BRB No. 13-0298 BLA

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| RUBLE CONLEY (deceased) | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| ROBERTS & SCHAEFER COMPANY, INCORPORATED | ) | |
| | ) | |
| | ) | DATE ISSUED: 03/26/2014 |
| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Order on Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco LLP), Birmingham, Alabama, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order on Modification (12-BLA-5677) of Administrative Law Judge Daniel F. Solomon denying employer's request to modify the award of benefits in a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The relevant procedural history is as follows. The miner filed a claim for benefits on March 19, 1979. On November 24, 1981, Administrative Law Judge Frank J. Marcellino awarded benefits, and the award was affirmed by the Board on appeal. *Conley v. Roberts & Schaefer Co.*, 7 BLR 1-309 (1984). Employer appealed to the United States Court of Appeals for the Seventh

Circuit, but subsequently moved that its appeal be dismissed. Director's Exhibit 1. On November 5, 1984, employer's appeal was dismissed with prejudice.[1] *Roberts & Schaefer Co. v. Benefits Review Board*, No. 84-2597 (7th Cir. Nov. 5, 1984).

The miner died on December 22, 2010, and on January 24, 2011 the miner's widow filed a survivor's claim.[2] On November 22, 2011, employer requested modification of the award of benefits in the miner's claim, and submitted additional evidence. *See* 20 C.F.R. §725.310; Director's Exhibit 2. On January 20, 2012, the district director denied employer's modification request, and employer requested a hearing. Director's Exhibits 5, 6.

In an Order on Modification, issued on March 8, 2013, the administrative law judge found that granting employer's request for modification of the award of benefits in the miner's claim would not render justice under the Act. Accordingly, the administrative law judge denied employer's request for modification.

On appeal, employer argues that the administrative law judge erred in finding that reopening the miner's claim would not render justice under the Act. Claimant's counsel responds in support of the administrative law judge's denial of employer's request for modification in the miner's claim. The Director, Office of Worker's Compensation Programs, declined to file a substantive response brief. Employer filed a reply brief, reiterating its contentions on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that granting employer's request for modification of the award of benefits in the miner's claim would not render justice under the Act. We disagree.

[1] The record reflects that the miner's last coal mine employment was in Illinois. Director's Exhibit 2. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] On February 9, 2012, Administrative Law Judge Daniel F. Solomon awarded survivor's benefits pursuant to the automatic entitlement provisions of Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). On appeal, the Board affirmed the award. *Conley v. Roberts & Schaeffer Co.*, BRB No. 12-0311 BLA (March 26, 2013) (unpub.).

Modification of a claim should not be granted automatically upon finding that a mistake was made in an earlier determination, but only when the administrative law judge concludes that doing so will render justice under the Act. *See* 20 C.F.R. §725.310(a); *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (recognizing that the purpose of modification is to "render justice"). The administrative law judge has broad discretion in determining whether to grant modification. *O'Keeffe*, 404 U.S. at 256; *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547, 22 BLR 2-429, 2-453 (7th Cir. 2002). In determining whether modification will render justice under the Act, the administrative law judge should consider all relevant factors, including the preference, under the Act, for accuracy; the interest in finality; any delay in seeking modification; the diligence and motive of the requesting party; the quality of the new evidence; and mootness. *See Hilliard*, 292 F.3d at 546-47, 22 BLR at 2-452-54; *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 25 BLR 2-157 (4th Cir. 2012), *cert. denied,* 570 U.S. (2013).

Employer sought modification of the miner's claim based upon a mistake in a determination of fact, pursuant to 20 C.F.R. §725.310(a). Employer specifically contended that the miner established the existence of pneumoconiosis with the assistance of the "true doubt" rule,[3] a legal standard that has since been invalidated, and asserted that its new evidence demonstrates that the miner did not have pneumoconiosis. Employer further alleged a mistake in the finding that the miner had twelve years of coal mine employment. In support of its request for modification, employer submitted medical treatment records obtained after the miner's death, and two new reports from Dr. Spagnolo, who reviewed the treatment records and opined that there was insufficient objective evidence to justify a diagnosis of pneumoconiosis. Director's Exhibit 2.

The administrative law judge determined that employer's lack of diligence in pursuing the miner's claim, employer's improper motive for seeking modification, and the lack of compelling new evidence submitted by employer, all weighed against employer's request for modification.[4] Order on Modification at 3-5. Thus, the

[3] Under the "true doubt" rule, when equally probative but contradictory evidence was presented in the record, the conflict would be resolved in favor of claimant. The United States Supreme Court invalidated the true doubt rule, holding that claimants have the burden of establishing all requisite elements of entitlement by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

[4] The administrative law judge also considered whether employer had abused the modification process, and determined that it had not. Order on Modification at 5. Finally, the administrative law judge considered whether employer's request for modification was futile or moot, because the miner was no longer receiving benefits. *Id.*

administrative law judge found that granting modification would not render justice under the Act.[5] Order on Modification at 5.

In finding that employer was not diligent in requesting modification, the administrative law judge noted that employer filed its request for modification approximately twenty-seven years after the award of benefits in the miner's claim became final, and approximately seventeen years after the "true doubt" rule was invalidated. *See Hilliard*, 292 F.3d at 546-47, 22 BLR at 2-452-54; Order on Modification at 3. The administrative law judge considered employer's assertion that it could not have requested modification earlier, because it did not obtain the miner's treatment records, upon which Dr. Spagnolo based his opinion, until after the miner's death in 2010. Order on Modification at 4; Employer's Brief in Support of Modification at 7-8. The administrative law judge noted, however, that as a basis for seeking modification, employer had also alleged error in the prior determination that the miner had twelve years of coal mine employment. Order on Modification at 4. Because neither Dr. Spagnolo's report, nor the medical treatment notes he reviewed, included evidence supporting a mistake in fact in the prior finding that the miner had twelve years of coal mine employment, the administrative law judge rationally concluded that the need to obtain new evidence did not wholly justify employer's delay in seeking modification. *See Hilliard*, 292 F.3d at 547, 22 BLR at 2-453; Order on Modification at 4.

The administrative law judge also questioned employer's motive for seeking modification, in light of claimant's counsel's assertion that employer requested modification of the award of benefits to the miner, in order to prevent the miner's widow from claiming benefits under the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Health Care Act, Public Law No. 111-148.[6] The administrative law judge noted that, while employer contended that it sought

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Because there was no evidence of record as to whether employer could recover benefits previously paid to the miner, the administrative law judge found that this factor was neutral and neither weighed for, nor against, employer's request for modification. *Id.*

[5] Having found that granting modification would not render justice under the Act, the administrative law judge did not address whether employer demonstrated a mistake in a determination of fact under 20 C.F.R. §725.310.

[6] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. The amendments, in pertinent part, revive Section 932(*l*) of the Act, which provides that the eligible survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

modification to overcome an erroneous award of benefits to the miner, it had also acknowledged that the granting of its modification request would terminate the benefits that the miner's widow is currently receiving. Employer's Brief in Support of Modification at 6-7.

As the administrative law judge recognized, the court in *Hilliard* stated that "if the party's purpose in filing a modification is to thwart a claimant's good faith claim . . . , the remedial purpose of the [Act] is no longer served." *Hilliard*, 292 F.3d at 546, 22 BLR at 2-452; Order on Modification at 2-3. Based on employer's statements, and the circumstances of this case, the administrative law judge rationally found, and employer now concedes, that employer's purpose in seeking modification was, in part, to thwart the miner's widow's automatic entitlement to future survivor's benefits by showing that the miner did not have pneumoconiosis and was not entitled to benefits.[7] Thus, under the particular circumstances of this case, the administrative law judge permissibly concluded that employer's questionable motive "weigh[ed] against a finding that modification of the miner's claim would render justice under the [A]ct." *See Hilliard*, 292 F.3d at 546-47, 22 BLR at 2-452-54; Order on Modification at 2-3, 5.

The administrative law judge next considered the quality of the new evidence submitted by employer, which employer asserted proved that the miner did not have pneumoconiosis and had been awarded benefits in error. The administrative law judge initially noted that Dr. Spagnolo's reports, and the treatment records upon which he relied, while new, did not constitute "particularly reliable evidence," such as autopsy evidence. Order on Modification at 4. The administrative law judge further found that Dr. Spagnolo's conclusions, that the miner did not have pneumoconiosis and was not totally disabled at the time of his death, were not entirely consistent with the newly obtained medical treatment notes he reviewed, which reflect diagnoses of "black lung" and "coal miner's lung" and do not contain the results of any objective testing performed after 1979, which could support the conclusion that the miner was not totally disabled. Order on Modification at 4.

The United States Court of Appeals for the Seventh Circuit has noted that "there is no point in readjudicating the question [of] whether a given miner had pneumoconiosis unless it is possible to adduce highly reliable evidence - which as a practical matter means autopsy results. Otherwise the *possibility* that the initial decision was incorrect is no reason to disturb it." *Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 334, 22 BLR 2-581, 2-587 (7th Cir. 2002) (emphasis added). The administrative law judge fully considered the quality of employer's newly submitted evidence, under the proper standard, and acted within his discretion in finding that "Dr. Spagnolo's opinion and the treatment records do not constitute 'compelling' new evidence that [the miner]

[7] On appeal, employer states that its motivation for requesting modification was to "seek[ ] to end future benefits" to the miner's widow. Employer's Brief on Appeal at 7.

did not have pneumoconiosis or that he was not totally disabled."[8] Thus, the administrative law judge permissibly concluded that the quality of employer's new evidence does not weigh in favor of a finding that modifying the prior award of benefits would render justice under the Act. *See Hilliard*, 292 F.3d at 547, 22 BLR at 2-453; Order on Modification at 4.

Employer contends that, in determining whether modification is warranted, "accuracy in adjudication is the ultimate consideration" for the administrative law judge, and that here, the administrative law judge's reliance on the factors discussed above was misplaced. Employer's Brief on Appeal at 5-7. Contrary to employer's contention, the administrative law judge recognized that, in adjudicating claims under the Act, the Seventh Circuit has emphasized that there is a "preference for accuracy over finality" and that "finality simply is not a paramount concern of the Act." Order on Modification at 5, *quoting Hilliard*, 292 F.3d at 547. The administrative law judge properly noted, however, that the Seventh Circuit also held that "we do not require that the [administrative law judge] give no weight to the concern of finality . . . [n]or do we preclude the possibility that, in a given case, it might be quite appropriate to permit this consideration to prevail in the adjudication of a case." *Id.* Under the circumstances of this case, the administrative law judge permissibly concluded that, taking into account employer's lack of diligence, improper motive, and lack of compelling new evidence, as well as the interest of finality, granting employer's request for modification would not render justice under the Act. *See Hilliard*, 292 F.3d at 546-47, 22 BLR at 2-452-54; *see also Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68, 73 (1999) (recognizing that the interest in arriving at the correct result does not always override the interest in finality); Order on Modification at 5.

Given the valid bases provided by the administrative law judge for his finding, we hold that the administrative law judge did not abuse his discretion in determining that reopening the miner's claim would not render justice under the Act. *See Hilliard*, 292 F.3d at 546-47, 22 BLR at 2-452-54; *Kinlaw*, 33 BRBS at 73. We, therefore, affirm the administrative law judge's denial of employer's request for modification. 20 C.F.R. §725.310.

[8] Contrary to employer's contention, in finding that Dr. Spagnolo's opinion was not "compelling," the administrative law judge did not hold employer to an improper burden of proof. Rather, the administrative law judge's decision reflects that he acted within his discretion in finding Dr. Spagnolo's opinion to be not "particularly reliable." *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 890-91, 22 BLR 2-514, 2-528-29 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 670-71, 22 BLR 2-483, 2-490-91 (7th Cir. 2002); Order on Modification at 3-4.

Accordingly, the administrative law judge's Order on Modification denying employer's request for modification of the award of benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P.SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge