BRB No. 12-0622 BLA

HASSEL J. CLINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 08/29/2013
LAUREL CREEK MINING CORPORATION	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Supplemental Decision and Order (10-BLA-5783) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a miner's subsequent claim filed on September 24, 2007.[1] Director's Exhibit 4.

The district director initially denied benefits, finding that claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 22. Claimant timely requested modification and submitted additional evidence. *See* 20 C.F.R. §725.310; Director's Exhibit 23. On October 1, 2008, the district director found that new x-ray evidence submitted by claimant established the existence of complicated pneumoconiosis arising out of coal mine employment, and he ordered the parties to show cause, within thirty days, why claimant's modification request should not be granted. Director's Exhibit 27. On December 18, 2008, the district director awarded benefits, finding that claimant established the existence of complicated pneumoconiosis and thus, invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Director's Exhibit 33. On February 17, 2009, employer submitted additional medical evidence and requested modification of the district director's award of benefits. Director's Exhibits 35-37. The district director denied employer's modification request, and employer requested a hearing. Director's Exhibits 51, 52.

The administrative law judge credited claimant with at least thirty-three years of coal mine employment,[2] based on the parties' stipulation. Decision and Order at 5. The administrative law judge found that the medical evidence did not establish the existence of complicated pneumoconiosis and that, therefore, claimant could not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304. The administrative law judge further found that, because complicated pneumoconiosis was not established, employer demonstrated a mistake of fact in the district director's December 18, 2008 decision awarding benefits.

[1] Claimant filed two previous claims, both of which were finally denied by the district director. Director's Exhibits 1, 2. Claimant's most recent prior claim, filed on December 17, 2002, was denied on December 10, 2003, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2.

[2] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibits 1, 5, 9. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Additionally, the administrative law judge found that granting employer's modification request would render justice under the Act.

The administrative law judge next considered whether claimant could otherwise establish a change in an applicable condition of entitlement since the denial of his most recent prior claim. *See* 20 C.F.R. §725.309(d). The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim established the existence of clinical pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1), (4), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). In considering the claim on the merits, based on all the evidence, the administrative law judge found that the x-ray evidence and medical opinion evidence established the existence of clinical pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). The administrative law judge further found, however, that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2).[4] Accordingly, the administrative law judge denied benefits.

Claimant timely moved for reconsideration, urging the administrative law judge to reconsider his determination that employer's modification request was appropriate. Specifically, claimant argued that the district director's December 18, 2008 decision granting claimant's modification request and awarding benefits became final thirty days after its issuance, and employer failed to demonstrate "good cause" for its failure to timely controvert the claim.[5] Supplemental Decision and Order at 2. The administrative law judge rejected claimant's argument, finding that under the regulations applicable to this claim, employer did not need to demonstrate good cause for failing to controvert the district director's December 18, 2008 Proposed Decision and Order, and it could seek

[3] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[4] Because the evidence did not establish total disability, the administrative law judge determined that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

[5] Claimant's May 29, 2012 Motion for Reconsideration is not contained in the record before the Board. We have summarized the administrative law judge's undisputed characterization of claimant's argument.

modification of that decision after it became final. Supplemental Decision and Order at 3, *applying* 20 C.F.R. §725.419(d) and *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33, 1-37-38 (2008).

Identifying a separate issue on his own motion, the administrative law judge noted that in his initial decision, he addressed employer's modification request in terms of claimant's ability to establish entitlement, when employer bore the burden to establish a mistake of fact. Accordingly, the administrative law judge stated that he would readdress employer's modification request with the burden of proof on employer. Summarizing the findings from his initial decision, the administrative law judge stated that employer established that claimant does not have complicated pneumoconiosis. The administrative law judge therefore denied reconsideration, and denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray evidence in determining that claimant does not suffer from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, because he selectively analyzed the evidence and failed to hold employer to its burden to demonstrate a mistake of fact. Additionally, claimant argues that the administrative law judge improperly relied on evidence that is not of record, and abused his discretion in determining that granting employer's modification request renders justice under the Act. Employer/carrier (employer) responds, urging affirmance of the denial of benefits. Claimant submitted a reply, reiterating his contentions, to which employer has responded.[6] The Director, Office of Workers' Compensation Programs, declined to file a substantive response to claimant's appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon consideration of claimant's modification request, the district director found that claimant established the existence of complicated pneumoconiosis, thereby invoking the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and awarded benefits. After the district director's decision became final, employer requested modification of the award of benefits.

[6] Claimant does not challenge the administrative law judge's finding, on the merits, that the medical evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). That finding is therefore affirmed. *Skrack v. Island Creek Coal, Co.*, 6 BLR 1-710 (1983).

Employer may request modification based on a change in conditions since the issuance of an award of benefits, or based on a mistake in a determination of fact underlying the award. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). As the party seeking modification, employer is the "proponent of the order with the burden of establishing a [mistake in a determination of fact] justifying modification." *See Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 139 (1997); *see also Stiltner*, 24 BLR at 1-38; *Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). The modification of a claim does not flow automatically from a finding that a mistake was made in an earlier determination, and should be granted only where doing so will render justice under the Act. *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 327-28, 25 BLR 2-157, 2-173-74 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2852 (2013); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-32, 24 BLR 2-56, 2-67-68 (4th Cir. 2007).

Claimant contends that the administrative law judge erred in his analysis of the analog and digital x-ray evidence in determining that the existence of complicated pneumoconiosis was not established, and therefore erred in determining that employer demonstrated a mistake in the prior decision. Claimant's Brief at 24. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *See E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(en banc).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered fifteen readings of seven analog x-rays, and considered the readers' radiological qualifications. Dr. Sutherland, whose qualifications are not of record, read an April 2, 2007 x-ray as positive for interstitial pulmonary fibrosis, but did not render an ILO classification of the x-ray. Claimant's Exhibit 2.

Dr. Rasmussen, a B reader, interpreted the November 27, 2007 x-ray as positive for both simple pneumoconiosis and for a 2.0 x 1.5 cm density that he opined was either a Category A large opacity consistent with coal workers' pneumoconiosis, or a granuloma. Director's Exhibit 13. He recommended a CT scan. *Id*. Drs. Alexander and DePonte, both of whom are dually-qualified as Board-certified radiologists and B readers, read the same x-ray as positive for both simple pneumoconiosis and for a Category A large opacity. Claimant's Exhibit 1; Director's Exhibit 23. Dr. Alexander additionally commented that the "25 mm x 15 mm" mass was "consistent with Category A complicated pneumoconiosis," but because the mass's location was "not typical," he recommended further evaluation to exclude another disease process. Claimant's Exhibit 1. Dr. DePonte included the additional notation "ca." Director's Exhibit 23. Drs. Wheeler and Scott, both of whom are also dually-qualified, read the same x-ray as negative for both simple pneumoconiosis and large opacities. Director's Exhibits 14, 44. They commented that the 2.5 cm mass was compatible with granulomatous disease or cancer. *Id*.

The next x-ray, dated February 13, 2008, was read by Dr. Sutherland as positive for a lung mass "with granulomatous large opacities . . . associated with complicated pneumoconiosis," but he did not render an ILO classification. Director's Exhibit 23.

Dr. DePonte read a March 22, 2008 x-ray as positive for both simple pneumoconiosis and a Category B large opacity, noting coalescence of opacities. Director's Exhibit 23. Dr. Scott read the same x-ray as negative for both simple pneumoconiosis and large opacities, commenting that he could not rule out cancer, and recommending consideration of pneumonia, "MAI,"[7] and sarcoidosis as diagnoses. Employer's Exhibit 4.

Dr. Alexander read the October 19, 2010 x-ray as positive for both simple pneumoconiosis and a Category A large opacity, with a "new 15 x 10 mm" mass appearing in addition to the original 25 x 15 mm mass. Claimant's Exhibit 5. Dr. Alexander commented that "[t]he large opacities seen on this x-ray are most likely due to complicated Coal Workers' Pneumoconiosis," but recommended that claimant be referred to his personal physician to rule out "other potential disease processes." *Id*. Dr. Wheeler read the same x-ray as negative for both simple pneumoconiosis and large opacities. Employer's Exhibit 1. Dr. Wheeler commented that there were "2 – 3 cm"

[7] Dr. Scott did not define the abbreviation, "MAI."

masses compatible with granulomatous disease, and stated that histoplasmosis or mycobacterial avian complex were more likely diagnoses than tuberculosis.[8] *Id*.

Finally, Dr. DePonte read two x-rays, dated February 7 and February 21, 2011, classifying both as positive for simple pneumoconiosis and Category B large opacities. Claimant's Exhibits 3, 4. Dr. Wheeler read the same two x-rays as negative for both simple pneumoconiosis and large opacities, commenting that the large masses were compatible with granulomatous disease. Employer's Exhibits 5, 6. Commenting specifically on the February 21, 2011 x-ray, Dr. Wheeler noted that a 2.5 cm opacity was compatible with granulomatous disease because, if the opacity were cancer, it should have grown since the 2007 x-ray. Employer's Exhibit 5.

The administrative law judge found that Dr. Sutherland's two unclassified x-ray readings were inconclusive for the existence of complicated pneumoconiosis.[9] With respect to the November 27, 2007 x-ray, the administrative law judge discounted the Category A readings of Drs. Rasmussen and Alexander, because he found that Dr. Rasmussen provided an alternative diagnosis of a granuloma, and because Dr. Alexander indicated that the mass's location was not typical and that other diseases should be ruled out. Decision and Order at 18, *citing Melnick*, 16 BLR at 1-37. The administrative law judge further found that Dr. DePonte's Category A reading retained probative value, but that "the consensus of Drs. Scott and Wheeler" established that the November 27, 2007 x-ray was negative for large opacities. Decision and Order at 18.

Regarding the March 22, 2008 x-ray, the administrative law judge found that, because of the conflicting readings by equally-qualified physicians, Drs. DePonte and Scott, the x-ray was inconclusive for the existence of large opacities.

The administrative law judge next found that the October 19, 2010 x-ray was inconclusive for the existence of large opacities. The administrative law judge discounted Dr. Alexander's opinion that the x-ray was positive for Category A large opacities, because Dr. Alexander also commented that other disease processes should be ruled out. The administrative law judge, however, also discounted Dr. Wheeler's negative reading, because he found that Dr. Wheeler relied on a generalization regarding dust levels in coal mines since the 1970s, rather than addressing the amount of dust

[8] Dr. Wheeler added that the masses were not large opacities because they were located in the lower lungs, because the adjacent nodules were of low profusion, and because claimant is young and worked after dust control measures began in the early 1970s. Employer's Exhibit 1.

[9] Claimant does not challenge the administrative law judge's finding that Dr. Sutherland's unclassified x-ray readings were inconclusive. *See Skrack*, 6 BLR at 1-711.

exposure that claimant actually experienced in his thirty-three years of underground coal mine employment. Decision and Order at 19.

Finally, the administrative law judge noted that Drs. DePonte and Wheeler were equally qualified and rendered conflicting interpretations of the February 7 and February 21, 2011 x-rays. He therefore found that both of these x-rays were inconclusive for the presence of large opacities.

Based on the foregoing analysis, the administrative law judge "set[] aside the [six] inconclusive films" of April 2, 2007, February 13, 2008, March 22, 2008, October 19, 2010, February 7, 2011, and February 21, 2011, and found that "the sole remaining radiographic study of November 27, 2007 is negative for the presence of a large pulmonary opacity consistent with pneumoconiosis." Decision and Order at 19. The administrative law judge, therefore, found that "[claimant] can not establish the presence of a large opacity consistent with pneumoconiosis under 20 C.F.R. §718.304(a)." *Id*. On reconsideration, the administrative law judge found that, "based on the evidentiary and probative value findings rendered in [his] initial decision," employer established that claimant does not have complicated pneumoconiosis. Supplemental Decision and Order at 4.

The administrative law judge also considered four readings of two digital x-rays, submitted pursuant to 20 C.F.R. §718.107.[10] Dr. Alexander read the March 13, 2008 and December 17, 2009 digital x-rays as positive for both simple pneumoconiosis and a Category A large opacity, commenting that, because the location of a 25 x 15 mm Category A large opacity in the left mid-lung zone was not typical, he recommended further evaluation by claimant's personal physician in case the mass represented another disease process. Claimant's Exhibit 5. Dr. Fino, a B reader, read the March 13, 2008 digital x-ray as positive for simple pneumoconiosis and negative for complicated pneumoconiosis, because of the location of the mass and because the mass was calcified. Director's Exhibit 14. Dr. Wheeler read the December 17, 2009 digital x-ray as negative for both simple pneumoconiosis and large opacities, commenting that the masses were compatible with granulomatous disease. *Id*. The administrative law judge discounted Dr. Alexander's Category A readings of both digital x-rays because Dr. Alexander "presented an alternative diagnosis of another disease process." Decision and Order at 21. Based on the negative readings of Drs. Fino and Wheeler, the administrative law judge found that the two digital x-rays were negative for a large opacity. The administrative law judge

[10] Based on comments by Drs. Alexander, Broudy, and Fino attesting to the medical acceptability and usefulness of digital x-rays, the administrative law judge determined that the parties' digital x-ray readings were admissible as other medical evidence pursuant to 20 C.F.R. §718.107(b). Decision and Order at 20 n.16.

initially concluded that claimant did not establish the existence of large opacities based on the digital x-rays, Decision and Order at 22, and on reconsideration, restated his conclusion as a finding that employer established that claimant does not have complicated pneumoconiosis. Supplemental Decision and Order at 4.

Claimant contends that the administrative law judge applied inconsistent standards and selectively analyzed the x-ray evidence. Specifically, claimant argues that the administrative law judge discredited Dr. Alexander's positive readings for Category A large opacities, as undercut by alternative diagnoses, even though Dr. Alexander did not diagnose an alternative disease, but merely recommended further evaluation given the atypical location of claimant's Category A large opacity. Claimant's Brief at 27. Claimant argues that, in contrast, the administrative law judge generally accepted at face value the negative readings by employer's physicians, even though there is no evidence in the record that claimant was ever diagnosed with, or treated for, any of the alternative diseases they identified as possibilities for the large masses that they agree are present on his x-rays.[11] Claimant's Brief at 28; Reply at 5. Claimant contends that by subjecting his x-ray evidence to greater scrutiny, while failing to evaluate the credibility of employer's x-ray evidence in light of the other evidence of record, the administrative law judge did not hold employer to its burden to demonstrate a mistake of fact. Claimant's Brief at 22, 24, 28; Reply at 6-7. Employer responds that it was proper for the administrative law judge to discredit claimant's positive x-ray readings as undermined by alternative diagnoses, while crediting the negative readings in which its own physicians set forth alternative diagnoses, because its physicians opined that the x-rays were negative for large opacities. Decision and Order at 17-18.

In *Melnick*, which was cited by the administrative law judge, the Board held that an administrative law judge must consider a physician's entire x-ray report at 20 C.F.R. §718.304(a), including any additional notations by the physician, because a comment that constitutes an alternative diagnosis would call into question the physician's diagnosis of a large opacity of complicated pneumoconiosis. *Melnick*, 16 BLR at 1-37. More recently, the United States Court of Appeals for the Fourth Circuit held that an administrative law judge, in weighing conflicting x-ray readings, has the discretion to discount, as speculative and unsupported, negative x-ray readings for complicated pneumoconiosis where there is no evidence in the record that the claimant was ever diagnosed with, or treated for, any of the alternative diseases or conditions put forward by the physicians as possible diagnoses for large masses present on the claimant's x-rays. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285-87, 24 BLR 2-269, 2-282-84 (4th Cir. 2010).

[11] Claimant adds that the administrative law judge did not consider the x-ray evidence in light of Dr. Wheeler's opinion that one of the large masses seen on claimant's x-rays is not cancer because it has remained stable. Claimant's Brief at 26.

In this case, the record reflects that the physicians agree that large masses are present on claimant's x-rays, but they disagree as to whether those masses constitute large opacities of complicated pneumoconiosis. Further, review of the record reflects that claimant argued to the administrative law judge, citing *Cox*, that there is no evidence in the record that he was ever diagnosed with, or treated for, any of the other diseases or conditions suggested by employer's physicians. Claimant's Closing Arguments, July 14, 2011, at 22, 39, 43-44, 46-47. In addition to the analog and digital x-ray readings, the record contains claimant's medical treatment records, Claimant's Exhibit 2, and the medical reports of Drs. Klayton,[12] Rasmussen, Fino, and Broudy, which were not addressed by the administrative law judge in his analysis of complicated pneumoconiosis. Director's Exhibits 13, 14, 49; Claimant's Exhibit 3; Employer's Exhibits 1, 2, 7. Review of the administrative law judge's decisions discloses no citation to or discussion of *Cox*, or any analysis by him of the credibility of the conflicting x-ray readings in light of the other medical evidence of record.

As the administrative law judge acknowledged, employer bears the burden to demonstrate a mistake of fact in this case. *See Rambo*, 521 U.S. at 139; *Stiltner*, 24 BLR at 1-38; *Branham*, 20 BLR at 1-34. Because the administrative law judge did not address a credibility issue concerning the probative value of the x-ray evidence, which was raised by claimant based on Fourth Circuit case law, *see Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84, we are unable to determine whether substantial evidence supports the administrative law judge's determination that employer met its burden. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Therefore, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.304(a), 718.107, and 725.310, and remand this case to him for consideration of all the relevant evidence regarding the existence of large opacities. The administrative law judge, on remand, is instructed to conduct a qualitative analysis of all the conflicting analog and digital x-ray readings in light of the evidence of record, consistent with *Cox* and *Melnick*, in order to determine whether employer has met its burden to establish a mistake of fact. In considering the probative value of the conflicting x-ray readings, the administrative law judge should explain the basis for his determination that Dr. Alexander's comments constitute alternative diagnoses pursuant to *Melnick*. Further, on

[12] Review of the record reflects that in claimant's Closing Arguments to the administrative law judge, he directed the administrative law judge's attention to Dr. Klayton's statements that claimant never smoked, and has "no history of any congenital pulmonary disease to explain some of his symptoms and he has no evidence of cardiac disease." Claimant's Exhibit 3 at 4; Claimant's Closing Arguments, July 14, 2011, at 39.

remand, the administrative law judge is instructed to include in his analysis the medical opinions of Drs. Klayton, Rasmussen, Fino, and Broudy at 20 C.F.R. §718.304(c).[13]

Because we vacate the administrative law judge's determination that employer demonstrated a mistake of fact, we also vacate his finding that granting employer's modification request would render justice under the Act. *See Sharpe*, 692 F.3d at 327-28, 25 BLR at 2-173-74. Should that issue be reached, on remand, we instruct the administrative law judge that, if he again relies on documents that employer attached to its closing brief in determining whether employer was diligent in seeking modification, the administrative law judge must specify the basis for their admission into the record. *See* 20 C.F.R. §§725.455(b), 725.456(a).

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order are affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[13] The record contains no biopsy evidence pursuant to 20 C.F.R. §718.304(b).