BRB No. 02-0778 BLA

MAELENE V. KEIL (Widow of MELVIN J. KEIL) Claimant-Respondent v. PEABODY COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-In-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (1999-BLA-00442) of Administrative Law Judge Thomas M. Burke rendered on a survivor's 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).

[1] This claim is before the Board for the third time.

Claimant's survivor's claim, filed on October 16, 1989, was denied by an administrative law judge who credited the miner with twenty-two years of coal mine employment, but found that the medical evidence did not establish the existence of pneumoconiosis, and therefore did not establish that the miner's death was due to pneumoconiosis. Claimant appealed, without the assistance of counsel, and the Board affirmed the administrative law judge's Decision and Order denying survivor's benefits as supported by substantial evidence. Director's Exhibit 68; *Keil v. Peabody Coal Co*., BRB No 91-1369 BLA (Dec. 28, 1992)(unpub.).

Thereafter, still without the assistance of counsel, claimant filed two successive, timely motions for reconsideration with the Board. Director's Exhibits 70, 76. In its first order on reconsideration, the Board reaffirmed the denial of benefits. Director's Exhibit 70. In its second order on reconsideration, issued on August 30, 1996, the Board granted reconsideration but denied claimant's request to reopen the record for the submission of new evidence, and informed claimant of the availability of modification. Director's Exhibit 76. On June 20, 1997, claimant filed the modification request at issue herein, alleging a mistake in a determination of fact. Director's Exhibit 80; *see* 33 U.S.C. §922, implemented by 20 C.F.R. §725.310(2000)(providing, in relevant part, for modification within one year of a denial, based on a mistake of fact). After holding a hearing, Judge Burke found that the record on modification established the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis. Accordingly, he granted modification and awarded survivor's benefits.

Upon consideration of employer's appeal, the Board rejected employer's contention that claimant's modification request was untimely, and affirmed the administrative law judge findings that the existence of pneumoconiosis arising out of coal mine employment was established by the autopsy evidence pursuant to 20 C.F.R. §718.202(a)(2) and that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to 20 C.F.R. §718.205(c). *Keil v. Peabody Coal Co*., BRB No. 00-0746 BLA (Jun. 29, 2001)(unpub.). However, the Board remanded the case for the administrative law judge to consider whether reopening the claim rendered justice under the Act. [2001] *Keil*, slip op. at 10-11. The Board denied employer's motion for reconsideration.

On remand, the administrative law judge found that reopening the claim and granting modification rendered justice under the Act. He considered the teaching of the United States Court of Appeals for the Seventh Circuit in *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, --- BLR --- (7th Cir. 2002), that Section 22 expresses a preference for accuracy over finality in deciding whether to reopen a claim.

The administrative law judge noted the broad standard for mistake in fact, set forth in *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992), which can justify an administrative law judge's exercise of discretion to reopen the case within one year. The administrative law judge observed that claimant's modification request was timely, and found no evidence that it was filed for an improper purpose. Accordingly, the administrative law judge determined that "entertaining Claimant's petition for modification and the reopening of the record for submission of additional medical evidence which resulted in an award of benefits . . . renders justice under the Act." Decision and Order on Remand at 2.

On appeal, employer contends that the administrative law judge erred in finding that reopening the claim rendered justice under the Act. Employer argues further that the Board should reconsider its prior decision in [2001] *Keil, supra*, because changes in the law require the administrative law judge to reconsider his finding that the existence of pneumoconiosis was established by the autopsy evidence pursuant to 20 C.F.R. §718.202(a)(2), and because the Board's prior decision was clearly erroneous. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal. Employer has filed a reply brief reiterating its contentions.

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 . . . .

There is general agreement on the purpose of Section 22: "Congress . . . incorporat[ed] within the statute a broad reopening provision to ensure the accurate distribution of benefits. The reopening provision is not limiting as to party--it is available to employers and miners alike." *Old Ben Coal Co. v. Director, OWCP*

[*Hilliard*], 292 F.3d 533, 546, 22 BLR 2-429, 2-451 (7th Cir. 2002)(Wood, J., dissenting). The administrative law judge has the authority on modification "to reconsider all the evidence for any mistake of fact," *Hilliard*, 292 F.3d at 541, 22 BLR at 2-444, including whether the "ultimate fact" was mistakenly decided. *Franklin*, 957 F.2d at 358, 16 BLR at 2-54-55. Where "there was arguably a mistake of fact . . . no more is required to reopen the proceeding within a year of denial." *Franklin*, 957 F.2d at 357, 16 BLR at 2-53. An administrative law judge deciding whether to reopen a claim has the discretion to find that considerations grounded in the policy of the Act trump the statutory preference for accuracy of determination in a particular case, so long as the administrative law judge weighs those factors under the standard of whether reopening renders "justice under the Act." *Hilliard*, 292 F.3d at 541-42, 546-47, 22 BLR at 2-451-54 (Wood, J., dissenting).

Employer contends that the administrative law judge erred in determining that reopening this claim rendered justice under the Act because the administrative law judge failed to consider factors that might overcome the preference for accuracy, such as the diligence of the parties, the number of times that a party has sought reopening, and the quality of the new evidence submitted. Employer's Brief at 9-10, citing *Hilliard*, 292 F.3d at 547, 22 BLR at 2-453. Employer asserts that the administrative law judge neglected to consider claimant's abusive filing of multiple modification requests, or claimant's motivation in seeking modification, which, employer alleges, was to forum shop. Employer's Brief at 11. Employer also alleges that the administrative law judge erred by stating that modification requests are treated differently depending on whether claimant or employer seeks modification. *Id*. Employer's contentions lack merit.

The administrative law judge complied with *Hilliard*. He recognized his duty to give weight to the Act's preference for accuracy over finality. Decision and Order on Remand at 1; *see Hilliard*, 292 F.3d at 547, 22 BLR at 2-453 (Administrative law judges must "keep in mind the basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act.") The administrative law judge further considered whether any factors might trump the preference for accuracy in this case:

> Here, Claimant's petition for modification was submitted timely, both parties were afforded the opportunity to submit additional medical evidence, a formal hearing was held on the petition, and the decision was based on the entire record. There is no evidence to suggest that Claimant's modification petition was filed for an improper purpose, such as to thwart Employer's good faith defense. Consequently, Employer's due process rights were protected.

Decision and Order on Remand at 1. The administrative law judge's analysis effectively subsumes the factors that the *Hilliard* court listed as examples of

considerations an administrative law judge might deem relevant, such as a party's diligence and the number of times modification has been sought. *See Hilliard*, 292 F.3d at 547, 22 BLR at 2-453. The administrative law judge's consideration of whether there was an intent to thwart employer's good faith defense comes directly from *Hilliard*. 292 F.3d at 546, 22 BLR at 2-452.

The Seventh Circuit court recognized in *Hilliard* that "[t]he ALJ is in a unique position to assess the motivations of the party, the merits of the motion as well as institutional concerns." *Hilliard*, 292 F.3d at 547, 22 BLR at 2-453. The administrative law judge did so here, and determined that reopening the claim rendered "justice under the Act." *See Hilliard, supra*. We conclude that the administrative law judge properly exercised his discretion in determining that reopening the claim would render justice under the Act. *See Hilliard, supra*; *Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-82-84 (1998)(McGranery, J., dissenting).

Employer's alternative argument does not alter the analysis. The administrative law judge did not state or imply that modification requests are weighed differently depending on which party files. He quoted from the Seventh Circuit court's opinion in *Franklin, supra*, to illustrate the breadth of mistake of fact on modification. Decision and Order on Remand at 2, quoting *Franklin*, 957 F.2d at 358, 16 BLR at 2-54 (Court's holding that mistake of fact includes the ultimate fact "is consistent with the Supreme Court's holding in *O'Keeffe* . . . that the reopening provision is to be interpreted generously to the claimant . . . .") Therefore, we reject employer's allegations of error and affirm the administrative law judge's finding that reopening the claim rendered justice under the Act.

Additionally, employer again alleges, as it did previously on reconsideration, that *Peabody Coal Co. v. McCandless*, 255 F.3d. 465, 22 BLR 2-311 (7th Cir. 2001), is intervening case law demonstrating that the administrative law judge impermissibly credited the opinion of the autopsy prosector at Section 718.202(a)(2), and erred in his analysis of other evidence. We disagree.

In *McCandless*, the Seventh Circuit court applied established law holding that an administrative law judge may not adopt a blanket preference for the opinion of the autopsy prosector, but must give a valid rationale for preferring the prosector's opinion. *McCandless*, 255 F.3d at 469, 22 BLR at 2-318, applying *Peabody Coal Co. v. Director OWCP* [*Railey*], 972 F.3d 178, 16 BLR 2-121 (7th Cir. 1992). The conflict in the autopsy evidence in this case concerned whether black pigment in the miner's lung tissue was associated with fibrosis also present in the tissue, or was mere pigmentation standing alone. Upon microscopic examination, the autopsy prosector saw "fibrosis associated with the pigment." Director's Exhibit 53 at 5. Subsequently, Dr. Jones reviewed the lung tissue slides and noted "emphysema with fibrosis and anthracotic pigment. These findings are diagnostic of coal miners

pneumoconiosis (black lung disease)." Director's Exhibit 54 at 2. Dr. Abraham reviewed the lung tissue slides and described "substantial accumulation of mixed dust in the lung . . . associated with areas of interstitial fibrosis." Claimant's Exhibit 1. Dr. Abraham identified some of the dust as "coal mine dust," and concluded that "the mixtures of dusts found in [the miner's] lungs, associated with fibrosis, must have originated in his mining occupation." *Id*. By contrast, Dr. Kleinerman described a small amount of "black granular pigment," without any macules of simple coal workers' pneumoconiosis. Employer's Exhibit 3 at 5, 6. Dr. Kleinerman also detected lung fibrosis which he did not link with the black pigment but rather labeled "nonspecific interstitial fibrosis." Employer's Exhibit 3 at 6. Dr. Crouch detected "irregular black particles" of dust without macules, nodules, or focal emphysema. Director's Exhibit 61. At deposition, Dr. Crouch testified that the miner's lung fibrosis was "not associated with the dust related lesions and the most obvious scarring [was] associated with an area of organizing pneumonia . . . ." Director's Exhibit 63 at 10.

The administrative law judge "accord[ed] greater weight to the findings of the prosector as he viewed the entire respiratory system and was specific in his findings of dark pigment with associated fibrosis as distinguished from the findings of organizing pneumonitis found later in his report." [2000] Decision and Order at 20. The administrative law judge gave less weight to the opinions of both Drs. Kleinerman and Crouch because they insisted that pneumoconiosis must be diagnosed based on Dr. Kleinerman's published criteria of coal macules, nodules, and focal emphysema, when the Act and regulations do not require such criteria; the administrative law judge also found Dr. Kleinerman's opinion undermined by his failure to adequately explain why the fibrosis was of unspecified origin. The administrative law judge credited, however, the opinions of Drs. Jones and Abraham, that the lung fibrosis was associated with the coal mine dust deposits, which supported the prosector's findings. The administrative law judge concluded, "This finding of coal dust deposits in the miner's lungs, and a reaction to it as evidenced by the fibrosis, persuades the undersigned to conclude that the miner suffered from coal workers' pneumoconiosis." [2000] Decision and Order at 21.

Although employer contends that the administrative law judge gave greater weight to the autopsy prosector's microscopic observation of fibrosis associated with pigment merely because the prosector viewed the entire respiratory system, the administrative law judge in fact provided additional, valid reasons for crediting the prosector, as required by *Railey, supra*. He permissibly found that the opinions of Drs. Jones and Abraham relating the fibrosis to the coal mine dust deposition and specifically diagnosing pneumoconiosis, supported the prosector's observation. *See Peabody Coal Co. v. Shonk*, 906 F.2d 264, 269 (7th Cir. 1990)(The weight to be accorded expert opinions is a determination for the administrative law judge). The administrative law judge further found, within his discretion, that Dr. Kleinerman did

not adequately explain his observation that the lung fibrosis was nonspecific. *Shonk, supra*. Additionally, the administrative law judge permissibly chose to give less weight to the opinions of Drs. Croucher and Kleinerman because the physicians insisted on diagnostic criteria that are not required to establish the existence of pneumoconiosis as defined in the Act and regulations. *See* 20 C.F.R. §718.201. Because the administrative law judge complied with *Railey, supra*, we reject employer's assignment of error. The Board's previous holding affirming the administrative law judge's finding at Section 718.202(a)(2) stands as the law of the case on this issue. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

Employer contends further that *McCandless* holds that medical opinions in black lung claims must meet scientific standards of accuracy, and that therefore it was error for the administrative law judge to discount the opinions of Drs. Kleinerman and Crouch for referencing diagnostic criteria that are accepted by the scientific community. Employer's Brief at 13-14, citing *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-317. This contention lacks merit. The administrative law judge's point was not that the opinions of Drs. Kleinerman and Crouch were scientifically unsound, but that the diagnostic criteria these physicians insisted upon are not required to establish the existence of pneumoconiosis as defined in the Act and regulations. Moreover, employer does not explain its claim that the Kleinerman article's diagnostic criteria are generally accepted in the scientific community. *See* 65 Fed. Reg. 79920, 79936 (Dec. 20, 2000)(Declining to adopt Kleinerman diagnostic criteria in 20 C.F.R. §718.106 because "the record does not substantiate the existence of a consensus among physicians for making diagnoses using these criteria, or the acceptance of the Kleinerman article as representative of the medical community's views.") Therefore, employer's argument does not establish an exception to law of the case doctrine. *See Brinkley, supra*; *Williams, supra*.

Employer argues that changes in law established by *McCandless* and by *Nat=l Mining Ass=n v. Department of Labor*, 292 F.3d 849, --- BLR --- (D.C. Cir. 2002), require the administrative law judge to reconsider his finding that the existence of pneumoconiosis was established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Because the Board previously declined to address the administrative law judge's subsection (a)(4) finding, based on the Board's affirmance of the administrative law judge's finding at Section 718.202(a)(2), [2001] *Keil*, slip op. at 8 n.6, we need not address employer's contentions.

Employer next contends that it was clearly erroneous for the Board to hold that claimant's request for modification was timely. Employer argues, as it did on appeal and on reconsideration, that claimant's two successive, timely motions for reconsideration did not toll the one-year time limit for seeking modification, and that claimant's June 20, 1997 modification request was therefore untimely. Employer's

Brief at 17-18. As the Board held previously, employer's reliance on *Midland Coal Co. v. Director, OWCP* [*Luman*], 149 F.3d 558, 21 BLR 2-451 (7th Cir. 1998), is misplaced because that case dealt with an untimely appeal to the circuit court of appeals following the filing of successive, timely motions for reconsideration with the Board, not the filing of a modification request. [2001] *Keil*, slip op. at 5. Modification is timely where, as here, it comes within one year of the conclusion of appellate proceedings. *See Hilliard*, 292 F.3d at 40, 22 BLR at 2-442 (Modification petition may be filed at any time within one year of the rejection of a claim); *Stanley v. Betty B Coal Co*., 13 BLR 1-72, 1-75-77 (1990). Therefore, employer's argument does not establish an exception to the law of the case doctrine. *See Brinkley, supra*; *Williams, supra*.

Employer next contends that the administrative law judge and the Board clearly erred by "misstat[ing]" the autopsy prosector's opinion. Employer's Brief at 18. Employer argues that because the prosector noted pigment with associated fibrosis but did not include pneumoconiosis as a final diagnosis, "the only proper inference is that he did not believe that Keil had it." *Id*., citing *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988). Neither the administrative law judge nor the Board stated that the prosector specifically diagnosed pneumoconiosis. The issue in this case was the significance of the autopsy prosector's finding of pigment with associated fibrosis, in the context of a record in which two other pathologists expressly attributed the pigment and fibrosis to the miner's coal mine employment. That situation contrasts with *Burns,* in which a comprehensive record of the miner's physical condition made no mention of any lung disease. The court held that on such a record, the administrative law judge properly inferred that no lung disease, *i.e.* pneumoconiosis, was present. *Burns*, 855 F.2d at 501-02. As the court recognized in *Burns*, "[d]rawing inferences from the evidence is part of the ALJ's role as factfinder." *Burns*, 855 F.2d at 501. Employer's assertion that there was only one proper inference on this record lacks merit and does not establish an exception to the law of the case doctrine. *See Brinkley, supra*; *Williams, supra*.

Finally, employer argues that the Board clearly erred by allowing the administrative law judge to treat the evidence inconsistently. Employer contends that the administrative law judge gave greater weight to the autopsy prosector at Section 718.202(a)(2), yet at Section 718.202(a)(4) preferred the opinion of a non-examining physician over that of a physician who had examined the miner. As noted above, the Board did not address the administrative law judge's findings at Section 718.202(a)(4). Therefore, we need not address employer's argument.

In sum, we hold that employer has not demonstrated an exception to the law of the case doctrine with respect to the Board's prior holdings in [2001] *Keil, supra*. *See Brinkley, supra*; *Williams, supra*. We hold further that the administrative law judge properly exercised his discretion in determining that reopening the claim rendered justice under the Act. *See Hilliard, supra*; *Branham, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge