U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 23-0325 BLA

STANLEY R. SALVA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUARTO MINING COMPANY	)	
	)	**NOT-PUBLISHED**
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	DATE ISSUED: 09/05/2024
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

William S. Mattingly (Jackson Kelly PLLC)), Lexington, Kentucky, for Employer.[1]

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Modification (Decision and Order on Modification) (2021-BLA-05535) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of a subsequent claim.[2]

Claimant filed his subsequent claim on August 23, 2016. Director's Exhibit 3. In a Decision and Order Denying Benefits dated August 7, 2020, the ALJ denied benefits because Claimant failed to establish pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2), (c); Director's Exhibit 52. Claimant timely requested modification of the

[1] Employer and its Carrier were previously represented by Kara L. Jones (Feirich/Mager/Green/Ryan), of Carbondale, Illinois, who filed their Petition for Review, Supporting Brief, and Reply Brief. After briefing, but prior to a decision in the case, R. James Giacone, II (Feirich/Mager/Green/Ryan), filed an Entry of Appearance and Notice of Substitution of Counsel for Employer and its Carrier. Subsequently, on March 1, 2024, William S. Mattingly of Jackson Kelly PLLC in Lexington, Kentucky, filed a Notice of Appearance as counsel for Employer.

[2] This is Claimant's second claim for benefits. The district director noted Claimant's prior claim, filed on April 21, 1989, became final on July 20, 1989. Director's Exhibit 41 at 7. The record from that claim was sent to the Federal Records Center on April 27, 1992, and eventually destroyed. Director's Exhibit 4. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement. . . has changed since the date upon which the order denying the prior claim becomes final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The ALJ proceeded as if Claimant did not establish disability causation in his prior claim and thus required him to submit evidence establishing this element to obtain review of the merits of his current claim. Decision and Order on Modification at 39.

denial on November 9, 2020. Director's Exhibit 54. Because Claimant submitted no new evidence, the district director transferred the case to the Office of Administrative Law Judges (OALJ), which again assigned it to the ALJ. Director's Exhibits 58, 59. Claimant subsequently submitted new evidence consisting of Dr. Go's April 27, 2021 medical opinion and curriculum vitae. Claimant's Exhibits 1, 2. Employer submitted new evidence consisting of the medical opinions of Drs. Rosenberg, Fino, and Zaldivar. Employer's Exhibits 14-17.

In a Decision and Order on Modification dated May 10, 2023, the subject of the current appeal, the ALJ accepted the parties' stipulation that Claimant has 13.3 years of coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Considering entitlement under 20 C.F.R. Part 718, the ALJ found that while Claimant did not establish clinical pneumoconiosis, he established legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). Consequently, he found Claimant established modification based on a change in conditions. 20 C.F.R. §725.310. He further found granting modification would render justice under the Act. Thus, he awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis and disability causation. It also argues he erred in finding Claimant established modification based on a change in conditions and that granting modification would render justice under the Act.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply brief, reiterating its contentions.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 13.3 years of coal mine employment and total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 6, 22-31.

accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Modification

In considering whether to grant modification of the prior denial of Claimant's subsequent claim, the ALJ was required to determine whether the denial contained a mistake in a determination of fact or whether the evidence submitted on modification, along with the evidence previously submitted in this subsequent claim, establishes a change in an applicable condition of entitlement. 20 C.F.R. §§725.309(c), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). In reviewing the record on modification, the ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Thus, the ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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Without the benefit of the statutory presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7.

'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

Medical Opinions

The ALJ considered the medical opinions of Drs. Saludes, Go, Rosenberg, Fino, and Zaldivar. Dr. Saludes opined Claimant has legal pneumoconiosis in the form of obstructive lung disease related to coal mine dust exposure and cigarette smoking. Director's Exhibits 16, 23. Similarly, Dr. Go opined Claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) related to coal mine dust exposure and cigarette smoking. Claimant's Exhibit 1. In contrast, Dr. Rosenberg opined Claimant does not have legal pneumoconiosis but has emphysema related to smoking, and unrelated to coal mine dust exposure. Employer's Exhibits 10, 11, 17. Dr. Fino opined Claimant does not have legal pneumoconiosis but has COPD with emphysema related to smoking, and unrelated to coal mine dust exposure. Employer's Exhibits 14, 15, 18. Finally, Dr. Zaldivar opined Claimant does not have legal pneumoconiosis but instead has asthma related to cigarette smoking and unrelated to coal mine dust exposure.[6] Employer's Exhibits 7-9, 16.

The ALJ found Drs. Saludes's and Go's opinions well-reasoned, documented, and entitled to great weight. Decision and Order at 20-21. Conversely, he found Drs. Rosenberg's, Fino's, and Zaldivar's opinions not reasoned and entitled to no weight. *Id*. He thus found the medical opinion evidence establishes the existence of legal pneumoconiosis based on Drs. Saludes's and Go's opinions. *Id*. at 21.

We initially reject Employer's argument that the ALJ erred in relying on the preamble to the 2001 revised regulations as a basis for weighing the medical opinions because the preamble "does not have the force of law and is not legally binding." Employer's Brief at 11-12, 15.

Federal circuit courts have consistently held that an ALJ may permissibly evaluate expert opinions in conjunction with the Department of Labor's (DOL's) resolution of questions of scientific fact relevant to the elements of entitlement. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Energy West Mining Co. v. Estate*

[6] Dr. Zaldivar also testified Claimant has "some centriacinar emphysema" and "was a smoker." Employer's Exhibit 9 at 20, 40, 45-46. He further opined Claimant's coal mine dust exposure is not "a substantially contributing cause" of his emphysema. *Id*. at 20-21.

of Blackburn, 857 F.3d 817, 830-31 (10th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). Here, the ALJ permissibly evaluated the medical opinions in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *See Sterling*, 762 F.3d at 491; *Adams*, 694 F.3d at 801-02; Decision and Order on Modification at 19-21.

Moreover, his references to the preamble did not, as Employer suggests, result in substituting his own opinion for that of the physicians; rather, as discussed below, he properly evaluated whether the physicians credibly explained their opinions that Claimant does or does not have legal pneumoconiosis. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Employer's Brief at 10-12.

We further reject Employer's argument that the ALJ erred in crediting Drs. Go's and Saludes's opinions. Employer's Brief at 6-10.

Dr. Go conducted a comprehensive review of all of the medical evidence of record, including Claimant's social, medical, and work histories; chest x-ray interpretations; pulmonary function studies; arterial blood gas studies; computed tomography (CT) scans; treatment records; and the medical reports of Drs. Saludes, Rosenberg, Fino, and Zaldivar. Claimant's Exhibit 1. He opined Claimant suffers from COPD, emphysema, and chronic bronchitis due to his coal mine dust exposure and cigarette smoking.[7] *Id.* In addition, he

[7] Employer argues the ALJ erred in crediting Dr. Go's opinion because, although the doctor relied on a smoking history of twenty to thirty-nine pack-years, he failed to specify the exact length of Claimant's smoking history. Employer's Brief at 9. After reviewing all the medical records in this case, Dr. Go relied on the documented smoking histories the examining physicians reported. Claimant's Exhibit 1 at 2. He observed that Dr. Saludes reported a smoking history of one pack of cigarettes per day for thirty-nine years, Dr. Fino noted a history of one-half of a pack per day for forty years, and Dr. Lenkey indicated a history of one-half to one pack per day for forty years. *Id.* Given these various smoking histories, Dr. Go stated Claimant "has a variably reported smoking history ranging from 20 to 39 pack-years." *Id.* at 7. While Dr. Go attributed Claimant's legal pneumoconiosis to his "13.3 years of coal mine employment," he opined Claimant's "20 to 39 pack-year cigarette smoking history" was a significant cause of his impairment. *Id.* As Dr. Go acknowledged Claimant had a significant smoking history, Employer has not shown the ALJ erred in crediting his opinion that Claimant also has a coal dust-related impairment. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is

explained that Claimant's documented symptoms of chronic productive cough, dyspnea, and wheezing are indicative of chronic bronchitis and obstructive lung disease. *Id*. at 7.

Supporting his opinion with objective test results, Dr. Go observed Claimant's pulmonary function testing demonstrated air trapping, the diffusion capacity tests produced reduced results, and the chest x-ray showed abnormalities consistent with emphysema. Claimant's Exhibit 1 at 7. Further, he cited scientific studies and medical literature demonstrating that, in cases such as Claimant's, "significant coal mine dust can be an important contributor to clinically significant COPD." *Id*. Because Dr. Go's opinion is based on Claimant's symptoms, employment and medical histories, medical literature, and the objective testing and medical evidence he reviewed, the ALJ permissibly found the doctor's opinion reasoned. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185; *see also Looney*, 678 F.3d at 310; Decision and Order on Modification at 20-21.

We also reject Employer's argument that Dr. Go's opinion that Claimant's "disease is *consistent with* legal pneumoconiosis" does not satisfy the regulatory definition of legal pneumoconiosis because it lacks certainty. Employer's Brief at 10; Claimant's Exhibit 1 at 7 (emphasis added). Contrary to Employer's argument, Dr. Go unequivocally opined, "to a reasonable degree of medical certainty, that [Claimant] acquired legal pneumoconiosis." Claimant's Exhibit 1 at 6; *see* 20 C.F.R. §718.201(a)(2).

In addition, we reject Employer's argument that Dr. Saludes "does not know what caused [Claimant's] COPD." Employer's Brief at 7. Contrary to Employer's argument, Dr. Saludes attributed his "significant COPD" to the combined effects of coal mine dust exposure and smoking. Director's Exhibit 23. He stated Claimant's coal mine dust exposure and smoking history are "risk factors that [led] to the development of his COPD." Director's Exhibit 23.

Moreover, Dr. Saludes's inability to identify the precise percentage that Claimant's coal mine dust exposure contributed to his COPD does not render his opinion unreasoned as "doctors need not make such particularized findings" in determining the existence of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (because coal dust need not be the sole cause of the miner's respiratory or pulmonary

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granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility and the Board will not disturb his or her findings unless they are inherently unreasonable).

impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them). Rather, a medical opinion can establish legal pneumoconiosis when the physician credibly diagnoses a lung disease or impairment that arose at least in part out of the miner's coal mine dust exposure. *See Looney*, 678 F.3d at 309-11; Decision and Order on Modification at 15.

Given Dr. Saludes's consideration of Claimant's objective testing and symptoms, as well as his own observations and other data supporting his conclusion,[8] the ALJ permissibly found the doctor's opinion reasoned and documented. *See Banks*, 690 F.3d at 482-83; *Napier*, 301 F.3d at 713-14; Decision and Order on Modification at 14-15, 20.

We further reject Employer's argument that the ALJ provided invalid reasons for finding Drs. Rosenberg's, Fino's, and Zaldivar's opinions not credible. Employer's Brief at 5-28. Drs. Rosenberg and Fino both eliminated coal mine dust exposure as a contributing cause of Claimant's obstructive impairment. Specifically, Dr. Rosenberg excluded coal mine dust exposure as a contributing factor to Claimant's COPD because he "did not [seek] medical attention for [his] respiratory complaints" after leaving coal mine employment. Employer's Exhibit 10 at 12. Dr. Fino attributed Claimant's COPD and emphysema entirely to smoking because he "stopped working in 1989" and "continued to smoke for another [fourteen] years." Employer's Exhibit 14 at 5.

The ALJ permissibly found Drs. Rosenberg's and Fino's reasoning inconsistent with the regulations' recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Young*, 947 F.3d at 407; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); *Beeler*, 521 F.3d at 726; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); Decision and Order on Modification at 20.

The ALJ also permissibly found their opinions unpersuasive because they did not adequately explain why Claimant's coal mine dust exposure, along with his smoking history, did not also contribute to his obstructive impairment. *See* 20 C.F.R. §718.201(b);

[8] Dr. Saludes relied on Claimant's symptoms, physical examination, pulmonary function test demonstrating a "moderate airflow obstruction that was not completely reversible," and arterial blood gas study illustrating "mild resting hypoxemia and mild hypercapnia post-exercise." Director's Exhibit 16.

Napier, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017) (ALJ permissibly discredited medical opinions that "solely focused on smoking" as a cause of obstruction and "nowhere addressed why coal dust could not have been an additional cause"); Decision and Order on Modification at 20-21.

Further, Dr. Rosenberg excluded Claimant's coal mine dust exposure as a contributing factor to his obstructive impairment because his pulmonary function testing showed a markedly reduced FEV_1/FVC ratio, which he opined is not a pattern of impairment consistent with legal pneumoconiosis. Decision and Order on Modification at 20; Employer's Exhibits 10 at 5-9; 17 at 1-5. The ALJ permissibly discredited Dr. Rosenberg's opinion because it is based on premises inconsistent with studies the DOL cited in the preamble indicating that coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV_1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Sterling*, 762 F.3d at 491-92; *see also Stallard*, 876 F.3d at 671-72; *Obush*, 650 F.3d at 257; Decision and Order on Modification at 20.

In addition, Dr. Fino excluded Claimant's coal mine dust exposure as a contributing factor to his COPD because he does not have an "above average loss" of FEV_1 on pulmonary function testing. Employer's Exhibit 14 at 5. The ALJ permissibly found Dr. Fino's opinion unpersuasive because, in opining that "the key" is "whether a miner has an above average loss of FEV_1 due to coal mine dust," Dr. Fino failed to explain his conclusion that Claimant's loss of FEV_1 is not above average and relied on general statistics and not Claimant's specific condition. *See Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014); *Beeler*, 521 F.3d at 726; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); 65 Fed. Reg. at 79,941 (statistical averaging can hide the effect of coal mine dust exposure in individual miners); Decision and Order on Modification at 21.

Finally, Dr. Zaldivar stated coal mine dust exposure does not cause asthma because "[s]ilica and coal are not allergenic." Employer's Exhibit 9 at 16, 23, 27, 39-40, 43. He further stated "[c]oal dust doesn't cause, contribute or aggravate asthma." *Id*. at 37. The ALJ correctly noted, however, that the DOL recognizes in the preamble that COPD includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma. Decision and Order on Modification at 20 (citing 65 Fed. Reg. at 79,939). The preamble further sets forth that COPD may be caused by coal mine dust exposure. 65 Fed. Reg. at 79,939. Because Dr. Zaldivar denied that coal mine dust exposure can cause asthma, the ALJ permissibly discredited his opinion as inconsistent with the DOL's recognition that asthma may constitute legal pneumoconiosis if it is

significantly related to or substantially aggravated by coal mine dust exposure. *See Helen Mining Co. v. Elliott*, 859 F.3d 226, 239-40 (3d Cir. 2017); *Looney*, 678 F.3d at 314-16; 65 Fed. Reg. at 79,937-39; Decision and Order on Modification at 16, 19-20.

We agree, however, with Employer's argument that the ALJ may have erred in failing to consider Dr. Lenkey's opinion that was submitted as part of Claimant's treatment records. Employer's Brief at 25-26, 28. Dr. Lenkey noted Claimant had over fifteen years of coal mine employment and smoked for forty years. Employer's Exhibit 13 at 23. He diagnosed chronic bronchitis with COPD but was "uncertain if there is any asthma[tic] component." *Id*. He opined Claimant's "issues are essentially all tobacco related, and there is no evidence of any occupational related lung disease." *Id*. Because this is relevant evidence that could weigh against a finding of legal pneumoconiosis, the ALJ must first consider whether it is admissible and, if so, the weight to accord it. We therefore must vacate his finding that Claimant established the existence of legal pneumoconiosis and remand the case for further consideration. 20 C.F.R. §718.202(a)(4); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Because we have vacated the ALJ's findings regarding legal pneumoconiosis, we must also vacate his determinations regarding disability causation, modification based on a change in conditions,[9] whether granting modification renders justice under the Act,[10] and

[9] We reject Employer's argument that because Dr. Go only reviewed previously submitted evidence in this claim, his opinion does not constitute "new evidence" and cannot serve as the basis for Claimant's request for modification. Employer's Brief at 3-5. First, a party seeking modification need not submit new evidence. 33 U.S.C. §922; 20 C.F.R. §725.310; *King v. Jericol Mining, Inc.*, 246 F.3d 822 (6th Cir. 2001). Once a claimant files a modification request, "there is no need for a smoking-gun factual error, changed conditions, or startling *new evidence*." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994) (emphasis added) (citing *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993)). Second, Claimant submitted Dr. Go's April 27, 2021 report after the ALJ's August 7, 2020 decision denying benefits and thus, contrary to Employer's assertion, the report constitutes new evidence. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-13 (1994) (en banc).

[10] We also reject Employer's assertion that the ALJ erred in failing to initially make a "threshold" determination of whether granting modification would render justice under the Act before considering the underlying merits of the petition. Employer's Brief at 3-4 (citing *Sharpe v. Director, OWCP* [*Sharpe I*], 495 F.3d 125, 128 (4th Cir. 2007)). In *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-47 (2023), the Board clarified that an

the award of benefits. Decision and Order on Modification at 36-38; 20 C.F.R. §§718.204(c), 725.310. However, in the interest of judicial efficiency, we address Employer's arguments regarding the ALJ's weighing of the remaining medical opinions on disability causation.

Disability Causation

To establish total disability due to pneumoconiosis, Claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

The ALJ considered the medical opinions of Drs. Go, Saludes, Zaldivar, Rosenberg, and Fino. Decision and Order on Modification at 33-38. He found Dr. Go's opinion that Claimant's legal pneumoconiosis contributed to his totally disabling respiratory impairment well-reasoned and entitled to "great" weight. *Id*. at 38. In contrast, he found

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ALJ need not make an initial threshold finding of justice under the Act before considering the merits of the request for modification. It explained:

> While it might make sense to make a threshold determination in cases of obvious bad faith, it does not follow that a threshold determination is appropriate in cases where there is no indication of improper motive. Rather, because accuracy is a relevant factor, it follows that an ALJ must consider the evidence and render findings on the merits to properly assess whether modification is warranted.

Id.; *see Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 330 (4th Cir. 2012), *cert. denied*, 570 U.S. 917 (2013) (The statute demonstrates a "preference for accuracy over finality," although finality can carry a great deal of weight where the party requesting modification acts with a patently improper motive.) (quoting *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 541 (4th Cir. 2002)); 20 C.F.R. §725.310(c) ("the [ALJ] . . . *must consider*" the merits of a modification request, i.e., whether the evidence demonstrates a change in condition or a mistake in a determination of fact") (emphasis added); 65 Fed. Reg. 79,920, 79,975 (Dec. 20, 2000) (rejecting limits on modification because Congress's overriding concern in enacting the Act was to ensure that miners who are totally disabled due to pneumoconiosis arising out of coal mine employment receive compensation).

Dr. Saludes's opinion that he could not exclude coal mine dust exposure as a cause of Claimant's disabling impairment not reasoned. *Id*. at 37. Further, he found Drs. Zaldivar's, Rosenberg's, and Fino's contrary opinions not reasoned. He thus found Claimant established that his pneumoconiosis is a substantially contributing cause of his total respiratory disability. *Id*. at 38.

We reject Employer's argument that the ALJ erred in crediting Dr. Go's opinion because, it asserts, the doctor did not explain the basis for his conclusion. Employer's Brief at 30. Dr. Go opined Claimant's twenty to thirty-nine pack-years of cigarette smoking contributed to his COPD, emphysema, and chronic bronchitis. Claimant's Exhibit 1 at 11. He also opined Claimant's "13.3 years" of coal mine dust exposure "led to the development of [his] legal pneumoconiosis" in the form of COPD, emphysema, and chronic bronchitis, and his legal pneumoconiosis contributed to his total disability. *Id*.

Because the ALJ permissibly found Dr. Go's opinion well-reasoned and therefore sufficient to prove Claimant's totally disabling obstructive lung disease constitutes legal pneumoconiosis, the ALJ rationally found the doctor's opinion also establishes Claimant is totally disabled due to the disease. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where COPD caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249 (2019); Decision and Order on Modification at 38.

We also reject Employer's argument that the ALJ erred in discrediting Drs. Zaldivar's, Rosenberg's, and Fino's opinions. Employer's Brief at 31-34. Contrary to Employer's assertion, the ALJ permissibly discredited their opinions regarding the cause of Claimant's total respiratory disability because they did not diagnose legal pneumoconiosis, contrary to his finding that Claimant established the disease.[11] *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *see also Epling*, 783

[11] Although we have vacated the ALJ's legal pneumoconiosis finding, if he again finds Claimant has the disease on remand (by either finding Dr. Lenkey's opinion inadmissible or finding it outweighed by Dr. Go's and Dr. Saludes's opinions), this rationale for discrediting Employer's disability causation rebuttal evidence remains valid. If, however, the ALJ were to find Claimant did not establish the disease, benefits would be precluded and the issue of disability causation need not be re-addressed.

F.3d at 504-05; *Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); Decision and Order on Modification at 36-38.

Remand Instructions

On remand, the ALJ must first reconsider whether Claimant has established legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); Employer's Exhibit 13.[12] As discussed, we affirm the ALJ's crediting of the opinions of Drs. Go and Saludes and discrediting of Drs. Rosenberg's, Fino's, and Zaldivar's opinions on this issue; but we hold he erred in not addressing Dr. Lenkey's opinion. Therefore, on remand, the ALJ must consider its admissibility.

In doing so, the ALJ must first render findings as to whether Dr. Lenkey's evaluation of Claimant is a "medical report" subject to the numerical evidentiary limitations at 20 C.F.R. §725.414(a)(3), or a "record of . . . medical treatment for a respiratory or pulmonary or related disease" at subparagraph (a)(4) and thus not subject to the numerical limitations. 20 C.F.R. §§718.101, 718.104, 725.414; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing conducted as part of a miner's treatment).

If he determines Dr. Lenkey's opinion is a medical report that exceeds the evidentiary limitations, and thus is not admissible, Claimant will have established legal pneumoconiosis based on the ALJ's permissible crediting of Drs. Saludes's and Go's opinions, and discrediting of the contrary opinions. Similarly, Claimant will have established disability causation based on the ALJ's permissible crediting of Dr. Go's opinion and discrediting of the contrary opinions. Consequently, under that scenario, the ALJ may reinstate the award of benefits.

However, if the ALJ determines Dr. Lenkey's opinion is admissible, the ALJ must evaluate the credibility of his opinion and weigh it against Drs. Go's and Saludes's credited legal pneumoconiosis diagnoses and Dr. Go's credited disability causation opinion. He must take into consideration the physicians' credentials, explanations for their conclusions, understanding of Claimant's work history, documentation underlying their medical

[12] It is unnecessary for the ALJ to separately consider whether Claimant's legal pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203 as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumes that inquiry. *See* 20 C.F.R. §718.201(a)(2), (b); *see also Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

judgments, and the sophistication of, and bases for, their opinions. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 254-55; 20 C.F.R. §§718.201(a)(2), 718.202(a)(4), 718.204(c)(1).

In making his determinations, the ALJ must set forth his findings and conclusions as the Administrative Procedure Act requires.[13] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

[13] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the ALJ's Decision and Order Awarding Benefits on Modification is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge