U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0229 BLA

HAZEL L. SMITH (Widow of DONNIE SMITH) Claimant-Petitioner	)	
v.	)	DATE ISSUED: 03/10/2016
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DECISION and ORDER

Appeal of the Order of Dismissal of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Order of Dismissal (2013-BLA-5663) of Administrative Law Judge Richard A. Morgan (the administrative law judge), rendered on a second petition for modification of a survivor's claim filed on December 12, 2005, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge issued an Order to Show Cause why consideration of claimant's request for modification would render justice under the Act. Subsequent to reviewing the responses by claimant and the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge dismissed claimant's request. On appeal, claimant alleges that the administrative law judge erred in determining that considering her petition for modification would not render justice under the Act. Claimant requests that the Board vacate the Order of Dismissal and remand the case to a new administrative law judge for reconsideration. The Director has responded and urges the Board to reverse the dismissal of claimant's modification request. Both parties also contend that the administrative law judge erred in failing to determine whether the Director can adopt the evidence submitted by the dismissed responsible operator.

The Board's scope of review is defined by statute. The administrative law judge's Order of Dismissal must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965). In ruling on modification requests, an administrative law judge "possesses broad – but not unlimited discretion." *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 327, 25 BLR 2-157, 2-173 (4th Cir. 2012), *citing Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 130, 24 BLR 2-56, 2-67 (4th Cir. 2007). Reversal of a modification ruling is appropriate where it "was 'guided by erroneous legal principles,' or if the adjudicator 'committed a clear error of judgment in the conclusion it

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[1] Claimant is the surviving spouse of the miner, Donnie Smith, who died on August 25, 2005. Director's Exhibit 10. The miner filed two claims for black lung benefits during his lifetime, both of which were finally denied prior to his death, based on findings that he was unable to establish that he had a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2.

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

reached upon a weighing of the relevant factors.'" *Sharpe II*, 692 F.3d at 327, 25 BLR at 2-173, *quoting Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir.1999).

The relevant procedural history of this case regarding claimant's request for modification is as follows. Claimant filed her claim for survivor's benefits on December 12, 2005. Director's Exhibit 2. In a Decision and Order issued on August 19, 2008, Administrative Law Judge Richard Stansell-Gamm denied the claim, finding that claimant failed to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304, and did not prove that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205. Director's Exhibit 50. On August 3, 2009, claimant filed her first request for modification. Director's Exhibit 54. Because no new evidence was submitted by claimant, the district director forwarded the case to the Office of Administrative Law Judges (OALJ), and the case was assigned to Administrative Law Judge Pamela J. Lakes. In a Decision and Order issued on September 22, 2011, Judge Lakes found that there was no mistake in a determination of fact in Judge Stansell-Gamm's denial of benefits. Director's Exhibit 73 at 8. In addition, Judge Lakes found that, although the miner had more than fifteen years of underground coal mine employment, claimant was not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[3] because she did not establish that the miner had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). *Id*. at 12. Thus, Judge Lakes denied modification pursuant to 20 C.F.R. §725.310. *Id*.

Claimant filed her second request for modification on July 4, 2012. Director's Exhibit 54. As claimant submitted no new evidence, the district director forwarded the case to the OALJ, and the case was assigned to the administrative law judge. On February 12, 2015, prior to the scheduled hearing, the administrative law judge issued an Order to Show Cause, stating:

> Given the fact this survivor's claim has been considered twice before, by different judges who reached similar conclusions, the fact that no error has been identified, no change in conditions is applicable, and no evidence is presented, I direct the claimant to show cause why "justice under the Act" would be served by a consideration of the same evidence a third time. In the absence of such showing, the claim shall be dismissed.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where the claimant establishes that the miner had fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012).

Order to Show Cause at 2. On February 18, 2015, the administrative law judge held a limited hearing at which claimant was represented by counsel, but the Director was not present. At the hearing, claimant's counsel responded to the Order to Show Cause, asserting:

> Our position would be that since the [responsible operator] has been apparently dismissed in this case, that Your Honor should look at the evidence in the case and not consider the evidence submitted by the responsible operator since they are no longer a participant in the case. We believe that if Your Honor were to do that, he would be left with no option but to award benefits.

Hearing Transcript at 5. Subsequently, in a letter dated March 4, 2015, the Director advised the administrative law judge that he agreed to the dismissal of the named responsible operator and carrier, but explained that he first learned of the Order to Show Cause on February 26, 2015, after the deadline to respond had passed. The Director thus requested an extension of time to file his response. By Order dated March 6, 2015, the administrative law judge set forth the chronology of the proceedings, formally dismissed the named responsible operator and carrier, and granted the Director's request for an extension of time.

By letter dated March 13, 2015, the Director submitted his response to the Order to Show Cause. The Director maintained that, pursuant to 20 C.F.R. §725.310, the administrative law judge was required to render a finding as to whether claimant established a mistake in a determination of fact in the denial of her survivor's claim. Regarding the substance of the modification request, the Director argued that it could be denied for the reasons set forth in Judge Lakes's 2011 decision. The Director also requested that the administrative law judge allow him to adopt the evidence submitted by the dismissed responsible operator.

After considering the parties' arguments, the administrative law judge issued the Order of Dismissal that is the subject of this appeal. The administrative law judge stated that 20 C.F.R. §725.310 established "the standards for determining a modification award, that is, whether there exists a change in conditions or a mistake in a determination of fact." Order of Dismissal at 2. He further determined, however, that the Act and case law have established that the purpose of modification is to "render justice under the [A]ct," such that an administrative law judge must make a "threshold determination . . . as to the propriety of the petition based on a 'justice under the Act' standard." *Id.*, *quoting Banks v. Chi. Grain Trimmers Ass'n*, 380 U.S. 459, 464 (1968). The administrative law judge observed that "this determination is discretionary," and summarized decisions identifying relevant factors to be considered, including "whether

the modification petition is moot or futile[.]"[4] Order of Dismissal at 2-3, *citing Sharpe I*, 495 F.3d at 134, 24 BLR at 2-70. The administrative law judge concluded:

> Given the fact that Claimant has produced no evidence, I find that she has failed to present "compelling new evidence." However, as directed by [*O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971)], I consider the wholly new evidence, the cumulative evidence, and further reflect upon the evidence initially submitted; I nonetheless find Claimant's modification petition futile despite the fact that I remain mindful that "modification does not always require 'a smoking-gun factual error, changed conditions, or startling new evidence.'"

Order of Dismissal at 7, *quoting Sharpe II*, 692 F.3d at 330, 25 BLR at 2-176. The administrative law judge found that consideration of claimant's second request for modification would not render justice under the Act. Accordingly, he dismissed the request for modification and did not address the evidentiary issue raised by the parties.

On appeal, claimant argues that the administrative law judge's Order of Dismissal should be vacated, and the case remanded for further proceedings before a different administrative law judge. In support of her appeal, claimant asserts that she has been diligent in pursuing her claim, that she did not have an improper motive in requesting modification, and that her claim is not futile, in that she is entitled to benefits. Claimant also argues that the administrative law judge erred by failing to address the Director's request that he be permitted to adopt the medical evidence that was previously submitted by employer in this claim.

The Director has filed a letter brief, asking the Board to reverse the administrative law judge's Order of Dismissal. The Director alleges that, because claimant in this case would receive benefits if she established a mistake in the determination of the ultimate fact of entitlement, her second request for modification was not futile. In addition, the Director contends that the administrative law judge erred in failing to "address whether claimant had established a mistake in fact justifying modification of the prior denial of

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[4] The administrative law judge also set forth a lengthy excerpt from his Order of Dismissal in *Sparks v. Amherst Coal Co.*, OWCP No. 2013-BLA-5362 (Jan. 31, 2014), a case in which, he asserts, the Director, Office of Workers' Compensation Programs (the Director), argued in favor of dismissing a surviving spouse's petition for modification because it was futile. Order of Dismissal at 5-6. In the Director's Letter Brief in the present appeal, he asserts, "neither the arguments nor the decision in *Sparks* have [sic] any precedential value." Director's Letter Brief at 4 n.6.

her claim (i.e., accuracy)."[5] Director's Letter Brief at 3. The Director requests, therefore, that the case be remanded for consideration of the merits of claimant's second modification request. The Director further states that the administrative law judge should be instructed to address the evidentiary issue raised with respect to the Director's adoption of the dismissed responsible operator's previously admitted evidence.

Based on our review of the administrative law judge's findings and the parties' arguments on appeal, we hold that the administrative law judge's dismissal of claimant's petition for modification must be vacated. Consistent with the stated purpose of the Act, "to ensure that . . . benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis," 30 U.S.C. § 901(a), Congress "incorporat[ed] within the statute a broad reopening provision to ensure the accurate disposition of benefits." *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 546, 22 BLR 2-429, 2-447 (7th Cir. 2002). Moreover, parties to federal black lung claims are afforded the right to request modification, without limit as to the number of times that a request may be filed, and need not submit new evidence in support of their requests.[6] *See* 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe,* 404 U.S. at 256. The implementing regulation, set forth at 20 C.F.R. §725.310, provides:

> In any case forwarded [from the district director] for a hearing, the administrative law judge assigned to hear such case *shall* consider whether any additional evidence submitted by the parties demonstrates a change in condition, and *regardless of whether the parties have submitted new evidence*, whether the evidence of record demonstrates a mistake in a determination of fact.

20 C.F.R. §725.310(c) (emphasis added). Contrary to the administrative law judge's view, the use of mandatory language in the implementing regulation signifies that the

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[5] Because this case involves a claim for survivor's benefits, modification based on a change in conditions is not available. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

[6] Indeed, the United States Court of Appeals for the Fourth Circuit has explicitly acknowledged that claimants are not limited in the number of claims they may file under the statutory framework, recognizing that "nothing bars or should bar claimants from filing claims *seriatim,* and the regulations recognize that many will." *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-230 (4th Cir. 1996) (emphasis added).

administrative law judge is required to consider a request for modification and, when a survivor's claim is at issue, render a finding as to whether a mistake in a determination of fact has been demonstrated. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

The modification inquiry does not end there, however. In addition to addressing whether there has been a change in condition or a mistake in a determination of fact, case law dictates that the administrative law judge must also determine whether granting a modification claim ultimately would "render justice under the Act." *O'Keeffe*, 404 U.S. at 255; *see Sharpe I*, 495 F.3d at 128, 24 BLR at 2-66; *Hilliard*, 292 F.3d at 541, 22 BLR at 2-444; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994). Courts have identified factors relevant to the "justice under the Act" inquiry, including whether modifying the claim would be futile. Order of Dismissal at 3-5; *see Sharpe II*, 692 F. 3d at 330, 25 BLR at 2-176; *Sharpe I*, 495 F.3d at 128, 24 BLR at 2-68.

We agree with the Director that the administrative law judge based his dismissal of claimant's request for modification on an inaccurate understanding of "futility" in determining whether modification would render justice under the Act. In dismissing this claim, the administrative law judge determined that claimant's second request for modification was "futile" because two administrative law judges had previously denied her claim for survivor's benefits, the miner died several years ago, claimant submitted no new evidence, and did not identify a specific mistake in a determination of fact. Order of Dismissal at 7. As the Director asserts, however, in the context of a request for modification, "futility refers to whether there is any relief available to a party . . . [when] the party establishes that it is entitled to modify a prior decision." Director's Letter Brief at 3, *citing Sharpe II*, 692 F.3d at 328, 25 BLR at 2-175. In this case, relief is plainly available to claimant because, if she succeeds on the merits of her request, she may establish entitlement to benefits. 20 C.F.R. §725.310(d). The administrative law judge's application of an incorrect interpretation of the "futility" factor requires us to vacate his finding that consideration of claimant's second request for modification would not render justice under the Act. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004). We therefore vacate the administrative law judge's Order of Dismissal and remand the case for reconsideration of claimant's request for modification.

Claimant has asked that this case be assigned to a different administrative law judge due to the administrative law judge's "seemingly concrete" position that granting her second petition for modification would not render justice under the Act, and his failure to address the evidentiary issue raised by the parties. Claimant's Brief at 22. There is support for claimant's concern that the administrative law judge has a fixed view of the modification process that may prevent him from considering her modification

petition in accordance with the Board's instructions. The administrative law judge stated, in both the Order to Show Cause and the Order of Dismissal, "the Board has held that no specific error need be assigned for a case to be considered." Order to Show Cause at 1 n.1; Order of Dismissal at 1 n.1. The administrative law judge further observed, "[t]he [Board] has very loosely and broadly defined the criteria for modifications under 20 C.F.R. [§]725.310. The result, in part, has been that nearly each year[,] the number of refiled claims processed equal[s] or exceed[s] new claims filed." Order to Show Cause at 1. The administrative law judge elaborated on this concern, stating:

> [T]he proper inquiry may be not whether judicial resources are overly consumed, but rather whether there exists equity considerations – that are supported by the language and policies of the Act – between filers of new claims and filers of modifications that do not serve justice under the Act. In recent years, the number of refiled claims processed equals or exceeds the number of new claims filed. First-time filers rely on the same group of [administrative law judges] to hear their claims. As a result, the additional processing time for modifications may overly delay the disposition of a claim made by a first-time filer and thereby raise judicial equity concerns.

Order of Dismissal at 5 n.6. These comments, together with the reasons provided for dismissing claimant's petition as "futile," suggest that, to alleviate delays in the processing of new claims by the OALJ, the administrative law judge has decided to forego the consideration of subsequent petitions for modification, and dismiss them unless new evidence is submitted or a new argument is made. However, in placing dispositive weight on the lack of new evidence, the administrative law judge's decision is inconsistent with both 20 C.F.R. §725.310 and the principle "that 'new' evidence [is] not a prerequisite for reopening" a claim. *Hilliard*, 292 F.3d at 545-46, 22 BLR at 2-447, *citing O'Keeffe*, 404 U.S. at 255. Nor was claimant required to identify a specific factual error. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-996; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In addition, the administrative law judge's conclusion that the procedural posture of this case makes any evaluation of the evidence presumptively futile dictates that further proceedings are more appropriately handled by a different administrative law judge.[7] Thus, we reluctantly grant claimant's request and direct that this case be assigned

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[7] The extent to which the administrative law judge reviewed the record prior to issuing his decision in this case is unclear. At one point in his decision, he states that "it stands to reason" that "if an [administrative law judge] rules that modification is futile, then an [administrative law judge] has implicitly further reflected upon the evidence, at least with the threshold decision of whether reopening would promote justice under the

to a different administrative law judge on remand. 20 C.F.R. §§802.404(a), 802.405(a); *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992).

In considering claimant's second petition for modification, the new administrative law judge must first resolve the evidentiary issue raised by claimant and the Director. He or she must determine whether the Director may adopt the evidence developed by the dismissed responsible operator, and if so, whether it has been properly designated and the parties have complied with the evidentiary limitations set forth at 20 C.F.R. §§725.310(b) and 725.414.

The new administrative law judge must then address claimant's second petition for modification and determine whether claimant has established that the denial of her claim for survivor's benefits was based on a mistake in a determination of fact. 20 C.F.R. §725.310(c); *Wojtowicz*, 12 BLR at 1-164. In so doing, the new administrative law judge must be aware that claimant need not allege any specific error in order to establish a basis for modification. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-996; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28-29. Rather, an administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-996. In addition, claimant is not required to submit new evidence because an administrative law judge has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 256; *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

If the new administrative law judge finds that claimant has not met her burden, he or she must deny the modification request, and further deny benefits. 20 C.F.R. §725.310(d); *see Worrell*, 27 F.3d at 230, 18 BLR at 2-296.[8] Should claimant succeed in

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Act." Order of Dismissal at 4. However, the administrative law judge did not evaluate or even refer to the relevant medical evidence upon which he may have relied in issuing his decision in this claim. Even if his decision could be read as a cursory determination that claimant cannot prevail on the merits of her claim, it does not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[8] Given that two judges have rendered findings on the same body of evidence, the ruling on claimant's request for modification need not be exceedingly detailed if the new administrative law judge agrees with their reasoning. However, the plain language of the statute and regulations, as well as the APA, require the new administrative law judge to examine the record prior to incorporating any previous findings, and to set forth those "findings and conclusions, and the reasons or basis therefor." 5 U.S.C. §557(c)(3)(A), as

demonstrating a mistake in a determination of fact, the new administrative law judge must consider whether modifying the claim will render justice under the Act, being mindful that the availability of modification embodies a policy favoring accuracy of determination over finality.[9] *See Banks*, 390 U.S. at 464; *Sharpe I*, 495 F.3d at 131-132, 24 BLR at 2-67-68; *Hilliard*, 292 F.3d at 546-547, 22 BLR at 2-452-454; *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-106 (6th Cir. 1982). Finally, the administrative law judge must set forth his or her "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record," in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

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incorporated into the Act by 30 U.S.C. §932(a). An administrative law judge may not, consistent with the statutory and regulatory scheme, simply predetermine that review would be futile as a threshold matter.

[9] In addition to futility, i.e., the request for modification is meritorious but no relief is available, the factors relevant to the "render justice under the Act" inquiry include the requesting party's diligence and motive, and the result of weighing the preference for accuracy against the interest in finality in decision making. *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 330, 25 BLR 2-157, 2-176 (4th Cir. 2012); *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 128, 24 BLR 2-56, 2-68 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 541, 22 BLR 2-429, 2-444 (7th Cir. 2002); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Thus, the administrative law judge's Order of Dismissal is vacated, and the case is remanded for reassignment to a different administrative law judge for consideration in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge