BRB No. 99-0186 BLA

HOMER L. HAMPTON	)	
Claimant-Petitioner	)	DATE ISSUED:
v.	)	
CUMBERLAND MOUNTAIN SERVICES CORPORATION (formerly MOUNTAIN DRIVE COAL COMPANY)	)	
and	)	
USF&G	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order on Remand--Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John E. Anderson (Cole, Cole & Anderson PSC), Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand--Denial of Benefits (95-BLA-0842) of Administrative Law Judge Daniel J. Roketenetz rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the third time.

Initially, the administrative law judge credited claimant with twelve years of coal mine employment and found that the medical evidence established that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204. Accordingly, he awarded benefits. Employer moved for reconsideration, arguing that the administrative law judge did not consider the medical opinions of Drs. Anderson and O'Neill, which employer had mailed to the Chief Administrative Law Judge for inclusion in the record. The administrative law judge denied reconsideration, explaining that he did not consider these opinions because employer's counsel never proffered them at the hearing so as to afford claimant an opportunity to object to their admission, and thus had not made the opinions part of the record.

Pursuant to employer's appeal, the Board held that the administrative law judge did not abuse his discretion in not considering the opinions of Drs. Anderson and O'Neill, as employer's counsel did not meet his affirmative duty to ascertain that all of the documents supporting his case were put into evidence. *Hampton v. Mountain Drive Coal Co*., BRB No. 88-2564 BLA (Feb. 27, 1990)(unpub.). The Board affirmed the award of benefits as supported by substantial evidence, and denied employer's motion for reconsideration.

Employer then requested modification pursuant to 20 C.F.R. §725.310 and submitted medical evidence. Employer resubmitted the opinions of Drs. Anderson and O'Neill. Additionally, employer submitted two medical reports by Dr. Dahhan, one a report of a new physical examination, and the other a review of the medical evidence. Employer also submitted medical record reviews by Drs. Stewart and Tuteur, and several x-ray readings.

On modification, the administrative law judge found that employer was precluded from establishing a change in conditions, and found that employer's evidence submitted on modification did not demonstrate that the administrative law judge made a mistake in awarding benefits. Accordingly, he denied employer's modification request.

Pursuant to employer's appeal, the Board vacated the administrative law judge's decision and remanded the case for him to address the change in conditions issue and to conduct a *de novo* review of the record to determine whether the ultimate fact of entitlement was correctly decided. *Hampton v. Mountain Drive Coal Co*., BRB No. 95-2156 BLA (Feb. 25, 1997)(unpub.). In remanding the case, the Board indicated that the administrative law judge retains the discretion to "determine whether reopening the claim in this instance will 'render justice'" under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922 (the Longshore Act). [1997] *Hampton*, Slip op. at 4.

On remand, the administrative law judge conducted a *de novo* review of the record and found that the weight of the most credible x-ray readings and medical opinions did not establish the

existence of pneumoconiosis pursuant to Section 718.202(a). In so finding, the administrative law judge determined that employer "failed to adequately defend the initial claim," and concluded that employer's evidence on modification was submitted "over five years after it should have been." Decision and Order on Remand at 2. Nevertheless, the administrative law judge found that the record on modification did not establish the existence of pneumoconiosis. Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge did not determine whether modification of claimant's award of benefits would render justice under the Act. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this 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 supported by substantial evidence, is rational, and is in accordance with law. 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 (1965).

Section 22 of the Longshore Act, 33 U.S.C. §922 (the statute underlying 20 C.F.R. §725.310), provides in part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation . . . .

"The purpose of this section is to permit a[n] [administrative law judge] to modify an award where there has been 'a mistake in a determination of fact [which] makes such a modification desirable in order to render justice under the act.'" *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-108 (6th Cir. 1982), quoting *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 464 (1968). The administrative law judge has the authority "to reconsider all the evidence for any mistake of fact or change in conditions," *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994), but the "exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68, 72 (1999). "An administrative law judge must not lightly consider reopening a case at the behest of a party who, right or wrong, could have presented its side of the case at the first hearing." *Branham v. BethEnergy Mines, Inc.*, 21 BLR 1-79, 1-82 (1998)(McGranery, J., dissenting). Nor is modification intended to protect litigants from their counsel's litigation mistakes. *Kinlaw*, 33 BRBS at 74. Consequently, the administrative law judge should consider whether reopening will render justice,

by balancing the interest in obtaining a "correct" result against the need for finality in decision making. *Id.*, at 73.

In this case, the administrative law judge found that the ultimate fact of entitlement was mistakenly decided. Decision and Order on Remand at 3 (employer's evidence "has called [the prior] finding into question"); *see Worrell, supra*. At the same time, the administrative law judge suggested that employer was attempting to obtain modification based on evidence which it should have developed previously. Decision and Order on Remand at 2-3. However, the administrative law judge did not then go on to address whether granting modification would render justice in this case. *See Kinlaw, supra*. Employer does not argue on appeal that it could not have developed the medical examination report of Dr. Dahhan or the record reviews of Drs. Stewart and Tuteur in the initial litigation. For these reasons, we vacate the administrative law judge's Decision and Order on Remand--Denial of Benefits, and remand this case to the administrative law judge to determine whether modification of

claimant's award of benefits would "render justice" under Section 22 of the Longshore Act. *See Kinlaw, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand--Denial of Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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[1] We have considered employer's argument that it renders justice to deny benefits to claimant, as it would be unfair to require employer to pay benefits to a claimant who does not satisfy the statutory requirements. Employer's Brief at 17. Employer attempts to analogize this case to *Branham, supra*, where the administrative law judge made such a finding after considering the facts of that case. In this case, however, the administrative law judge has not made a "render justice" finding on all the facts presented. Such a determination is committed to the administrative law judge's discretion, which must be exercised.