BRB No. 11-0793 BLA

GARY N. FOX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELK RUN COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 09/18/2012
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

John C. Cline, Piney View, West Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (07-BLA-5984) of Administrative Law Judge Thomas M. Burke awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended*

by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). This case, involving a subsequent claim filed on November 8, 2006,[1] is before the Board for the second time.

In his initial consideration of claimant's subsequent claim, the administrative law judge granted claimant's motion to compel employer to produce any x-rays or pathology slides that it had not previously submitted, or exchanged with claimant, in the adjudication of claimant's 1999 claim. In response to the Order, employer withdrew its controversion of claimant's 2006 claim, withdrew its request for a hearing, and requested that the case be remanded to the district director for the payment of benefits. The administrative law judge, however, at claimant's request, retained jurisdiction of the case and ordered employer to produce the requested documents. Employer complied with the Order, producing the April 20, 2000 and May 4, 2000 pathology reports of Drs. Naeye and Caffrey, along with several x-ray interpretations. After reviewing these documents, along with the evidence previously submitted in connection with claimant's 1999 claim, the administrative law judge found that, in claimant's 1999 claim, employer committed fraud on the court by concealing pathology reports diagnosing claimant with complicated pneumoconiosis.[2] The administrative law judge, therefore, found that the prior denial of benefits was ineffective and, thus, never became final. The administrative law judge granted claimant's motion to set aside the 2001 decision denying benefits in his prior claim, and awarded benefits as of January 1, 1997, the date of the first x-ray that was interpreted as positive for complicated pneumoconiosis.[3]

Pursuant to employer's appeal,[4] the Board rejected employer's contention that the administrative law judge erred in ordering it to produce the pathology reports of Drs.

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[1] Claimant initially filed a claim for benefits on May, 4, 1999. In a Decision and Order dated January 5, 2001, Administrative Law Judge Edward Terhune Miller found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Miller denied benefits.

[2] A miner who establishes the existence of complicated pneumoconiosis is entitled to an irrebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[3] Ordinarily, when benefits are awarded in a subsequent claim, benefits may not commence prior to the date upon which the decision denying the prior claim became final. 20 C.F.R. §725.309(d)(5).

[4] While employer's appeal was pending, claimant's counsel informed the Board that claimant died on April 14, 2009. Claimant's surviving spouse, Mary L. Fox, is pursuing the claim.

Naeye and Caffrey, holding that the administrative law judge reasonably found that the information sought by claimant was not protected work product. *Fox v. Elk Run Coal Co.*, BRB No. 09-0438 BLA (Apr. 16, 2010) (unpub.). However, the Board agreed with employer that the administrative law judge failed to assemble a proper evidentiary record. Consequently, the Board vacated the administrative law judge's finding that employer committed fraud on the court, and the administrative law judge's determination regarding the date of claimant's entitlement to benefits. The Board instructed the administrative law judge, on remand, to make the necessary evidentiary rulings, mark the admissible evidence for identification, and incorporate it into the record. The Board further instructed the administrative law judge that after developing a proper evidentiary record, he should reconsider whether employer's actions, in the adjudication of claimant's prior claim, constituted "fraud on the court." Fed. R. Civ. P. 60(d)(3). The Board further instructed the administrative law judge to reconsider the date of claimant's entitlement to benefits.[5]

On remand, the administrative law judge allowed the parties to submit additional evidence. After issuing several Orders,[6] the administrative law judge held a hearing on February 24, 2011. At the hearing, the administrative law judge allowed the parties to submit evidence into the record, and properly marked the admissible evidence for identification, as instructed by the Board.

In a Decision and Order dated July 20, 2011, the administrative law judge again found that, in the adjudication of claimant's 1999 claim, employer committed fraud on the court by concealing pathology reports diagnosing claimant with complicated pneumoconiosis, thereby rendering the prior denial of benefits ineffective. The administrative law judge granted claimant's motion to set aside the January 5, 2001 Decision and Order denying benefits in his prior claim, and awarded benefits as of

[5] Because employer withdrew its controversion and conceded entitlement in the claim, the Board affirmed the administrative law judge's award of benefits. *Fox v. Elk Run Coal Co.*, BRB No. 09-0438 BLA (Apr. 16, 2010) (unpub.).

[6] By Order dated September 29, 2010, the administrative law judge denied employer's motion that he disqualify himself. Employer appealed the administrative law judge's Order to the Board, which dismissed the appeal as interlocutory, on November 29, 2000. By Order dated December 21, 2010, the administrative law judge denied employer's motion for a summary decision, wherein employer asserted that the administrative law judge lacked authority to set aside a decision denying benefits once a year has passed. Finally, by Order dated January 25, 2011, the administrative law judge granted employer's motions for protective orders from claimant's discovery requests.

January 1, 1997, the date of the first x-ray that was interpreted as positive for complicated pneumoconiosis.

On appeal, employer argues that the administrative law judge erred in failing to disqualify himself. Employer also contends that the administrative law judge lacked the authority to set aside a final decision based upon a finding of fraud on the court. Employer further contends that the administrative law judge erred in finding that employer committed fraud on the court. Claimant responds in support of the administrative law judge's finding that employer committed fraud on the court, and of the administrative law judge's decision to set aside the September 5, 2001 Decision and Order denying benefits in his prior claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contention that the administrative law judge lacked the authority to consider whether to set aside the decision denying claimant's 1999 claim, based upon a finding of fraud on the court. In a reply brief, employer reiterates its previous contentions.[7]

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.[8] 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).

Administrative Law Judge's Denial of Employer's Motion for Recusal

Employer initially argues that the administrative law judge erred in not disqualifying himself from this case. While this case was before the administrative law judge on remand, the administrative law judge filed a complaint with the Lawyer Disciplinary Board of the West Virginia State Bar (Disciplinary Board) against the law

[7] We decline to address employer's contention that the administrative law judge erred in compelling employer to produce reports from its non-testifying, consulting experts. The Board previously rejected employer's contention that the administrative law judge erred in ordering it to produce the pathology reports of Drs. Naeye and Caffrey, holding that the administrative law judge reasonably found that the information sought by claimant was not protected work product. *Fox*, slip op. at 4. Employer has not demonstrated any exception to the law of the case doctrine. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

[8] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

firm of Jackson Kelly, employer's counsel. The administrative law judge notified the Disciplinary Board of his belief that the actions of Jackson Kelly, in representing employer in the prior claim, violated West Virginia State Bar Rules of Professional Conduct, specifically, Rule 3.3(a)(4), providing that a lawyer shall not knowingly offer evidence to a tribunal that it knows to be false, and Rule 3.4(a), providing that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. The administrative law judge mailed a copy of his complaint to Jackson Kelly.

Employer moved that the administrative law judge disqualify himself from this case, alleging that the administrative law judge's notification to the Disciplinary Board of his belief that Jackson Kelly acted contrary to Rules 3.3(a)(4) and 3.4(a) demonstrated bias or prejudice under 20 C.F.R. §725.352(a).[9] By Order dated September 29, 2010, the administrative law judge denied employer's Motion for Recusal.

In denying employer's motion, the administrative law judge accurately noted that, other than his references to the West Virginia State Bar Rules of Professional Conduct, his complaint contained no information that was not set forth in his 2009 Decision and Order. Thus, the administrative law judge noted that the findings supporting fraud on the court were based on the record before him. Citing *Liteky v. United States*, 510 U.S. 540 (1994), the administrative law judge determined that his previous findings did not preclude him from considering the case on remand. Order Denying Motion for Recusal at 2-3. We agree. In *Liteky*, the Supreme Court held that "[o]pinions formed by [a] judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555; *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618-19, 23 BLR 2-345 (4th Cir. 2006). Employer has not demonstrated any such favoritism or antagonism in this case.

Further, the administrative law judge accurately noted that judicial referrals for disciplinary review do not, in themselves, constitute grounds for disqualification.[10] Order

[9] Section 725.352(a) provides that "[n]o adjudication officer shall conduct any proceedings in a claim in which he or she is prejudiced or partial . . . ." 20 C.F.R. §725.352(a).

[10] The administrative law judge further found that he had an obligation to report suspected misconduct. Specifically, he noted that the American Bar Association's Model Code of Judicial Conduct provides that a judge, having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other

Denying Motion for Recusal at 4; *see United States v. Cook*, 400 F.2d 877, 878 (4th Cir. 1968) (holding that a judge who sat in a disciplinary hearing that led to suspension of attorney was not disqualified); *United States v. Mendoza*, 468 F.3d 1256 (10th Cir. 2006) (holding that a judge should not be disqualified for reporting counsel to a disciplinary board). We, therefore, hold that the administrative law judge's notification to the Disciplinary Board of his belief that Jackson Kelly violated rules of professional conduct does not demonstrate bias or prejudice pursuant to 20 C.F.R. §725.352(a). Consequently, we reject employer's contention that the administrative law judge erred in not disqualifying himself.

The Authority of an Administrative Law Judge to Consider Whether an Otherwise Final Decision was Procured by Fraud on the Court

Employer next argues that the administrative law judge lacked the authority to consider whether the denial of claimant's 1999 claim was based upon a finding of fraud on the court. The Director disagrees, asserting that the administrative law judge "correctly found that as an administrative law judge, an Article I court, he possessed the . . . authority to investigate the integrity of prior decisions." Director's Brief at 3. We agree with the Director's position.

The Supreme Court has recognized the inherent equity power of courts to set aside a judgment whenever its enforcement would be "manifestly unconscionable" because of "fraud upon the court." *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-45 (1944); *see also* Fed. R. Civ. P. 60(d)(3). Employer's argument, that the administrative law judge lacked the authority to consider whether the prior decision was procured by fraud on the court, because 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), provides the exclusive means of addressing otherwise final black lung decisions, is unpersuasive. As both the administrative law judge and the Director note, a "decision produced by fraud on the court is not in essence a decision at all and never becomes final." *Kenner v. Comm'r*, 387 F.2d 689, 691 (7th Cir. 1968), *cert. denied*, 393 U.S. 841 (1968); Order dated January 14, 2011 at 3; Director's Brief at 3. And here, the issue of whether claimant's prior denial ever became final relates to a relevant issue the administrative law judge must determine in this subsequent claim, namely, the date for the commencement of benefits. 20 C.F.R. §725.309(d)(5). We, therefore, agree with the Director that an administrative law judge possesses the authority to consider whether an otherwise final decision was procured by fraud on the court.

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respects, shall inform the appropriate authority. Order Denying Motion for Recusal at 4.

Fraud on the Court

We now turn to the issue of whether the administrative law judge permissibly found that employer's actions in the adjudication of claimant's 1999 claim satisfy the requirements necessary to constitute fraud on the court.

Factual Background

Claimant's allegation of fraud on the court centers upon employer's development, and submission, of its evidence in the adjudication of claimant's initial 1999 claim. In support of his initial claim, claimant submitted Dr. Koh's pathology report. Dr. Koh examined lung tissue that he removed during a lobectomy of claimant's right lung on September 25, 1998. *Id.* In a report dated September 29, 1998, Dr. Koh diagnosed an "inflammatory pseudotumor, 5.0 cm. in greatest dimension." *Id.*

Employer forwarded Dr. Koh's lung tissue slides to Drs. Caffrey and Naeye for their review. In separate pathology reports, Drs. Naeye and Caffrey diagnosed the existence of complicated pneumoconiosis. Claimant's Exhibits 1, 2. The regulations provide an irrebuttable presumption that a miner suffering from complicated pneumoconiosis is totally disabled due to pneumoconiosis. 20 C.F.R. §718.304. Employer did not submit the pathology reports of Drs. Naeye and Caffrey into evidence. Instead, employer submitted medical reports prepared by four Board-certified pulmonologists, Drs. Castle, Dahhan, Fino, and Hippensteel.

Although employer provided Drs. Castle, Dahhan, Fino, and Hippensteel with medical records for their review, including a copy of Dr. Koh's pathology report, it did not provide them with copies of the pathology reports of Drs. Naeye and Caffrey. Thus, in opining that claimant did not suffer from complicated pneumoconiosis, Drs. Castle, Dahhan, Fino, and Hippensteel relied, in part, upon Dr. Koh's pathology report, unaware of the opinions of Drs. Naeye and Caffrey.

In a Decision and Order dated January 5, 2001, Administrative Law Judge Edward Terhune Miller credited claimant with twenty-five years and seven months of coal mine employment, but found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Director's Exhibit 1. In finding that the evidence did not establish the existence of complicated pneumoconiosis, Judge Miller credited Dr. Koh's opinion that the large mass in claimant's right lung was a pseudotumor. Judge Miller's Decision and Order at 12. Judge Miller, therefore, denied benefits.

The Administrative Law Judge's Finding

In his consideration of claimant's 2006 subsequent claim, the administrative law judge determined that employer's actions, in the adjudication of claimant's 1999 claim, constituted a fraud on the court:

> Employer withheld the opinions of two expert pathologists, Drs. Caffrey and Naeye, and skewed the evidence by disclosing to its experts the less probative pathology report of Dr. Koh. The opinions of Drs. Castle, Dahhan, Fino, Hippensteel, and Wheeler unequivocally demonstrate that Dr. Koh's pathology report was crucial to their reasoning and the development of their opinions. Despite knowledge of the role pathology evidence played in the case, [e]mployer continued to conceal the more probative reports of Drs. Caffrey and Naeye while emphasizing, and encouraging reliance upon[,] the report of Dr. Koh. When [c]laimant's counsel attempted to bring evidence of [e]mployer's conduct to light, [e]mployer engaged in a course of conduct designed to conceal its actions; first denying the presence of the reports, then conceding liability to prevent their disclosure. While perhaps initially not concocted as such, [e]mployer's knowledge and behavior is tantamount to a scheme intended to defraud its experts, the *pro se* [c]laimant, and the court.

Decision and Order on Remand at 15.

Discussion

In *Hazel-Atlas*, the Supreme Court addressed the issue of fraud on the court, holding that federal courts have the inherent equitable power to grant relief in cases of after-discovered fraud regardless of the term of their entry. *Hazel*-Atlas, 322 U.S. at 244. In *Hazel-Atlas*, a company created a fraudulent trade journal article to obtain a patent, and subsequently relied upon the fraudulent article in a lawsuit to obtain damages for infringement of the patent. In finding that there was a fraud on the court, the Supreme Court noted that "[t]his [was] not simply a case of a judgment obtained with the aid of a witness who . . . is believed possibly to have been guilty of perjury," but was "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Hazel-Atlas*, 322 U.S. at 245. However, the Supreme Court limited the scope of fraud on the court, emphasizing that, in order to constitute fraud on the court, the litigation must concern, not merely the private parties, but also "issues of great public moment." *Hazel-Atlas*, 322 U.S. at 245-46.

In *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982), the United States Court of Appeals for the Fourth Circuit, within whose

jurisdiction this case arises, recognized that "fraud on the court" is confined to the most egregious of cases, such as the bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged. The Fourth Circuit held that even perjury and fabricated evidence[11] are not sufficient grounds for relief based on fraud on the court:

> Perjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible. In addition, the legal system contains other sanctions against perjury. Fraud on the court is therefore limited to the more egregious forms of subversion of the legal process already suggested, those that we cannot necessarily expect to be exposed by the normal adversary process.

Great Coastal Express, 675 F.2d at 1357 (citations omitted). As the Director summarizes, "This heavy burden means that fraud on the court should be found only in the most egregious circumstances and when conclusively proven . . . ." Director's Brief at 5.

Based on the facts of this case, as found by the administrative law judge, we hold, as a matter of law, that employer's conduct did not rise to the level of fraud on the court. Employer, in withholding the pathology reports of Drs. Naeye and Caffrey from its own experts, did not engage in a deliberate scheme to directly subvert the judicial process, sufficient to constitute fraud on the court. Employer's conduct in this case primarily concerns the two private parties involved, and does not threaten the public injury that a fraudulently obtained legal monopoly did in *Hazel-Atlas*. Moreover, employer's behavior falls short of the undisputed perjury and outright fabrication of evidence in *Great Coastal*, conduct which was held to be not sufficiently egregious to constitute fraud on the court. *Great Coastal Express*, 675 F.2d at 1357; *see also H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (6th Cir. 1976) (recognizing that allegations

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[11] *Great Coastal* involved a dispute arising out of a 1970 strike by the International Brotherhood of Teamsters (IBT) against Great Coastal Express. Great Coastal brought suit against IBT for lost business caused by illegal secondary boycotting. Great Coastal was awarded damages. In IBT's subsequent action for relief from the judgment, it was established that Great Coastal paid some of its employees to damage its own trucks, creating false evidence that IBT had damaged the company's property. Several of those employees then gave perjured testimony in the trial. The Fourth Circuit held that Great Coastal's "actions, however reprehensible, [were] not tantamount to fraud on the court." *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1357 (4th Cir. 1982).

of nondisclosure in pretrial discovery will not support an action for fraud on the court). We, therefore, hold that the administrative law judge erred in granting claimant's motion to set aside the January 5, 2001 Decision and Order denying benefits in the prior claim, and in awarding benefits as of January 1, 1997.

Date of Entitlement to Benefits

Employer has conceded liability in regard to claimant's 2006 subsequent claim. In a case where a miner is found entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the fact-finder must consider whether the evidence of record establishes an onset date of the miner's complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989). If the evidence does not reflect the onset date for complicated pneumoconiosis, then the date for the commencement of benefits is the month during which the claim was filed, unless the evidence affirmatively establishes that the miner had only simple pneumoconiosis for any period subsequent to the date of filing, in which case benefits must commence "following the period of simple pneumoconiosis." *Williams*, 13 BLR at 1-30. In a subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(d)(5).

When this case was initially before the administrative law judge, he ordered the parties to submit closing arguments on the issue of the date for the commencement of benefits. On October 17, 2008, employer filed its response to the administrative law judge's Order, arguing that benefits should commence as of November, 2006, a date based upon Dr. Rasmussen's evaluation. Alternatively, employer argued that the earliest date for the commencement of benefits should be June 2006, based upon Dr. Miller's interpretation of claimant's June 19, 2006 x-ray, as positive for complicated pneumoconiosis. Based upon employer's concession, we hold that claimant is entitled to benefits as of June 2006, the onset date of his complicated pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and is modified to reflect June 2006 as the date from which benefits commence.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision to hold that the administrative law judge erred in finding that employer committed fraud on the court. In this case, the administrative law judge premised his finding of "fraud on the court" on employer's calculated effort to deceive its own experts, and ultimately the administrative law judge, in relying upon what employer knew to be unreliable and discredited pathology evidence. Under the facts of this case, the administrative law judge found that employer's counsel's manipulation of the evidence seriously affected the integrity of the process of adjudicating federal black lung claims. Consequently, based on this characterization, I would hold that the administrative law judge permissibly, and within his discretion, found that employer's actions in the prior claim constituted a fraud on the court, in that the fraud involved was directed at the judicial process. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co*., 322 U.S. 238, 244 (1944); *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982).

Moreover, the fraud in this case did not primarily concern the two parties involved, but threatens the "public injury," similar to the way that a fraudulently-obtained legal monopoly did in *Hazel-Atlas*. In finding fraud on the court in *Hazel-Atlas*, the Supreme Court held that the employer's deception was a "wrong against the institutions set up to protect and safeguard the public," and "cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas*, 322 U.S. at 246. Similarly, as

the administrative law judge found here, employer's representation strategy "instills uncertainty and cynicism into a program intended to compensate miners disabled from black lung disease." Decision and Order on Remand at 19. I believe that the fact that the fraud involved employer's counsel, was found to be directed at the judicial process, and that its effects go beyond the parties involved in the case, distinguishes this case from *Great Coastal*.

Although the administrative law judge acknowledged the "adversarial" nature of black lung proceedings, he noted that the proceedings were intended to "remove the heavy cost of litigation from both parties." Decision and Order on Remand at 18. Moreover, as the administrative law judge noted, the Act is remedial in nature, and, therefore, must be "liberally construed to include the largest number of miners as benefit recipients."[12] *Southard v. Director, OWCP*, 732 F.2d 66, 71, 6 BLR 2-26, 2-34 (6th Cir. 1984); Decision and Order on Remand at 18.

Consequently, I would affirm the administrative law judge's decision to set aside the 2001 decision denying benefits in claimant's prior claim, and would uphold his award of benefits as of January 1, 1997, the date of the first x-ray that was interpreted as positive for complicated pneumoconiosis.

I concur in all other respects with the majority's decision.

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BETTY JEAN HALL
Administrative Appeals Judge

[12] Claimant, having been diagnosed with complicated pneumoconiosis at the time of his first claim, was unquestionably qualified to receive black lung benefits, and is the type of miner that the Fourth Circuit has characterized as "the very paradigm of the man Congress intended to compensate." *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1359, 20 BLR 2-227, 2-229 (4th Cir. 1996) (en banc).