BRB No. 13-0104 BLA

ROBERT A. RILEY (on behalf of ARTHUR S. RILEY, Deceased) Claimant-Respondent v. WELLMORE COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/30/2013 DECISION and ORDER

Appeal of the Decision and Order Granting Request for Modification of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Request for Modification (2011-BLA-05152) of Administrative Law Judge Christine L. Kirby (the administrative law judge) with respect to a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] In her Decision and Order, dated November 13, 2012, the administrative law judge determined that employer is the properly designated responsible operator. The administrative law judge also found that the miner had at least twenty-three years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. Relying primarily on Administrative Law Judge Alice M. Craft's summary of the evidence in her December 3, 2004 Decision and Order, the administrative law judge determined that

[1] The miner filed his initial claim for benefits on December 10, 1979, which was denied by Administrative Law Judge John C. Holmes because the miner did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibits 59-1B, 59-139. The Board affirmed the denial of benefits and denied the miner's motion for reconsideration. *Riley v. Beth Ann Coal Co.*, BRB No. 92-1599 BLA (Sept. 9, 1994)(Order)(unpub.); *Riley v. Beth Ann Coal Co.*, BRB No. 92-1599 BLA (May 18, 1994)(unpub.). The miner filed a duplicate claim on January 5, 1996, which was denied by Administrative Law Judge Daniel L. Leland, as the miner did not establish a material change in conditions. Director's Exhibits 1, 43. The Board affirmed the denial of benefits. *Riley v. Wellmore Coal Corp.*, BRB Nos. 97-1652 BLA and 97-1652 BLA-A (Aug. 21, 1998)(unpub.). The miner filed a request for modification, which was granted by Administrative Law Judge Pamela Lakes Wood, based on her determination that the miner established total disability. Director's Exhibits 51, 70. Judge Wood ultimately denied benefits, however, as she found that the miner did not establish the existence of pneumoconiosis. Director's Exhibit 70. The Board again affirmed the denial of benefits. *Riley v. Wellmore Coal Corp.*, BRB No. 01-0373 BLA (Jan. 8, 2002)(unpub.). The miner filed the current request for modification on August 22, 2002. Director's Exhibit 82. Administrative Law Judge Alice M. Craft granted the miner's request and awarded benefits on the merits. Director's Exhibit 117. Employer appealed and the Board vacated Judge Craft's merits findings and remanded the case to the district director for further evidentiary development concerning slides from a biopsy performed on July 25, 2002. *Riley v. Wellmore Coal Corp.*, BRB No. 05-0321 BLA (Nov. 15, 2005)(unpub.). After reviewing the evidence submitted by employer on remand, the district director issued a proposed decision awarding benefits. Director's Exhibit 169. Employer requested a hearing and the case was assigned to Administrative Law Judge Christine L. Kirby (the administrative law judge).

claimant[2] established, based on the newly submitted evidence and the evidence of record as a whole, the existence of pneumoconiosis, total respiratory disability, and total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer initially argues that the administrative law judge erred by substituting Robert A. Riley as a party to this claim, as the miner's estate cannot gain from any award of benefits and there is no overpayment for which the estate has been held liable. Employer also contends that the administrative law judge erred in not considering Dr. Oesterling's opinion in its entirety and in finding that claimant established that the miner was totally disabled due to pneumoconiosis. Further, employer asserts that the administrative law judge improperly found that the onset date for benefits is March 1997. Claimant responds, asserting that the designation of Robert A. Riley as a party, and the award of benefits, should be affirmed. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, indicating that any error in substituting Robert A. Riley as a party was harmless, and that the administrative law judge permissibly interpreted the Board's remand order to limit the admissibility of Dr. Oesterling's report. In addition, the Director states that it was within the administrative law judge's discretion to adopt Judge Craft's findings regarding the relevant elements of entitlement.[3]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

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[2] Claimant in the present case is Robert A. Riley, the deceased miner's son. The miner died on March 9, 2005, and his widow, Marlene Riley continued to pursue the claim on his behalf. Director's Exhibits 131, 133. Marlene Riley died on July 12, 2010. Director's Exhibit 173. On April 17, 2012, the administrative law judge issued an order allowing Robert A. Riley to represent the miner's estate in this case.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established the existence of pneumoconiosis and a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibits 2, 6, 59-1A. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

I. Substitution of Party

Employer contends initially that the administrative law judge erred in substituting Robert A. Riley as a party to this claim pursuant to 20 C.F.R. §725.360(b), as the Last Will and Testament of the widow, submitted in support of the substitution request, does not establish that any rights to benefits were transferred to Robert A. Riley, or that he has a valid interest that might be prejudiced by any decision in this case.[5] Employer asserts that "[t]he dispute at this time is between the Black Lung Disability Trust Fund and the [e]mployer" and that the miner's estate does not remain a viable entity merely because an overpayment might exist if benefits are ultimately denied. Employer's Brief at 15.

Claimant states that, in a letter dated September 22, 2010, a claims examiner reported that, although $844.10 was due to the miner for benefits in February 2005, this amount could not be paid until there was a final adjudication of the claim. *See* Director's Exhibit 174. Claimant argues that Robert A. Riley, in his role as representative of the widow's estate, was properly permitted to substitute as a party, based on the widow's position as the representative of the miner's estate at the time of her death. The Director maintains that, as the miner's surviving child, Robert A. Riley may be entitled to any underpayment of benefits pursuant to 20 C.F.R. §725.545(c).[6] In its reply, employer

[5] Under 20 C.F.R. §725.360(b), "[a] widow, child, parent, brother or sister, or the representative of a decedent's estate who makes a showing in writing that his or her rights with respect to benefits may be prejudiced by the decision of an adjudication officer may be made a party." 20 C.F.R. §725.360(b).

[6] In relevant part, 20 C.F.R. §725.545(c) provides:

> If an individual to whom an underpayment was made dies before receiving payment of the deficit or negotiating the check or checks representing payment of the deficit, such payment shall be distributed to the living person (or persons) in the highest order of priority as follows:
>
> . . . . .

asserts that, in the district director's proposed decision and order there is no indication that any further benefits would be payable in the miner's claim beyond the total amount employer would be required to reimburse the Department of Labor if the claim is ultimately awarded and employer is found to be the responsible operator.

Although employer notes correctly that the district director's proposed decision and order did not indicate that any further benefits were due in the miner's claim, the subsequent letter from a claims examiner clarified that $844.10 is due to the miner for benefits for February 2005. Director's Exhibit 174. Therefore, as the miner's surviving child, Robert A. Riley has a potential interest in the claim pursuant to 20 C.F.R. §725.545(c), independent of his status as representative of his mother's estate. Accordingly, we hold that any error in the administrative law judge's decision to permit Robert A. Riley to be a party to the claim pursuant to 20 C.F.R. §725.360(b), is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We affirm, therefore, the administrative law judge's decision to substitute Robert A. Riley as a party to the claim.

II. Admission of the Opinions of Drs. Oesterling and Tuteur

In support of his second request for modification of the denied duplicate claim, the miner submitted Dr. Bensema's report of a biopsy performed on July 25, 2002. Director's Exhibit 82. Employer attempted, without success, to obtain the tissue slides reviewed by Dr. Bensema prior to the issuance of Judge Craft's Decision and Order. Director's Exhibits 109 at 15-18, 50-52, 110-112. In her Decision and Order awarding benefits, Judge Craft determined that Dr. Bensema's biopsy report supported a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Director's Exhibit 117 at 34. On appeal to the Board, employer argued that the case should not have been forwarded to the Office of Administrative Law Judges for hearing without employer having the opportunity to have a physician review the slides. The Board agreed with employer and, accordingly, "vacate[d] [Judge Craft's] findings on the merits, and her award of benefits, and remand[ed] this case to the district director for further evidentiary development pursuant to 20 C.F.R. §725.421(a)." *Riley v. Wellmore Coal Corp.*, BRB No. 05-0321 BLA, slip op. at 5 (Nov. 15, 2005)(unpub.).

> (2) In the case of a deceased miner . . . his or her child entitled to benefits as the surviving child of such miner . . . for the month in which such miner or spouse died. . . .

20 C.F.R. §725.545(c).

On remand, employer submitted a pathology report from Dr. Oesterling. *See* Director's Exhibit 164. Dr. Oesterling indicated that the July 25, 2002 biopsy slides showed relatively mild macular coal workers' pneumoconiosis, which was insufficient to alter respiratory function, panlobular emphysema due to cigarette smoking, and squamous cell carcinoma. *Id*. Dr. Oesterling also reviewed tissue slides from a February 21, 2005 biopsy performed subsequent to Judge Craft's decision. *Id*. He stated that these "clearly indicate that [the miner] did have some form of chronic bronchitis, however, there is no evidence of malignancy or coal dust deposits. *Id*.

When Dr. Oesterling's report was submitted to the district director, claimant's counsel objected to the portion of the report pertaining to the February 21, 2005 slides. Employer responded, stating that if Dr. Oesterling's review of the later slides was improper, the district director should consider only the portion of Dr. Oesterling's report dealing with the July 25, 2002 biopsy slides. The district director considered Dr. Oesterling's opinion with respect to the July 25, 2002 biopsy and not to the February 21, 2005 biopsy. The administrative law judge found that the district director's action was correct, "as the additional evidence is beyond the scope of the [Benefits Review Board] remand order." Decision and Order at 7.

Employer argues that, because the Board's remand order did not place any restrictions on evidentiary development, the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by prohibiting employer from having Dr. Oesterling review slides from additional biopsies. Therefore, employer asserts that the administrative law judge should have considered Dr. Oesterling's report in its entirety. Employer further asserts that the administrative law judge erred in failing to consider the November 11, 2011 report in which Dr. Tuteur found that the miner's respiratory impairment was not due to coal dust exposure.

Claimant responds, stating that employer did not preserve this issue for appeal, as it did not object to the district director's evidentiary ruling, limiting Dr. Oesterling's report to the July 25, 2002 biopsy slides and, when the case was before the administrative law judge, it did not argue that the report should be considered in its entirety. In the alternative, claimant contends that, even if the issue was preserved for appeal, the administrative law judge's decision was appropriate, based on the Board's holding in its remand order that employer should have the opportunity to submit evidence concerning the July 25, 2002 biopsy. Claimant also states that the administrative law judge's omission of Dr. Tuteur's report from consideration was correct, as employer did not submit the report into evidence before her. The Director urges the Board to reject employer's arguments concerning Dr. Oesterling's report, as it was within the administrative law judge's discretion to interpret the Board's remand order as permitting the development of evidence related only to the July 25, 2002 biopsy.

In its reply brief, employer states that, contrary to claimant's contention, the issue is appropriate for Board review, as the hearing before the administrative law judge on remand was *de novo*, therefore negating any requirement that employer specifically preserve objections raised before the district director. In addition, employer states that the Board did not limit the evidence which employer may submit to that which concerned only the 2002 slides. Employer asserts that "[t]he most recent biopsy evidence would assist the finder of fact in seeking the truth as to the cause of the miner's disability." Employer's Reply Brief at 5.

We agree with employer that, because the hearing on the record before the administrative law judge was *de novo* with respect to all issues, including evidentiary ones, employer was not required to object to the district director's evidentiary ruling in order to challenge the administrative law judge's limitation on the admissible scope of Dr. Oesterling's report in the present appeal. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Regarding employer's arguments concerning the administrative law judge's treatment of the reports of Drs. Oesterling and Tuteur, we note that the administrative law judge is granted broad discretion in resolving procedural and evidentiary issues. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). Accordingly, the party seeking to overturn an administrative law judge's resolution of an evidentiary issue must prove that his or her action represented an abuse of discretion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). We hold that employer has not met its burden in this case. The administrative law judge acted within her discretion in finding that the Board's remand order permitted development only of evidence responsive to the 2002 biopsy slides, as the issue raised before the Board concerned the fact that employer was not given the opportunity to have Dr. Bensema's 2002 biopsy report reviewed. *See Williams*, 453 F.3d at 620, 23 BLR at 2-369. Therefore, the administrative law judge permissibly did not consider the portion of Dr. Oesterling's report in which he discussed slides from subsequent biopsies. *Id*. Additionally, we hold that, contrary to employer's contention, the administrative law judge did not err in omitting Dr. Tuteur's November 11, 2011 report from consideration, as it was not proffered to the administrative law judge for admission on remand.[7] *See* Employer's Brief at 12 n.2

[7] On November 11, 2011, employer indicated, via letter, that it was filing Dr. Tuteur's November 11, 2011 supplemental report as Employer's Exhibit 1, but that the report was not included in the correspondence sent to the administrative law judge, as it was going to be introduced into evidence at the hearing. On November 23, 2011, the administrative law judge issued an Order granting employer's request for a hearing on the Record. The administrative law judge further notified the parties that they had thirty days to submit documentary evidence. Because employer did not subsequently proffer Dr.

III. 20 C.F.R. §718.204(c) – Total Disability Due to Pneumoconiosis

After evaluating the evidence concerning disability causation at 20 C.F.R. §718.204(c), the administrative law judge stated:

> I find that [Judge] Craft accurately summarized and analyzed the evidence relating to the issue of total disability causation that was before her and is now before me, and I adopt her description and analysis of that evidence. The issue I must answer now is whether the subsequently submitted report of Dr. Oesterling changes that analysis.
>
> In his report, Dr. Oesterling did not address whether [the miner] had a totally disabling respiratory impairment. Nor could he have adequately discussed this issue as the only evidence he had before him was biopsy slides which he was analyzing for the presence of [coal worker's pneumoconiosis] or other disease. I find that Dr. Oesterling's opinion is not probative on the issue of total disability causation. Accordingly, I find that it does not alter the analysis of the evidence relating to the issue of total disability causation as set forth in [Judge] Craft's December 2004 [decision and order,] and I adopt her finding that [c]laimant has established that coal dust exposure was a substantially contributing cause to [the miner's] totally disabling respiratory impairment.

Decision and Order at 12.

Employer argues that the administrative law judge erred in deferring to Judge Craft's weighing of the evidence, instead of conducting an independent analysis of the evidence. Employer also argues that the administrative law judge did not consider all relevant evidence, including Dr. Tuteur's opinion and Dr. Oesterling's full report. Employer's assertions of error, however, are without merit.

Tuteur's November 11, 2011 report, it was not in the record for the administrative law judge to consider.

Contrary to employer's characterization, the administrative law judge did not merely adopt Judge Craft's determinations wholesale. Rather, she indicated that she reviewed Judge Craft's summary of the evidence, found it to be accurate, and agreed with Judge Craft's determinations. Decision and Order at 12. We conclude that the administrative law judge's analysis was proper, and that she acted within her discretion in adopting, as her own, Judge Craft's credibility findings with regard to the earlier evidence. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012). Further, employer has not established how it was prejudiced by the administrative law judge's action as, in the present appeal, employer has had a full opportunity to challenge the findings relied on by the administrative law judge. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni*, 6 BLR at 1-1278.

As discussed, *supra*, Dr. Tuteur's supplemental opinion was not submitted by employer; therefore, there was no error by the administrative law judge in failing to consider it, relevant to the issue of disability causation. Furthermore, contrary to employer's contention, the administrative law judge rationally found that Dr. Oesterling's opinion on the issue of total disability causation was not probative because he could not "have adequately discussed this issue as the only evidence he had before him was biopsy slides which he was analyzing for the presence of [coal workers' pneumoconiosis] or other disease." Decision and Order at 12; *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Employer also contends that the administrative law judge was bound by Administrative Law Judge Daniel L. Leland's prior finding, in his Decision and Order denying benefits in the 1996 duplicate claim, that smoking was the cause of the miner's totally disabling respiratory impairment. *See* Director's Exhibit 43. Employer further asserts that the administrative law judge improperly minimized the miner's smoking history, as she did not adequately explain how the record supported her finding that claimant smoked only one pack per day for twenty-five years. The Director responds that the administrative law judge considered the conflicting smoking history evidence, but permissibly decided to credit the miner's testimony concerning the length of his smoking history, over the histories appearing in the medical reports.

Contrary to employer's argument, Judge Leland's finding was not binding on the administrative law judge in light of the miner's request for modification. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). We also reject employer's contention that the administrative law judge erred in her consideration of the miner's smoking history. The administrative law judge indicated that there were varying

smoking histories for claimant and specifically set them forth in her decision.[8] Decision and Order at 4; Director's Exhibit 117 at 6. However, she permissibly resolved the conflict in this evidence by relying on the miner's testimony concerning his smoking history. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). In doing so, the administrative law judge noted that the miner testified concerning the physicians' reports of his smoking history and clarified potential discrepancies in calculating his total pack years.[9] Decision and Order at 4; *see* Director's Exhibit 117 at 6. Therefore, we affirm the administrative law judge's determination that the miner "smoked the equivalent of 25 years at the rate of one pack of cigarettes per day." Decision and Order at 4; *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133.

Employer further contends that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Hippensteel, who ruled out coal dust inhalation as a cause of the miner's respiratory impairment. Employer argues that it was error to give less weight to Dr. Dahhan's opinion on the grounds that he was unaware of Dr. Bensema's biopsy report diagnosing pneumoconiosis, and he disagreed with her diagnosis of pneumoconiosis. Concerning Dr. Hippensteel, employer asserts that the administrative law judge erred in discrediting his causation opinion because he did not diagnose pneumoconiosis. Employer specifically alleges that the administrative law judge's reliance on *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); and *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), to reject Dr. Hippensteel's opinion was in error, as Dr. Hippensteel "offers a valid basis for finding the absence of any contribution of coal dust exposure to disability in this case, even accepting Dr. Bensema's findings [that there was pneumoconiosis on biopsy]." Employer's Brief at 27.

We hold that the administrative law judge rationally gave less weight to the opinions of Drs. Dahhan and Hippensteel, as neither diagnosed the existence of

[8] Dr. Sikder reported a history of "2-3 packs a day for 50 years." Claimant's Exhibit 1. Dr. Dahhan's most recent opinion indicated a smoking history of 43 pack years. Employer's Exhibit 1.

[9] The administrative law judge noted that the miner denied telling Dr. Modi, one of his treating physicians, that he smoked two packs per day and that the miner explained that "Dr. Modi may have misinterpreted his representation that he sometimes smoked two cigarettes per day." Director's Exhibit 117 at 6; *see* Director's Exhibit 59-138 at 23, 26.

pneumoconiosis, which was contrary to the administrative law judge's findings.[10] *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006); Director's Exhibits 28, 48, 66; Employer's Exhibits 1, 2. In doing so, we further hold that the administrative law judge permissibly discredited Dr. Hippensteel's opinion, despite his statement that he would not change his view that smoking was the sole cause of the miner's impairment, "even if one would accept that [Dr. Bensema's report] meant that [the miner] had coal workers' pneumoconiosis . . . ." Employer's Exhibit 2 at 23; *see Scott*, 289 F.3d at 269, 22 BLR at 2-383-84. Under similar factual circumstances in *Scott*, the United States Court of Appeals for the Fourth Circuit vacated an administrative law judge's decision to accord determinative weight to opinions in which the physicians stated that coal dust exposure played no role in causing a miner's totally disabling impairment, and further indicated that their opinions would not change, even if they assumed that the miner had pneumoconiosis. The court stated:

> [T]heir opinions are in direct contradiction to the ALJ's finding that Scott suffers from pneumoconiosis arising out of his coal mine employment, bringing our requirements in *Toler* into play. Under *Toler*, the ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most.

Scott, 289 F.3d at 269, 22 BLR at 2-383-84, *citing Toler*, 43 F.3d at 116, 19 BLR at 2-83.

Additionally, employer argues that the administrative law judge did not offer a valid reason for crediting the opinions of Drs. Sikder or Jain, as neither provided reasoned opinions but "merely offered unexplained responses to questions from claimant's counsel." Employer's Brief at 29. Employer also alleges that the administrative law judge did not explain how the opinions of Drs. Sikder and Jain supported claimant's burden of proof. Employer also asserts that, because 20 C.F.R. §718.104 does not require that a treating physician's opinion be given more weight, the opinions of Drs. Sikder and Jain were not entitled to additional weight on that basis, particularly in light of their failure to explain how pneumoconiosis contributed to the miner's impairment.

We reject employer's arguments, as the administrative law judge permissibly credited the opinions of Drs. Sikder and Jain, both of whom found that the miner's

[10] Therefore, it is not necessary to address employer's additional arguments concerning the administrative law judge's weighing of their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

disabling respiratory impairment was due, in part, to his coal dust exposure, as she determined that they were supported by substantial evidence. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Compton*, 211 F.3d at 211, 22 BLR at 2-175; Claimant's Exhibits 1-2, 6. Although employer contends that the opinions of Drs. Sikder and Jain were not entitled to more weight based on their status as treating physicians, this was not the sole reason the administrative law judge accorded them greater weight.[11] We affirm, therefore, the administrative law judge's finding that claimant established disability causation at 20 C.F.R. §718.204(c), and we further affirm the award of benefits. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998).

IV. Commencement of Benefits

The administrative law judge found that the miner was entitled to benefits commencing in March 1997, stating:

> The earliest medical opinion finding [the miner] disabled given in the subsequent claim was Dr. Dahhan's, on March 12, 1997. In an earlier opinion from May 1996, Dr. Dahhan said [c]laimant was not disabled. Judge Lakes Wood credited Dr. Dahhan's opinion because he had the opportunity to examine [the miner], his opinion as to the extent of impairment changed over time, and he had no incentive to exaggerate the severity of [the miner's] condition. I agree with this reasoning. Moreover, Dr. Dahhan consistently found [the miner] to be disabled thereafter.

Decision and Order at 12.

Employer contends that the administrative law judge did not comply with the Board's instruction on remand to apply 20 C.F.R. §725.503(d), when determining the

[11] In finding disability causation established, Judge Craft referenced the responses of Drs. Sikder and Jain to a questionnaire in which they indicated that coal dust exposure contributed to the miner's disabling respiratory impairment. 2004 Decision and Order at 37. In addition, when determining that the miner had pneumoconiosis, Judge Craft identified several reasons for awarding more weight to their opinions over the opinions of Drs. Dahhan and Hippensteel. *Id*. at 35. Judge Craft indicated that they had excellent credentials, an ongoing treatment relationship with the miner, and were aware of his smoking history and recorded a greater smoking history than the administrative law judge found. *Id*. Judge Craft also commented that their opinions were more consistent with the evidence of record as a whole and, in particular, with the biopsy results showing the existence of pneumoconiosis. *Id*. at 35-36.

commencement date for benefits. In addition, employer argues that 20 C.F.R. §725.503(d)(2) precludes the award of benefits commencing in March 1997, as it states that "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner from the month in which the claimant requested modification." Employer also asserts that the administrative law judge's reliance on Dr. Dahhan's opinion from the prior denied claim does not support her identification of March 1997 as the commencement date because Dr. Dahhan determined that the miner was not totally disabled due to pneumoconiosis. Claimant responds, asserting that the administrative law judge correctly cited 20 C.F.R. §725.503(b), as her determination that the miner had pneumoconiosis established a mistake in a determination of fact.

Employer's argument has merit. Pursuant to 20 C.F.R. §725.503(d), if modification is premised upon a finding of a mistake in a determination of fact, the general provisions of 20 C.F.R. §725.503(b) are applicable, allowing for benefits to be paid from the original application date if a specific date of onset of total disability due to pneumoconiosis is not ascertainable. 20 C.F.R. §725.503(b), (d)(1); *see Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If, however, the ground for granting modification is a change in conditions, the miner is entitled to benefits from the date of that change, provided that no benefits are payable for any month prior to the effective date of the most recent denial of benefits; if the date of change is not ascertainable, benefits are payable beginning with the month in which the miner requested modification. 20 C.F.R. §725.503(d)(2); *see Eifler*, 926 F.2d at 666, 15 BLR at 2-4.

In the current case, because the administrative law judge found that claimant established a change in conditions, the regulation at 20 C.F.R. §725.503(b) was not applicable. *See* Decision and Order at 8, 12-13. There is also merit to employer's argument that the administrative law judge erred in relying on Dr. Dahhan's March 12, 1997 opinion. The regulation at 20 C.F.R. §725.503(d)(2) specifically provides that benefits commence the month in which it is established that the miner's totally disabling respiratory impairment *due to pneumoconiosis* began. Although the administrative law judge accurately determined that Dr. Dahhan opined that the miner was totally disabled, he did not indicate that the miner's disabling respiratory impairment was due to pneumoconiosis. *See* Director's Exhibit 48. Consequently, Dr. Dahhan's opinion is insufficient to support the administrative law judge's determination. As a result, we vacate the administrative law judge's designation of March 1997, as the date for the commencement of benefits.

We further hold, however, that remand to the administrative law judge for reconsideration of this issue is not required. Based on the absence of record evidence that the miner was totally disabled due to pneumoconiosis prior to the filing of his request for

modification on August 22, 2002, and the administrative law judge's permissible discrediting of any evidence that the miner was not totally disabled due to pneumoconiosis subsequent to August 22, 2002, we modify the date of commencement of benefits from March 1, 1997 to August 1, 2002. *See Eifler*, 926 F.2d at 666, 15 BLR at 2-4.

Accordingly, the administrative law judge's Decision and Order Granting Request for Modification is affirmed, as modified to reflect August 1, 2002, as the date from which benefits commence.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge