U.S. Department of Labor

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

LD

BRB No. 90-0153 BLA
OWCP No. 230-48-1096

PUBLISHED

LEVI COLEMAN

Claimant-Respondent

v.

RAMEY COAL COMPANY

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED: SEP 28 1990

DECISION and ORDER

Appeal of the Decision and Order Upon Remand by the Benefits Review Board and the Third Supplemental Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Stephen E. Arey, Tazewell, Virginia, for claimant.

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

Helen H. Cox (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Upon Remand by the Benefits Review Board and the Third Supplemental Decision and Order (84-BLA-8363) of Administrative Law Judge Robert D. Kaplan awarding benefits 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 second time. In the original Decision and Order, the administrative law judge credited claimant with twenty-one years of coal mine employment, and, relying on

On appeal, employer asserts that the administrative law judge erred in finding that the x-ray and the pulmonary function study evidence is sufficient to establish invocation of the interim presumption, and urges that the evidence is sufficient to establish rebuttal of the presumption at Section 727.203(b)(3). *See* 20 C.F.R. §727.203(b)(3). Employer also contends that it was error for the administrative law judge to alter his original finding that the attorney's fees were to be paid by the Director. Claimant responds, urging affirmance of the administrative law judge's Decision and Order Upon Remand and his Third Supplemental Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, also responds, urging affirmance of the administrative law judge's Decision and Order Upon Remand and his Third Supplemental Decision and Order, asserting that the administrative law judge properly took official notice of the qualifications of the x-ray readers and that the administrative law judge, within a proper exercise of his discretion, corrected the identity of the party responsible for the payment of attorney's fees.[2]

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). An award of attorney's fees is discretionary and will be sustained on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Initially, we address employer's assertions regarding the administrative law judge's weighing of the pulmonary function study evidence. In finding the evidence sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2), the administrative law judge weighed all of the pulmonary function studies[3] and found that:

---

[2] We affirm the administrative law judge's length of coal mine employment finding, as this finding is not challenged on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The administrative law judge did not consider the March 25, 1980 pulmonary function study, Director's Exhibit 10, on remand. In his initial Decision and Order the administrative law judge noted that the results of this test were not signed by a physician and that the study had been invalidated, Director's Exhibit 11, and found that the results of this test were unreliable. Decision and Order at 4. None of the parties have challenged the omission on remand by the administrative law

results both before and after the bronchodilator was administered,[6] Employer's Exhibit 7.

Employer asserts that the administrative law judge erred by failing to fully explain his weighing of the pulmonary function study evidence, failing to explain why he credited Dr. Paranthaman's pre-bronchodilator results over his post-bronchodilator results, and by failing to apply the Part 718 standards in his evaluation of the pulmonary function study evidence, since several of the tests were performed after March 31, 1980, the effective date of the Part 718 regulations. Further, employer contends that the administrative law judge erred by crediting Dr. Dahhan's pulmonary function study although claimant was hospitalized for pneumonia that year. Employer also asserts that the administrative law judge improperly exceeded his expertise in finding that Dr. Dahhan's test was not administered a "short time" after this illness and was thus not affected by that illness. Employer further contends that the administrative law judge impermissibly speculated that Dr. Dahhan knew of claimant's hospitalization for pneumonia.

We affirm the administrative law judge's weighing of the pulmonary function study evidence and his finding that the pulmonary function study evidence is sufficient to establish invocation of the interim presumption at Section 727.203(a)(2). The administrative law judge properly found that the pulmonary function study administered by Dr. Dahhan, is sufficient, alone, to establish invocation of the interim presumption, based on its recency, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984); *cf. Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We affirm the administrative law judge's finding of invocation of the interim presumption on this basis, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), and hold that any errors by the administrative law judge in otherwise weighing the pulmonary function studies are harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Likewise, we reject employer's contention regarding the administrative law judge's finding that Dr. Dahhan's pulmonary function study was not administered a "short time" after claimant's hospitalization for pneumonia. The administrative law judge rendered a proper factual determination,

---

[6] It is noted that Dr. Dahhan's study stated that claimant's height was sixty-four inches. Employer's Exhibit 7. The administrative law judge, in his initial Decision and Order, found, however, that claimant was five feet, ten inches tall, Decision and Order at 4; *see generally Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983), accordingly, the determination of whether these results are qualifying is based on a height of seventy inches.

within his purview as the trier-of-fact and, as such, this factual finding must be affirmed. *See Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). We also note that employer has not proffered any evidence to contradict Dr. Dahhan's statement that claimant's cooperation and comprehension were good, Employer's Exhibit 7, or to otherwise invalidate the study, *see generally Braden v. Director, OWCP*, 6 BLR 1-1083 (1984).[7] Finally, we reject employer's assertion regarding the applicability of the Part 718 quality standards in this case which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit since the application for benefits was filed in 1979, *see Pezzetti v. Director, OWCP*, 8 BLR 1-464 (1986); *Sgro v. Rochester & Pittsburgh Coal Co.*, 4 BLR 1-370 (1981); *contra Prater v. Hite Preparation Co.*, 829 F.2d 1363, 10 BLR 2-297 (6th Cir. 1987).

In view of our affirmance of the administrative law judge's weighing of the pulmonary function study evidence and his finding that the interim presumption has been invoked, we need not address employer's assertions regarding the administrative law judge's weighing of the x-ray evidence, *see Hoffman v. B & G Construction Co.*, 8 BLR 1-65, 1-66 (1985); *Brown v. Bethlehem Steel Corp.*, 4 BLR 1-527 (1981). In addition, we decline to address employer's assertions regarding Section 727.203(b)(3) since this issue was resolved in the Board's first Decision and Order, and, therefore, the previous ruling constitutes the law of the case with regard to this issue, *see Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(2-1 opinion with Brown, J., dissenting); *see also Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Inasmuch as employer has not shown a basis for an exception to this doctrine, *see Williams, supra*, we hold that employer's contentions in this regard are without merit.

We now turn to employer's contentions regarding the administrative law judge's findings with respect to the award of attorney's fees. After the issuance of the original Decision and Order on the merits, the administrative law judge issued, on December 11, 1987, a Supplemental Decision and Order Granting Attorney Fees. The administrative law judge there noted several objections made by employer regarding claimant's counsel's fee request and "ORDERED that the Director, Office of Workers'

---

[7] We also reject employer's contention regarding speculation by the administrative law judge since the administrative law judge's comment that Dr. Dahhan might have known of the hospitalization, Decision and Order on Remand at 6, n.5, was provided only as a response to employer's "speculation", *see generally Braden, supra*, that Dr. Dahhan was not aware of claimant's hospitalization. *See* Decision and Order Upon Remand at 6; Employer's Brief on Remand at 9-10.

Compensation Programs pay" claimant's counsel's fee of $2,715.72, Supplemental Decision and Order Granting Attorney Fees. After the case was considered by the administrative law judge on remand, the administrative law judge again considered the issue of claimant's counsel's fees, and on March 8, 1990, the administrative law judge ordered that employer pay claimant's counsel's fees of $976.25. Supplemental Decision and Order Upon Remand by the Benefits Review Board Granting Attorney Fees. In response to a motion for reconsideration filed by the Director, the administrative law judge, noting his two prior orders regarding attorney's fees and the Director's motion for reconsideration, "ORDER[ED] that the Employer, Ramey Coal Company, pay Stephen E. Arey, Esq. $3,691.77 in compensation for professional services rendered to the Claimant." Third Supplemental Decision and Order. This is the extent of the administrative law judge's order correcting his previous supplemental orders.

On appeal, employer asserts that the administrative law judge erred by modifying his Supplemental Decision and Order, contending that the Director's motion for reconsideration was untimely because the Supplemental Decision and Order had become final, and contending that the administrative law judge lacked jurisdiction to alter his prior Supplemental Decision and Order. Employer relies on the Board's holding in *Johnson v. Director, OWCP,* 7 BLR 1-206 (1984)(2-1 decision with Clarke, J., dissenting), to support its assertion that the order became final after the expiration of the thirty day appeal period, *see* 33 U.S.C. §921(a); 20 C.F.R. §802.205, and that the decision thus cannot be modified or corrected by the administrative law judge at a later date.

The Director responds, contending that the administrative law judge has the authority to correct his earlier clerical error, and asserting that the administrative law judge did not abuse his discretion by correcting a clerical mistake while the case was still pending before him. The Director urges that *Johnson, supra,* is distinguishable from the instant case, inasmuch as the instant case concerns liability for a portion of the attorney's fees, while in *Johnson* the administrative law judge had erred in assigning liability for benefits, in addition to attorney's fees, to the Director. The Director asserts that the "mistake made with respect to the liability of one portion of the attorney's fee award does not constitute a 'substantial and serious change' as contemplated by the Board in *Johnson.*" Director's Brief at 10. The Director further contends that employer's concession, that it may be liable for benefits, includes an implicit concession that it will be liable for any attorney's fee awarded. Director's Brief at 11. Claimant responds to employer's appeal, asserting that the administrative law judge's order that the Director pay his counsel's fee was a "scr[ivene]r's error....[and] it seems proper that the

Administrative Law Judge be able to correct this obvious mistake...." Claimant's Brief at 14.

Initially, we note that the administrative law judge's Supplemental Decision and Order Granting Attorney Fees is a final order inasmuch as no motion for reconsideration was filed, nor was the administrative law judge's order appealed, *see* 20 C.F.R. §725.479. We also note that an attorney's fee award does not become effective, and is thus not enforceable, until there is successful prosecution of the claim, *see Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987), *aff'd, Bethenergy Mines Corp. v. Director, OWCP [Markovich]*, 854 F.2d 632 (3d Cir. 1988), and all appeals are exhausted, *see Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc* decision with Brown, J., concurring); *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248, 253 (1987).

Relief from clerical mistakes is provided by Rule 60(a) of the Federal Rules of Civil Procedure.[8] A clerical error is "one which is a mistake or omission 'mechanical in nature which does not involve a legal decision or judgment by an attorney' and which is apparent on the record," *see McLaughlin v. Jones & Laughlin Steel Corp.*, 2 BLR 1-103, 1-105 (1979), quoting *In Re Merry Queen Transfer Corp.*, 266 F.Supp. 605 (E.D.N.Y. 1967); *see also Johnson v. Director, OWCP*, 7 BLR 1-206 (1984)(Clarke, J., dissenting). Case law interpreting Rule 60(a) reveals that the question of whether the record indicates that the result stated by the court was the result that it had intended, *see American Trucking Associations, Inc. v. Frisco Transportation Co.*, 358 U.S. 133 (1958); *Allied Materials Corp. v. Superior Products Co.*, 620 F.2d 224 (10th Cir. 1980); *cf. Stradley v. Cortez, Jr.*, 518 F.2d 488 (3d Cir. 1975); *West Virginia Oil & Gas Co.*, 213 F.2d

---

[8] Rule 60(a) provides relief with respect to clerical mistakes and states:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed. R. Civ. P. 60(a). The Federal Rules of Civil Procedure apply to hearings under the Act where they are not in conflict with the Act or the regulations promulgated thereunder. *See Smith v. Westmoreland Coal Co.*, 12 BLR 1-39, 1-43 (1988); 29 C.F.R. §18.1(a); *see also* 20 C.F.R. §725.1.

702 (5th Cir. 1954); *Tillman v. Tillman*, 172 F.2d 270 (D.C. Cir. 1948), and whether the parties had a reason to conclude that the error was merely clerical, *see McLaughlin, supra*, is a more significant concern than the specific language -- in the instant case, the identity of the party held liable -- that is incorrect in the decision, *see Myrtle v. Checker Taxi Co.*, 279 F.2d 930, 934 (7th Cir. 1960). In *Allied Materials Corp.*, the court provided an instructive distinction between a Rule 60(a) correction and a modification of judgment, *see* Fed. R. Civ. P. 60(b); 33 U.S.C. §922; 20 C.F.R. §725.310, stating that a correction under Rule 60(a) is proper if the mistake to be corrected occurred "because the thing spoken, written or recorded is *not what the person intended to speak, write, or record,*" whereas a modification of judgment is necessary when that which is erroneous is so "because the person later discovers that the thing said, written or recorded was wrong." *Allied Materials Corp.*, 620 F.2d at 226 (emphasis in original).

It is noteworthy that neither the record nor theories of law relevant to the issue of Trust Fund liability support a conclusion that, in this case in which the responsible operator had been properly identified pursuant to the applicable criteria, *see* 20 C.F.R. §725.412, the Black Lung Disability Trust Fund is to be held liable for payment of claimant's attorney's fees. *Cf. Director, OWCP v. South East Coal Co. [Spicer]*, 598 F.2d 1046 (6th Cir. 1979); *Director, OWCP v. Black Diamond Mining Co. [Frederick]*, 598 F.2d 945 (5th Cir. 1979); *Director, OWCP v. Leckie Smokeless Coal Co. [Bennett]*, 598 F.2d 881 (4th Cir. 1979); *Republic Steel Corp. v. Director, OWCP [Hromyak]*, 590 F.2d 77 (3d Cir. 1978)(the foregoing cases concern dismissal of employers in cases involving claims filed under Section 415 of the Act, 30 U.S.C. §925, during the transition between Parts B and C of the Black Lung program, between July 1 and December 31, 1973); *Couch v. The Pittston Co.*, 7 BLR 1-514 (1984)(holding that the Trust Fund, rather than employer, was to be liable for both benefits and attorney's fees under the transfer of liability provisions of the 1981 Amendments, *see* 30 U.S.C. §932(c)); *Yokley v. Director, OWCP,* 3 BLR 1-230 (1981)(holding Trust Fund liable for payment of benefits and attorney's fees because no responsible operator identified under the Act, *see* 30 U.S.C. §932(c)). Consequently, there was no proper basis from which the parties could have concluded that the administrative law judge had determined that the Trust Fund was to be held liable for payment of claimant's attorney's fees in the instant case. This case is thus distinguishable from those in which the parties should have been on notice that the error was not a clerical mistake but an error resulting from an application of pertinent law to the facts of record, and in which the courts have denied relief under Rule 60(a), *see, e.g., Stradley, supra.*

Furthermore, the text of the administrative law judge's Supplemental Decision and Order Granting Attorney Fees provided a

basis for a reasonable belief by the parties that employer, not the Director, was actually intended to be liable for payment of attorney's fees. The administrative law judge refers to objections made by employer regarding the fee petition in that decision. Supplemental Decision and Order Granting Attorney Fees at 1-2. It is also significant that employer had filed objections to claimant's counsel's fee petition, which action was noted by the administrative law judge, and which indicates employer's belief that it would be held liable for the payment of the attorney's fees awarded.

Accordingly, we hold, based on the clear intention of the administrative law judge, as indicated in his Supplemental Decision and Order Granting Attorney Fees and as supported by the record, to find employer responsible for the payment of claimant's attorney's fees, that the administrative law judge properly corrected the misidentification of the party liable for attorney's fees in a manner consistent with the provisions of Fed. R. Civ. P. 60(a). To the extent that *Johnson, supra*, is inconsistent with this holding, it is overruled. We therefore affirm the administrative law judge's finding in his Third Supplemental Decision and Order that employer, not the Trust Fund, is liable for the entire amount of claimant's attorney's fees.

Accordingly, the administrative law judge's Decision and Order Upon Remand by the Benefits Review Board and the Third Supplemental Decision and Order are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

CERTIFICATE OF SERVICE

BRB No. 90-0153 BLA: Levin Coleman v. Ramey Coal Company and Director, Office of Workers' Compensation Programs (Case No. 84-BLA-8363) (OWCP No. 230-48-1096)

I certify that this Decision and Order was sent this day to:

SEP 28 1993

(DATE)

Lisa L. Lahrman, Executive Counsel
Clerk of the Board

Stephen E. Arey, Esq. — Certified
P.O. Box 895
204 Main Street
Tazewell, VA 24651

Mr. Levin Coleman — Certified
Box 918
Grundy, VA 24614

Ronald E. Gilbertson, Esq. — Certified
Kilcullen, Wilson
and Kilcullen
Suite 300
1800 K Street, N.W.
Washington, DC 20006

Helen H. Cox, Esq. — Certified
U.S. Department of Labor
Office of the Solicitor
Suite N-2605, NDOL
Washington, DC 20210

Mr. Steven Breeskin
District Director
U.S. Department of Labor
Suite C-3516, NDOL
Washington, DC 20210

Judge Robert Kaplan
U. S. Department of Labor
2600 Mt. Ephraim Avenue
Camden, NJ 08104