BRB No. 01-0243 BLA

HAROLD E. PEARCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED ENERGIES, INCORPORATED/	)	DATE ISSUED:
HARRISBURG COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0987) of Administrative Law

Judge Robert L. Hillyard awarding benefits 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).[1] Claimant filed a duplicate claim on February 18, 1994.[2] By Decision and Order dated November 17, 1996, Administrative Law Judge Mollie W. Neal found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). Judge Neal also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b)(2000). Judge Neal further found that the evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c) (2000) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Judge Neal also found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, Judge Neal awarded benefits. By Decision and Order dated December 18, 1997, the Board affirmed Judge Neal's

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On February 26, 2001, employer filed a Motion for Stay of Proceedings. Employer argued that the final rules could affect the outcome of the case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). By Order dated August 30, 2001, the Board, *inter alia*, denied employer's Motion for a Stay of Proceedings.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on October 7, 1988. Director's Exhibit 25. The district director denied the claim on May 25, 1989. *Id.* There is no indication that claimant took any further action in regard to his 1988 claim.

Claimant filed a second claim on February 18, 1994. Director's Exhibit 1.

findings pursuant to 20 C.F.R. §§718.203(b)(2000) and 718.204(c) as unchallenged on appeal. *Pearce v. United Energies, Inc.*, BRB No. 97-0456 BLA (Dec. 18, 1997) (unpublished). The Board also affirmed Judge Neal's findings pursuant to 20 C.F.R. §§718.202(a)(1) (2000), 718.204(b) (2000) and 725.309 (2000). *Id.* The Board, therefore, affirmed Judge Neal's award of benefits. *Id.*

Employer filed a timely motion for reconsideration and a request to establish the briefing schedule. By Order dated March 17, 1998, the Board granted employer's request for an extension of time in which to file its brief on reconsideration. The Board provided employer thirty days from receipt of the Board's Order to file its brief. By Order dated May 22, 1998, the Board held that employer's motion for reconsideration was moot because employer had failed to file a brief. *Pearce v. United Energies, Inc.*, BRB No. 97-0456 BLA (May 22, 1998) (Order) (unpublished).

Employer subsequently filed a timely motion for reconsideration of the Board's May 22, 1998 Order, requesting the Board to reconsider its finding that employer's first motion for reconsideration was moot. Because employer had not provided an excusable reason for its failure to timely file its brief on reconsideration, the Board denied employer's subsequent motion for reconsideration.

Employer filed a timely motion for modification on December 23, 1998. Director's Exhibit 4. In a Decision and Order dated October 31, 2000, Administrative Law Judge Robert L. Hillyard (the administrative law judge) held, *inter alia*, that because pneumoconiosis is a progressive and irreversible disease, there could not be a showing of a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[3] The administrative law judge further found that employer had ample opportunity to submit its new evidence while the case was pending before Judge Neal. Because employer failed to identify extraordinary circumstances to excuse its delay, the administrative law judge declined to consider this evidence. The administrative law judge, within a proper exercise of his discretion, further found that Judge Neal did not commit a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, denied employer's motion for modification. On appeal, employer contends that the administrative law judge erred in denying employer's motion for modification. Employer argues, *inter alia*, that Judge Neal committed numerous errors in awarding benefits in the instant case. Employer has also filed a "Motion to Supplement Petition for Review" and a "Supplemental Employer's Brief."

[3]Although Section 725.310 has been revised, these revisions only apply to claims filed after January 19, 2001.

Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

On January 8, 2001, employer filed a "Motion to Supplement Petition for Review" and a "Supplemental Employer's Brief." On February 1, 2001, claimant filed a response brief.

By Order dated August 30, 2001, the Board stated:

> Section 802.215, 20 C.F.R. §802.215, of the Board's Rules of Practice and Procedure provides that additional briefs may be filed or ordered in the discretion of the Board and shall be submitted within time limits specified by the Board. The Board construes employer's submission as a supplemental brief.
>
> The Board will determine whether to accept or reject these statements in its Decision and Order on the merits of this case. 20 C.F.R. §802.215.

Pearce v. United Energies, Inc., BRB No. 01-0243 BLA (Aug. 30, 2001) (Order) (unpublished).

While we accept employer's supplemental brief, we reject employer's arguments contained therein. In its Supplemental Brief, employer challenges the administrative law judge's denial of its motion to compel claimant to provide employer with access to his records or to submit to an examination. On January 25, 2000, employer filed a "Motion for Order to Show Cause Why [Claimant] Should Not Provide Authorizations." By Order dated February 16, 2001, the administrative law judge held that:

> The Courts and the Board have granted employers' requests for modification where the interests of justice outweigh the need for finality in decisions. When the evidence an employer seeks to offer was available or could have been developed at the time of the earlier proceeding, such requests are to be denied. In the instant case, the Employer has made no specific allegations of error or mistakes in fact and did not state how reopening the record would render justice under

> the Act. In its request for modification, Employer generally alleges mistakes in determination of fact and stated "United believes that the decision to award benefits in the instant case is mistaken and requests modification." In a letter to the District Director, the Employer requested time to submit additional evidence in support of its petition and to establish that the Administrative Law Judge erred in concluding that the Miner's pneumoconiosis progressed. As stated in the cases cited above, "a bare claim of need to reopen to serve the interests of justice is not enough; a court must balance the need to render justice against a need for finality in decision making." "Parties should not be permitted to invoke § 22 to correct errors or misjudgements of counsel, nor to present a new theory of the case when they discover a subsequent decision arguably favorable to their position."
>
> For the reasons stated above, I find that the Employer has failed to state a sufficient cause for the granting of its Motion.

Administrative Law Judge's February 16, 2001 Order at 5-6.

An employer's right to have a claimant re-examined or to compel a claimant to respond to discovery requests pursuant to a request for modification is not absolute, and the determination of whether an employer is entitled to such examination or discovery rests within the discretion of the administrative law judge. *Stiltner v. Wellmore Coal Corp*., 22 BLR 1-37, 1-40-42 (2000) (*en banc*); *Selak v. Wyoming Pocahontas Land Co*., 21 BLR 1-173, 1-177-78 (1999) (*en banc*).[4] More specifically, the issue is whether employer "has raised a credible issue pertaining to the validity of the original adjudication...so that an order compelling claimant to submit to examinations or tests would be in the interest of justice." *Selak*, 21 BLR at 1-179. The same standard applies to an employer's motion to compel claimant to respond to discovery. *See Stiltner, supra*.

[4]The Board's decisions in *Selak* and *Stiltner* were based on 20 C.F.R. §718.404(b)(2000), providing for a claimant who has been finally adjudged entitled to benefits to submit to examination and provide other medical information, if requested, for the purpose of determining whether claimant continues to be totally disabled due to pneumoconiosis. The language of the former 20 C.F.R. §718.404(b)(2000) now appears, in substantially the same form, at revised 20 C.F.R. §725.203(d), which is applicable to the instant claim. *See* 20 C.F.R. §725.2(c). Upon review of 20 C.F.R. §725.203(d), the legal standard set forth in *Selak* and *Stiltner* is applicable to this case.

Under the facts of the instant case, we hold that the administrative law judge's basis for rejecting employer's requests for the development of additional evidence, *i.e.*, that employer failed to make any specific allegation of error or mistakes in findings of fact and failed to state how reopening the record would render justice under the Act, constitutes a permissible exercise of his discretion. *See Stiltner*, *supra*.

In *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 315, 20 BLR 2-76, 2-89 (3d Cir. 1995), the United States Court of Appeals for the Third Circuit noted that 20 C.F.R. §718.404(b) (2000)[5] effectuates Section 22 of the Longshore and Harbor Workers' Compensation Act by stating the grounds whereby an employer or the Department of Labor may seek modification based upon a change in conditions. In *Plesh v. Director, OWCP*, 71 F.3d 103, 109, 20 BLR 2-30, 2-41 (3d Cir. 1995), the Director argued that Section 718.404(b) authorizes the reopening of a case "only upon a finding of a mistake in the original determination or of a change in condition other than recovery from pneumoconiosis." The Third Circuit observed in *Plesh* that Congress and the courts have consistently recognized that pneumoconiosis is progressive and irreversible. *Id.* Hence, in some Black Lung cases, modification may not be sustained based upon a change in conditions because it

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[5]Section 718.404, entitled "Cessation of entitlement," provides that:

> (a) An individual who has been finally adjudged to be totally disabled due to pneumoconiosis and is receiving benefits under the Act shall promptly notify the Office and the responsible coal mine operator, if any, if he or she engages in any work as defined in §718.204(c).
>
> (b) An individual who has been finally adjudged to be totally disabled due to pneumoconiosis shall, if requested to do so upon reasonable notice, where there is an issue pertaining to the validity of the original adjudication of total disability, present himself or herself for, and submit to, examinations or tests as provided in §718.101, and shall submit medical reports and other evidence necessary for the purpose of determining whether such individual continues to be under a disability. Benefits shall cease as of the month in which the miner is determined to be no longer eligible for benefits.

20 C.F.R. §718.404 (2000).

As previously noted, the language of the former 20 C.F.R. §718.404(b)(2000) now appears, in substantially the same form, at revised 20 C.F.R. §725.203(d), which is applicable to the instant claim.

is not possible for the adjudicated condition to change. For example, because Congress and the courts have acknowledged that pneumoconiosis is an irreversible disease, modification may not be granted based upon the premise that the claimant has recovered from the disease. *See* H.R. Rep. No. 95-151, 95th Cong., 2d Sess. (1977); *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988) (recognizing that pneumoconiosis is a "serious and progressive pulmonary condition."); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976) (noting that "once contracted [pneumoconiosis] is irreversible in both its simple and complicated stages.").

The principle that pneumoconiosis is progressive is the same under both case law recognizing the progressive nature of pneumoconiosis, *see Mullins, supra*; *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1139 (7th Cir. 1988) ("Pneumoconiosis is a progressive disease...."), and 20 C.F.R. §718.201(c).[6] *See* 65 Fed. Reg. 79937, 79971-72.

In the instant case, in regard to whether the evidence was sufficient to establish a change in conditions, the administrative law judge stated:

> The prior decision resulted in an award of benefits. The Circuit Courts and Benefits Review Board have held that, for purposes of establishing modification, the phrase "change in conditions" refers to a change in the claimant's physical condition. *See General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982); *Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987). Because pneumoconiosis is a latent and irreversible disease, there can be no showing of a change in conditions. Therefore, I will review the evidence, old and new together, to determine whether a mistake in a determination of fact was made in the prior decision awarding benefits.

Decision and Order at 6.

Employer did not attempt to show a change in conditions by demonstrating that claimant's total disability had ceased. In fact, employer, at one point, acknowledges

[6]Section 718.201(c) provides that pneumoconiosis is "recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c).

that its "petition for modification was based on a mistake of fact." Employer's Brief at 14. Consequently, we affirm the administrative law judge's finding that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

Employer, however, contends that the administrative law judge erred in failing to find a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The Supreme Court, federal circuit and district courts, and the Board have held that an administrative law judge's assessment of a request for modification involves a balancing of the interest in maintaining the finality of decisions against the interest in rendering justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards,* 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982)(*per curiam*); *McCord v. Cephas*, 532 F.2d 1377, 1381, 3 BRBS 371, 377 (D.C. Cir. 1976); *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999)[7]; *Branham v. Bethenergy Mines, Inc.*, 21 BLR 1-79 (1998). Moreover, the United States Court of Appeals for the Seventh Circuit, within whose appellate jurisdiction the instant case arises, has recognized that motions to reopen a case "are appeals to the discretion" of the administrative law judge. *See Amax Coal Co. v. Franklin,* 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992).

We affirm, as within his discretion, the administrative law judge's implicit determination that reopening the present case would not render justice under the Act. *See* Decision and Order at 6-8. The administrative law judge rationally based his finding upon the fact that the evidence proffered by employer, which included readings of x-rays dated prior to the issuance of Judge Neal's Decision and Order and the consultative reports of Drs. Renn, Tuteur and Fino concerning reviews of evidence dated prior to Judge Neal's Decision and Order, could have been obtained before the miner's claim for benefits was adjudicated. *See Branham*, *supra*.

With respect to employer's allegation that the administrative law judge erred in

[7]In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), a case arising under the Longshore and Harbor Workers' Compensation Act, the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's 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*, 33 BRBS at 72 (citing *Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991)).

determining that Judge Neal did not make a mistake in a determination of fact, we hold that the administrative law judge did not abuse his discretion in making this finding. The administrative law judge indicated his awareness of the contents of Judge Neal's Decision and Order and the relevant evidence and acted rationally in determining that there was not mistake in a determination of fact under Section 725.310 (2000). *See O'Keeffe*, *supra*; *Franklin*, *supra*; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

Employer raises numerous contentions of error in regard to Judge Neal's previous findings. *See* Employer's Brief at 22-29. However, employer had an adequate opportunity to raise its contentions of error regarding Judge Neal's award of benefits when it appealed Judge Neal's Decision and Order to the Board.[8] Employer presently attempts to raise contentions of error that it could have raised in its initial appeal to the Board. Section 22 is not intended to provide a back-door route to retrying a case, or to protect litigants from their counsel's litigation mistakes. *See General Dynamics Corp. v. Director, OWCP*, 14 BRBS 636 (1st Cir. 1982). There has not been a change in the underlying factual situation; there has not been any intervening controlling authority which demonstrates that the Board's initial decision was erroneous; and there has not been any evidence that the Board's first decision was clearly erroneous and to let it stand would produce a manifest injustice. Consequently, we decline to address employer's contentions of error regarding Judge Neal's previous findings. *See generally Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). We, therefore, affirm the administrative law judge's denial of employer's request for modification.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[8]*See* summary of procedural history at pp. 2-3, *supra*.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge