BRB No. 05-0297 BLA

HAROLD E. PEARCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED ENERGIES, INCORPORATED/	)	
HARRISBURG COAL COMPANY	)	DATE ISSUED: 11/03/2005
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

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

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (99-BLA-0987) of Administrative Law Judge Robert L. Hillyard with respect to 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). Claimant was awarded benefits on a

duplicate claim filed on February 18, 1994. The Board affirmed the award and rejected employer's subsequent motions for reconsideration. Employer filed a timely request for modification, which the administrative law judge denied. The Board affirmed the administrative law judge's Decision and Order and rejected employer's requests for reconsideration. Employer appealed to the United States Court of Appeals for the Seventh Circuit, which remanded the case for reconsideration of modification in light of its decision in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). The Board remanded the case to the administrative law judge.

The administrative law judge determined that the evidence of record did not establish a mistake of fact in the prior determination that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment. The present appeal followed. Employer argues that the administrative law judge erred in declining to order claimant to submit to an examination, in rejecting employer's request to develop evidence regarding the latency and progressivity of pneumoconiosis, in denying its request to depose Dr. Tuteur for a second time, and in excluding Dr. Rosenberg's deposition. In addition, employer argues that the administrative law judge did not properly apply the Seventh Circuit's standard for assessing whether a material change in condition was established. Employer also maintains that the administrative law judge did not properly weigh the x-ray evidence or the medical opinions of Drs. Selby, Tuteur, Fino, Renn, and Rosenberg. Employer further asserts that the administrative law judge erred in crediting Dr. Cohen's opinion. Finally, employer contends that the administrative law judge erred in awarding benefits when the Department of Labor determined in 1989 that claimant was disabled due to a nonrespiratory condition.

Claimant has responded and urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has responded to employer's arguments concerning the latency and progressivity of pneumoconiosis and its right to have claimant reexamined. The Director asserts that employer's allegations of error are without merit.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson*

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

We will first address employer's allegations of error regarding the administrative law judge's evidentiary rulings. In the administrative law judge's initial disposition of this case, he rejected a request by employer that claimant appear for a new physical examination and determined that reopening the case on modification was not appropriate, as much of employer's evidence could have been developed when the case was before Judge Neal. Citing its published decisions in *Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37 (2000)(*en banc*) and *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999), the Board affirmed the administrative law judge's denial of employer's request for another exam of claimant, holding that employer did not have an absolute right to have claimant reexamined pursuant to a modification request and that employer was required to raise a credible issue regarding the validity of the original adjudication such that an order compelling claimant to submit to an exam was in the interest of justice. The Board noted that the administrative law judge provided a proper basis for rejecting employer's requests by relying upon employer's failure to make any specific allegation of error or mistake of fact and its failure to identify how reopening the record would render justice under the Act. The Board also held that the administrative law judge implicitly determined, within his discretion, that reopening this case would not render justice under the Act because employer relied upon evidence which it could have obtained earlier in the proceedings. *Pearce v. United Energies, Inc./Harrisburg Coal Co.*, BRB No. 01-0243 BLA (Nov. 30, 2001)(unpub.). Upon consideration of employer's appeal of the Board's Decision and Order, the Seventh Circuit remanded this case to the administrative law judge for reconsideration in light of the court's decision in *Hilliard*.

In *Hilliard*, which was issued subsequent to the Board's prior Decision and Order, the court indicated that the standard for determining whether reopening a claim on modification would render justice under the Act, in accordance with the Supreme Court's holding in *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), is a standard that articulates a preference for accuracy over finality. The court noted that the Supreme Court in *O'Keeffe* explicitly held that "new" evidence was not a prerequisite for reopening a claim on modification, but that "justice under the Act" should be considered in reopening decisions, requiring that an administrative law judge's administration of "justice" be grounded in the stated purpose of the Act, *i.e.*, to ensure the accurate distribution of benefits. In light of the Act's preference for accuracy of determination over finality, the court held that a modification request cannot be denied solely on the basis that the argument or evidence submitted in support of a request for modification could have been presented at an earlier stage in the proceedings or on the number of times modification has been requested. *Hilliard*, 292 F.3d at 544, 22 BLR at 2-452.

Nevertheless, the court held that an administrative law judge is not precluded from determining, within his or her discretion, that there are reasons found in the language and policies of the Act that overcome the preference for accuracy and would justify the denial of a request to reopen a claim on modification, such as: the moving party's disregard of the administrative process, abuse of the adjudicatory system or "sanctionable conduct"; "if it were clear from the moving party's submissions that reopening would not alter the substantive award"; or an employer requests modification "in an unreasonable effort to delay payment." *Hilliard*, 292 F.3d at 547, 22 BLR at 2-452-53. While the court held that the administrative law judge is not required to give no weight to finality, the court concluded that a determination as to whether reopening a claim on modification would render "justice under the Act" in accordance with the standard enunciated in *O'Keeffe* limits the discretion of the administrative law judge by requiring him to give great weight to the accuracy of the entitlement determination. *Hilliard*, 292 F.3d at 545, 22 BLR at 2-453.

The court also noted that under the applicable regulations, a miner's claim may be denied as abandoned if the miner "'unreasonably refuses . . . [t]o provide the Office or the designated responsible operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records[.]'" *Hilliard*, 292 F.3d at 548, 22 BLR at 2-455-56. Because the administrative law judge in *Hilliard* rejected the employer's request for a medical authorization, however, "without considering the reasonableness of Mrs. Hilliard's refusal," a remand was required "for a determination of whether Mrs. Hilliard's refusal was reasonable under the circumstances." *Id*.

Employer argues in this case that the Seventh Circuit's decision in *Hilliard* altered the standard applicable to the type of evidence that may be developed and submitted on modification. Employer maintains that under the new standard, the administrative law judge's rejection of its request on remand to compel a new examination of claimant is in error. The Director responds that *Hilliard* did not change the principle that employer does not have an absolute right to claimant's medical records or to an examination of claimant. The Director also asserts that under the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), because employer was the proponent of the order to compel claimant to appear for an exam, it bears the burden of proving that its request for an examination was reasonable.

In rejecting employer's request, the administrative law judge relied heavily upon the Board's published decision in *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999), to find that employer was required to raise a "credible issue pertaining to the validity of the original adjudication," proffer "evidence to demonstrate that its request to have claimant re-examined is reasonable under the circumstances," and prove that claimant's refusal to appear for the re-examination was unreasonable. Sept. 19, 2003

Order at 6, quoting *Selak*, 21 BLR at 1-179. The court in *Hilliard* did not set forth similar prerequisites and, as indicated, held that the administrative law judge erred in failing to determine whether the widow's refusal to authorize the release of medical information was reasonable. Although the administrative law judge, in his Decision and Order on Remand, and claimant and the Director, in their response briefs, attempt to distinguish *Hilliard* by noting that the Seventh Circuit interpreted the new regulation found at §725.414(a)(3)(i)(A), which pertains to requests for medical records, not physical examinations, the provision relating to examinations is similarly worded. *See* 20 C.F.R. §725.414(a)(3)(i)(B). In addition, the court observed that the former regulations, which apply in this case, contain a similar provision at §718.402 (2000), and concluded that "both the former and current regulations articulate the same standard for evaluating [a claimant's] refusal" to provide a medical history or authorize access to medical records. *Hilliard*, 292 F.3d at 548 and n.10, 22 BLR at 2-455 and n.10.

The Director also argues that because the APA requires that the proponent of a rule or order bear the burden of proof, employer must prove that its request for an examination is reasonable and/or that claimant's refusal to appear for the examination is unreasonable. This argument was apparently not raised in *Hilliard*. Nevertheless, the court's decision to remand the case to the administrative law judge for a determination of whether the miner's widow reasonably refused to authorize the employer's access to certain medical information indicates that the Director's contention does not have merit. We vacate, therefore, the administrative law judge's finding regarding employer's request to compel claimant to appear at an examination and remand this case to the administrative law judge. On remand, the administrative law judge must consider employer's request for an examination under 20 C.F.R. §718.402 (2000) and the court's decision in *Hilliard*.

Regarding employer's other discovery requests on remand, employer sought to develop evidence regarding the latency and progressivity of pneumoconiosis as recognized in the newly adopted definition of pneumoconiosis set forth in 20 C.F.R. §718.201. Specifically, employer requested permission to depose Dr. Tuteur a second time and to depose Dr. Rosenberg, who had prepared a post-remand record review. The administrative law judge rejected employer's request regarding Dr. Tuteur on the ground that determining the validity of Section 718.201 was beyond the administrative law judge's authority.

The administrative law judge permitted employer to depose Dr. Rosenberg for the specific purpose of fully developing his written report. When employer sought to admit Dr. Rosenberg's deposition and the attached exhibits, however, the administrative law judge granted claimant's motion to strike because employer elicited testimony concerning the latency and progressivity of pneumoconiosis, thereby exceeding the scope of the Order granting employer's request.

Employer argues that the administrative law judge erred in denying its request to develop evidence regarding Section 718.201, including its request to obtain another deposition from Dr. Tuteur and to admit the deposition of Dr. Rosenberg in its entirety. The Director responds that contrary to employer's position, the case law of the Seventh Circuit supports the administrative law judge's action, as it prohibits a party from challenging the validity of a regulation once the rule-making procedure has been completed and provides that a party may only challenge the agency's authority to promulgate the rule. Claimant urges affirmance of the administrative law judge's decision on this issue as it is rational and supported by substantial evidence.

As the Director indicates, there are limited grounds upon which a party can challenge the validity of a regulation. A party may show that the regulation is inconsistent with the statute, that it is not supported by the rulemaking record, or that the agency did not have the authority to issue the regulation. *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). In presenting evidence in support of any of these positions, however, a party is limited to evidence available to the agency at the time that the rule was promulgated. *Wisconsin Electric Power Co. v. Costle*, 715 F.2d 323 (7th Cir. 1983).

In this case, employer sought to challenge the validity of Section 718.201 by introducing scientific evidence developed after the rule-making process was completed. Employer cites *Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998) and *Peabody Coal Co. v. Spese*, in support of its arguments. In those cases, the Seventh Circuit indicated that parties who took issue with the view that pneumoconiosis is a latent and progressive disease could submit new evidence in support of their position. Those cases were issued before the adoption of the amended version of Section 718.201, however. In *Shores*, which was decided after the adoption of revised §718.201, the court stated that:

> Now that the agency has issued a formal regulation using full notice-and-comment procedures, *Chevron* imposes on the mine operators the heavy burden of showing that the agency was not entitled to use its delegated authority to resolve the scientific question in this manner. [The mine operator] has not undertaken to show why the Department's conclusion was not itself supported by substantial evidence (a somewhat different question from whether it had the authority to adopt a general rule on the point).

358 F.3d at 490, 23 BLR at 2-26, citing *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Employer's efforts in the present case went beyond questioning the authority of the Department of Labor to issue a rule and beyond the extent to which the Department's decision was supported by the actual rule-making

record. Accordingly, the administrative law judge did not abuse his discretion in denying employer's requests upon this ground. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 153 (1989)(*en banc*). Moreover, with respect to Dr. Rosenberg's deposition, the administrative law judge acted within his discretion in granting claimant's Motion to Strike, as the bulk of the deposition testimony exceeded the scope of the administrative law judge's Order giving employer permission to depose Dr. Rosenberg. *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987).

We now turn to employer's allegations of error concerning the administrative law judge's consideration of modification pursuant to Section 725.310. Employer argues that the administrative law judge did not address the issue of material change in conditions under Section 725.309(d) when considering whether the award of benefits on the duplicate claim constituted a mistake in a determination of fact, and did not engage in a *de novo* review of the evidence of record.

Employer's first contention has no merit. The Seventh Circuit has held that in order to establish a material change in conditions, a claimant must prove that something capable of making a difference has changed since the prior denial, and that establishing an element of entitlement that was previously adjudicated against claimant would generally satisfy this requirement. *Shores*, 358 F.3d at 489, 23 BLR at 2-25; *Kennellis Energies v. Director, OWCP [Ray]*, 333 F.3d 822, 22 BLR 2-591 (7th Cir. 2003); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc rehearing*). Although the administrative law judge did not explicitly determine whether the material change in conditions finding was correct, the administrative law judge's consideration of this issue was implicit in his finding that the x-ray evidence submitted with claimant's earlier applications for benefits was negative for clinical pneumoconiosis, while the newly submitted x-ray evidence is sufficient to establish the existence of the disease at Section 718.202(a)(1). Decision and Order on Remand at 20. Employer also argues that the administrative law judge's finding under Section 718.202(a)(1) must be vacated. We disagree.

The administrative law judge acted within his discretion in finding that the existence of clinical pneumoconiosis was proven based upon the preponderance of positive readings by dually qualified readers. Decision and Order on Remand at 20; *Clark*, 12 BLR at 1-151; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). In addition, contrary to employer's allegation of error, there is no evidence in the record establishing that Drs. Abramowitz, Wershba, Gogineni, and Binns were dually qualified physicians at the time they rendered the x-ray interpretations that were in the record before Judge Neal. Employer's description of their qualifications in a cover letter does not constitute such evidence nor was the administrative law judge required to refer to sources outside the record to ascertain

whether these physicians were Board-certified radiologists when they read the x-rays in question.

Employer's allegation that the administrative law judge did not properly assess whether the newly submitted medical opinion evidence established a mistake in a determination of fact regarding whether claimant has legal pneumoconiosis and is totally disabled by it, has merit. As indicated above, the court in *Hilliard* determined that the modification procedures enacted by Congress and implemented by the Secretary of Labor express a strong preference for accuracy over finality. The court also indicated that modification is very broad in its potential scope, which permits an administrative law judge to take a completely fresh look at a case to determine whether the ultimate finding regarding entitlement was correct.

In this case, when considering whether there was a mistake in a determination of fact in Judge Neal's award of benefits on the duplicate claim, the administrative law judge identified the particular finding contested by employer, summarized Judge Neal's disposition of the issue, and then concluded that Judge Neal did not commit any error requiring modification of the award of benefits. Decision and Order on Remand at 22-24. The administrative law judge's focus on Judge Neal's findings suggests that he reviewed Judge Neal's Decision and Order rather than engaging in a *de novo* review of the award of benefits itself. Significantly, the administrative law judge indicated that he accepted Judge Neal's preference for Dr. Cohen's opinion diagnosing chronic obstructive pulmonary disease due to coal dust exposure, without independently assessing the probative value of this opinion. Decision and Order on Remand at 23.

We must therefore vacate the administrative law judge's finding that the medical opinions of record do not support a determination of a mistake in fact pursuant to Section 725.310. On remand, the administrative law judge must perform an independent assessment of the newly submitted medical opinion evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish that an error was made in the determination that claimant established that he is totally disabled due to pneumoconiosis as defined in Section 718.201. *Hilliard*, 292 F.3d at 545, 22 BLR at 2-452; *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Finally, employer maintains that an award of benefits is precluded in this case because the Department of Labor determined in 1989 that claimant is suffering from a totally disabling respiratory impairment that is not related to coal dust exposure. Employer bases its argument upon the denial letter sent to claimant on May 25, 1989, in which the district director stated that claimant did not establish any of the elements of entitlement and the accompanying guide to submitting additional evidence, which indicated that the pulmonary function study submitted by claimant produced qualifying

MVV and FEV1 values. Director's Exhibit 25. It is not apparent from the record that employer's premise – that the district director determined that claimant had a totally disabling respiratory impairment in 1989 that was not related to pneumoconiosis – is correct. The district director did not explicitly set forth this conclusion and the mere presence of a pulmonary function study which included qualifying values does not establish it as fact. Moreover, employer's position is contradicted by the district director's reference in the same document to a blood gas study with nonqualifying values.

Even assuming that employer is correct, a prior finding of total respiratory disability unrelated to coal dust exposure does not preclude an award of benefits in this case. In its decision in *Shores*, the Seventh Circuit held, *inter alia*, that a miner is considered totally disabled due to pneumoconiosis where non-disabling pneumoconiosis combines with another non-disabling condition to render the miner totally disabled. The court ruled that total disability due to pneumoconiosis is also established where the miner suffers from several conditions, each of which is independently sufficient to render the miner totally disabled, as long as one of the conditions is related to dust exposure in coal mine employment. *Shores*, 358 F.3d at 496, 23 BLR at 1-35-36. In the present case, if the administrative law judge determines on remand that the facts of this case place claimant in one of these scenarios, an award of benefits is appropriate regardless of any prior determination of total respiratory disability unrelated to pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge