BRB No. 09-0842 BLA

VIRGIL CLEVINGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARMAN MINING CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 09/30/2010
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Awarding Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Emily Goldberg-Kraft (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (2005-BLA-5166) of Administrative Law Judge Larry S. Merck rendered on a request for modification of a subsequent claim filed pursuant to 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). This case is before the Board for a second time.[1] Director's Exhibit 5. Claimant filed his subsequent claim on December 14, 2001. In a Proposed Decision and Order issued on July 8, 2003, the district director found that claimant failed to establish any of the requisite elements of entitlement and failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Director's Exhibit 25. Claimant requested modification on August 20, 2003 and submitted additional evidence. Director's Exhibit 27. The district director denied modification and the case was forwarded to the Office of Administrative Law Judges for a hearing, which was held before the administrative law judge on June 28, 2006. In his Decision and Order, issued on June 5, 2007, the administrative law judge credited claimant with more than thirty-seven years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence of record was sufficient to establish total disability at 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and a basis for modification under 20 C.F.R. §725.310. Reviewing the claim on the merits, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer appealed, and the Board rejected employer's argument that the administrative law judge applied an incorrect standard in determining whether the evidence established a basis for modification of the denial of the subsequent claim. *See V.C.* [*Clevinger*] *v. Harman Mining Corp.*, BRB No. 07-0842 BLA, slip op. at 3-5 (July 14, 2008) (unpub.). The Board affirmed the administrative law judge's findings that the newly submitted arterial blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id*. at 6. However, because the administrative law judge failed to explain the weight he accorded to the conflicting medical opinions, the Board vacated his finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), and his finding that claimant had demonstrated a change in an applicable condition of entitlement. *Id*. at 8-9.

[1] The relevant procedural history of this claim is set forth in the Board's prior decision and is incorporated herein. *V.C.* [*Clevinger*] *v. Harman Mining Corp*., BRB No. 07-0842 BLA, slip op. at 1-2 (July 14, 2008) (unpub.).

Additionally, in the interest of judicial economy, the Board addressed employer's arguments with respect to the administrative law judge's findings on the existence of pneumoconiosis and disability causation. The Board instructed the administrative law judge, on remand, to reconsider the admissibility of x-ray and medical opinion evidence submitted by the parties, on modification, in accordance with the evidentiary limitations at 20 C.F.R. §725.310(b).[2] The Board also instructed the administrative law judge to reconsider, as necessary, whether claimant established the existence of pneumoconiosis pursuant to either 20 C.F.R. §718.202(a)(1) or (4), and then determine whether claimant established, based on a review of all of the evidence at 20 C.F.R. §718.202(a), that he has pneumoconiosis. Additionally, the administrative law judge was to determine, if reached, whether claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

In his Decision and Order on Remand, issued on September 2, 2009, the administrative law judge noted the Board's remand instructions and again found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and a basis for modification pursuant to 20 C.F.R. §725.310. Considering the merits of the claim, the administrative law judge determined that, while the x-ray evidence was not sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), the weight of the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), and awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant is totally disabled by a respiratory or pulmonary impairment at 20 C.F.R.

[2] The Board held that the administrative law judge erred in failing to explain why he admitted both Dr. Rasmussen's April 1, 2003 report and Dr. Fino's December 4, 2003 report into the record, on modification, in support of claimant's affirmative case, as the regulations provide that each party, in a modification proceeding, shall be entitled to submit no more than one additional medical report as affirmative evidence. *Clevinger*, slip op. at 9-10. As such, the Board advised the administrative law judge to reconsider the admissibility of the medical opinion evidence that was submitted by the parties in accordance with 20 C.F.R. §725.310(b). *Id*. at 10. The Board also held that the administrative law judge mischaracterized Dr. Tuteur's opinion, in finding that it was vague and equivocal, and that he failed to properly explain his determination that Dr. Tuteur's conclusions were not supported by the medical opinion evidence. *Id*. at 11. Therefore, the administrative law judge was instructed to reweigh Dr. Tuteur's opinion on remand. *Id.*

§718.204(b)(ii), (iv). Employer asserts that the administrative law judge erred in weighing the medical opinions at 20 C.F.R. §718.202(a)(4), and challenges the administrative law judge's findings with respect to disability causation under 20 C.F.R. §718.204(c). Employer also asserts that, insofar as claimant seeks modification of his fifth application for benefits, the administrative law judge erred in failing to specifically determine whether granting claimant's petition for modification would render justice under the Act. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final."[5] 20 C.F.R.

[3] By Order dated June 29, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Clevinger v. Harman Mining Corp.*, BRB No. 09-0842 BLA (June 29, 2010) (unpub. Order). Employer and the Director, Office of Workers' Compensation Programs, have responded and assert that Section 1556 is not applicable to this claim because it was filed before January 1, 2005. Based upon the parties' responses and our review of the record, we hold that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the miner's initial and subsequent claims were filed before January 1, 2005. Director's Exhibits 1, 5.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1-4, 6, 8.

[5] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of

§725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim, filed on April 8, 1997, was denied by the district director on August 6, 1997, because the evidence did not establish that he was totally disabled by pneumoconiosis. Director's Exhibit 4.

Additionally, because this case involves claimant's request for modification of the denial of his December 14, 2001 subsequent claim (based on a failure to establish a change in an applicable condition of entitlement), the issue properly before the administrative law judge was whether the new evidence submitted with the request for modification, considered in conjunction with the evidence developed in the subsequent claim, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). If the evidence establishes a change in an applicable condition of entitlement, or a mistake in a determination of fact with respect to the prior denial pursuant to 20 C.F.R. §725.310, the administrative law judge must then consider all of the record evidence as to whether claimant is entitled to benefits. *Hess*, 21 BLR at 1-143.

I. Total Disability

Employer contends that the administrative law judge erred in finding that claimant is totally disabled, and that he established a basis for modification by demonstrating a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. In weighing the newly submitted evidence as to the issue of total disability, the administrative law judge considered, pursuant to 20 C.F.R. §718.204(b)(2)(i), the results of three pulmonary function tests, dated August 5, 2002, August 20, 2002 and December 4, 2003. Director's Exhibits 13, 24, 38. The administrative law judge found that the August 5, 2002 and December 4, 2003 pulmonary function tests produced qualifying values,[6] but he assigned both tests little weight because they did not conform to the applicable quality standards. Decision and Order at 9-10. In considering the August, 20, 2002 pulmonary function test, the administrative law judge noted that it produced non-

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entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[6] A "qualifying" pulmonary function test yields results that are equal to, or less than, the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. Specifically, the FEV1 and either the MVV, FVC or the FEV1/FVC values must qualify. A "non-qualifying" test yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

qualifying values and found that it was entitled to "full probative weight." *Id*. at 10. Accordingly, the administrative law judge found that "the pulmonary function study evidence does not establish total disability." *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the results of three arterial blood gas tests dated August 5, 2002, August 20, 2002 and April 1, 2003. Director's Exhibits 13, 24, 27. The administrative law judge found that the arterial blood gas test evidence of record establishes total disability because "[a]ll three studies produced qualifying results at rest, and the August 5, 2002 test also shows qualifying results after exercise."[7] Decision and Order at 10.

The administrative law judge then considered the newly submitted medical opinions addressing claimant's pulmonary and respiratory condition pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, the administrative law judge considered the medical opinions of Drs. Ranavaya, Hippensteel, Rasmussen, Fino and Tuteur.[8] Dr. Ranavaya examined claimant on August 20, 2002, at the request of the Department of Labor (DOL). Director's Exhibit 13. He diagnosed pneumoconiosis, based on claimant's forty year history of exposure to coal mine dust and radiological evidence of the disease, and also diagnosed coronary artery disease. *Id*. He opined that claimant suffers from a moderate lung impairment, "as reflected by moderate hypoxemia at rest which meets [the] federal criteria for [t]otal disability." *Id*. Dr. Ranavaya stated that claimant's diagnosed conditions contribute to his disability "[t]o a major extent." *Id*.

In a report dated February 5, 2003, Dr. Hippensteel indicated that he had examined claimant on August 5, 2002, and also reviewed Dr. Ranavaya's objective test results of August 20, 2002. Director's Exhibit 24. He noted that claimant's August 5, 2002 arterial blood gas test revealed hypoxemia at rest and during exercise, and that a pulmonary function test performed on the same day revealed moderate airflow obstruction with reduced diffusion. *Id*. He observed that Dr. Ranavaya's August 20, 2002 pulmonary function test showed a mild decrease in the FEV1, with the FVC in the normal range, and that the arterial blood gas study was indicative of hypoxemia. *Id*. According to Dr. Hippensteel, the x-ray evidence is insufficient to support a diagnosis of coal workers'

[7] A "qualifying" arterial blood gas study yields results that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields results that exceed those values. 20 C.F.R. §718.204(b)(2)(ii).

[8] The administrative law judge also considered treatment records from Tri-State Clinic and Dr. H.J. Patel, but found that they "contain no specific opinion as to total disability" and are entitled to "no weight on this issue." Decision and Order at 16; Claimant's Exhibit 2.

pneumoconiosis. He opined that claimant has developed moderate airflow obstruction and significant hypoxemia without any evidence of restriction. *Id.* Dr. Hippensteel noted that there was only a mild decrease in the FEV1 on Dr. Ranavaya's August 20, 2002 pulmonary function study, in comparison to the August 5, 2002 pulmonary function test performed in his office, and described claimant as having a "variable level of obstructive impairment," which is not typical for coal workers' pneumoconiosis. *Id*. He opined that claimant's heart disease was the cause of his gas exchange impairment and "has shown worsening in the last few years not associated with concomitant worsening of ventilatory function." *Id*. Dr. Hippensteel concluded that claimant has a mild pulmonary impairment that would not keep him from returning to his job in the mines, but that he was totally disabled based on his cardiac problems. *Id*.

Dr. Rasmussen examined claimant on April 1, 2003, and reported a minimal, irreversible obstructive ventilatory impairment and a reduction in the single breath carbon monoxide diffusing capacity. Director's Exhibit 27. Dr. Rasmussen also noted that claimant's arterial blood gas test revealed mild hypoxemia at rest, with very marked hypoxemia during exercise. *Id*. He stated that it "is medically reasonable to conclude that [claimant] has coal workers' pneumoconiosis which arose from his coal mine employment" based on claimant's "significant history of exposure to coal dust" and radiographic evidence "consistent with pneumoconiosis." *Id*. Dr. Rasmussen opined that claimant's objective studies showed very marked loss of lung function and that he "does not retain the pulmonary capacity to perform his last regular coal mine job." *Id*. Dr. Rasmussen opined that "[t]he major cause of [claimant's] totally disabling lung disease is his coal mine dust exposure." *Id*. He explained that cigarette smoking and coal dust exposure are both causative factors for COPD, including chronic bronchitis and emphysema, which result in airway obstruction and hypoxia. *Id*. Dr. Rasmussen further stated, however, that "[claimant's] hypoxia is greatly out of proportion to his minimal obstructive ventilatory impairment. This is a common pattern among impaired coal miners reflecting marked destruction of lung tissue by [] coal mine dust exposure." *Id*.

Dr. Fino examined claimant on December 4, 2003, and diagnosed simple coal workers' pneumoconiosis. Director's Exhibit 38. He indicated that the pulmonary function study obtained in his office was invalid due to poor effort, but summarized the objective testing contained in the record and opined that claimant has "an obstructive abnormality which is no more than moderate and variable over time." *Id*. Dr. Fino also reported that the arterial blood gas study he conducted showed mild hypoxemia, and opined that claimant has a "disabling impairment in oxygen transfer." *Id*.

Dr. Tuteur reviewed the medical record, including the medical reports of Drs. Ranavaya, Hippensteel, and Rasmussen, and prepared a consultative report dated June 2, 2006. Employer's Exhibit 1. Dr. Tuteur opined that claimant does not have either clinical or legal pneumoconiosis, and indicated that even if there were radiographic

evidence of the disease, it would be "of insufficient severity and profusion to produce any clinically important changes." *Id*. He noted that claimant clearly has a respiratory impairment and an impairment of gas exchange, which at times worsens with exercise. *Id*. He attributed the latter condition to claimant's heart disease and explained:

> It should be recognized that "respiratory" means gas exchange and with poor perfusion of blood to the tissues[,] the large oxygen needs are not met and venous return is so low in oxygen that even nearly normal lungs cannot provide sufficient O2 transfer. This is the case here. His "respiratory" impairment is in no way related to either the inhalation of coal mine dust or the development of coal workers' pneumoconiosis.

Id. Dr. Tuteur concluded that had claimant "never worked in the coal mine industry, this clinical history and this database would be no different than depicted." *Id*.

In weighing the conflicting medical opinions pursuant to 20 C.F.R §718.204(b)(2)(iv), the administrative law judge found that Drs. Ranavaya, Hippensteel, Rasmussen and Tuteur each submitted "well-reasoned and well-documented opinions on the issue of total disability; however, the physicians disagree as to whether [c]laimant has a respiratory disability or a disabling cardiac condition."[9] Decision and Order at 16. The administrative law judge gave controlling weight to Dr. Rasmussen's opinion, because he "has the most specialized qualifications in the area of pneumoconiosis and related pulmonary disability." *Id*. Thus, the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 17. Weighing all of the evidence together, the administrative law judge concluded that claimant established total disability based on a preponderance of the qualifying arterial blood gas tests and Dr. Rasmussen's opinion. *Id*. Because total disability was an element of entitlement previously adjudicated against claimant, the administrative law judge concluded that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[10] *Id*.

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[9] The administrative law judge found that Dr. Fino's opinion was entitled to little weight on issue of total disability because Dr. Fino did not expressly state whether claimant is totally disabled from performing his prior coal mine employment. Decision and Order on Remand at 14.

[10] The administrative law judge noted that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii) as the record does not contain any evidence that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 10.

On appeal, employer argues that the administrative law judge's finding of total disability fails to properly resolve the conflict in the medical evidence, and does not satisfy the Board's remand instructions. We disagree.

Employer first challenges the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(ii). Employer argues that the administrative law judge "did not weigh the comments concerning the blood gas tests to determine whether they establish a respiratory disability or a cardiac disability [as] . . . a pulmonary impairment that is caused by a non-respiratory or non-pulmonary condition is not sufficient." Employer's Brief in Support of Petition for Review at 17. Contrary to employer's contention, the proper inquiry at 20 C.F.R. §718.204(b)(2)(ii) is whether the arterial blood gas tests indicate the presence of a totally disabling respiratory or pulmonary impairment. The etiology of that impairment is addressed at 20 C.F.R. §718.204(c). *Compare* 20 C.F.R. §718.204(b)(2)(ii) *with* 20 C.F.R. §718.204(c); *see also Clevinger*, slip op. at 5, 6 n. 7. Because the administrative law judge correctly found that all three arterial blood gas studies had qualifying values for total disability at rest, and that the August 5, 2002 study had qualifying values during exercise, we affirm, as supported by substantial evidence, his conclusion that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 10.

Employer also challenges the administrative law judge's finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer contends that the administrative law judge erred in assigning controlling weight to Dr. Rasmussen's opinion and failed to explain how certain aspects of Dr. Rasmussen's credentials bolstered his opinion over that of Dr. Hippensteel. Brief in Support of Petition for Review at 17-18. Contrary to employer's argument, the administrative law judge explained that Dr. Rasmussen's well-reasoned and documented opinion, that claimant is totally disabled, was persuasive in light of "Dr. Rasmussen's superior experience and authorship in the area of pulmonary impairment amongst coal miners, and considering the supporting opinions of Drs. Ranavaya and Tuteur . . . ." Decision and Order at 16; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). The administrative law judge noted that "Dr. Rasmussen's curriculum vitae reflects that he was appointed to multiple NIOSH committees focused on coal miners and pneumoconiosis, and he also authored many relevant articles on pulmonary impairment in coal miners."[11] Decision and Order at 16. Because the administrative law judge, as trier-of-fact, has discretion to make credibility determinations, and the

[11] The administrative law judge listed several articles published by Dr. Rasmussen to support his finding that Dr. Rasmussen's opinion was credible. Decision and Order at 16 n. 16.

Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, we affirm his finding that Dr. Rasmussen's opinion is well reasoned and documented and entitled to the most probative weight on the issue of total disability. *See Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Lane*, 105 F.3d at 166, 21 BLR at 2-34; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Thus, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

In addition, contrary to employer's argument, the administrative law judge properly weighed together all the medical evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv), and found that the qualifying arterial blood gas tests and the medical opinions diagnosing total disability, outweighed the inconclusive pulmonary function tests. Decision and Order at 17; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Therefore we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

II. Existence of Pneumoconiosis

Employer next argues that the administrative law judge erred in weighing the medical opinions as to the existence of legal pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge assigned Dr. Hippensteel's opinion, that claimant's lung impairment was due to his heart condition and not to coal dust exposure, less weight because Dr. Hippensteel relied on explanations that the administrative law judge found to be unreasoned. Decision and Order at 23. Moreover, the administrative law judge found that Dr. Tuteur's diagnosis of no legal pneumoconiosis was entitled to less probative weight, because Dr. Tuteur relied on an explanation that "is at odds with the preamble to the revised regulations." *Id*. at 27-28. The administrative law judge also assigned little weight to the affirmative diagnoses of pneumoconiosis from Drs. Ranavaya and Fino because the opinions of both physicians were not well-reasoned or well-documented. *Id*. at 24-26.

In contrast, the administrative law judge found that Dr. Rasmussen diagnosed claimant with disabling hypoxia and marked loss of lung function, and indicated that this disabling lung disease was due to claimant's coal dust exposure. Decision and Order at 28. The administrative law judge determined that Dr. Rasmussen's opinion contained a reasoned and documented diagnosis of legal pneumoconiosis and accorded the opinion full probative weight. *Id*. Accordingly. the administrative law judge relied "on the opinion of Dr. Rasmussen, a highly-qualified physician in this field," to find that claimant has established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*. The administrative law judge then weighed all the evidence at 20

C.F.R. §718.202(a)(1)-(4) and found it sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Id*.

Employer contends that the administrative law judge erred in assigning less weight to the opinions of Drs. Hippensteel and Tuteur, while finding Dr. Rasmussen's opinion to be reasoned and documented. We disagree. Contrary to employer's contention, the administrative law judge permissibly found Dr. Hippensteel's opinion to be unreasoned because Dr. Hippensteel, "based his opinion, in part, on the variability in the two pulmonary function tests, but did not account for the levels of effort given on the two tests." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141 (1984). The administrative law judge noted that Dr. Hippensteel relied on the variability in the FEV1 values, but determined that "the variability in the tests [is] an unreasoned basis for discounting the presence of pneumoconiosis" because:

> Dr. Ranavaya noted [c]laimant's effort and comprehension as "good" whereas the test performed for Dr. Hippensteel did not record [c]laimant's effort level, and the report stated that "[p]atient was unable to produce [a]cceptable and [r]eproducible [s]pirometry data." Dr. Hippensteel also noted that "diffusion is reduced but partly related to low volume inhaled for this test."

Decision and Order at 23, *quoting* Director's Exhibit 24. Moreover, the administrative law judge acted within his discretion in finding Dr. Hippensteel's opinion to be unreasoned because Dr. Hippensteel "cited the obstructive nature of [c]laimant's impairment" in ruling out coal dust exposure as a potential cause of claimant's condition, but the definition of legal pneumoconiosis includes any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. Decision and Order at 23; *see* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79938 (Dec. 20, 2000); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

We also reject employer's contention that the administrative law judge erred in giving less weight to Dr. Tuteur's opinion. The administrative law judge permissibly found that Dr. Tuteur's opinion "is at odds with the preamble to the revised regulations [and] . . . with how the DOL has chosen to resolve this question of scientific fact." Decision and Order at 27; *see* 65 Fed. Reg. 79940 (Dec. 20, 2000); *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 23 BLR 2-184 (4th Cir. 2004). As the administrative law judge noted, Dr. Tuteur "explained that coal mine dust has a much smaller chance of causing COPD than does cigarette smoking," but the DOL "has

determined that cigarette smoking and coal dust cause obstructive impairments similarly, that the risk of chronic bronchitis increases with dust exposure, and that coal mine dust exposure is associated with clinically significant chronic bronchitis."[12] Decision and Order at 27. In addition, contrary to employer's assertions, the administrative law judge did not treat the preamble to the regulations as evidence, or as a presumption that all obstructive lung disease is pneumoconiosis; rather, he permissibly consulted the preamble as an authoritative statement of medical principles accepted by the DOL.[13] *See McCoy*, 373 F.3d at 570, 23 BLR at 2-184; *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

We also reject employer's contention that the administrative law judge erred in finding Dr. Rasmussen's opinion credible in light of flaws that employer has found in Dr. Rasmussen's opinion. Specifically, employer argues that the administrative law judge did not address Dr. Rasmussen's reliance on a discredited x-ray. Brief in Support of Petition for Review at 21. However, the administrative law judge is not required to discredit a physician's opinion as to the existence of legal pneumoconiosis merely because the administrative law judge did not find that opinion sufficient to establish the existence of clinical pneumoconiosis. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 761, 21 BLR 2-587, 2-601-02 (4th Cir. 1999). Moreover, the administrative law judge acted within his discretion in finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis was reasoned and documented and entitled to full probative weight because, "Dr. Rasmussen examined [c]laimant, reviewed objective medical testing, and diagnosed [c]laimant with hypoxia and a marked loss of lung function." Decision and

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[12] The administrative law judge correctly cited to the language of the preamble, noting:

> [T]he Department of Labor reviewed studies, considered public comments, and found that coal mine dust and cigarette smoking both increase the risk of developing chronic bronchitis and COPD:
>
> [T]he incidence of nonsmoking coal miners with intermediate dust exposure developing moderate obstruction . . . is roughly equal to the incidence of moderate obstruction in smokers with no mining exposure . . . .

Decision and Order at 27, *quoting* 65 Fed. Reg. 79940 (Dec. 20, 2000).

[13] In addition, contrary to employer's suggestion, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990).

Order at 25; *Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269. The administrative law judge stated that:

> [Dr. Rasmussen] explained that both cigarette smoking and coal mine dust can cause COPD, which causes airway obstruction and hypoxia. Dr. Rasmussen concluded that [c]laimant's "hypoxia is greatly out of proportion to his minimal obstructive ventilatory impairment," and that such a pattern is common among impaired miners and reflects marked destruction of lung tissue by [c]laimant's coal mine dust exposure.

Decision and Order at 24. Although employer contends that Dr. Rasmussen did not consider all the potential causes of claimant's condition, employer's assertion of error amounts to no more than a request that the Board reweigh the evidence, which it is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that the medical opinion evidence established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Lastly, we reject employer's assertion that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge properly found Dr. Rasmussen's opinion on the issue of disability causation to be "well-reasoned and well-documented" because he opined that coal dust exposure and cigarette smoking contributed to claimant's lung disease, and because Dr. Rasmussen "[c]onsidered the role of both factors, and the objective medical evidence of [c]laimant's pulmonary function test, exercise study, and arterial blood gas study." Decision and Order at 30; *Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269. Moreover, the administrative law judge noted that only Dr. Rasmussen provided a reasoned and documented opinion on the issues of total disability and the existence of pneumoconiosis. *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Therefore, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(c), that claimant is totally disabled due to legal pneumoconiosis.

III. Modification

Employer also argues that the administrative law judge erred in failing to address whether granting claimant's modification request renders justice under the Act. Specifically, employer contends that, insofar as claimant sought to modify the denial of his fifth application for benefits, "that [claimant] did not return to work, and that [claimant's] prior attempts were repeatedly and consistently denied, the request for modification could only be deemed an attempt to thwart an employer's good faith defense or to search for a more sympathetic judge . . . ." Brief in Support of Petition for Review at 14.

We agree with employer that the administrative law judge did not specifically address whether granting claimant's petition would render justice under the Act. 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. A modification of a claim does not automatically flow from a finding that there has been a change in conditions, and should be made only where doing so will render justice under the Act. *See Sharpe v. Director, OWCP*, 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007), *citing Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *McCord v. Cephas*, 532 F.2d 1377, 1380 (D.C. Cir. 1976). The administrative law judge must exercise the discretion granted under 20 C.F.R. §725.310, by assessing other factors relevant to the rendering of justice under the Act. *Sharpe*, 495 F.3d at 131-132, 24 BLR at 2-67-68; *Hilliard*, 292 F.3d at 533, 22 BLR at 2-429. The relevant factors include the need for accuracy, the quality of the new evidence, the diligence and motive of the parties seeking modification, and the futility or mootness of a favorable ruling. *Id*.

The administrative law judge did not address the factors outlined by the United States Court of Appeals for the Fourth Circuit in *Sharpe*, 495 F.3d at 131-132, 24 BLR at 2-67-68, or explain why these factors do not preclude claimant from pursuing modification. Because the administrative law judge did not render specific findings as to whether reopening this claim would render justice under the Act, 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 the administrative law judge to make an explicit determination as to whether the granting of the modification request would render justice under the Act.

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is 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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge