BRB No 00-0212 BLA

VIRGINIA DEGILIO (On behalf of DANIEL DEGILIO, deceased)	)	
Claimant-Respondent	)	DATE ISSUED:
v.	)	
DEGILIO TRUCKING, INCORPORATED	)	
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 Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

John G. Swatkowski, Kingston, Pennsylvania, for claimant.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

Jeffrey S. Goldberg (Henry L. Solano, 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, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-1011) of Administrative Law Judge Ainsworth H. Brown denying 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 fourth time. Previously, the Board set forth this claim's full procedural history. *Degilio v. Degilio Trucking, Inc*., BRB No. 97-1678 BLA at 2 (Aug. 21, 1998)(unpub.); *Degilio v. Degilio Trucking, Inc*., BRB No. 93-1422 BLA at 1-3 (Mar. 30, 1995)(unpub.). We now focus only on those procedural aspects relevant to the issues raised in this appeal of the administrative law judge's decision to deny employer's request for modification.

In a Decision and Order on Remand issued on April 12, 1993, the administrative law judge found that Degilio Trucking, Inc. (DTI), as successor to Degilio Trucking Company, had been properly identified as the responsible operator and was therefore liable for the payment of benefits. Director's Exhibit 96. Upon consideration of employer's appeal, the Board affirmed the administrative law judge's findings. [1995] *Degilio*, slip op. at 4-5; Director's Exhibit 101. Thereafter, the United States Court of Appeals for the Third Circuit summarily denied employer's petition for review. *Degilio Trucking, Inc. v. Degilio*, No. 95-3302 (3d Cir. Mar. 15, 1996); Director's Exhibit 102. Accordingly, the district director ordered employer to reimburse the Black Lung Disability Trust Fund (the Trust Fund) for the interim benefits paid to Daniel and Virginia Degilio, and to commence monthly benefit payments to Mrs. Degilio. Director's Exhibit 103.

Instead, employer timely requested modification pursuant to 20 C.F.R. §725.310, alleging that a mistake in a determination of fact was made when the administrative law judge found that DTI was properly designated as the responsible operator. Director's Exhibit 104. Specifically, employer indicated its intent to present evidence which would prove its financial inability to reimburse the Trust Fund or assume liability for the payment of continuing benefits.

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[1] Claimant is Virginia Degilio, the widow of Daniel Degilio, the miner, who was receiving benefits on his 1979 claim at the time of his death on August 17, 1985. Claimant's entitlement to benefits is not at issue in this case.

[2] As of the district director's August 13, 1996 letter, employer owed $61,880.33 on Daniel Degilio's claim, $76,175.50 on Virginia Degilio's derivative entitlement, plus monthly benefits of $652.70. Director's Exhibit 103.

The district director denied employer's request for modification, and, pursuant to employer's request, forwarded the case to the Office of Administrative Law Judges. Before employer could submit its evidence, the administrative law judge denied modification on the grounds that employer waived the issue of its financial ability to pay benefits. Upon consideration of employer's appeal and the Motion to Remand filed by the Director, Office of Workers' Compensation Programs (the Director), the Board vacated the administrative law judge's Decision and Order and remanded the case for him to address the merits of employer's request for modification. [1998] *Degilio,* slip op. at 3-4.

While the case was pending before the administrative law judge on remand, employer submitted the deposition testimony of Thomas H. Douaihy, the accountant for DTI, along with DTI's corporate income tax returns and other financial data for the years 1994-1998.

The administrative law judge considered the new evidence and found that, although it reflected DTI's operating losses for tax purposes, it did not prove that DTI lacked any assets which may be available for the payment of benefits. The administrative law judge further found that the new evidence considered along with the evidence previously submitted "substantially confirmed" his previous findings. Decision and Order on Remand at 2. Consequently, the administrative law judge found that the record failed to demonstrate that the identification of DTI as the responsible operator was a mistake of fact pursuant to Section 725.310 Accordingly, he denied employer's request for modification.

On appeal, employer contends that the administrative law judge did not sufficiently explain his findings. Employer further asserts that the administrative law judge erred in his weighing of both Mr. Douaihy's testimony and DTI's financial records, and therefore erred in finding that no mistake of fact was demonstrated. Claimant has not filed a response, but the Director responds, urging affirmance.

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

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[3] Employer and the Director, Office of Workers' Compensation Programs (the Director), waived their right to a hearing on modification and requested a decision on the documentary record. *See* 20 C.F.R. §725.461(a); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-71-72 (2000).

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).

Previously, the administrative law judge found that DTI met all of the criteria for identification as the responsible operator. *See* 20 C.F.R. §§725.492, 725.493. Employer's request for modification challenged only one of those criteria, specifically, DTI's ability to assume liability for benefits payments. *See* 20 C.F.R. §725.492(a)(4). Employer alleged that its financial inability to pay benefits demonstrated that its identification as the responsible operator was a mistake in a determination of fact pursuant to Section 725.310.

Section 725.310 provides that 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 because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority to reconsider all the evidence for any mistake of fact in the prior decision. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971). As the party requesting modification based on an alleged mistake of fact, employer bore the burden of persuasion. *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-34 (1996).

For an employer to be identified as a responsible operator, Section 725.492 provides, in pertinent part:

> (a) The operator or the employer shall be capable of assuming its liability for the payment of continuing benefits under this part, through any of the following means:
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> (i) By obtaining a policy or contract of insurance. . .; or
>
> (ii) By qualifying as a self-insurer. . .; or

(iii) By possessing any assets that may be available for the payment of benefits under this part or through an action under subpart H of this part.

(b) In the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability under this part.

20 C.F.R. §725.492(a)(4), (b). DTI exists as a corporate entity; therefore, there must be contrary evidence to prove that DTI is incapable of assuming liability. DTI was not insured against Black Lung claims. Therefore, the issue is whether the evidence proves that DTI lacks sufficient assets available for the payment of benefits. *See Borders v. A.G.P. Coal Co.*, 9 BLR 1-32, 1-34 (1986); *Gilbert v. Williamson Coal Co.*, 7 BLR 1-289, 1-294 (1984).

Mr. Douaihy testified that in 1998 DTI reported assets of $120,808 on its federal corporate income tax return. ROX 2 (Tr.) at 16; Defendant's Exhibit 1. According to Mr. Douaihy, these assets consist of $12,883.00 in cash, inventory valued at $32,550, and fixed assets with a net depreciated value of $75,375. *Id*. The fixed assets include land, a building, gasoline tanks, a front-end loader, and three buses. Tr. 17. Mr. Douaihy stated that DTI's land and building constitute most of the $75,375 asset value, but are unmarketable because of environmental damage from underground fuel tanks. Tr. 19-20. Mr. Douaihy testified that he has seen no documentation of this fact from either the Pennsylvania Department of Environmental Resources or a real estate appraiser, but stated it was "what I've been told. . . ." Tr. 19. Review of the record reveals no documentation on this matter.

Mr. Douaihy testified further that DTI's 1994-1998 income tax returns show that it has operated at a loss in every year except 1994, and that DTI's corporate officers, Nicholas Degilio, Jr. and Michael Hanis, took a salary reduction. Tr. at 12-13. Mr. Douaihy added that DTI's business is "stagnant" and that its corporate officers lent DTI money to keep it afloat. Tr. at 13, 15. However, Mr. Douaihy also testified that DTI recently repaid its officers $25,000 of the debt from operations proceeds, and that DTI has a snow removal contract that "helps them make a lot of money. . . ." Tr. 11, 27.

The administrative law judge noted that DTI's reported assets were "a little under $121,000.00." Decision and Order on Remand at 2. The administrative law judge considered Mr.

Douaihy's opinion that the bulk of these assets could not be sold, but found "nothing of a substantial probative nature" in the record to corroborate Mr. Douaihy's testimony. *Id.* The administrative law judge additionally found that although DTI's "tax returns reflect[ed] an operating loss for tax purposes," they did "not show at all the inability to pay what is owed and owing." *Id*. Rather, the administrative law judge found, they showed that DTI chose which of its debts to repay, such as the $25,000 in debt service, and that DTI's tax losses resulted in part from depreciation, "which [did] not speak to [DTI's] ability to pay [its] creditors." *Id*. Consequently, the administrative law judge found that Mr. Douaihy's testimony and DTI's tax records did not establish DTI's financial inability to pay benefits, and therefore did not demonstrate a mistake of fact in DTI's designation as the responsible operator.

Employer first contends that the administrative law judge's findings on modification do not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Based on our review of the administrative law judge's decision, we hold that he referred sufficiently to the evidence and explained his reasoning adequately to permit review. *See Wensel v. Director, OWCP*, 888 F.2d 14, 16, 13 BLR 2-88, 2-91-92 (3d Cir. 1989). Therefore, we reject employer's contention that the administrative law judge violated the APA.

Employer argues further that the administrative law judge erred in according diminished weight to Mr. Douaihy's testimony that most of DTI's assets are unmarketable. Employer's Brief at 11. Contrary to employer's contention, the administrative law judge acted within his discretion in discounting Mr. Douaihy's testimony. *See Lafferty v. Cannelton Industries, Inc*. 12 BLR 1-190, 1-192 (1989)(the administrative law judge assesses the credibility of the evidence and witnesses). Because the issue in dispute is whether DTI possesses assets that may be available to pay benefits, the administrative law judge reasonably looked for some corroboration of Mr. Douaihy's claim that the bulk of DTI's assets can never be sold. *See Borders*, 9 BLR at 1-34 (mere assertion of inability to pay is inadequate to meet employer's burden). Because no such evidence was submitted into the record, the administrative law judge permissibly accorded less weight to Mr. Douaihy's testimony on this point. *See Lafferty, supra*.

Employer asserts that the administrative law judge substituted his judgment for that of the accountant when he found that DTI's tax records do not prove DTI's financial inability to pay benefits, but rather, reflect operating losses for tax purposes. Employer's Brief at 11. Employer's contention lacks merit. First, as highlighted by the administrative law judge, DTI's 1998 tax return indicates that DTI listed assets valued at $120,808. *See* 20 C.F.R. §725.492(a)(4)(iii). Second, substantial evidence supports the administrative law judge's finding that the losses reported on DTI's tax returns result in part from deductions for depreciation, and thus do not necessarily reflect

an actual inability on the part of DTI to assume liability for benefits. *See Borders, supra*; *Gilbert, supra*. Therefore, we find no error in the administrative law judge's analysis of Mr. Douaihy's testimony or of DTI's tax records.

In sum, the administrative law judge properly considered that DTI's most recent tax return lists $120,808 in assets, that DTI continues to pay salaries to its officers, that DTI repaid $25,000 in debt in 1998, and that DTI has a potentially profitable contract for snow removal. Decision and Order on Remand at 2; *see* 20 C.F.R. §725.492(a)(4)(iii). Under these circumstances, we hold that the administrative law judge permissibly found that employer did not meet its burden to establish that it is incapable of assuming its liability to pay benefits, *see Borders, supra*; *Gilbert, supra*, and therefore failed to establish a mistake of fact pursuant to Section 725.310. *See Branham, supra*.

[4] Review of DTI's 1995-1998 tax returns indicates that in each year, DTI's deduction for depreciation (line 20) exceeded the loss reported by DTI on line 28. Defendant's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order on Remand denying modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge