BRB No. 01-0958 BLA

ELLA MAE WHITT (Widow of OLIVER G. WHITT) Claimant-Petitioner v. KENNEDY COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents 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 Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp, Grundy, Virginia, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

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

HALL, Administrative Appeals Judge:

Claimant[1] appeals the Decision and Order on Modification (01-BLA-0355) of

[1] Claimant is the surviving widow of the miner, Oliver G. Whitt, who originally filed a miner's claim on October 16, 1981, Director's Exhibit 1. The miner died on June 19, 1987,

Administrative Law Judge Jeffrey Tureck denying 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).[2] Originally, in a Decision and Order issued on June 27, 1988, Administrative Law Judge V.M. McElroy found thirteen and three-quarters years of coal mine employment established and adjudicated the miner's claim pursuant to 20 C.F.R. Part 718. After finding that the evidence established the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, total disability, and that total disability was due to pneumoconiosis, Judge McElroy awarded benefits on the miner's claim. In addition, although Judge McElroy found that claimant failed to establish independent entitlement in her survivor's claim because the evidence did not establish death due to pneumoconiosis, he found claimant entitled to derivative survivor's benefits based on the award of benefits on the miner's pre-January 1, 1982 filed claim. Director's Exhibit 1; 30 U.S.C. §§901(a), 932(l); *see* 20 C.F.R. §725.212(a); *Deloe v. Director, OWCP*, 16 BLR 1-9 (1991); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Employer appealed. The Board initially affirmed Judge McElroy's findings pursuant to Sections 718.202, 718.203 and 718.204(c)(2000) as unchallenged on appeal. *Whitt v. Kennedy Coal Co.*, BRB No. 89-3602 BLA (Jan. 29, 1991)(unpub.). Regarding Judge McElroy's determination that total disability due to pneumoconiosis was established, the Board held, in relevant part, that Judge McElroy acted within his discretion when he determined that the February 1982 opinion of Dr. Berry, that the miner suffered with severe chronic obstructive pulmonary disease, emphysema and asthma arising out of coal mine employment, established disability causation. Director's Exhibit 11. In addition, the Board

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Director's Exhibit 53-15, and, subsequently, claimant filed a survivor's claim on July 16, 1987, Director's Exhibit 53-1. Both claims were consolidated and referred to the Office of Administrative Law Judges.

[2] 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

held that the administrative law judge permissibly accorded less weight to the opinions of Drs. Dahhan and Castle, that the miner's emphysema was due to cigarette smoking, because these physicians relied on an incorrect assumption regarding the miner's smoking history. The Board, therefore, affirmed Judge McElroy's finding that disability causation was established, and affirmed the award of benefits on the miner's claim. Pursuant to 30 U.S.C. §§901, 932(l), the Board also affirmed Judge McElroy's award of survivor's benefits to claimant based on the award of benefits on the miner's claim filed before January 1, 1982, even though the evidence did not establish death due to pneumoconiosis in the survivor's claim. The Board subsequently denied motions for reconsideration filed by employer on June 9, 1995, and March 19,1996.

Employer filed a timely petition for modification on June 25, 1996, alleging a mistake in a determination of fact. Director's Exhibit 53-35. In support of the petition for modification, employer submitted evidence that Dr. Berry had been convicted, on December 7, 1989, of income tax evasion for income that he had received in part, among other sources, from services that he performed in connection with conducting black lung physical examinations between September 1, 1981, and April 14, 1984, *i.e.*, at the same time that he rendered his medical report in this case. *See* Director's Exhibit 53-35. In addition, employer submitted new opinions from Drs. Dahhan, Castle, and Kleinerman addressing the cause of the miner's total disability. Director's Exhibits 53-42, 44-45.

In his Decision and Order on Modification, the administrative law judge found that employer established that Judge McElroy had "unknowingly made a mistake in relying on Dr. Berry's report to establish that [the miner's] totally disabling respiratory impairment was related to his coal mine employment[,]" because "subsequent to the issuance of Judge McElroy's decision, Dr. Berry was convicted of three counts of income tax evasion for acts occurring between September 1, 1981 and December 22, 1985 (Director's Exhibits 53-35)." Decision and Order on Modification at 4. Citing to the provision of the Rules of Evidence for the Office of Administrative Law Judges at 29 C.F.R. §18.609(a), which states, in relevant part, that "For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if the crime ... involved dishonesty or false statement, regardless of the punishment," the administrative law judge found that because the filing of false income tax returns involves both dishonesty and false statements, which occurred at the time the February 1982 report was prepared, "Dr. Berry is not a credible individual, and, ...his report has no probative value." Decision and Order on Modification at 4. Further, the administrative law judge concluded that, because no other medical expert had concluded that the miner's totally disabling respiratory impairment was related to pneumoconiosis, and several physicians, including Drs. Dahhan, Castle and Kleinerman, "credibly concluded" that the miner's respiratory impairment was not related to pneumoconiosis, modification of Judge McElroy's award of benefits must be granted. In addition, the administrative law judge found that because claimant had been found

derivatively entitled to survivor's benefits solely based on her status as the survivor of a miner who was awarded benefits on a claim filed before January 1, 1982, and the prior evidence in the survivor's claim as well as the evidence on modification supported Judge McElroy's finding that claimant did not establish that the miner died of pneumoconiosis, claimant was no longer entitled to survivor's benefits. The administrative law judge, therefore, granted modification of the previous award of benefits on the miner's claim, and denied benefits on both the miner's and the survivor's claims.

On appeal, claimant contends that the administrative law judge erred in finding that employer established a mistake in a determination of fact in the prior award on the miner's claim and in denying benefits in the survivor's claim on that basis.[3] Employer responds, urging affirmance of the administrative law judge's Decision and Order on Modification denying benefits. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal.

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 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, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented at 20 C.F.R.

[3] The administrative law judge's finding that claimant did not independently establish death due to pneumoconiosis in her survivor's claim, *see* 20 C.F.R. §718.205(c), is affirmed as unchallenged on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, unless claimant establishes entitlement to derivative benefits based on the award of benefits on the miner's pre-January 1, 1982 filed claim, she will not be entitled to survivor's benefits. Director's Exhibit 1; 30 U.S.C. §§901(a), 932(l); *see* 20 C.F.R. §725.212(a); *Deloe v. Director, OWCP*, 16 BLR 1-9 (1991); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

§725.310, provides that upon his own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310. Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if a party merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"). *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). The intended purpose of modification based on a mistake in fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted" in an effort to render justice under the Act, *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). If the administrative law judge determines that a mistake in a determination of fact has been made, he must then determine whether reopening the claim would render justice under the Act. *Branham v. Bethenergy Mines Inc.*, 20 BLR 1-27, 1-34 (1996); *see O'Keeffe, supra*.

Claimant contends that the administrative law judge erred by finding that Dr. Berry's conviction for income tax evasion, in and of itself, rendered Dr. Berry not credible to provide a probative medical report on the miner's condition, without further analysis of Dr. Berry's medical opinion and how it was influenced or materially affected by Dr. Berry's conviction. Thus, claimant contends that the administrative law judge's rejection of Dr. Berry's opinion was extremely unfair and prejudicial to the miner's surviving beneficiaries who would otherwise be entitled to continuing benefits under the Act. In support of her arguments, claimant contends that there is no evidence that Dr. Berry was paid more or less or profited based upon the medical findings he rendered, and there was no allegation that Dr. Berry did not provide the medical services for which he was compensated. Further, claimant contends that although Dr. Berry was convicted of not reporting income, part of which was derived from federal black lung examinations, there was never any allegation that Dr. Berry had modified or misconstrued his medical findings for personal gain in any black lung case. Thus, claimant contends that Dr. Berry's conviction for income tax evasion is distinguishable from a criminal case in which a physician was specifically convicted of defrauding the federal black lung program by falsifying medical records and submitting false claims.

In finding that Judge McElroy had "unknowingly made a mistake in relying on Dr. Berry's report to establish that [the miner's] totally disabling respiratory impairment was related to his coal mine employment," the administrative law judge relied on evidence, submitted on modification, that Dr. Berry had been "convicted of three counts of income tax evasion for acts occurring between September 1, 1981 and December 22, 1985 (Director's

Exhibit 53-35)." Decision And Order on Modification at 4. Based on this evidence the administrative law judge found that because "filing false income tax returns involves both dishonesty and false statement" and "Dr. Berry was engaging in these activities at the time he prepared his February 22, 1982 report[,]" "Dr. Berry [was] not a credible individual, and ... his report has no probative value." Decision And Order on Modification at 4. This was rational. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984). Further, determining that "no other medical expert has concluded that the miner's totally disabling respiratory or pulmonary impairment was related to his coal mine employment, and several physicians, including Drs. Castle, Dahhan and Kleinerman, have credibly concluded that the miner's respiratory impairment was not related to his pneumoconiosis," the administrative law judge found that "modification of Judge McElroy's award of benefits must be granted, and the miner's claim is denied." Decision And Order on Modification at 4.

Because Dr. Berry's opinion was the sole opinion provided by the Department of Labor (DOL), the administrative law judge's rejection of that opinion as incredible means that DOL has failed to discharge its statutory obligation to provide a credible medical opinion sufficient to substantiate the claim in the case at bar. Accordingly, the case must be remanded to the district director for DOL to provide an appropriate, credible, medical opinion sufficient to substantiate the claim. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*). In raising this issue *sua sponte*, and applying the rationale of the Eighth Circuit's decision in *Newman*, we follow the example of the United States Court of Appeals for the Fourth Circuit in *Browning v. Director, OWCP*, 986 F.2d 1412 (4th Cir. 1993)(unpub.), the only decision in which the Fourth Circuit addressed the issue. *See* 4th Cir. R. 36(c). The Fourth Circuit's conduct in *Browning* is entirely consistent with the Supreme Court's teaching in *Hormel v. Helvering, Commisioner of Internal Revenue*, 312 U.S. 552, 557 (1941): "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below" (citation omitted).

Accordingly, the administrative law judge's Decision and Order On Modification is affirmed in part, vacated in part, and the case is remanded to the district director for the development of additional evidence sufficient to substantiate the miner's claim, and for the administrative law judge to reconsider the merits of this claim in light of the new evidence.

SO ORDERED.

BETTY JEAN HALL
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

I fully agree with the decision of my colleagues to affirm the administrative law judge's decision with respect to the report of Dr. Berry. However, I must respectfully dissent from the decision of my colleagues to remand this case. I would, for the reason that follows, simply affirm the decision of the administrative law judge in all respects.

While my colleagues raise an interesting issue in remanding this case, I do not believe that the issue of a full pulmonary evaluation is properly before this Board for disposition. The only issue raised in this appeal involves the administrative law judge's decision not to credit Dr. Berry's report. This Board has consistently held that it will only address issues that are properly raised and briefed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g sub nom. Cox v. Director, OWCP*, 7 BLR 1-610 (1984). In the decision below, the administrative law judge chose not to credit Dr. Berry's medical report, and on appeal, the issue of a full pulmonary evaluation has not been raised. Following the established law of this Board, I would not raise this issue *sua sponte*.

Consequently, I would affirm the administrative law judge's Decision and Order on Modification denying benefits.

NANCY S. DOLDER, Chief
Administrative Appeals Judge