BRB No. 95-2260 BLA

JAMES H. COMBS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH ON THE NORTH FORK, INCORPORATED	)	DATE ISSUED: _____
	)	
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 of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Nancy M. Collins, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson, & Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (94-BLA-0684) of Administrative Law Judge J. Michael O'Neill denying employer's request for modification 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. The administrative law judge found that claimant[1] established thirty-two years of

[1]Claimant is James H. Combs, the miner, who filed a claim for benefits on October 27, 1982. Director's Exhibit 1.

qualifying coal mine employment and total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b) and 718.204(c)(2), (4). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(c)(4) and the award of benefits. *Combs v. Falcon Coal Co.,* BRB No. 87-1502 BLA (Apr. 20, 1989)(unpub.). On reconsideration, the Board affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.204 and its original Decision and Order. *Combs v. Falcon Coal Co., BRB No. 87-1502 BLA (Aug. 8, 1990)(unpub.).*

Employer filed a petition for modification pursuant to Section 725.310 on December 5, 1991, which was found to have been timely filed by Administrative Law Judge Frederick D. Neusner on July 20, 1993. In the instant Decision and Order, pursuant to Section 725.310, Administrative Law Judge O'Neill concluded that reopening the record would not render justice under the Act and further found that employer could not establish that claimant's condition has changed and that employer failed to establish a mistake in a determination of fact or that the prior finding of total disability due to pneumoconiosis was erroneous. Accordingly, modification was denied. In the instant appeal, employer contends that the administrative law judge erred in making his findings pursuant to Section 725.310 and in addressing the issues of whether claimant established the existence of pneumoconiosis and total respiratory disability pursuant to Sections 718.202(a) and 718.204. Claimant responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 the administrative law judge erred in denying employer's motion for modification, based upon the interest of justice. Employer's Brief at 15-16. We disagree. After discussing the facts of the case and listing the evidence of record, the administrative law judge discussed whether reopening the claim is appropriate. Decision and Order at 12. The administrative law judge stated:

> In my view, reopening the award of benefits in this case at this late date will not render justice under the Act and so is not appropriate. It seems clear to me that the employer, for whatever reason, simply failed to timely appeal the Benefits Review Board's decision and now seeks to relitigate the case at a time when the claimant should be sure that his award of benefits is safe from challenge. See USX Corp. . .[*v. Director, OWCP,* 978 F.2d 656] 659 [11th Cir. 1992].
>
> There is a threshold question of whether this employer even has the right to

> petition for modification. While Arch on the North Fork, as successor to Falcon Coal Co., is indisputably the "responsible operator" liable for payment of benefits to the claimant, it has not reimbursed the Black Lung Disability Trust Fund for payments made in its behalf nor has it initiated payments to the claimant. Surely the statute and regulation were not intended to permit a party to flout one section of the law, which requires its payment of benefits to the claimant, while relying on broad authority provided in another section to relitigate the issue of its liability. . . .It seems reasonable to me to restrict the right to take advantage of the broad exception to the principle of finality in litigation in this kind of situation to the party which is, in fact, paying benefits.
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> Despite the Orders of an Administrative Law Judge and the Benefits Review Board, the most recent of which is now more than 5 years old, the employer has not complied with the terms of any final orders and discharged its liability to the claimant or the Trust Fund. The employer, therefore, has waived any rights it might otherwise be entitled to exercise under section 22 as applied in black lung benefits proceedings through 20 C.F.R. §725.310.
>
> Furthermore, justice is not served in this matter by subjecting the claimant to years of litigation attempting to take away his award of benefits. He was found entitled to benefits more than eight years ago with a commencement date of 1982. He and his wife depend on those benefits to live. He successfully defended his award in two administrative appeals. More than 14 months after the time for further appeal had passed, when he had every right to believe his award of benefits was final and safe, his former employer (which still was not paying his benefits in any event) began proceedings to re-hash the evidence and try to prove that he was never entitled to have those benefits. Since the law is constantly changing and claimant's burdens of proof and the entitlement criteria have changed since 1987 when benefits were awarded, the employer seeks every advantage in its attempt to escape liability. It cannot be allowed to do so. Justice is not served by permitting the employer to relitigate this case and attempt to achieve a better result at the expense of this beneficiary.

D&O at 12-13.

Pursuant to Section 725.310, a party may request modification at any time before one year from the date of the last payment of benefits. *See* 20 C.F.R. §725.310; *Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). In determining whether claimant has established modification pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-

156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge is also authorized to exercise discretion in determining whether reopening the claim would render justice under the Act. *See Branham v. Bethenergy Mines., Inc.,* 20 BLR 1-27 (1996); *Wojtowicz, supra.*

Although employer contends that the administrative law judge erred in denyiing its motion for modification, employer does not even address its failure to pay benefits or the fact that its petition for modification would have been untimely if the Trust Fund had not made the requisite payments. Nor does employer address the administrative law judge's view that to permit further protracted litigation intended to overturn the award of benefits made eight years earlier would be against the interest of justice. Employer simply asserts that the administrative law judge's speculation that it failed to appeal the award timely is insufficient to support the denial of modification. As we have seen, that is simply one of several bases of the administrative law judge's decision. In the instant case, the administrative law judge permissibly considered the facts and procedural history of this case, including employer's failure to pay claimant's benefits and employer's failure to timely file an appeal with the Board, and acted within his discretion in determining that justice is not served by reopening the record. Decision and Order at 12-13; *see Branham, supra; Wojtowicz, supra; Kuchwara v. Director, OWCP,* 7 BLR 1-167 (1984). Consequently, as the administrative law judge rationally determined that reopening the case pursuant to Section 725.310 would not render justice under the Act, we affirm the denial of modification.

Accordingly, the administrative law judge's Decision and Order denying employer's request for modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge