BRB No. 97-0295 BLA

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| ART STANLEY | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: |
| BETTY B. COAL COMPANY | ) | |
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| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| | ) | DECISION and ORDER |
| Party-in-Interest | ) | |

Appeal of the Decision and Order on Remand of George A. Fath, Administrative Law Judge, and the Decision and Order on Reconsideration of James Guill, Administrative Law Judge, United States Department of Labor.

Hugh P. Cline (Cline, Adkins & Cline), Norton, Virginia, for claimant.

Thomas H. Odom (Arter & Hadden), Washington, D.C., for employer.

Jennifer U. Toth (J. Davitt McAteer, 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, the United States Department of Labor.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (84-BLA-7899) of Administrative Law Judge George A. Fath and the Decision and Order on Reconsideration of Administrative Law Judge James Guill awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the third time. Initially,

Judge Fath considered and denied claimant's second application for benefits under 20 C.F.R. Part 718. The second claim, however, had been filed within one year of the denial of claimant's first claim adjudicated under Part 727. Therefore, on appeal, the Board held that claimant's second application constituted a timely request for modification pursuant to 20 C.F.R. §725.310, and remanded the case for the administrative law judge to consider modification, and to adjudicate the claim under Part 727. *Stanley v. Betty B Coal Co*., 13 BLR 1-72 (1990).

On remand, the administrative law judge adjudicated the claim *de novo* under Part 727. The administrative law judge found that the medical evidence established invocation of the interim presumption pursuant to Section 727.203(a)(2) and (a)(3), and concluded that employer failed to establish rebuttal. Accordingly, he awarded benefits. On appeal, the Board affirmed the administrative law judge's invocation finding pursuant to Section 727.203(a)(2),[1] and the administrative law judge's finding that rebuttal was not established pursuant to Section 727.203(b). *Stanley v. Betty B Coal Co*., BRB No. 92-0590 BLA (Apr. 19, 1994)(unpub.). Therefore, the award of benefits was affirmed. However, because the administrative law judge failed to specify a date for the commencement of benefits, the Board remanded the case. The Board instructed the administrative law judge on remand to indicate whether modification of the district director's denial was based on a mistake in fact or a change in conditions, and to determine the benefits commencement date accordingly.[2]

[1] Employer conceded on appeal that the administrative law judge properly found invocation established pursuant to 20 C.F.R. §727.203(a)(2). [1993] Employer's Brief at 14-15, n.5.

[2] The Board indicated that if modification were based on a change in conditions, as opposed to a mistake in fact, benefits should commence no earlier than the time of the change. [1994] *Stanley*, slip op. at 7-8.

On remand, Judge Fath indicated that modification was based on a change in conditions, citing the valid, qualifying[3] pulmonary function study of February 2, 1982 submitted with claimant's modification request. The administrative law judge found that benefits should commence as of September 1, 1981, the filing date of claimant's request for modification. In addition, Judge Fath corrected an oversight from his previous decision by augmenting the award of benefits to account for claimant's dependent child, Roy Dean Stanley, pursuant to Section 725.209(a)(2)(ii).

On reconsideration, the case was reassigned, without notice to the parties, to Judge Guill.[4] He rejected employer's contentions that Judge Fath failed to consider all relevant evidence on modification and that his subsection (a)(2) invocation finding was not supported by substantial evidence. Judge Guill declined to address employer's argument that Judge Fath erred by augmenting benefits.

On appeal, employer contends that it was unduly prejudiced by the unannounced reassignment of the case to a different administrative law judge on reconsideration. Employer further asserts that Judge Fath failed to consider all relevant evidence or to explain his change in conditions finding. Employer also argues that Judge Fath erred by augmenting the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds regarding the procedural aspects of this case, urging affirmance. Claimant has not participated in this appeal.[5]

The Board's scope of review is defined by statute. The administrative law judge's

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[3] A "qualifying" pulmonary function study yields values which are equal to or less than the values specified in the table at 20 C.F.R. §727.203(a)(2).

[4] The Director states that Judge Guill was substituted for Judge Fath because Judge Fath retired from service in the Office of Administrative Law Judges on January 3, 1996. Director's Brief at 2.

[5] The administrative law judge's finding regarding the entitlement date is affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

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).

Employer initially contends that it was unduly prejudiced by the unannounced reassignment of the case to Judge Guill on reconsideration, and requests remand for the opportunity to request a hearing *de novo*. Although the parties to a claim should be notified when there is a substituted administrative law judge on remand or on reconsideration, the failure to provide such notice constitutes prejudicial error only when the issues on reconsideration are dependent on credibillity determinations. *Gillen v. Peabody Coal Co*., 16 BLR 1-22, 1-24 (1991)(Stage, J., dissenting); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-67 (1990). The issues on reconsideration in this case were not dependent upon an assessment of claimant's testimony at the hearing.[6] Therefore, employer was not prejudiced by the reassignment to Judge Guill on reconsideration. Consequently, we decline employer's request to remand this case for a new hearing.

Employer further asserts that Judge Fath failed to consider all of the relevant evidence on modification and failed to adequately explain his change in conditions finding. Employer's Brief at 17-18. In his initial decision on modification, Judge Fath considered the entire record, and specifically addressed all six pulmonary function studies in finding Section 727.203(a)(2) invocation established. [1991] Decision and Order on Remand at 3-4. On the subsequent remand, when he was instructed to indicate the specific basis for modification, Judge Fath referred to his prior subsection (a)(2) analysis, and found that:

> Although the record prior to the request for modification included qualifying results on pulmonary function studies, those tests were determined to be invalid . . . . In contrast, the February 2, 1982 test was determined to be acceptable on review of the tracings (DX 13, 14). The Director's determination to deny the initial claim was apparently based, in part, on acceptance of the invalidation of the qualifying pulmonary function studies.[7] Thus, the valid and qualifying study of February 2, 1982 which invoked the interim

[6] Although Judge Fath on remand had discussed claimant's testimony regarding his son's disability, he based his augmentation finding on the Social Security Administration documentation contained in the record. Decision and Order on Remand at 4 ("[T]he statement from the [SSA] establishes that claimant's son Roy D. Stanley is his dependent for purposes of benefit augmentation. . . ."); Director's Exhibit 39.

[7] We note that the denial letter issued to claimant on July 1, 1980 informed him that the evidence "[did] not show that you are totally disabled," and advised him that he could submit additional pulmonary function studies. Director's Exhibit 20 at 1, 4.

> presumption . . . is the basis for a finding of a change in conditions.

Decision and Order on Remand at 3. Contrary to employer's contentions, the administrative law judge considered all of the relevant evidence on modification, explained his finding on remand by stating explicitly the basis for modification of the district director's initial denial, and identified the specific evidence that established a change in conditions, as directed by the Board. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Therefore, we reject employer's contentions and affirm the administrative law judge's finding regarding a change in conditions.[8]

Employer next contends that Judge Fath erred by augmenting the award of benefits on remand. Specifically, employer contends that claimant waived this issue by failing to raise it in the previous appeal, and asserts that therefore, the administrative law judge lacked authority to address it on remand. Employer's Brief at 23. The record indicates that claimant raised the issue of Roy D. Stanley's dependency in writing four years before the hearing, and again at the hearing. *See* 20 C.F.R. §725.463(a); Director's Exhibit 39; Hearing Transcript at 9. Judge Fath requested testimony on this issue, Hearing Transcript at 9, but neglected to make a finding in his 1991 Decision and Order on Remand awarding benefits. No one raised Judge Fath's omission with the Board, but on remand Judge Fath detected his oversight and corrected it. His finding does not conflict with any of the Board's remand instructions.

[8] We reject as meritless employer's related arguments that the administrative law judge's change in conditions finding is internally inconsistent, and rests on the unwarranted assumption that pneumoconiosis is a progressive disease. Employer's Brief at 20-22. We decline to address employer's contention regarding the applicability, if any, of *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990), because employer failed to raise this issue in the previous appeal, or before Judge Fath on remand via a request to reopen the record. Employer's Brief at 25.

An administrative law judge must address all issues raised. 20 C.F.R. §725.463(a). Moreover, employer does not explain how it was prejudiced by Judge Fath's decision to address augmentation on remand. Therefore, we hold that Judge Fath properly made a finding on an issue that was timely raised and for which evidence was submitted into the record. Therefore, we reject employer's allegation of error.[9]

Employer further argues that augmentation was improper because there is no evidence in the record that claimant's son is disabled as defined in Section 223(d) of the Social Security Act. Employer's Brief at 23-24. This contention lacks merit. The record contains a Social Security Administration (SSA) certification that claimant receives "child disability benefits" on behalf of his son, Roy D. Stanley. Director's Exhibit 39. Although not binding on the administrative law judge, this report reflects "a determination by an agency with specialized expertise, applying the definition of disability which must be applied to this controversy." *Scalzo v. Director, OWCP*, 6 BLR 1-1016, 1-1019 (1984); *see* 20 C.F.R. §725.209(a). Such a report "is highly probative evidence which, if not controlling, can be afforded great weight." *Scalzo*, 6 BLR at 1020. Because the administrative law judge acted within his discretion in crediting the SSA documentation of the son's disability, we reject employer's contention and affirm the administrative law judge's augmentation finding.

[9] Employer's view that the administrative law judge lacked authority on remand to address the augmentation issue raises administrative efficiency concerns. If employer were correct that Judge Fath was powerless to correct his oversight on remand, claimant would be required to file another modification of this eighteen-and-a-half-year-old claim to resolve the benefits augmentation issue.

Accordingly, the administrative law judges' Decision and Order on Remand and Decision and Order on Reconsideration awarding benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge