BRB No. 09-0813 BLA

TIMOTHY NOE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY	)	DATE ISSUED: 09/30/2010
	)	
Employer-Petitioner	)	
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Sarah M. Hurley (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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Modification (2007-BLA-5194) of Administrative Law Judge Alice M. Craft (the administrative law judge) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with at least 12.5 years of qualifying coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718

and 725. The administrative law judge found that the evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203. The administrative law judge also found that the evidence established a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Consequently, the administrative law judge found that the evidence established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge violated its due process rights by denying it a full and fair hearing under the requirements of the Administrative Procedure Act (APA). Employer also challenges the administrative law judge's findings that the evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that the legal pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Further, employer challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Lastly, employer contends that the administrative law judge erred in failing to determine whether modification would render justice under the Act. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, urging affirmance of the administrative law judge's awarding of benefits on modification.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).[3]

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), but that the evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

[3] Subsequent to the issuance of the administrative law judge's Decision and Order, amendments to the Act, which became effective on March 23, 2010, were enacted, affecting claims filed after January 1, 2005. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a presumption of total disability due to pneumoconiosis or, relevant to survivor's claims, death due to

Initially, we will address employer's contention that the administrative law judge violated its due process rights by denying employer the right to a full and fair hearing under the requirements of the APA,[4] 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), as it was deprived of the opportunity to fully present its case. Specifically, employer argues that the administrative law judge abused her discretion by the "arbitrary refusal to follow through with the dismissal of the claim based on claimant's violation of her order, or to require claimant to attend a deposition in lieu of a hearing." Employer's Brief at 10. Employer also asserts that the administrative law judge erred in failing to conduct a hearing, given that there was no written waiver of a hearing by the parties pursuant to 20 C.F.R. §725.461(a). Further, employer asserts that the administrative law judge erroneously denied employer the right to a full and fair hearing by applying the provision of 20 C.F.R. §725.465(d). Employer maintains that Section 725.465(d) is invalid because

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pneumoconiosis in cases where the claimant has established that the miner had fifteen or more years of coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). The amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which holds that an eligible survivor of a miner who filed a successful claim for benefits is automatically entitled to survivor's benefits without the burden of reestablishing entitlement. 30 U.S.C. §932(*l*). Employer and the Director, Office of Workers' Compensation Programs (the Director), responded to the Board's May 20, 2010 Order, which permitted the parties to submit supplemental briefing in this case to address the impact, if any, of the 2010 amendments in this case. Employer contends that the parties should be given the opportunity to submit new evidence relevant to the Section 411(c)(4) presumption if the claim is remanded to the administrative law judge for reconsideration. The Director contends that the recent amendment to the Section 411(c)(4) presumption does not affect this case because claimant alleged only 13 years of coal mine employment. Because claimant alleged only 13 years of coal mine employment, and because the record does not support a finding of more than 13 years of coal mine employment, the Section 411(c)(4) presumption does not apply to this case. Furthermore, the amendments to Section 422(*l*) do not apply to this living miner's claim.

[4] The Administrative Procedure Act, 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), provides, in part, that a party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

it is inconsistent with the APA "because it places the Director's office in control of the decision issued by the administrative law judge." *Id*. at 8-13. We disagree.

The pertinent procedural history of the case is as follows: Claimant filed his claim on August 23, 2005. Director's Exhibit 2. In a Schedule for the Submission of Additional Evidence dated December 28, 2005, a claims examiner concluded that claimant would be entitled to benefits if a decision was issued at that time. Director's Exhibit 26. By letter dated January 3, 2006, employer contested the claims examiner's determination that claimant would be entitled to benefits. Director's Exhibit 54. In a Proposed Decision and Order dated March 30, 2006, the claims examiner denied benefits because the evidence did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 33. Claimant filed a request for modification on June 22, 2006. Director's Exhibit 35. By Order dated August 30, 2006, the district director granted claimant's request for modification, awarded benefits, and ordered the parties to show good cause, within 30 days, why the proposed findings should not result in modification of the previous denial. Director's Exhibit 41. On September 29, 2006, the district director advised claimant that he would receive payment of his benefits from the Black Lung Disability Trust Fund (Trust Fund) because employer declined to make a payment to him until the issue of entitlement was finally resolved. Director's Exhibit 47.

By letter dated October 20, 2006, employer requested a formal hearing, Director's Exhibit 51, and the case was transferred to the Office of Administrative Law Judges, Director's Exhibits 51, 54. By letter dated May 11, 2007, claimant's attorney advised Chief Administrative Law Judge John M. Vittone that he was withdrawing from further representation of claimant. The case was assigned to Administrative Law Judge Joseph E. Kane, who, on May 25, 2007, notified claimant that a hearing was scheduled for September 13, 2007 at the Benham School House Inn in Benham, Kentucky. At the hearing, Judge Kane stated that he received a note from a hotel clerk that indicated that claimant was in the emergency room and would not be able to appear for the hearing.[5] September 13, 2007 Hearing Trans. at 3-4. Employer's counsel proposed that Judge Kane allow him to contact claimant within a few days to determine if claimant's preference was to proceed with a deposition in lieu of a formal hearing, rather than have Judge Kane issue a general continuance. *Id*. at 4. Judge Kane gave employer's counsel until September 21, 2007 to advise him of claimant's response to the proposal. *Id*. By letter dated September 20, 2007, employer's counsel advised Judge Kane that claimant stated that he preferred to continue the case for rescheduling, so that he could continue

[5] In an e-mail dated September 13, 2007, a claims examiner indicated that claimant called her and stated that he was in the emergency room at Harlan Appalachian Regional Hospital because of heart problems.

his recovery and possibly secure an attorney for representation. Employer's counsel also advised Judge Kane that he did not object to the continuance of the claim. By Order dated October 25, 2007, Judge Kane continued the September 13, 2007 hearing for good cause shown.

The case was reassigned to the administrative law judge, who notified the parties that a hearing was scheduled for August 26, 2008. At the hearing, the administrative law judge noted that claimant was not present or represented by counsel, but submitted a statement that she construed as a request for a continuance, so that he could try to obtain an attorney.[6] August 26, 2008 Hearing Trans. at 3-4. Employer's counsel responded by stating, "So we submit that, rather than a continuance, we would be agreeable to take the claimant's deposition, if he wants something to be heard from him, and then submit the case on the record." *Id*. at 4. Employer's counsel further stated that "we think it's time to submit the case for decision." *Id*. at 5. The administrative law judge stated that she would issue a notice to claimant regarding employer's position at the hearing to get his response as to how he is willing to proceed, and then take the request for a continuance under advisement. *Id*. By Order dated September 18, 2008, the administrative law judge found that claimant's August 26, 2008 letter was ambiguous as to whether claimant was seeking a continuance or was agreeing to a decision on the record and, therefore, ordered claimant to complete an attached form within 15 days to indicate his intention. The administrative law judge noted that claimant's failure to respond to the order within 15 days would result in the dismissal of the claim. Employer filed a request to dismiss the claim for cause on October 21, 2008. By Order dated October 30, 2008, the administrative law judge dismissed the claim because claimant failed to attend the hearing and he failed to respond to the Order issued on September 18, 2008.

The Director filed a Motion for Reconsideration, requesting that the administrative law judge vacate her order dismissing the claim. The Director argues that his agreement was required prior to dismissal pursuant to 20 C.F.R. §725.465(d),[7] as the Trust Fund had been making interim payments to claimant and dismissal would result in an overpayment of benefits. The Director requested that the administrative law judge reset the case for a hearing or issue an order stating that claimant waived his right to present evidence at a

[6] By letter dated August 26, 2008, claimant apologized to the administrative law judge for not appearing at the hearing, noted that he was having a hard time getting an attorney but was still trying to do so and had a prospect, and stated that he respected any decision that she made.

[7] Section 725.465(d) provides that no claim shall be dismissed with respect to which payments prior to final adjudication have been made to the claimant except upon the motion or written agreement of the Director. 20 C.F.R. §725.465(d).

hearing pursuant to Section 725.461(b).[8] Employer responded to the Director's request, arguing that the dismissal of the claim is warranted because claimant's recalcitrance resulted in the unnecessary delay of the proceedings and prejudiced its case. Alternatively, employer asserts that, if the dismissal of the claim was vacated, the administrative law judge should issue an order stating that claimant waived his right to present evidence pursuant to 20 C.F.R. §725.461(b). Further, employer asserts that it should be given an opportunity to submit the exhibits it exchanged before the two previously scheduled hearings, and that claimant should be barred from presenting any additional evidence. By Order dated January 7, 2009, the administrative law judge granted the Director's request for reconsideration, vacated the dismissal of the claim, found that claimant waived his right to present evidence, admitted Director's Exhibits 1-57 and Employer's Exhibits 1-6 into the record, subject to the parties' objections, and set a schedule to complete the record.

Contrary to employer's assertion, the record reveals that employer was provided with a fair opportunity to fully present its case, as the administrative law judge permissibly canceled the hearing upon notice to the parties, and employer was granted the relief it requested in its response to the Director's Motion for Reconsideration. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). Furthermore, employer waived this issue by failing to object before the administrative law judge, and cannot now raise the argument before the Board. *See* 20 C.F.R. §725.452; *Dankle v. DuQuesne Light Co*., 20 BLR 1-1, 1-6 (1995); *Martin v. Island Creek Coal Co*., 2 BLR 1-276 (1979). Moreover, the Board has held that the broad mandate of the APA must be synthesized with the specific requirements of the Act governing the processing of claims, and that while the Director's role is to oversee the administration of the Act in which an employer may be found liable for payment of benefits, he does not supervise or direct the administrative law judge in the performance of her duties, or participate or advise in the administrative law judge's decision. *See Boggs v. Falcon Coal Co*., 17 BLR 1-62, 1-64 (1992). Thus, we reject employer assertion that the administrative law judge erroneously denied employer the right to a full and fair hearing by applying the provision of 20 C.F.R. §725.465(d).

Next, we address employer's contention that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer argues that the administrative law judge violated the APA by failing to provide a valid explanation for according

[8] Section 725.461(b) provides, in part, that the unexcused failure of any party to attend a hearing shall constitute a waiver of such party's right to present evidence at the hearing. 20 C.F.R. §725.461(b).

greater weight to Dr. Baker's diagnosis of pneumoconiosis than to the contrary opinions of Drs. Dahhan, Rosenberg, and Vuskovich. Specifically, employer asserts that Dr. Baker's opinion is not reasoned and too equivocal to establish the existence of legal pneumoconiosis or disability causation. Employer also asserts that the administrative law judge irrationally applied a different standard to Dr. Baker's opinion than she applied to the opinions of Drs. Dahhan, Rosenberg, and Vuskovich. Employer further asserts that the administrative law judge imposed an improper burden of proof on employer by requiring employer's physicians to rule out coal dust as a contributing factor.

The administrative law judge summarized the findings of Drs. Baker, Dahhan, Rosenberg, and Vuskovich, and determined that all the medical opinions were documented and reasoned, as they provided "at least some rationale" in support of their conclusions. Decision and Order at 19. While Dr. Baker[9] diagnosed pneumoconiosis based on x-ray, a restrictive impairment, and bronchitis, Drs. Dahhan[10] and Rosenberg[11] diagnosed an obstructive impairment that was not coal dust related, and Dr. Vuskovich[12]

[9] Dr. Baker, a Board-certified pulmonologist, examined claimant in 2005 on behalf of the Department of Labor, and diagnosed clinical pneumoconiosis based on a positive x-ray reading and coal dust exposure, as well as a moderate restrictive defect, mild resting hypoxemia, and mild bronchitis. Director's Exhibit 15. He stated that claimant's condition is significantly related to, and substantially aggravated by, dust exposure in his coal mine employment . . . with a contribution from his smoking. *Id*.

[10] Dr. Dahhan, a Board-certified pulmonologist, examined claimant on January 10, 2006, and diagnosed a moderate, partially-reversible obstructive impairment due to claimant's 21-pack years of smoking. Director's Exhibit 17. He noted that, even though coal dust exposure can cause an obstructive defect, claimant's response to bronchodilator therapy was inconsistent with the permanent adverse effects of coal dust on the respiratory system. *Id*.

[11] Dr. Rosenberg, a Board-certified pulmonologist, examined claimant on April 16, 2007, and diagnosed a disabling obstructive lung disease due to obesity, smoking, and asthma. Employer's Exhibit 2.

[12] Dr. Vuskovich, who is Board-certified in occupational medicine, provided a consulting opinion on June 29, 2007, and found that claimant does not clinical pneumoconiosis. Employer's Exhibit 6. He stated that it was not possible to determine if claimant had chronic obstructive pulmonary disease and that there was evidence that claimant's pulmonary impairment was not permanent, as it was due to obesity, smoking, and taking narcotics. *Id*. He stated that there was no evidence that pneumoconiosis had a material adverse effect on claimant's respiratory condition. *Id*.

found no permanent respiratory impairment. Director's Exhibits 15, 17; Employer's Exhibits 2, 6. The administrative law judge gave the least weight to Dr. Vuskovich's opinion, because she found that the doctor's opinion that claimant's pulmonary impairment is not permanent, but due to the self-inflicted sources of obesity, smoking, and narcotics, was inconsistent with the regulations and "entirely different" from the opinions of the three Board-certified pulmonologists that she determined were better qualified to render an opinion on the condition of claimant's lungs. Decision and Order at 20. The administrative law judge also found that Dr. Vuskovich failed to offer an explanation for why coal dust did not affect claimant's pulmonary condition. *Id*. In addition, the administrative law judge gave less weight to Dr. Dahhan's opinion, because she found that Dr. Dahhan failed to adequately address the irreversible component of claimant's obstruction and the doctor failed to explain why significant coal dust exposure was not a contributing or aggravating factor in claimant's obstructive disease. *Id*. at 19-20. Further, the administrative law judge also gave less weight to Dr. Rosenberg's opinion, because she found that the doctor's opinion that claimant's obstructive disease was due to smoking and asthma, while having a preserved FEV_1/FVC ratio, was contrary to the doctor's stated theory that smoking causes a reduced ratio, and because Dr. Rosenberg attributed claimant with a "much heavier smoking history" than she found. *Id*. at 20. The administrative law judge additionally found that Dr. Rosenberg failed to explain why coal dust exposure was not a contributing or aggravating factor in claimant's pulmonary impairment. *Id*. Lastly, the administrative law judge noted that Dr. Baker's diagnosis of pneumoconiosis was "undermined" because Dr. Baker relied on an x-ray that she found was negative and on a diagnosis of a restrictive impairment in 2005 that was not diagnosed again in later examinations. *Id*. at 19; Director's Exhibit 15. Nonetheless, the administrative law judge found that Dr. Baker's opinion was entitled to the greatest weight because it was "otherwise supported by the evidence available to him" and "consistent with the premises underlying the regulations." *Id*. at 19, 21; Director's Exhibit 15. In so finding, the administrative law judge concluded that the contrary opinions of Drs. Dahhan, Rosenberg, and Vuskovich were inconsistent with the premises underlying the regulations, and that neither Dr. Dahhan nor Dr. Rosenberg, Board-certified pulmonologists who attributed claimant's pulmonary impairment to other factors, offered a sufficient explanation of why coal dust was not a contributing factor. Decision and Order at 21. The administrative law judge also concluded that Dr. Vuskovich's conclusions were inconsistent with the premises underlying the regulations. *Id*.

We agree with employer's assertion that the administrative law judge applied an inconsistent standard when assessing the credibility of the medical opinions. *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-139-40 (1999)(*en banc*). The APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions

of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge failed to subject all of the conflicting medical opinions to the same scrutiny, as she discounted the opinions of Drs. Dahhan, Rosenberg, and Vuskovich for failing to explicitly explain why coal dust was not a contributing or aggravating factor, while crediting Dr. Baker's opinion that claimant's impairment was due to coal dust and smoking without requiring a similarly explicit explanation as to why coal dust exposure was a contributing factor. In addition, the administrative law judge failed to explain how the totality of the underlying documentation better supported Dr. Baker's diagnosis of legal pneumoconiosis, in light of her finding that Dr. Baker's opinion was undermined by the negative x-ray evidence and by his diagnosis of a restrictive impairment. 20 C.F.R. §718.201(a), (b); *see Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165; *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, the administrative law judge did not explain why she found that Dr. Baker's report supported his determination that claimant's respiratory impairment was due to both smoking and coal dust exposure. *Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165. While Dr. Baker's opinion was consistent with the amended definition of legal pneumoconiosis, there is no presumption that a causal link exists in any particular individual's case and a physician's diagnosis of a respiratory impairment related, in part, to coal dust exposure must be adequately documented and reasoned. *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *see also* 65 Fed. Reg. 79,940 (Dec. 20, 2000). Thus, the administrative law judge's finding that Dr. Baker's opinion outweighed the contrary opinions of Drs. Dahhan, Rosenberg, and Vuskovich cannot be affirmed. *Hughes*, 21 BLR at 1-139-40.

We find no merit, however, in employer's assertion that the administrative law judge erred in discounting Dr. Rosenberg's opinion because it was based on an inflated smoking history. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Dr. Rosenberg attributed claimant with a smoking history of "forty plus" pack years, Employer's Exhibit 2 at 5, while the administrative law judge determined that claimant had a smoking history of "about twenty-five" pack years, based on her assessment of the smoking histories noted in the medical reports, Decision and Order at 4. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Thus, because the administrative law judge properly found that Dr. Rosenberg's opinion was based on an inaccurate smoking history, *Trumbo*, 17 BLR at 1-89, we reject employer's assertion that the administrative law judge erred in discounting Dr. Rosenberg's opinion because it was based on an inflated smoking history.

In view of the foregoing, we vacate the administrative law judge's finding that the medial opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R.

§718.202(a)(4), and remand the case for further consideration of the medical opinion evidence in accordance with the APA.[13] *Wojtowicz*, 12 BLR at 1-165.

On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Because we herein vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remand the case for further consideration of the evidence in accordance with the APA, if reached. On remand, the administrative law judge must consider the evidence in accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).[14] *Peabody Coal Co.*

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[13] On remand, if the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), then she need not separately determine the etiology of the disease at 20 C.F.R. §718.203, as her findings at Section 718.202(a)(4) will necessarily subsume that inquiry. *Kiser v. L&J Equipment Co.*, 23 BLR 1-146, 1-159, n.18 (2006).

[14] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially 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).

v. Smith, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge must specifically consider whether legal pneumoconiosis contributed to claimant's totally disabling respiratory impairment at 20 C.F.R. §718.204(c).

Finally, employer contends that the administrative law judge erred in failing to specifically address whether granting claimant's request for modification would render justice under the Act. We agree. Under Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the fact-finder may, on the ground of a change in conditions or because of a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310. The intended purpose of modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion 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 (1971); *see Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987). However, the modification of a claim does not automatically flow from a finding that a mistake was made on an earlier determination, and should be made only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (the purpose of modification under the Longshore Act, also applicable to the Black Lung Benefits Act, is to "render justice."); *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007). In this case, the administrative law judge did not consider claimant's conduct during the modification proceedings and failed to render specific findings as to whether reopening the denial of benefits in the miner's claim would render justice under the Act. *Banks*, 390 U.S. at 464; *Sharpe*, 495 F.3d at 128, 24 BLR at 2-66. Consequently, we vacate the administrative law judge's finding that claimant was entitled to modification pursuant to 20 C.F.R. §725.310, and remand this case for further consideration of the evidence.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge