BRB No. 10-0451 BLA

ROSETTA SARGENT (on behalf of the Estate of FLOYD DUNCAN)	)	
Claimant-Petitioner	)	
v.	)	
DIXIE FUEL COMPANY, LLC	)	DATE ISSUED: 04/28/2011
and	)	
BITUMINOUS CASUALTY CORPORATION	)	
Employer/Carrier Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits and Granting Employer's Request for Modification of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Rosetta Sargent, Ages, Kentucky, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits and Granting Employer's Request for Modification (2006-BLA-00009) of Administrative Law Judge Kenneth A. Krantz with respect to a duplicate 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*)) (the Act).[1] The administrative law judge adjudicated employer's request for modification of the award of benefits in the miner's duplicate claim[2] pursuant to the regulatory provisions set forth in 20 C.F.R. Part 718. The administrative law judge found that employer proved that there was a mistake in a determination of fact in the finding that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, therefore, a material change in conditions at 20 C.F.R. §725.309 (2000).[3] Accordingly, the administrative law

[1] Claimant is the daughter of Floyd Duncan, the miner, who died on July 15, 2004. At the hearing, claimant was represented by Jerry Murphree, a benefits counselor with Stone Mountain Health Services. On claimant's behalf, Mr. Murphree submitted the appeal of the administrative law judge's Decision and Order – Denying Benefits and Granting Employer's Request for Modification, but is not representing claimant before the Board. Claimant's Notice of Appeal; *see Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The miner filed a claim on December 4, 1987, which was denied by Administrative Law Judge Daniel J. Roketenetz. Director's Exhibit 32. The Board affirmed the denial of benefits. *Duncan v. Dixie Fuel Co.*, BRB No. 92-1523 BLA (Apr. 26, 1994)(unpub.). The miner filed a duplicate claim on April 28, 1995. Director's Exhibit 1. Judge Roketenetz determined that the miner established a material change in conditions and entitlement to benefits on the merits. Director's Exhibit 4. Upon consideration of employer's appeal, the Board vacated the award of benefits and remanded the case for reconsideration of the issues of the existence of pneumoconiosis and disability causation. *Duncan v. Dixie Fuel Co.*, BRB No. 98-0879 BLA (Apr. 5, 1999)(unpub.). On remand, Judge Roketenetz determined that the miner established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis and awarded benefits. Director's Exhibit 5. Pursuant to employer's appeal, the Board affirmed the award of benefits. *Duncan v. Dixie Fuel Co.*, BRB No. 00-1019 BLA (Aug. 31, 2001)(unpub.). Employer filed both a Petition for Modification with the district director and an appeal of the Board's decision with the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 5. Employer's request for modification did not progress beyond the district director's office until the Sixth Circuit issued an order on November 8, 2004, remanding the case to the district director with instructions to resolve the issue of modification. *Id*. The district director denied employer's Petition for Modification on July 19, 2005. *Id*. Employer requested that the case be transferred to the Office of Administrative Law Judges for a hearing. *Id*.

[3] The Department of Labor 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

judge granted employer's request for modification and denied benefits. Claimant generally contends on appeal that the administrative law judge erred in granting employer's request for modification. Employer and the Director, Office of Workers' Compensation Programs, have not filed briefs in this appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence and consistent with applicable law.[5] 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, incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310 (2000), a party may seek modification of an award or denial of benefits based, in pertinent part, on a mistake in a determination of fact. The intended purpose of modification on this basis 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, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The revised regulations at 20 C.F.R. §§725.309 and 725.310 do not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

[4] The Director, Office of Workers' Compensation Programs (the Director), filed a Notice of Appeal in this case on April 30, 2010 and noted that Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims, does not apply to the present claim, as it was filed prior to January 1, 2005. We agree with the Director and hold that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as the claim was filed prior to January 1, 2005. The Director subsequently filed a motion requesting that the Board dismiss his appeal on July 7, 2010. By Order dated June 10, 2010, the Board dismissed the Director's appeal. *Sargent v. Dixie Fuel Co.*, BRB Nos. 10-0451 BLA and 10-0451 BLA-A (June 10, 2010)(unpub. Order).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1.

822, 22 BLR 2-305 (6th Cir. 2001); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). As the party seeking modification, employer is the "proponent of the order with the burden of establishing a [mistake in a determination of fact] justifying modification." *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *see also Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). However, the modification of a claim does not automatically flow from a finding that a mistake was made in the prior decision; a request for modification should be granted only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-106 (6th Cir. 1982).

As an initial matter, we hold that the administrative law judge erred in failing to place the burden of persuasion on employer to establish a mistake in a determination of fact under 20 C.F.R. §715.310. The issue presented to the administrative law judge was whether employer's request for modification should have been granted on the basis of a mistake in a determination of fact in the prior decision. *Rambo*, 521 U.S. at 139; *Branham*, 20 BLR at 1-34. Because the administrative law judge did not properly allocate the burden of proof, we vacate his determinations that claimant failed to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, as a result, a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000).

We will now address the administrative law judge's consideration of the evidence relevant to the presence of legal pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the medical opinions of Drs. Baker, Broudy, Dahhan, Rosenberg, Tuteur and Vuskovich.[6] Decision and Order at 16-23; Director's Exhibits 11, 12, 34; Employer's Exhibits 1, 3, 5. Dr. Baker had examined the miner in 1995 and diagnosed chronic obstructive pulmonary disease due, in part, to coal dust exposure. Director's Exhibits 11, 34. Drs. Broudy, Dahhan, Rosenberg, Tuteur and Vuskovich opined that the miner's lung condition was unrelated to coal dust exposure. Director's Exhibit 12; Employer's Exhibits 1, 3, 5.

[6] Pursuant to 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as any chronic lung disease or impairment and its sequelae arising out of coal mine employment and includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment," denotes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(b).

The administrative law judge initially determined that the newly submitted medical opinion evidence was sufficient to establish that the miner "had a chronic lung disease in the form of COPD." Decision and Order at 23. In assessing the credibility of the medical opinions, the administrative law judge noted that Dr. Baker reported on the miner's condition in 1995, before the miner quit smoking and before he received a coronary bypass graft, both of which improved his pulmonary function. *Id*. The administrative law judge acted within his discretion in according less weight to Dr. Baker's opinion, "[s]ince substantial medical changes occurred after Dr. Baker's examination that affected the [m]iner's pulmonary functions [sic], and . . . [knowledge of] these changes [might] have affected Dr. Baker's analysis of the medical evidence." Decision and Order at 23-24; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge also rationally determined that the opinions of Drs. Broudy, Dahhan, Rosenberg, and Tuteur were entitled to diminished weight, as their conclusions, that the miner's coal dust exposure for thirty-nine years was not a contributing cause of the miner's pulmonary impairment, were not well-reasoned or well-documented.[7] *See Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103 (6th Cir. 1983); Decision and Order at 25-26. Accordingly, we affirm the administrative law judge's finding that the opinions of Drs. Broudy, Dahhan, Rosenberg, and Tuteur were entitled to little weight under 20 C.F.R. §718.202(a)(4).

Regarding Dr. Vuskovich's opinion, that there was insufficient evidence to justify a diagnosis of legal pneumoconiosis, the administrative law judge found that this opinion, prepared on March 16, 2009, was entitled to greater weight than Dr. Baker's opinion, because it was based on a more complete view of the miner's medical history and was

[7] The administrative law judge found that Dr. Broudy did not explain how he determined that the miner's chronic obstructive pulmonary disease (COPD) was not caused, in part, by coal dust exposure. Decision and Order at 24. Regarding Dr. Dahhan's opinion, the administrative law judge determined that his finding, that the miner did not have a pulmonary impairment, was not supported by the objective evidence of record. *Id*. The administrative law judge concluded that Dr. Rosenberg's opinion was not well-reasoned or persuasive, as he did not reconcile his finding, that the miner's pulmonary function values were consistent with an impairment caused solely by smoking, with the findings in the medical journal article that he cited in support of his opinion. *Id*. at 26. With respect to Dr. Tuteur's opinion, the administrative law judge determined that his statements regarding the link between coal dust exposure and COPD were not well-supported and conflicted with the Department of Labor's view of the accepted medical literature on this issue. *Id*. at 25.

well-reasoned and well-documented.[8] Decision and Order at 26. The administrative law judge stated:

> Dr. Vuskovich noted that the [m]iner quit smoking in 1995, and that his lung condition substantially improved after he quit smoking. He then explained that lung impairments due to coal dust exposure are irreversible, but that impairments due to smoking may improve after smoking has ceased. Therefore, he concluded that, due to the reversible nature of the [m]iner's impairment, his exposure to coal dust did not cause his lung impairments. I find Dr. Vuskovich's reasoning to be persuasive. The pulmonary function studies show an increase in lung function after the [m]iner ceased smoking.

Id. However, the administrative law judge did not consider that evidence of some improvement in the miner's pulmonary function does not preclude the existence of legal pneumoconiosis nor does it show that coal dust exposure did not exacerbate a miner's smoking-related impairment. *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *see Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. 2004); Decision and Order at 26. We vacate, therefore, the administrative law judge's findings with respect to Dr. Vuskovich's opinion and instruct him to reconsider this opinion.

On remand, the administrative law judge must determine whether employer has proffered medical evidence sufficient to satisfy its burden to prove that the miner did not have pneumoconiosis. In reconsidering Dr. Vuskovich's opinion, the administrative law judge must render a finding as to whether Dr. Vuskovich ruled out the presence of a respiratory condition that could meet the definition of legal pneumoconiosis. The

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[8] Dr. Vuskovich diagnosed a mild obstructive impairment that was not totally disabling. Employer's Exhibit 5. Regarding the source of the miner's impairment, Dr. Vuskovich stated:

> Clinical and legal coal workers' pneumoconiosis are irreversible diseases. Smoking cessation would not reverse pulmonary impairment caused by coal mine dust exposure or by clinical coalworkers' pneumoconiosis. Smoking cessation improved [the miner's] pulmonary function because cigarette smoking was responsible for his pulmonary impairment. Demonstrated by 4/25/96 valid spirometry results removing cigarette smoke induced bronchial inflammation improved his measured FEV1.

Id.

administrative law judge is also required to determine whether reopening the case will render justice under the Act. He cannot grant employer's request for modification unless he finds that to do so would be in the interests of justice. *Banks v. Chi. Grain Trimmers Ass'n*, 390 at 464; *Blevins*, 683 F.2d at 142, 4 BLR at 2-106. In this regard, although the administrative law judge has the authority "to reconsider all the evidence for any mistake of fact," *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994), the "exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *See Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68, 72 (1999).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits and Granting Employer's Request for Modification is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge