BRB No. 03-0843 BLA

WINSTON GIBBS, Jr.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/22/2004
	)	
ARCH OF KENTUCKY, INCORPORATED	)	
	)	
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 Denying Employer's Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Shawn C. Conley (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Denying Employer's Request for Modification (97-BLA-1447) of Administrative Law Judge Robert L. Hillyard 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).[1] Claimant filed a claim for benefits on February 22, 1993. In a Decision and Order dated September 20, 1995, Administrative Law Judge Stuart A. Levin credited claimant with twenty and one-half years of coal mine employment, and considered entitlement pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). Judge Levin determined that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3) (2000), but found the medical opinion evidence of record sufficient to establish the presence of the disease pursuant to 20 C.F.R. §718.202(a)(4) (2000). Judge Levin then determined that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to §718.203(b) (2000), and that the presumption was not rebutted. Judge Levin found the pulmonary function study and medical opinion evidence sufficient to establish total disability under 20 C.F.R. §718.204(c)(1) and (c)(4) (2000). Finally, Judge Levin found the evidence sufficient to establish disability causation pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, he awarded benefits. Employer appealed. In a Decision and Order dated July 24, 1996, the Board affirmed Judge Levin's finding that the evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000). *Gibbs v. Arch of Kentucky, Inc.*, BRB No. 96-0129 BLA (July 24, 1996)(unpublished). The Board further affirmed, as unchallenged on appeal, Judge Levin's finding that claimant established total disability pursuant to Section 718.204(c) (2000).[2] *Id*. The Board also affirmed Judge Levin's finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) (2000). *Id*. The Board vacated Judge Levin's finding with regard to the date of onset of claimant's total disability, however, and remanded the case for reconsideration of that issue. *Id*. Employer filed a Motion for Reconsideration with the Board on July 24, 1996 and, on August 20, 1996, filed a Petition for Modification with the district director. In an Order dated November 20, 1996, the Board held that employer's Motion for Reconsideration was moot in light of employer's Petition for Modification, and remanded the case to the district director

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[1]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.

[2]The Board also affirmed, as unchallenged on appeal, Administrative Law Judge Stuart A. Levin's decision to credit claimant with twenty and one-half years of coal mine employment, and Judge Levin's findings under 20 C.F.R. §§718.202(a)(1)-(3) (2000) and 718.203(b) (2000). *Gibbs v. Arch of Kentucky, Inc.*, BRB No. 96-0129 BLA (Nov. 20, 1996)(unpublished).

for modification proceedings. *Gibbs v. Arch of Kentucky, Inc.*, BRB No. 96-0129 BLA (Nov. 20, 1996)(unpublished Order).

On April 16, 1997, the district director denied employer's request for modification, and the case was thereafter referred to Administrative Law Judge Robert L. Hillyard (the administrative law judge). In response to the administrative law judge's March 18, 1998 Order to Show Cause why a hearing on modification is necessary, the parties agreed to waive a hearing and to receive a decision on the record. In a Decision and Order dated November 9, 1998, the administrative law judge found the newly submitted evidence insufficient to establish a change in conditions under 20 C.F.R. §725.310 (2000). In addition, he found that the evidence did not establish a mistake in a determination of fact because the evidence was insufficient to discredit Judge Levin's prior findings that claimant established the existence of pneumoconiosis under Section 718.202(a)(4) (2000), and disability causation under Section 718.204(b) (2000). Consequently, the administrative law judge denied employer's request for modification and awarded benefits. Additionally, the administrative law judge found that the date from which benefits commence was August 1, 1993, the month in which claimant filed his application for benefits. Employer appealed. The Board vacated the administrative law judge's finding that the evidence was insufficient to establish a mistake in a determination of fact under Section 725.310 (2000), and remanded the case to the administrative law judge for a *de novo* review of the evidence of record to determine whether employer has established a mistake in a determination of fact.[3] *Gibbs v. Arch of Kentucky, Inc.*, BRB No. 99-0303 BLA (Sept. 27, 2000)(unpublished). In doing so, the Board held that the administrative law judge erred in determining that, in order for employer to meet its burden of establishing a mistake in a determination of fact, employer was required to submit evidence on modification which affirmatively discredited the opinions of Drs. Anderson, Baker and Myers, the prior evidence of record credited by Judge Levin. *Id*. The Board instructed the administrative law judge to consider also, if he were to find a mistake in a determination of fact on remand, whether the reopening of the case would render justice under the Act. *Id*.

In a Decision and Order on Remand dated May 9, 2001, the administrative law judge found that employer's new evidence submitted on modification should have been developed and presented in the initial litigation before Judge Levin.

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[3]The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that a change in conditions was not established pursuant to 20 C.F.R. §725.310 (2000). *Gibbs v. Arch of Kentucky, Inc.*, BRB No. 99-0303 BLA (Sept. 27, 2000)(unpublished), slip op. at 4, n.3.

The administrative law judge concluded that, therefore, it would not render justice to consider whether the new evidence demonstrated a mistake in a determination of fact. The administrative law judge then reviewed Judge Levin's 1995 Decision and Order and the previously submitted evidence, adopted Judge Levin's findings and credibility determinations, and found that employer did not establish a mistake in a determination of fact. Consequently, the administrative law judge denied modification. Employer appealed. In a Decision and Order dated April 26, 2002, the Board held that the administrative law judge did not abuse his discretion in determining that it would not render justice under the Act to consider whether employer's new evidence submitted in support of its request for modification demonstrated a mistake in a determination of fact. *Gibbs v. Arch of Kentucky, Inc.*, BRB No. 01-0715 BLA (Apr. 26, 2002)(unpublished). The Board held that the administrative law judge rationally exercised his discretion in finding that modification is not intended to provide a back-door route to retrying a case, and that a reopening of the record based on the newly submitted evidence would not render justice under the Act. *Id.* The Board further held that the administrative law judge adequately reflected on the previously submitted evidence, and thus affirmed the administrative law judge's finding that a mistake in determination of fact was not established under Section 725.310 (2000). *Id*.

Employer filed a Motion for Reconsideration. In a Decision and Order on Reconsideration, dated October 31, 2002, the Board granted employer's request for reconsideration. *Gibbs v. Arch of Kentucky, Inc.*, BRB No. 01-0175 BLA (Oct. 31, 2002)(unpublished Decision and Order on Reconsideration). The Board noted that it had previously remanded the case for the administrative law judge to conduct a *de novo* review of the evidence of record to determine whether a mistake in a determination of fact was established, but that the administrative law judge "instead found at the threshold" that it did not render justice to even consider whether employer's new evidence demonstrated a mistake in fact, because he concluded that the evidence should have been submitted earlier. *Id*., slip op. at 2. The Board held that, upon further reflection, the administrative law judge's approach was inconsistent with the Board's remand instructions and relevant authority on the issue of modification. *Id*. The Board thus remanded the case for further consideration. *Id*.

In his Decision and Order on Remand dated August 27, 2003, the administrative law judge stated that he reviewed the newly submitted opinions with regard to the contested issues of the existence of pneumoconiosis under Section 718.202(a)(4), and disability causation under Section 718.204(b)(2)(iv); specifically, the examination reports of Drs. Broudy, Powell, Wright, Wier and Caizzi, a deposition of Dr. Fino regarding his past consultative report, and a consultative report of Dr. Branscomb. The administrative law judge concluded that the opinions do not indicate a mistake in a determination of fact, once again

citing the holding in *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), that a petition for modification is not intended to provide a back-door route to retrying a case or to protect litigants from their counsel's mistakes. The administrative law judge stated that the new medical opinions seek to develop a theory that claimant's pulmonary condition and total disability are related to cigarette smoking, which is a theory that could have been developed more fully in the original claim, and which was dismissed by Judge Levin. The administrative law judge thus found that employer failed to establish a mistake in determination of fact and, consequently, denied modification. On appeal, employer argues that the administrative law judge again failed to engage in a proper *de novo* review of the evidence of record, and thus failed to follow the Board's remand instruction. Employer contends that the administrative law judge's summary rejection of the newly submitted evidence, because it could have been submitted earlier, is inconsistent with the applicable law on modification. Employer requests that the case be remanded to a new administrative law judge for a *de novo* consideration of all of the evidence of record to determine whether a mistake in a determination of fact is established pursuant to Section 725.310 (2000). Claimant responds in support of the administrative law judge's decision denying modification. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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, and in accordance with applicable law. 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).

"[B]y its plain language, 33 U.S.C. §922 is a broad reopening provision that is available to employers and employees alike." *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001). When a request for modification is filed, "[t]he fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact," *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 729, 743, 21 BLR 2-203, 2-210 (6th Cir. 1997), including whether "the ultimate fact was wrongly decided…." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

We find merit in employer's contention on appeal that the administrative law judge erred in failing to properly conduct a *de novo* review of the record in considering whether a mistake in a determination of fact was established pursuant to Section 725.310 (2000). In considering modification for the third time in this case, the administrative law judge did not weigh the newly submitted evidence together with the previously submitted evidence on the contested issues of the

existence of pneumoconiosis under Section 718.202(a)(4), and disability causation under Section 718.204(b)(2)(iv), but rather rejected employer's evidence stating:

> The new medical opinions presented by employer…seek to develop a counter-argument based upon tobacco smoking that could have been developed more fully in the original claim. The strength of that counter-argument, however, is based mostly upon the piling-on of additional, cumulative evidence and not upon the addition of new, substantive theories upon which a mistake of fact could be argued. The tobacco smoking argument was made, discussed, considered, and dismissed in the original Decision and Order. Judge Levin specifically dealt with the medical narrative evidence related to cigarette smoking and/or its relationship to the diagnosis of pneumoconiosis by discounting the opinions of Drs. Dahhan and Fino in favor of the opinions of Drs. Anderson and Baker.

Decision and Order on Remand at 5-6.

While the administrative law judge stated that he carefully considered the newly submitted opinions of Drs. Broudy, Powell, Wright, Wier, Caizzi, Fino and Branscomb, and summarized the opinions, Decision and Order on Remand at 4-5, he did not weigh these opinions against the previously submitted opinions and make credibility determinations. Instead, in rejecting the newly submitted opinions on the basis noted above, the administrative law judge provided the same rationale employed in his prior, May 9, 2001, Decision and Order. *See* 2001 Deci sion and Order on Remand at 5. Thus, the administrative law judge again blurred the inquiries of whether a mistake in a determination of fact was established in the first instance, and the separate question of whether reopening the record would render justice under the Act. We vacate, therefore, the administrative law judge's decision denying modification. We grant employer's request to transfer this case to another administrative law judge for a *de novo* consideration of the evidence on the issue of whether employer established a mistake in a determination fact pursuant to Section 725.310 (2000). On remand, if the administrative law judge assigned to this case finds that the evidence of record is sufficient to establish a mistake in a determination fact pursuant to Section 725.310 (2000), he must then consider whether reopening this claim will "render justice under the Act." *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *see Hunt*, 124 F.3d at 743, 21 BLR at 2-210 (6th Cir. 1997); *Worrell*, 27 F.3d at 230, 18 BLR at 2-296 (6th Cir. 1994).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Employer's Request for Modification 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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BETTY JEAN HALL
Administrative Appeals Judge