# No. 14-3488

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

LEECO, INCORPORATED,

and

JAMES RIVER COAL COMPANY

Petitioners

v.

DARRELL MAY

and

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

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

## BRIEF FOR THE FEDERAL RESPONDENT

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DARRELL MAY

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On Petition for Review of a Final Order of the Benefits Review Board, United States Department of Labor

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# BRIEF FOR THE FEDERAL RESPONDENT

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## STATEMENT OF JURISDICTION

This appeal involves a claim for benefits under the Black Lung

Benefits Act (BLBA), 30 U.S.C. §§ 901-44, filed in April 1995 by Darrell May, who worked as a coal miner for twenty-one years.[1] After extensive proceedings, a Department of Labor (DOL) administrative law judge (ALJ) awarded his claim, and the Benefits Review Board affirmed. Leeco, Incorporated, Mr. May's former employer, has petitioned the Court to review the Board's decision. The Director, Office of Workers' Compensation Programs, responds in support of the Board's decision.[2]

This Court has both appellate and subject matter jurisdiction over Leeco's petition for review under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c), as incorporated into the BLBA by 30 U.S.C. § 932(a). Leeco petitioned

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[1] Because Mr. May's claim was filed before 2005, the amendments to the BLBA contained in Section 1556 of the Affordable Care Act do not apply to this case. *See* Pub. L. No. 111-148, § 1556(c) (2010); *Vision Processing, LLC, v. Groves*, 705 F.3d 554-55 (6th Cir. 2013) (discussing changes to BLBA made by Section 1556).

[2] The Black Lung Disability Trust Fund has paid benefits to Mr. May on an interim basis. *See* 20 C.F.R. § 725.522(a). If the Court affirms his award, Leeco will have to reimburse the Trust Fund for the payments made, *see* 20 C.F.R. § 725.602, in addition to paying continuing benefits to Mr. May.

for review of the Board's March 26, 2014, decision on May 20, 2014, within the sixty-day limit prescribed by Section 21(c). Moreover, the "injury" as contemplated by Section 21(c)—Mr. May's exposure to coal-mine dust—occurred in Kentucky, within this Court's territorial jurisdiction.

The Board had jurisdiction to review the ALJ's decision on Mr. May's claim under Section 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). The ALJ issued her decision on February 22, 2013. (Leeco contends that the ALJ lacked jurisdiction to consider Mr. May's claim, but as discussed below (*infra* at 23-27), this contention is incorrect.) Leeco filed a notice of appeal with the Board on March 20, 2013, within the thirty-day period prescribed by Section 21(a) of the Longshore Act, 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a).

## STATEMENT OF THE ISSUES

1. In 2001, Mr. May timely filed a request to modify two previous decisions denying this claim for BLBA benefits. The DOL district director did not act on the request. Mr. May filed a new benefits application in 2006. Both the district director and the ALJ treated this filing as a new claim, and awarded benefits. The Board

recognized that the 2001 modification petition was still pending, and remanded the claim for consideration of that petition. Did the Board commit reversible error in remanding the case to the ALJ rather than the district director?

2. It is uncontested that Mr. May suffers from chronic obstructive pulmonary disease (COPD),[3] and that he is totally disabled as result. But Leeco continues to contest the ALJ's finding that Mr. May's COPD was caused, in part, by coal-mine dust exposure and is therefore compensable. Leeco relies solely on the opinion of Dr. Broudy on this issue. Did the ALJ correctly discount that opinion because Broudy believed (without foundation) that he

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[3] COPD is a lung disease characterized by airflow obstruction. *The Merck Manual* 1889 (19th ed. 2011). COPD is also referred to as chronic obstructive lung disease or chronic obstructive airway disease. For ease of use, we will refer to COPD even where a physician employed one of the alternative terms. COPD encompasses chronic bronchitis, emphysema and certain forms of asthma. 65 Fed. Reg. 79939 (Dec. 20, 2000); *Peabody Coal Co. v. Director, OWCP*, 746 F.3d 1119, 1121, n. 2 (9th Cir. 2014). Both cigarette smoking and dust exposure during coal-mine employment can cause COPD. *See* 65 Fed. Reg. 79939-43 (Dec. 20, 2000) (summarizing medical and scientific evidence of link between COPD and coal mine work); *The Merck Manual* 1889 (discussing smoking as cause of COPD).

could distinguish smoking-related COPD from dust-related lung disease?

3. Leeco also contests whether Mr. May's disability is due to pneumoconiosis, arguing that the ALJ applied an incorrect legal standard on this issue. The ALJ did cite an incorrect standard ("more than de minimis" instead of "substantially contributing cause") in finding that Mr. May's disability is due to pneumoconiosis. But since Mr. May's COPD (which the ALJ found to be legal pneumoconiosis) is the *sole* cause of his disability, was the ALJ's citation of an incorrect standard harmless error?

## STATEMENT OF THE CASE

### A. Statutory and Regulatory Background

The BLBA provides benefits to coal miners who are totally disabled due to pneumoconiosis.[4] 30 U.S.C. § 901(a). To obtain

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[4] "Pneumoconiosis" includes both "clinical pneumoconiosis" (diseases commonly recognized as pneumoconiosis by the medical community) and the broader category of "legal pneumoconiosis" (any chronic lung disease caused by coal-mine-dust inhalation, including "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment"). 20 C.F.R. § 718.201(a)(1), (2); *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 486 (6th Cir. 2014).

benefits, a miner must prove 1) that he has pneumoconiosis; 2) that the pneumoconiosis arises out of coal-mine employment; 3) that he has a totally disabling pulmonary impairment; and 4) that his disability is due to pneumoconiosis. [5] 20 C.F.R. §§ 718.202-.204; *see Navistar, Inc., v. Forester*, 767 F.3d 638, 640 (6th Cir. 2014).[6]

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[5] Mr. May filed a claim in 1990, which was denied for failure to establish the fourth element (total disability). Thus, his present (1995) claim is a new or "subsequent" claim—*i.e.,* a claim filed more than one year after the final denial of a previous claim. Under the prior regulations applicable to this case, such a new claim was referred to as "duplicate" claim—a term used in the record here. *See* 20 C.F.R. § 725.309(d) (2000). To recover on such a new claim, a miner must establish a "material change in condition"—that is, he must establish (with evidence addressing his present condition) one of the elements previously decided against him on his 1990 claim. *Id.*; *see Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1993); *cf. Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 484-86 (6th Cir. 2012) (discussing similar change in condition requirement under current regulation). The ALJ found, and Leeco does not contest, that Mr. May met this requirement by proving that he now has a totally disabling pulmonary impairment. *See* 2013 ALJ Decision at 8, 32-33.

[6] The black lung program regulations, 20 C.F.R. Parts 718 and 725, were substantially revised effective January 19, 2001. *See* 65 Fed. Reg. 79920-80107 (Dec. 20, 2000). Some of the revised regulations apply to claims (such as Mr. May's) filed before that date. *See* 20 C.F.R. §§ 718.2, 725.2(c). For other rules, the previous (2000) version of the regulations continues to apply to claims filed before the effective date of the revised regulations. *See id.* Where the prior rules apply, we will cite the 2000 edition of the (cont'd . . .)

To complicate matters further, this case also involves a request for modification. A miner may request modification (based either on a mistake of fact in the prior denial or a change in the miner's condition) within one year of the prior denial of his claim. 33 U.S.C. § 922, as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 725.310(a) (2000). Modification is an expansive remedy that permits a miner to seek reconsideration of his claim (or an employer to seek reconsideration of an award) based either on new evidence or simply on a new look at previously-considered evidence. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994) (discussing expansive nature of modification). A modification request does not create a new claim, it merely continues the litigation of a claim.

A modification request must be filed with a DOL district director (formerly known as a deputy commissioner). 20 C.F.R. § 725.310(b) (2000); *see* 20 C.F.R. § 725.101(a)(16). And, under the regulations applicable to Mr. May's claim, the district director can

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Code of Federal Regulations. Otherwise, regulatory citations refer to the current (2014) edition.

either grant or deny the modification request, or forward it to an ALJ for a hearing without issuing a decision. 20 C.F.R. § 725.310(c) (2000).[7]

Any new application for BLBA benefits filed within one year of the denial of a claim is treated as a modification request. *See Consolidation Coal Co.*, 27 F.3d at 229-30; 20 C.F.R. § 725.309(d) (2000).[8] A new application filed while a previous claim or

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[7] After a year has passed from the most recent decision denying benefits (including a decision declining to modify a denial), a miner can no longer seek modification of that claim. Such miners can only receive BLBA benefits by filing subsequent claims. *See* n. 5, *supra.* And they can never receive benefits for any period before the earlier claim was denied, because any award in a subsequent claim must be consistent with the assumption that the previous denial was correct when issued and that the miner's condition changed afterwards. *See Cumberland River Coal Co.,* 690 F.3d at 482. A timely modification request, on the other hand, can (as here) result in an award of benefits finding that the previous decision(s) denying benefits were simply wrong.

[8] *See also* 20 C.F.R. § 725.309(c) (providing, more straightforwardly than its predecessor, that claims filed within one year of a denial are automatically treated as modification requests); 62 Fed. Reg. 3353 (Jan. 22, 1997) (explaining that the current language was adopted to codify the longstanding practice recognized in *Consolidation Coal*).

modification request is pending before a district director, ALJ, the Board, or a Court simply merges with the pending claim. *Id.*

**B. Statement of the Facts**

Mr. May worked in coal mining for twenty-one years, and has a seventy-two pack-year smoking history. 2013 ALJ Decision at 6. The remaining disputed medical issues are 1) whether Mr. May's COPD is legal pneumoconiosis and 2) if so, whether his disability is due to legal pneumoconiosis. In evaluating these issues, the ALJ discounted the negative opinion of Dr. Broudy and credited the positive opinions of Drs. Baker, Vaezy, Westerfield, and Wilson.[9] Leeco now relies solely on Dr. Broudy's opinion, and its arguments focus on his opinion alone.[10] Thus, we will describe only his opinion in detail, and summarily describe the other opinions.

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[9] In addition, the record contains a number of other medical reports that the ALJ did not credit. Leeco does not challenge the ALJ's rejection of those reports in this appeal. Thus, we omit them from this summary. Likewise, the remaining medical evidence (*e.g.*, x-rays and breathing tests) is not at issue, and is also omitted.

[10] Notably, Leeco does not challenge the ALJ's determination that the Baker, Vaezy, Westerfield and Wilson opinions are credible.

*1. Dr. Broudy.* Over the course of this litigation, Dr. Broudy examined Mr. May four times. Director's Exhibits (DX) 2-532, 2-492, 2-338; Employer's Exhibit (EX) 1.[11] He was also deposed in both 2000 and 2008. DX 2-153; EX 5.

After his 1998 examination, Dr. Broudy diagnosed COPD due to smoking, but no coal-workers' pneumoconiosis (CWP), noting that Mr. May exhibited a slight response to the administration of bronchodilators during a pulmonary-function test.[12] DX 2-534. He

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[11] Exhibit numbers refer to the record compiled before the ALJ.

[12] A bronchodilator is a drug used to treat COPD. *The Merck Manual* 1894. It expands the "air passages of the lung." *Dorland's Illustrated Medical Dictionary* 253 (32nd ed. 2012).

A pulmonary-function (or ventilatory) test is one measure of a miner's pulmonary capacity, and is used in determining the existence of pulmonary disability. *See* 20 C.F.R. § 718.204(b)(2)(i). The test measures three values: the $FEV_1$ (forced expiratory volume), the FVC (forced vital capacity), and the MVV (maximum voluntary ventilation). The $FEV_1$ value measures the amount of air exhaled in one second on maximum effort. It is expressed in terms of liters per second. Obtaining a FVC value requires the miner to take a deep breath and then exhale as rapidly and forcibly as possible. The FEV value is taken from the first second of the FVC exercise. The MVV value measures the maximum volume of air that can be moved by the miner's respiratory apparatus in one minute, and is expressed in liters. *See Dotson v. Peabody Coal Co.*, 846 (cont'd . . .)

concluded that Mr. May is totally disabled by his pulmonary condition, but that he has no significant disease or impairment caused by coal-mine dust exposure. *Id.*

Dr. Broudy reached essentially the same conclusions after his 1999 and 2000 examinations. DX 2-493/94; 2-339/40. After those two examinations, Dr. Broudy stated that "[i]t is medically feasible . . . to distinguish between the pulmonary disability caused by cigarette smoking as opposed to that caused by exposure to coal mine dust." DX 2-494; 2-340. He did not, however, offer any explanation of *how* smoking-related disability could be distinguished from dust-related.

On deposition in 2000, while agreeing that CWP could cause obstruction in some miners, Dr. Broudy testified that CWP usually causes a restrictive impairment, and that Mr. May has no lung restriction.[13] DX 2-161, 2-166. Dr. Broudy also offered that

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F.2d 1134, 1138 nn. 6, 7 (7th Cir. 1988); 20 C.F.R. § 718.103; Part 718, App. B.

[13] "Restrictive disorders are characterized by a reduction in lung volume." *The Merck Manual* 1855. "Obstructive disorders are characterized by a reduction in airflow." *Id.* at 1853. In lay terms, (cont'd . . .)

because Mr. May showed *some* response to bronchodilators, he did not have a dust-related condition. DX 2-163/64. Rather, Mr. May has an obstructive condition (COPD), which the doctor attributed solely to smoking. DX 2-161/62.

After examining Mr. May again in 2006, Dr. Broudy diagnosed moderately severe COPD. EX 1 at 3. He noted that Mr. May exhibited a "slight, but not significant" response to bronchodilators. EX 1 at 3. Dr. Broudy also found that Mr. May's lungs are enlarged ("hyperinflated"). EX 1 at 2. Dr. Broudy explained that coal dust causes either a restrictive impairment or a mixed restrictive and obstructive impairment; that even a mild response to bronchodilators indicates that a miner's lung disease is not dust-related; and that dust-related restriction results in "small lungs." EX 1 at 3. As a result, he attributed Mr. May's COPD solely to smoking. *Id.*

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restrictive disease makes it more difficult to inhale, while obstructive disease makes it more difficult to exhale. *See Gulf & Western Indus. v. Ling*, 176 F.3d 226, 229 n. 6 (4th Cir. 1999). Legal pneumoconiosis encompasses both restrictive and obstructive conditions. 20 C.F.R. § 718.201(a)(2).

Dr. Broudy was deposed a second time in 2008. EX 5. There, he explained that COPD "is largely due to cigarette smoking," and concluded that Mr. May's COPD was not caused by dust exposure. EX 5 at 6-7. When asked to explain why he eliminated dust exposure as a cause of Mr. May's COPD, Dr. Broudy noted that Mr. May left the mines in 1989, but continued to smoke as of 2006; that obstruction with some response to bronchodilators is characteristic of smoking-related disease, whereas dust-related disease causes a restrictive or mixed impairment with no response to bronchodilators; and Mr. May's enlarged lungs are indicative of emphysema, an obstructive condition. EX 5 at 12-13, 17. He also stated that while coal dust could cause focal emphysema,[14] that

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[14] Focal emphysema is a subtype of centriacinar emphysema "associated with inhalation of environmental dusts." *Dorland's Illustrated Medical Dictionary* 610. Centriacinar emphysema (also known as centrilobular), one of the most prevalent forms of the disease, occurs in the bronchioles (passageways) of the lungs, as opposed to the alveoli (air sacs). *See id.* The most common cause of centriacinar emphysema is smoking. *See*, *e.g.*, Takahashi M, Yamada G, Koba H, Takahasi H., *Classification of Centrilobular Emphysema Based on CT-Pathologic Correlations*, Open Resp. Med. J. 2012; 6: 155-59.

type of emphysema did not result in enlargement of the lungs. EX 5 at 27.

Dr. Broudy was asked whether he had ever diagnosed pneumoconiosis in a miner who had COPD but did have not clinical pneumoconiosis. Dr. Broudy replied that he was unable to "put a number" on this "very unlikely situation." EX 5 at 28-29.

*2. Drs. Baker, Vaezy, Westerfield and Wilson.* Mr. May was also examined by Drs. Baker, Vaezy and Westerfield (with Dr. Baker testifying on deposition), and by his treating physician, Dr. Wilson. DX 1-102, 1-182, 2-383, 12; Claimant's Exhibits 4, 6, 7. All four diagnosed clinical pneumoconiosis (a finding later discounted by the ALJ), as well as COPD caused by a combination of smoking and dust exposure (*i.e.*, legal pneumoconiosis), and attributed Mr. May's disabling impairment to these conditions.

**C. Procedural History**

Mr. May originally applied for benefits in 1990. DX 1 at 122. That first claim was ultimately denied by an ALJ in 1993 because Mr. May was not totally disabled. DX 1 at 8. Mr. May did not file an appeal to the Board nor did he seek to modify it within one year. As a result, the denial became final.

Mr. May filed a second claim for benefits in 1995. DX 1 at 237; *see* 20 C.F.R. § 725.309(d) (2000). This 1995 claim remains pending and is the subject of this appeal. Its long procedural history is summarized below.

*1. Initial Adjudication (1995-1999).* An ALJ denied the claim in 1998, this time on the basis that Mr. May failed to prove that his disability was due to pneumoconiosis. DX 2 at 595. Mr. May appealed, but the Board affirmed the denial of his claim in May 1999. DX 2 at 556.

*2. May's 1999 Modification Request.* Mr. May timely requested modification of the denial of his 1995 claim in July 1999. DX 2 at 554; *see* 20 C.F.R. § 725.310 (2000). An ALJ denied this request in July 2001. DX 2 at 8. Mr. May did not appeal this decision to the Board.

*3. May's 2001 Filing (The Second Modification Request).* In September 2001, Mr. May filed what purported to be a new application for benefits with the district director. DX 2 at 4. Because this application was filed within a year of the last ALJ decision (the July 2001 denial of modification), the application should have been treated as a request to modify that decision.

*Consolidation Coal Co.*, 27 F.3d at 229-30; *see supra* at 8-9 and n. 8. Unfortunately, the district director did not take any action on Mr. May's 2001 filing at that time.[15] As a result, the 1995 claim remained pending.

4. *May's 2006 Filing (initially treated as a third claim; ultimately merged into the pending modification request).* No further action occurred until 2006, when Mr. May again filed what purported to be a new application for benefits. DX 4. The district director apparently did not recognize that Mr. May's September 2001 modification request (and thus his 1995 claim) was still pending, and processed the 2006 filing as a new (or subsequent) claim, which he ultimately awarded.[16] DX 23, 33; *see* 20 C.F.R. § 725.309(d). Leeco then requested a hearing. DX 34.

*5. 2009 ALJ Decision*. After the hearing, ALJ Donald W. Mosser issued a decision awarding benefits. *D[arrell] M[ay] v. Leeco, Inc.*, ALJ Case No. 07-BLA-5602 (Jul. 14, 2009) (ALJ-I). ALJ Mosser

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[15] Our records do not indicate why the district director failed to act on the 2001 application.

[16] *See* n. 5, *supra*.

was apparently unaware of May's 2001 filing, and (like the district director) adjudicated the 2006 application as a refiled claim, subject to the evidence-limiting rules of 20 C.F.R. § 725.414.[17] *See* ALJ-I at 4. He then found that Mr. May was entitled to benefits, commencing May 2006 (when he filed his 2006 application). ALJ-I at 8-14; *see* 20 C.F.R. § 725.503(b). Leeco appealed to the Board.

*6. 2010 Board Decision.* In response to Leeco's appeal, the Director argued that Mr. May's 2001 filing was a still-pending request for modification on his 1995 claim, and that his 2006 claim therefore merged into that pending modification request. Because the 1995 claim was not subject to the evidence-limiting rules, the mis-adjudication of the 2006 application as a new claim was not harmless error, and remand was necessary.[18] The Board agreed

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[17] For claims filed after January 19, 2001, there are limitations on the amount of evidence a party may submit. *See* 20 C.F.R. § 725.414; *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 283-84 (4th Cir. 2007). Those limitations do not apply to claims filed before or on January 19, 2001.

[18] In addition, the period of entitlement on the 1995 claim could date back eleven years earlier than the 2006 entitlement date found by ALJ Mosser.

with the Director, *May v. Leeco, Inc.*, BRB No. 09-767 BLA (Aug. 25, 2010) (Board-I), and remanded the case for consideration of the 2001 application as a request for modification on the 1995 claim. Board-I at 4-5.

*7. 2013 ALJ Decision.* Because ALJ Mosser had retired, the case was reassigned on remand to ALJ Alice M. Craft, who awarded benefits. *May v. Leeco, Inc.*, ALJ Case No. 07-BLA-5602 (Feb. 23, 2013) (ALJ-II). After crediting Mr. May with twenty-one years of coal-mine employment, she found (based on Leeco's concession and her own review of the medical evidence) that Mr. May has a totally disabling pulmonary impairment. ALJ-II at 32-33. As a result, she concluded that Mr. May had established a material change in condition on his 1995 claim, and adjudicated that claim on the merits. ALJ-II at 49; *see* 20 C.F.R. § 725.309(d) (2000); *Sharondale Corp.*, 42 F.3d at 997-98.

Turning to whether Mr. May has pneumoconiosis, ALJ Craft found that he does not have clinical pneumoconiosis based on the x-ray evidence. ALJ-II at 35-37. But she further found that he has legal pneumoconiosis based on the medical-opinion evidence. ALJ-II at 37-44. In so doing, she credited the opinions of Drs. Baker,

Vaezy, Westerfield and Wilson, who all found that Mr. May's COPD resulted from both coal-dust exposure and smoking. ALJ-II at 40-42.

In contrast, ALJ Craft rejected Dr. Broudy's conclusion that Mr. May's COPD is due solely to smoking. ALJ-II at 43-44. She explained that his views (specifically, that it is possible to distinguish between smoking-related and dust-related impairments; that coal dust will not cause a purely obstructive impairment; and that the only type of emphysema caused by coal-mine dust is focal emphysema) are contrary to DOL's program regulations or the premises underlying them. ALJ-II at 44.

Finally, ALJ Craft concluded that Mr. May's disability is due to pneumoconiosis. She found, citing *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997), that the same opinions that proved legal pneumoconiosis also established that Mr. May's pneumoconiosis was more than a *de minimis* contributor to his disability. ALJ-II at 46-47. In rejecting the negative medical opinion of Dr. Broudy (along with other evidence submitted by Leeco), the ALJ noted that "none of [Leeco's] doctors attributed [Mr. May's] impairment to coal dust, even in part," and that there was no

basis "for concluding that any of their judgments . . . did not rest upon their disagreement with my finding that [Mr. May] has legal pneumoconiosis." *Id.*

ALJ Craft ultimately concluded that Mr. May had been totally disabled by pneumoconiosis since 1995 (*i.e.,* that the prior ALJ denials of his 1995 claim were based on a mistake of fact). ALJ-II at 47. Accordingly, she awarded benefits as of Mr. May's 1995 filing date. ALJ-II at 49-50; *see* 20 C.F.R. § 725.503(b).

*8. 2014 Board Decision.* Leeco appealed, challenging ALJ Craft's legal-pneumoconiosis and disability-causation findings, but the Board affirmed her decision. *May v. Leeco, Inc.*, BRB No. 12-284 BLA (Mar. 26, 2014) (BRB-II). Noting that Leeco did not challenge her evaluation of any other medical opinion, the Board rejected Leeco's argument that ALJ Craft erred in discounting Dr. Broudy's. BRB-II at 5-7. The Board specifically affirmed her findings that Broudy's views on whether a smoking-related impairment could be distinguished from a dust-related one, and that coal-mine dust will not cause obstruction are contrary to the

regulations or their underlying premises.[19] BRB-II at 6. Finally, the Board affirmed ALJ Craft's discounting of Dr. Broudy's disability-causation determination, as the doctor incorrectly assumed that Mr. May does not have pneumoconiosis. BRB-II at 7. Leeco then petitioned the Court for review.

## SUMMARY OF THE ARGUMENT

The Court should affirm the decisions of the Board and the ALJ. Contrary to Leeco's argument, the ALJ had subject-matter jurisdiction over Mr. May's 2001 modification request. The company's argument on this point is really an allegation of procedural error that it waived by not raising below. Moreover, the applicable regulations do not require an up-or-down ruling by the district director on a modification request before it is considered by an ALJ.

In addition, the ALJ correctly discounted Dr. Broudy's opinion on the issue of legal pneumoconiosis. Dr. Broudy provided no foundation for his assumptions that coal-mine dust will not cause

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[19] The Board declined to address the ALJ's finding regarding Dr. Broudy's focal-emphysema theory.

COPD; that dust exposure will only cause focal emphysema (and no other form of the disease); and that partial reversibility of an impairment upon administration of bronchodilators rules out coal-mine dust as an etiology of a miner's COPD. Thus, his conclusion that Mr. May's COPD is necessarily due to smoking alone is invalid and not credible. As Leeco does not challenge the ALJ's reliance on four other doctors who linked Mr. May's COPD to dust exposure, the ALJ properly found that Mr. May has legal pneumoconiosis.

Finally, the ALJ correctly found that Mr. May's totally disabling pulmonary impairment is due to pneumoconiosis. It is uncontested that Mr. May's disability was caused solely by his COPD. Since the ALJ properly found that the COPD is legal pneumoconiosis, Mr. May's disability is necessarily due to pneumoconiosis. The ALJ's citation of an incorrect legal standard on this issue was harmless error—Mr. May would prevail regardless of the standard applied.

## ARGUMENT

### A. Standard of Review

This case presents both factual and legal questions. On factual issues, the Court "reviews the ALJ's decision . . . to

determine whether it was supported by substantial evidence," and her "findings are conclusive if they are supported by substantial evidence and accord with the applicable law." *Central Ohio Coal*, 762 F.3d at 488 (internal quotations and citations omitted). Moreover, "[the Court] does not reweigh the evidence or substitute [its] judgment for that of the ALJ, . . . even though [it] would have taken a different view of the evidence were [it] the trier of facts." *Big Branch Coal Co. v. Ogle*, 737 F.3d 1063, 1069 (6th Cir. 2013). The Court, however, "review[s] . . . legal conclusions *de novo*." *Central Ohio Coal*, 762 F.3d at 488 (internal quotations and citations omitted).

**B. ALJ Craft properly considered Mr. May's September 2001 modification request.**

Leeco alleges that ALJ Craft could not properly consider Mr. May's September 2001 modification request. According to the company, DOL's district director was required to grant or deny the modification request before ALJ Craft could consider it. Thus, when the Board remanded the case for consideration of the modification request, it should have remanded the case to the district director rather than the ALJ, who was not empowered to

consider it. This argument is wholly without merit.

Leeco attempts to cloak its argument in the mantle of subject-matter jurisdiction (referring to a tribunal's authority to decide particular types of disputes). Subject-matter jurisdiction, of course, is "neither forfeitable nor waivable." *In re Lindsey*, 726 F.3d 857, 858 (6th Cir. 2013). But any contention that an ALJ cannot resolve modification requests is simply untenable. ALJs have "full power and authority to hear and determine all questions in respect of [a] claim." 33 U.S.C. § 919(a), as incorporated by 30 U.S.C. § 932(a); *see* 33 U.S.C. § 919(d), as incorporated; *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 428 & n. 2 (6th Cir. 1998). This plainly encompasses jurisdiction over modification requests. *See Robbins*, 146 F.3d at 428.

The real gravamen of Leeco's argument is not a jurisdictional defect, but an alleged procedural one—that the Board did not follow the correct procedure when it remanded the case to the ALJ rather than the district director. Leeco's contention, however, fares no better as a procedural argument.

A modification request must be filed with the district director, even when an ALJ has previously decided the claim. 20 C.F.R.

§ 725.310(b) (2000); *Saginaw Min. Co. v. Mazzuli*, 818 F.2d 1278, 1283 (6th Cir. 1987). And Mr. May did precisely that, filing his September 2001 modification request with the district director. Leeco, citing the current modification regulation, 20 C.F.R. § 725.310, nevertheless argues that because the district director *did not grant or deny* the 2001 modification request, ALJ Craft could not adjudicate the request on remand from the Board.

Stripped of the jurisdictional veneer, Leeco's argument is not properly before the Court. The company has waived any argument that proper procedure was not followed here by failing to raise the issue before either the ALJ or the Board. *See Arch on the Green, Inc., v. Groves*, 761 F.3d 594, 602 (6th Cir. 2014). Leeco had the opportunity to raise the issue before the Board when the Director originally moved for remand, before ALJ Craft on remand, and again before the Board on appeal from her decision, but failed to do so. Raising it now before the Court is too late. *See id.*

Even if it had not waived the issue, Leeco's argument has no merit. Mr. May's claim is governed by the prior version of the modification regulation, 20 C.F.R. § 725.310 (2000), not the current version cited by the company. 20 C.F.R. § 725.2(c); *see supra* at n.

6. And under the older version, the district director did not have to give an up-or-down ruling on a modification request before it could be considered by an ALJ. Rather, the district director could "issue a proposed decision and order [on the request] . . ., *forward the claim [to an ALJ] for a hearing* . . ., or, if appropriate, deny the claim by reason of abandonment . . . ." 20 C.F.R. § 725.310(c) (2000) (emphasis added; internal cross-references omitted); *see Saginaw Min.*, 818 F.2d at 1282 (a district director "has *three choices* in a modification proceeding, . . . [including] forward[ing] the claim to an ALJ for a hearing") (emphasis added). Thus, Leeco's argument that ALJ Craft *could not* consider Mr. May's 2001 modification request here because the district director had not granted or denied the request is incorrect. And, by the same token, the Board was not required to remand the case to the district director rather than to the ALJ.

In any event, remand to the district director would have been futile. This Court has held (under the version of Section 725.310 applicable to this claim) that where modification of a prior ALJ decision is requested, the district director is precluded from reconsidering the ALJ's findings. *Youghiogheny and Ohio Coal Co.*

*v. Milliken*, 200 F.3d 942, 950 (6th Cir. 1999) (citation omitted). Thus, where those findings are at issue on modification (*i.e.*, where modification is sought based on a mistake in fact—the ground ultimately relied on by ALJ Craft), the district director has to forward the request to an ALJ without granting or denying it. Such would have been the case here even had the Board remanded the case to the district director. In short, there was no procedural error in ALJ Craft's consideration of Mr. May's 2001 modification request. Leeco's argument to the contrary should be rejected.

**C. ALJ Craft properly discounted Dr. Broudy's opinion on the question of whether Mr. May has legal pneumoconiosis.**

ALJ Craft found that Mr. May's COPD arose out of his coal-mine employment and, thus, is legal pneumoconiosis based on the Baker, Vaezy, Westerfield and Wilson opinions. She also discounted Dr. Broudy's negative opinion. Leeco does not challenge the ALJ's reliance on Baker, Vaezy, Westerfield and Wilson, but contends she erred in discounting Broudy. In fact, ALJ Craft properly found that Broudy's opinion is not credible, as he failed to offer a valid explanation for his belief that he could distinguish between smoking-related impairments and those caused by coal-

mine dust.

As an initial matter, Leeco complains that ALJ Craft incorrectly found that Dr. Broudy is "hostile to the Act." A medical opinion may be discredited as "hostile" where a doctor holds beliefs—such as that simple pneumoconiosis cannot cause disability—that are inimical to the fundamental premises of the BLBA, provided those beliefs affected his conclusions. *See*, *e.g.*, *Wetherill v. Director, OWCP*, 812 F.2d 376, 382 (7th Cir. 1987). As the Board pointed out, however, the ALJ did not find Dr. Broudy's opinion "hostile." Instead, she discounted his opinion because his conclusion lacked foundation or credibility.

Leeco further suggests that ALJ Craft downgraded Broudy's opinion merely because he stated that he could distinguish between smoking-related COPD and dust-related COPD. While her decision is inartfully phrased on this point, a fair reading of it is that Broudy's opinion is not credible because he provided no viable foundation for his assumption. This defect is particularly damning, as the ALJ found, in light of DOL's conclusion in the regulatory preamble that the medical literature demonstrates that the effects of smoking and dust exposure on COPD are similar and additive.

65 Fed. Reg. 79940, 79943. Dr. Broudy, on the other hand, cited no medical literature to support his assumption and, as discussed below, the justifications he did provide are not credible.[20] Thus, ALJ Craft reasonably discounted Broudy's assertion that he could validly distinguish smoking-related COPD from dust-related disease. *See Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 490 (7th Cir. 2004) (DOL's conclusions on matters of scientific fact accepted "unless the mine operators produced the type and quality of medical evidence that would invalidate a regulation").

As for the specific reasons Dr. Broudy offered for attributing Mr. May's COPD to smoking alone, they simply do not withstand scrutiny. First, as the ALJ noted, Dr. Broudy repeatedly indicated that Mr. May has an obstructive impairment, and that coal-mine dust causes a purely restrictive or mixed restrictive and obstructive impairment; as a result, he attributed Mr. May's purely obstructive impairment solely to cigarette smoking. *See* DX 2-161/2, 2-166; EX 1 at 3; 5 at 6-7. The regulatory definition of legal

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[20] And Leeco notably does not contend that the preamble is wrong. Rather, it attempts (but fails) to show that Broudy's opinion is consistent with the preamble.

pneumoconiosis makes plain, however, that coal-mine dust can cause obstructive impairments, such as COPD. 20 C.F.R. § 718.201(a)(2) (legal pneumoconiosis includes obstructive lung disease caused by coal dust). And this definition "render[s] invalid . . . medical opinions which categorically exclude obstructive lung disorders from occupationally-related pathologies." 65 Fed. Reg. 79938; *see Cumberland River Coal Co.*, 690 F.3d at 487-88 (affirming ALJ's downgrading of medical opinion that dust-related impairments must have restrictive component). Because Dr. Broudy's opinion contravened the regulation, ALJ Craft appropriately discounted it. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802 (6th Cir. 2012) (affirming ALJ's rejection of physician opinion that "was at odds with the regulations").

Second, Dr. Broudy found that Mr. May has some variety of emphysema, but did not identify the type other than to specify that it is not focal emphysema.[21] EX 5 at 17. Because, according to the doctor, coal-mine dust will only cause focal emphysema, Mr. May's disease could not have been caused by his work in the mines. EX 5

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[21] *See* note 14, *supra*.

at 27. Like his view on dust and COPD, Dr. Broudy's focal-emphysema theory is without foundation. As the ALJ found, the regulatory preamble indicates that dust exposure can cause emphysema.[22] And Dr. Broudy offered no basis for his conclusion that dust exposure did not cause, contribute to or aggravate Mr.

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[22] The preamble contains DOL's evaluation of the scientific evidence on the etiology of COPD, including both chronic bronchitis and emphysema. 65 Fed. Reg. 79937-43; *Arch on the Green*, 761 F.3d at 601 (citation omitted); *see generally Peabody Coal Co. v. Director, OWCP*, 746 F.3d 1119, 1121-23 (9th Cir. 2014). Leeco does not, and cannot, contend that the ALJ was not allowed to consult the preamble. *A & E Coal Co.*, 694 F.3d at 801.

In the preamble, DOL relied on the National Institute of Occupation Safety and Health's (NIOSH's) *Criteria for a Recommended Standard: Occupational Exposure to Respirable Coal Mine Dus*t (1995) (available on the Internet at http://www.cdc.gov/niosh/docs/95-106/) in concluding that coal-mine dust can cause emphysema. NIOSH is DOL's scientific advisor on medical issues under the BLBA. 30 U.S.C. § 902(f)(1)(D). In 2011, NIOSH released Current Intelligence Bulletin 64,*Coal Mine Dust Exposure and Associated Health Outcomes, A Review of Information Published Since 1995* (2011)(available on the Internet at http://www.cdc.gov.niosh/docs/2011-172/). One of the main conclusions NIOSH drew from its review of the more recent medical literature was that the "new findings strengthen [the] conclusions and recommendations" it had reached in the original 1995 publication. *Id.* at 5. Among other findings, the Bulletin confirms that coal-mine dust can cause or aggravate COPD (including emphysema), and that dust-exposure and smoking have similar effects. *Id.* at 23-24.

May's emphysema other than his essentially tautological statement that coal-mine dust causes only focal emphysema (*i.e.*, centriacinar emphysema caused by dust). Thus, given both DOL's conclusion in the preamble and Dr. Broudy's failure to explain his conclusions, ALJ Craft properly discounted his opinion. *See A & E Coal Co.*, 694 F.3d at 801; *Lango v. Director, OWCP*, 104 F.3d 573, 578 (3d Cir. 1997) (ALJ may discount unexplained opinion); *see generally Big Branch Resources, Inc.*, 737 F.3d at 1072 (whether physician's report is adequately reasoned and explained is "a credibility decision we have expressly left to the ALJ") (internal quotations and citation omitted)

Finally, although ALJ Craft did not address this point, Dr. Broudy's view (*see* DX 2-163/64; EX 1 at 3;EX 5 at 12-13) that *any* reversibility in a miner's impairment upon the administration of bronchodilators eliminates coal-mine dust as a cause of his lung disease is wholly lacking in foundation. Dr. Broudy attributed Mr. May's impairment to smoking because 1) coal-mine dust causes a "fixed" impairment and 2) Mr. May showed a slight response to bronchodilators (*i.e.*, his impairment is not wholly "fixed"). But the fact that a miner still has a residual impairment even after the

administration of bronchodilators—and, according to Dr. Broudy, Mr. May's impairment was almost entirely irreversible—refutes the contention that he does not have a fixed impairment.[23] *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (affirming ALJ's rejection of opinion ruling out dust exposure based on responsiveness to bronchodilators); *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (affirming ALJ's reliance on medical opinions attributing miner's impairment to coal-mine dust based on residual impairment after bronchodilators).

In support of Dr. Broudy, Leeco attempts to parse his opinion and the preamble so as to create the semantic illusion that he did not either dispute that the coal-mine dust could cause obstruction

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[23] Likewise, Dr. Broudy's reliance on the fact that Mr. May had left the mines in 1989, but continued to smoke until 2006, EX 5 at 11, may also undercut his conclusion. To the extent that this reliance indicates that Dr. Broudy assumed that pneumoconiosis could not manifest or progress after the cessation of coal-mine employment, his opinion is not valid. *See* 20 C.F.R. § 718.201(c) (recognizing that pneumoconiosis may be a latent and progressive disease); *Cumberland River Coal Co.*, 690 F.3d at 477-78 (affirming ALJ's rejection of opinion ruling out dust exposure as cause of lung disease based on length of time since miner's last dust exposure).

or foreclose the possibility that it can cause some type of emphysema other than focal emphysema. Even a cursory review of his opinion, however, belies Leeco's suggestion.

While Broudy paid lip service to the notion that coal-mine dust can cause obstructive lung disease, he repeatedly stated that dust-related pulmonary impairments necessarily involve some element of restriction. EX 1 at 2; EX 5 at 12-13. Moreover, his rigid adherence to this view is exemplified by his testimony that he rarely, and possibly never, diagnosed legal pneumoconiosis in miners suffering from purely obstructive impairments. EX 5 at 28-29. It is precisely this sort of categorical exclusion of coal-mine dust as a possible cause of COPD that Section 718.201 now "render[s] invalid." *See* 65 Fed. Reg. 79938; *Cumberland River Coal Co.*, 690 F.3d at 487-88. Likewise, Dr. Broudy specifically stated that coal-mine dust only causes focal emphysema, and categorically rejected any dust contribution to Mr. May's emphysema. *See* EX 5 at 27. *Cf.* 65 Fed. Reg. at 79939, 79941-42 (discussing link between dust exposure and emphysema); *Peabody Coal*, 746 F.3d at 1121-23 (same). The ALJ's decision to discredit Dr. Broudy's analysis of the legal pneumoconiosis issue is supported by

substantial evidence and falls comfortably within her discretion as fact-finder.[24]

**D. ALJ Craft's application of the *Peabody Coal v. Smith* disability-causation standard was harmless error.**

Finally, Leeco contends that the ALJ erred in applying the disability-causation standard enunciated in *Peabody Coal Co. v. Smith*, 127 F.3d 505, 506-07 (6th Cir. 1997), which held that a miner need only establish that pneumoconiosis was more than a de minimis cause of disability. Instead, Leeco contends that the Court should remand the case for the ALJ to apply the standard set forth in *Arch on the Green*, 761 F.3d at 600, which held that pneumoconiosis must be a substantially contributing cause of disability—a potentially higher standard than the one announced in *Peabody Coal*.

While the ALJ did cite the wrong standard, it does not matter.

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[24] Assuming the Court affirms the ALJ's legal-pneumoconiosis finding, Dr. Broudy has no credibility on disability-causation (regardless of the standard), as he incorrectly believed that Mr. May does not have pneumoconiosis. *See Big Branch Coal Co.*, 737 F.3d at 1074; *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233 (6th Cir. 1993), *vacated on other grounds sub nom. Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994).

Mr. May suffers from only one pulmonary disease or condition—COPD. It is now uncontested that this disease is the sole cause of his totally disabling pulmonary impairment. If (as ALJ Craft correctly found) his COPD is legal pneumoconiosis, then Mr. May has established disability causation as a matter of law, even under the *Arch on the Green* standard.

Prior to the adoption of the current regulations, the Court held that a miner could prove disability causation by showing that "pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment." *Peabody Coal*, 127 F.3d at 507. In other words, he needed only "to prove more than a de minimis or infinitesimal contribution by pneumoconiosis to his total disability." *Id.*

The current regulations, however, require that pneumoconiosis be "a substantially contributing cause of the miner's totally disabling . . . pulmonary impairment." 20 C.F.R. § 718.204(c)(1). Based on Section 718.204(c)(1), the Court recently overruled *Peabody Coal*. *Arch on the Green*, 761 F.3d at 600. The Court held that, to the extent that its "more than de minimis" standard permitted recovery by showing that pneumoconiosis was

less than a substantially contributing cause of disability, *Peabody Coal* is contrary to the current regulations. *Id.*

In *Arch on the Green*, the miner had legal pneumoconiosis (COPD caused by dust exposure), but also suffered from several other pulmonary diseases, including lung cancer. The Court vacated an award of benefits, and remanded the case for the ALJ to determine whether the miner's COPD was a "substantially contributing cause" in light of the other lung diseases he had.[25]

Because the ALJ here cited and applied the *Peabody Coal* standard, the Court could vacate her decision and remand the case. In our view, however, the result of any such remand is foreordained

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[25]*Arch on the Green* did not discuss the parameters of the "substantially contributing cause" standard. The regulations, however, provide that

> [p]neumoconiosis is a 'substantially contributing cause' of the miner's disability if it: (i) Has a material adverse effect on the miner's . . . pulmonary condition; or (ii) Materially worsens a totally disabling . . . pulmonary impairment which is caused by a [condition] unrelated to coal mine employment.

20 C.F.R. § 718.204(c)(1)(i), (ii). When pneumoconiosis is the sole cause of a miner's disability, this standard is plainly satisfied.

because (assuming the Court affirms the ALJ's legal pneumoconiosis finding) the ALJ would have to reach the same result under the *Arch on the Green* standard. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249 (6th Cir. 1995) (remand unnecessary where result foreordained). Instead, the Court should hold that Mr. May established disability causation under the *Arch on the Green* standard as a matter of law.

Every physician agreed that Mr. May has COPD. Moreover, unlike in *Arch on the Green*, there is no evidence (and Leeco does not argue) that Mr. May has any pulmonary disease other than COPD which could have caused his disability. Thus, Mr. May's COPD is necessarily the *sole* cause of his totally disabling pulmonary impairment. Because, as the ALJ found, Mr. May's COPD arose out of his coal-mine employment,[26] then that disease (his sole lung disease) was necessarily a substantially contributing

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[26] Notably, Leeco does not argue that ALJ Craft employed an incorrect legal standard on the question of whether Mr. May has legal pneumoconiosis. Nor could it maintain such an argument, as the ALJ properly found that Mr. May need only show that his COPD was "significantly related to, or substantially aggravated by" his coal-mine employment. *See* 20 C.F.R. § 718.201(b).

cause of his totally disabling pulmonary impairment. Tellingly, Leeco offers no argument as to how the outcome here would have differed if ALJ Craft had applied the *Arch on the Green* standard. The Court should therefore decline the company's request for a pointless remand, and hold that Mr. May established disability causation under the correct legal standard as a matter of law.

## CONCLUSION

The Director requests that the Court affirm the decisions of the ALJ and the Board awarding Mr. May's claim.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contain contains 7,837 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in fourteen-point Bookman Old Style font.

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## CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2014, an electronic copy of this brief was served through the CM/ECF system on the following:

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# ADDENDUM

**20 C.F.R. § 725.310(a)-(c) (2000)**

**§ 725.310 Modification of awards and denials.**

(a) Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

(b) Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate. Additional evidence may be submitted by any party or requested by the deputy commissioner. Modification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board.

(c) At the conclusion of modification proceedings the deputy commissioner may issue a proposed decision and order (§ 725.418), forward the claim for a hearing (§ 725.421) or, if appropriate, deny the claim by reason of abandonment (§ 725.409).

* * *