BRB No. 00-1185 BLA

B. F. CAUDILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
CUMBERLAND RIVER COAL COMPANY INCORPORATED	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Employer Motions, and the Decision on Motion for Reconsideration and Order of Dismissal of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Edward Waldman (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Employer Motions, and the Decision on Motion for Reconsideration and Order of Dismissal (2000-BLA-0321) of

Administrative Law Judge Rudolf L. Jansen 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).[1] Claimant filed his application for benefits on October 26, 1992. Director's Exhibit 1. After a hearing, Administrative Law Judge Paul H. Teitler awarded benefits in a Decision and Order issued on September 6, 1995 and ordered employer to pay benefits. Director's Exhibit 51. Upon consideration of employer's appeal, the Board affirmed Judge Teitler's finding that the existence of pneumoconiosis arising out of coal mine employment was established, and his finding that total disability was due to pneumoconiosis, but remanded the case for the administrative law judge to properly consider the medical opinion evidence to determine whether claimant suffered from a totally disabling respiratory impairment. *Caudill v. Cumberland River Coal Co*., BRB No. 95-2257 BLA (Nov. 26, 1996)(unpub.); Director's Exhibit 69.

On remand, Judge Teitler reweighed the medical evidence as instructed and again found that claimant was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 71. Accordingly, benefits were awarded. Upon consideration of employer's appeal, the Board affirmed the award of benefits on March 25, 1998. *Caudill v. Cumberland River Coal Co*., BRB No. 97-0986 BLA (Mar. 25, 1998)(unpub.); Director's Exhibit 77. Employer did not appeal the Board's decision.

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[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 forty-seven 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*, 145 F.Supp.2d 1 (D.D.C. 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Because claimant was receiving Kentucky workers' compensation benefits for total disability due to pneumoconiosis pursuant to a 425-week award beginning January 13, 1992, in an amount exceeding the monthly federal black lung rate, claimant's federal benefits were completely offset until the state award expired on April 24, 1999. Director's Exhibits 9, 55, 73, 78; *see* 20 C.F.R. §725.535(b)(providing for the reduction of benefit payments, but not below zero, by an amount equal to any payments of state benefits). After receiving notice of the last payment of state benefits, on May 13, 1999 the District Director of the Office of Workers' Compensation programs initiated modification pursuant to 20 C.F.R. §725.310 and issued an Amended Award of Benefits ordering employer to pay full federal benefits commencing May 1999. Director's Exhibit 79. The record does not indicate whether employer began payments or whether the Black Lung Disability Trust Fund paid benefits.[2]

On October 6, 1999, employer petitioned for modification, alleging that the prior award was a mistake. Director's Exhibit 80. In support of employer's contention that a mistake in a determination of fact was made, employer attached a report by Dr. Ben Branscomb, who reviewed the medical evidence of record and concluded that claimant "probably" does not have pneumoconiosis and definitely is not totally disabled by a respiratory or pulmonary impairment. *Id*. Employer also alleged that new evidence it was developing might demonstrate a change in conditions. Employer indicated that it planned to make discovery requests to claimant and would also arrange for a physical examination. *Id*. On the same day, employer mailed interrogatories, requests for production of documents, and a medical release form to claimant. *Id*.

By order dated October 25, 1999, the District Director denied modification. Director's Exhibit 81. By separate letter the District Director advised employer that because employer's modification petition did not specifically request to have claimant examined, the denial order did not address that issue. *Id*. Nevertheless, in the letter the District Director concluded that "the report you submitted is not sufficient to justify a finding that it is reasonable to have Mr. Caudill re-examined." *Id*.

Employer requested reconsideration, and in the alternative requested that the case be forwarded to the Office of Administrative Law Judges (the OALJ) for a hearing. Director's Exhibit 82. Employer also requested that the District Director

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[2] Because employer refused to begin paying benefits after Judge Teitler's 1995 decision awarding benefits, the Trust Fund began payments at that time, but because of the total offset the Trust Fund was sending claimant a monthly check for $0. Director's Exhibits 55, 73. The record does not reflect whether the Trust Fund sent these $0 federal payments continuously through April of 1999, or whether employer assumed responsibility for the $0 payments after the Board's 1998 decision affirming the award.

order claimant to respond to discovery requests and provide a medical release. *Id*. The District Director denied reconsideration and found that "nothing in the claim file suggests [that claimant] should have further obligation to assist Cumberland River in developing further evidence." Director's Exhibit 83.

Thereafter, the District Director referred the case to the OALJ for a formal hearing. Director's Exhibit 84. On the Form CM-1025 listing the hearing issues, the District Director checked "Modification. An error in a determination of fact," as the only issue contested by employer. *Id*. Subsequently, claimant's counsel informed employer that claimant would not attend "the appointment with Dr. Dahhan." Letter, Dec. 27, 1999 (unstamped exhibit).

On February 11, 2000, employer filed with the OALJ a motion to compel claimant to respond to discovery requests and undergo examination, a motion to remand the case to the District Director to complete the development of evidence, and a motion to amend the CM-1025 form to include the issues of the existence of pneumoconiosis arising out of coal mine employment, total disability, and disability causation. Claimant opposed employer's motions.

On June 7, 2000, the parties were informed that the case was scheduled for a hearing on September 21, 2000 before Administrative Law Judge Rudolf L. Jansen. By letter dated June 28, 2000, employer informed the administrative law judge that employer's motions were still pending, and requested a continuance of the hearing pending a ruling on those motions.

By Order dated August 8, 2000, the administrative law judge denied employer's motions and ordered employer to show cause why its petition for modification should not be dismissed. The administrative law judge found that Dr. Branscomb's report did not demonstrate a mistake of fact, and found that employer did not demonstrate a basis for having claimant re-examined because there was "no evidence that the miner's condition has changed in any way." Aug. 8 Order at 8. The administrative law judge additionally found that reopening the claim would not render justice because, in his view, employer was merely attempting to relitigate the case. *Id*.

Employer responded to the show cause order, requested reconsideration, and submitted additional medical evidence. The additional evidence consisted of two negative readings of a chest x-ray dated January 15, 1992, Employer's Exhibits 1, 2, and a medical report by Dr. James Castle, who reviewed the medical evidence and concluded that claimant does not have pneumoconiosis and is not totally disabled by a respiratory or pulmonary impairment. Employer's Exhibit 3. The record contains no objection to these proffered exhibits.

In a Decision on Motion for Reconsideration and Order of Dismissal issued on August 30, 2000, the administrative law judge did not consider the additional

evidence proffered, but confined his analysis to Dr. Branscomb's report. The administrative law judge again found that Dr. Branscomb's report did not demonstrate a mistake of fact and ruled that "justice would not be served by re-examining Mr. Caudill's claim." Decision on Motion for Reconsideration at 2. Consequently, the administrative law judge denied employer's motions, dismissed the modification petition, and indicated that the additional medical evidence submitted "is simply being associated with the file." *Id*. at 3.

On appeal, employer contends that the administrative law judge did not consider all of the relevant evidence and erred in denying employer's motions to compel claimant to respond to discovery requests and undergo examination. Employer further asserts that the administrative law judge erred in dismissing the modification petition without holding the requested hearing, and in denying employer's motion to amend the hearing issues list. In addition, employer alleges that the administrative law judge abused his discretion in determining that reopening the claim would not render justice. Claimant responds, contending that employer's request for modification was untimely, and alternatively, urges affirmance of the administrative law judge's orders. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge did not consider all of the relevant evidence and did not apply the proper test to determine whether employer demonstrated a basis for requiring claimant to respond to discovery and submit to an examination.

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 and Harbor Workers' Compensation 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 . . . .

"[B]y its plain language, 33 U.S.C. §922 is a broad reopening provision that is

available to employers and employees alike." *King v. Jericol Mining, Inc*., 246 F.3d 822, 825, BLR (6th Cir. 2001). "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); *see also Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-82-84 (1998)(McGranery, J., dissenting). The administrative law judge has the authority on modification "to reconsider all the evidence for any mistake of fact," including whether "the ultimate fact (disability due to pneumoconiosis) was wrongly decided . . . ." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Claimant contends that employer's October 6, 1999 petition for modification was untimely because it was not filed within one year of the Board's March 3, 1998 decision or within one year of the last payment of benefits, as no federal benefits were paid. Claimant's contention lacks merit. Employer was under an order to pay benefits and would have been doing so after the Board's 1998 decision but for the total offset due to claimant's state award. Given that state benefits for total disability due to pneumoconiosis must be offset dollar for dollar against federal benefits payments, *see* 20 C.F.R. §725.535, claimant cites no authority for his implicit assertion that state benefit payments do not constitute the "payment of compensation" under Section 22.[3] Accordingly, we hold that employer's petition for modification was filed within one year of the last payment of compensation, and was therefore a timely request for modification.[4] *See* 33 U.S.C. §922; 20 C.F.R. §725.310.

Employer and the Director challenge the administrative law judge's denial of employer's motions to compel claimant to respond to discovery requests and submit to an examination. An employer's right to have claimant re-examined or to compel claimant to respond to discovery requests pursuant to a request for modification is not absolute, and the determination of whether 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*). Here,

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[3] Claimant's argument ignores the fact that federal benefit checks were apparently being made to him, albeit with payment reduced to $0. Director's Exhibits 55, 73; *see* n.2, *supra*.

[4] The District Director's modification, which claimant does not challenge, was also timely initiated within one year of the last payment of compensation, and the issuance of the District Director's Amended Award of Benefits began a one-year period in which any party could request modification of that decision. *See Stanley v. Betty B Coal Co*., 13 BLR 1-72, 1-76 (1990). Employer's petition was filed within that one-year period.

employer and the Director contend that the administrative law judge did not consider all of the relevant evidence in ruling on employer's requests for discovery and an examination on modification. This contention has merit, as the administrative law judge did not consider Dr. Castle's report or the additional x-ray readings submitted by employer. Consequently, we must vacate the administrative law judge's orders and remand this case for him to consider all of the relevant evidence to determine whether employer has "demonstrate[d] that its request to have claimant re-examined is reasonable under the circumstances." *Selak*, 21 BLR at 1-178. 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 employer's motion to compel claimant to respond to discovery. *See Stiltner, supra*.[5]

[5] 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. As the Director points out, 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 pending claims. *See* 20 C.F.R. §725.2(c). Upon review of 20 C.F.R. §725.203(d), we agree with the Director that the legal standard set forth in *Selak* and *Stiltner* remains applicable to this case.

Employer contends that the administrative law judge erred by failing to hold the requested hearing on modification. Under the Act and regulations, an administrative law judge must hold a hearing on any claim, including a request for modification filed with the district director, whenever a party requests such a hearing, unless such hearing is waived by the parties, *see* 20 C.F.R. §725.461(a), or a party requests summary judgment and the administrative law judge determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, *see* 20 C.F.R. §725.452(c). *Robbins v. Cyprus Cumberland Coal Co*., 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co*., 144 F.3d 388, 390, 21 BLR 2-384, 2-388-89 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co*., 22 BLR 1-69, 1-71-72 (2000). Therefore, on remand, after addressing employer's motions, the administrative law judge should hold the hearing that was requested after the district director denied modification, unless the parties waive their right to a hearing, or a motion for summary judgment is properly granted.[6] In considering the petition for modification, the administrative law judge has the discretion to determine whether reopening the case will render justice. *See Kinlaw v. Stevens Shipping and Terminal Co*., 33 BRBS 68, 72 (1999); *Branham, supra*.

[6] Because the modification issue includes whether the ultimate fact of entitlement was correctly decided, *see Worrell, supra*, the medical issues of entitlement were necessarily raised when the District Director listed modification as a hearing issue on the CM-1025 Form. Consequently, the administrative law judge need not revisit employer's motion to expand the hearing issues list.

Accordingly, the administrative law judge's Order Denying Employer Motions and the Decision on Motion for Reconsideration and Order of Dismissal are vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge