BRB No. 06-0550 BLA

DUDLEY STEWART	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WAMPLER BROTHERS COAL COMPANY	)	DATE ISSUED: 04/30/2007
	)	
	)	
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's Motion to Dismiss and Motion Directing Claimant to Submit to Medical Evaluation; Granting Claimant's Motion to Dismiss Modification; and Canceling Hearing of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Douglass Law Office), Harlan, Kentucky, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Employer's Motion to Dismiss and Motion Directing Claimant to Submit to Medical Evaluation; Granting Claimant's Motion to Dismiss Modification; and Canceling Hearing (05-BLA-0008) of Administrative Law Judge Janice K. Bullard 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). This case has a lengthy procedural history and is summarized in pertinent

part as follows. Claimant filed a duplicate claim on August 13, 1993.[1] Director's Exhibit 2. In a Decision and Order issued on February 14, 1996, Administrative Law Judge Daniel L. Leland found that a newly submitted medical opinion from claimant's treating physician, Dr. Sundaram, was sufficient to establish that claimant suffered from pneumoconiosis, and therefore, he found that claimant had established a material change in conditions under 20 C.F.R. §725.309 (2000).[2] After reviewing all of the record evidence, the administrative law judge further determined that claimant was totally disabled due to pneumoconiosis and awarded benefits. Employer filed an appeal with the Board, alleging, in part, that the administrative law judge erred by mechanically applying a preference for the opinion of claimant's treating physician. Citing *Tussey v. Island Creek Coal. Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the Board affirmed the administrative law judge's determination to credit Dr. Sundaram's opinion at Section 718.202(a)(4), and also affirmed Judge Leland's finding of a material change in conditions under Section 725.309 (2000). *See Stewart v. Wampler Brothers Coal Co.*, BRB No. 96-0757 BLA (Feb. 13, 1997) (unpub.). However, because Judge Leland failed to weigh all of the evidence of record in finding that claimant had established the existence of pneumoconiosis, the Board vacated his finding at Section 718.202(a). The

[1] Claimant initially filed an application for benefits with the Social Security Administration (SSA) on March 15, 1973. The claim was denied by SSA on October 5, 1973. Director's Exhibit 1. On April 10, 1978, claimant elected review of his claim with the SSA pursuant to Section 435 of the Act. *Id*. The SSA advised claimant on October 25, 1978 that his claim was denied. *Id*. The case was then referred to the Department of Labor (DOL). Director's Exhibit 1. Following a denial of benefits issued by the deputy commissioner, the case was submitted to the Office of Administrative Law Judges for a decision on the record. *Id*. On March 23, 1990, Administrative Law Judge Donald W. Mosser denied benefits. Director's Exhibit 1. He also denied claimant's request for reconsideration on July 3, 1990. *Id*. Claimant took no further action with regard to the denial of his claim until he filed a duplicate claim on August 13, 1993. Director's Exhibits 2-4.

[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). The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c). The amendments to the regulations at 20 C.F.R. §§ 725.309 and 725.310, do not apply to claims, such as this, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Board similarly vacated Judge Leland's finding that claimant established total disability under Section 718.204(c) (2000) because Judge Leland failed to weigh all of the contrary probative evidence, and the Board vacated his finding with respect to disability causation under Section 718.204(b) (2000). *Stewart*, BRB No. 96-0757 BLA at 6-9. Thus, the case was remanded to the administrative law judge for further consideration.

In a Decision and Order on Remand dated May 20, 1997, Judge Leland weighed all of the evidence at Section 718.202(a) and found that claimant established the existence of pneumoconiosis based on Dr. Sundaram's opinion. Under Section 718.204(c) (2000), after weighing all of the contrary probative evidence, Judge Leland similarly concluded that Dr. Sundaram's opinion established that claimant was totally disabled by a respiratory or pulmonary impairment. Lastly, under Section 718.204(b) (2000), Judge Leland reweighed the medical opinions and determined that Dr. Sundaram's opinion established that claimant was totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits beginning with the date claimant filed his duplicate claim.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that claimant established the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(c) (2000). *Stewart v. Wampler Brothers Coal Co.*, BRB No. 97-1295 BLA (May 27, 1998) (unpub.). However, because the administrative law judge had applied an improper legal standard in weighing the conflicting medical opinions relevant to the issue of disability causation, the Board vacated the administrative law judge's finding under Section 718.204(b) (2000), and remanded the case for further consideration. *Stewart*, BRB No. 97-1295 BLA at 8-9. In his Second Decision and Order on Remand dated August 28, 1998, Judge Leland awarded benefits after crediting Dr. Sundaram's opinion that claimant was totally disabled due to pneumoconiosis pursuant to Section 718.204(b) (2000).

Employer appealed, and the Board affirmed the award of benefits. *Stewart v. Wampler Brothers Coal Co.*, BRB No. 99-0246 BLA (July 31, 2000) (*en banc*) (J. Nelson and J. Hall, concurring in part and dissenting in part) (unpub.); Director's Exhibit 99. The Board also denied employer request for reconsideration. *Stewart v. Wampler Brothers Coal Co.*, BRB No. 99-0246 (July 31, 2000) (Order on Motion for Reconsideration *en banc*) (unpub.); Director's Exhibit 110. Employer also filed an appeal with the United States Court of Appeals for the Sixth Circuit, wherein jurisdiction for this claim arises, and the court affirmed the Board's decision. *Stewart v. Wampler Brothers Coal Co.*, No. 01-3745 (6th Cir. May 5, 2003); Director's Exhibit 112. The court specifically rejected employer's contention that Judge Leland erred in assigning probative weight to Dr. Sundaram's opinion. *Wampler*, No. 01-3745, slip op. at 4.

On March 30, 2004, within one year of the circuit court's decision, employer filed a petition for modification with the district director, along with a medical authorization form to be signed by claimant for release of his treatment records. Director's Exhibit 114. Employer alleged in its petition for modification that Judge Leland's award of benefits was based on a mistake of fact. *Id*. On April 13, 2004, the district director acknowledged employer's petition and advised the parties that they had thirty days to submit evidence. Director's Exhibit 115. On April 20, 2004, the district director specifically advised employer that it was "not allowed to have the claimant submit to a new medical examination." Director's Exhibit 116. By letter dated June 14, 2004, employer requested an extension of time to develop evidence in support of its petition for modification and further requested that claimant be ordered to cooperate with discovery by providing employer with a signed medical release form.[3] Director's Exhibit 123. The record reflects that employer was granted an extension of time until July 14, 2004 to submit a transcript of a deposition of claimant conducted on May 13, 2004. Director's Exhibits 117-118. Employer later submitted the deposition transcript on July 22, 2004. Director's Exhibit 127. By letter dated July 22, 2004, the district director advised employer that the case was being transferred to the Office of Administrative Law Judges (OALJ) for further consideration of employer's modification request. Director's Exhibit 128. The district director specifically noted that employer failed to submit any evidence to support a change in conditions, and therefore, that employer's request for modification appeared to be based solely on its allegation that there had been mistake in a determination of fact with respect to the prior award of benefits. Director's Exhibit 128. Employer next filed a request for reconsideration on July 22, 2004, which was denied.[4] Director's Exhibit 130.

Once the case was forwarded to the OALJ it was assigned to Administrative Law Judge Janice K. Bullard (the administrative law judge). On September 27, 2005, employer filed a Motion to Dismiss or in the Alternative to Compel a Pulmonary Examination and Hold Discovery in Abeyance. Claimant responded to employer's motion on December 21, 2005 and moved to have employer's petition for modification summarily dismissed on the grounds of *res judicata*. Claimant further argued that employer was not entitled to modification since employer had failed to submit any evidence to show that claimant's medical condition had improved. On January 31, 2006,

[3] Employer also noted its objection to the district director's position that it was not entitled to have claimant examined. Director's Exhibit 123.

[4] Employer sought reconsideration in order to obtain additional time to submit evidence in support of its modification request. The district director refused to retain jurisdiction of the matter, noting that employer could submit any additional evidence to the Office of Administrative Law Judges for consideration. Director's Exhibit 130.

the administrative law judge scheduled the matter for a hearing to be held on May 11, 2006. However, prior to the scheduled hearing, the administrative law judge issued an Order dated February 17, 2006, which canceled the hearing and dismissed employer's petition for modification. Although employer requested reconsideration, the administrative law judge issued an Order on April 4, 2006 denying employer's request because she found that it was not timely filed within ten days of her February 17, 2006 Order.[5] She further noted that she found no good cause for modifying her decision.

Employer appeals, raising several challenges to the administrative law judge's decision to summarily dismiss its petition for modification. Employer asserts that the administrative law judge erred in granting summary judgment, because she "*sua sponte*" considered grounds for granting the motion that were not raised by claimant. Employer contends that the administrative law judge erred in issuing her order to summarily dispose of employer's modification request, based on "lack of evidence," since she issued her ruling prior to the twenty day deadline for submission of evidence permitted the parties under the regulations at 20 C.F.R. §725.456(b). Employer challenges the administrative law judge's interpretation of *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002) to support her finding that employer was not entitled to pursue modification. Employer contends that the administrative law judge erred when she characterized employer's request for modification as an attempt to "thwart a claimant's good faith claim." Employer's Brief at 7, citing ALJ Order (Feb. 17, 2006) at 2. Employer further argues that administrative law judge erred by failing to independently assess whether employer was entitled to modification based on a mistake of fact. Employer also asserts that the administrative law judge's decision to grant summary judgment denies employer its due process right to a hearing.

Claimant responds, urging affirmance of the administrative law judge's Order granting summary judgment, cancelling the hearing, and dismissing employer's petition for modification. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

[5] Contrary to the administrative law judge's ruling, "any party may, within [thirty] days after the filing of a decision and order under [Section] 725.478, request a reconsideration of such decision and order by the administrative law judge." 20 C.F.R. §725.479.

and in accordance with applicable law.[6] 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).

Pursuant to 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 by 20 C.F.R. §725.310 (2000), a party may request modification of the terms of an award or denial of benefits within one year on the grounds that a change in conditions has occurred or a mistake in a determination of fact was made in the prior decision. *See* 20 C.F.R. §725.310 (2000). Modification proceedings are to be conducted in accordance with the provisions of 20 C.F.R. Part 725 [setting forth the procedures for the adjudication of black lung claims as appropriate] and include the right to a hearing. *Robbins v. Cypress Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000). Any party to a claim has a right to a hearing concerning any contested issue of fact or law unresolved by the district director, *see* 20 C.F.R. §725.450. An oral hearing shall be conducted by an administrative law judge unless the parties mutually agree to waive the oral hearing, or upon a proper motion, the administrative law judge determines that summary judgment is warranted. *See* 20 C.F.R. §§725.452(c), 725.461(a). Section 725.452(c) specifically provides:

> A full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

20 C.F.R. §725.452(c).

In the instant case, the administrative law judge summarily dismissed employer's petition for modification and cancelled the hearing based upon her determination that there was no genuine issue of material fact to be resolved under Section 725.310 (2000). Specifically, the administrative law judge determined that employer was not entitled to modification based on a change in conditions since employer had not submitted any evidence to establish that claimant was not totally disabled due to pneumoconiosis, and

[6] Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. S*ee Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

therefore, that the prior award of benefits was issued in error. ALJ Order (Feb. 17, 2006) at 2. The administrative law judge also found that it was unnecessary for her to independently assess whether employer was entitled to modification based on a mistake in fact, since the prior award of benefits had already been affirmed by both the Board and the Sixth Circuit.[7] *Id*.

After reviewing the administrative law judge's Order and the briefs of the parties, we agree with employer that the administrative law judge erred in granting summary judgment. First, although the administrative law judge found that employer failed to submit any evidence to support modification of the award based on a change in conditions, the administrative law judge's summary judgment ruling was premature since she did not wait until expiration of the time permitted under 20 C.F.R. §725.456 for employer to submit evidence to support its modification request.[8] The administrative law judge's ruling also ignores that employer sought to obtain evidence by compelling an examination of claimant. Rather than ruling on employer's motion to compel, the administrative law judge simply denied employer's modification request without addressing the merits of that motion.[9] Thus, the administrative law judge's ruling effectively thwarted employer's attempt at discovery without any explanation as to why employer was not entitled to have claimant examined.

Furthermore, the administrative law judge erred in granting summary judgment because she did not properly consider whether employer was entitled to modification based on a mistake in fact. *See Robbins*, 146 F.3d at 428, 21 BLR at 2-502-503;

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[7] The administrative law judge stated in her decision that employer's modification request should not proceed as a matter of right since employer "produced no new evidence to support its modification request" and since "[t]he procedural history of this claim reveal[ed] that employer had continually sought review of [Judge Leland's] decision[;]" thereby demonstrating that employer's modification request was an "attempt to thwart" claimant's good faith claim. ALJ Order (Feb. 17, 2006) at 2.

[8] Section 725.456(b)(2) provides that "documentary material, including medical reports, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least [twenty] days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(2).

[9] The administrative law judge construed employer's motion to compel claimant to submit to a medical evaluation as "an attempt to secure medical evidence to support [employer's] modification on the grounds of a change in conditions." ALJ Order (Feb. 17, 2006) at 2.

Consolidation Coal Co. v. Worrell, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).[10] The administrative law judge stated that "although a modification would require a review of all of the evidence of record to assure accuracy by correcting mistakes of fact, that role has been filled by both the [Benefits Review Board] and the [Sixth Circuit]." ALJ Order (Feb. 17, 2006) at 2. The administrative law judge, however, erred by not performing a *de novo* review of the record, including both the prior evidence and the new evidence on modification, to determine whether there was a mistake in fact with regard to the award of benefits. *See generally Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (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." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971); *see Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).

Thus, because the administrative law judge has not fully considered the merits of employer's modification request under Section 725.310 (2000), we vacate her summary judgment ruling, and remand the case for further consideration.[11] The administrative law judge is instructed to reschedule the hearing in this matter pursuant to employer's hearing request. *See Robbins*, 146 F.3d at 428, 21 BLR at 2-502-503; *Pukas*, 22 BLR at 1-72. Following the completion of evidentiary development, the administrative law judge is further directed to consider whether employer is entitled to modification based either on a change in conditions or a mistake in fact, based on her *de novo* review of the record, under 20 C.F.R. §725.310 (2000). *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

[10] If a party avers generally that the ultimate fact was mistakenly decided, the administrative law judge has the authority, without more, to modify the denial of benefits, and there is no need for a smoking gun factual error, changed conditions, or startling new evidence. *See Jessee v. Director, OWCP*, 5 F.3d 725, 18 BLR 2-28 (4th Cir. 1993).

[11] Citing *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002), employer argues that the administrative law judge erred in failing to rule on employer's motion to compel an examination. Employer's Brief in Support of Petition for Review at 11. On remand, we direct the administrative law judge to specifically address employer's request for an examination.

Accordingly, the Order Denying Employer's Motion to Dismiss and Motion Directing Claimant to Submit to Medical Evaluation; Granting Claimant's Motion to Dismiss Modification; and Canceling Hearing of the administrative law judge is vacated, and the case is remanded for further consideration 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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JUDITH S. BOGGS
Administrative Appeals Judge