BRB No. 12-0449 BLA

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| THEODORE M. LATUSEK, JR. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | DATE ISSUED: 08/05/2013 |
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| and | ) | |
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| CONSOL ENERGY, INCORPORATED | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Sue Anne Howard, Wheeling, West Virginia, for claimant.

William S. Mattingly and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5809) of Administrative Law Judge Thomas M. Burke, rendered on claimant's request for modification on a claim filed on July 5, 1994, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The procedural history of this case is lengthy and we summarize the most relevant aspects as

follows. Claimant filed his claim for benefits on July 5, 1994. In a Decision and Order dated June 26, 1997, Administrative Law Judge Daniel L. Leland accepted the parties' stipulation that claimant worked twenty-four years in coal mine employment, that he suffers from pneumoconiosis arising out of coal mine employment and that he has a totally disabling respiratory or pulmonary impairment. Thus, the only issue presented was disability causation. Judge Leland determined that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000),[1] by proving that his disabling interstitial pulmonary fibrosis[2] was caused by coal dust exposure. In so finding, the administrative law judge gave controlling weight to the opinions of Drs. Jennings and Rose over employer's experts. Accordingly, benefits were awarded. Upon review of employer's appeal, the award was affirmed by the Board. *Latusek v. Consolidation Coal Co.*, BRB No. 97-1454 BLA (July 17, 1998) (unpub.)

Subsequently, employer appealed to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises.[3] A majority of the Fourth Circuit court held that the administrative law judge failed to properly consider that employer's medical experts criticized the validity of three medical articles[4] cited by Drs. Jennings and Rose to support their opinions and that he did not properly explain why he

[1] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c). Moreover, the 2010 amendments to the Black Lung Benefits Act do not apply to claims, such as this one, that were filed before January 1, 2005. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 216 (2010).

[2] Judge Leland noted that interstitial pulmonary fibrosis is also known as usual interstitial pneumonitis. June 26, 1997 Decision and Order at 4.

[3] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

[4] *Diffuse Interstitial Fibrosis In Nonasbestos Pneumoconiosis – A Pathological Study* by Dr. Honma; *Idiopathic Pulmonary Fibrosis* by Dr. Iwai; and *Mineralogical Microanalysis of Idiopathic Pulmonary Fibrosis* by Dr. Monso. We reference these studies collectively as the "Honma, Iwai, and Monso articles" in this decision.

discredited the opinions of employer's experts. *Consolidation Coal Co. v. Latusek* (*Latusek I*), 187 F.3d 628 (4th Cir. 1999) (unpub). Consequently, the award was vacated and the case remanded for further consideration.

In a Decision and Order on Remand – Awarding Benefits dated June 8, 2000, Judge Leland adhered to his credibility determinations. Upon consideration of employer's appeal, the Board vacated the award because Judge Leland had not followed the Fourth Circuit's instruction that he address employer's experts' criticisms of the three medical articles relied upon by Drs. Jennings and Rose to link interstitial pulmonary fibrosis with coal dust exposure. *Latusek* v. *Consolidation Coal Co*., BRB No. 00-0996 BLA (Sept. 17, 2001) (unpub.). In a Decision and Order dated January 2, 2002, Judge Leland again awarded benefits, giving controlling weight to the opinions of Drs. Jennings and Rose because he considered them to be better qualified than employer's experts to address the cause of claimant's interstitial pulmonary fibrosis. He also found that their opinions were reasoned and better supported by the objective medical factors they cited to support their conclusions. Judge Leland noted that, even if Drs. Jennings and Rose relied upon flawed medical articles, their opinions were still credible because they based their etiological conclusions primarily on the objective medical evidence and their own specialized expertise in interstitial pulmonary fibrosis.

Pursuant to employer's appeal, the award was affirmed by the Board. *Latusek v. Consolidation Coal Co*., BRB No. 02-0279 BLA (Nov. 26, 2002) (Dolder, J., dissenting) (unpub.). However, in considering employer's subsequent appeal, the Fourth Circuit determined that the administrative law judge's credibility findings were irrational and reversed the award of benefits. *See Consolidation Coal Co. v. Latusek* (*Latusek II*), 89 F. App'x 373 (4th Cir. 2004) (unpub.). A majority of the court held that it was error for Judge Leland to reject the opinions of Drs. Kleinerman, Renn, Morgan and Fino on the ground that they did not provide a definitive etiology for claimant's disabling interstitial pulmonary fibrosis when they ruled out coal dust exposure as a causative factor for his condition. *Id.* at 377. The Fourth Circuit further held that Judge Leland erred in discrediting the opinions of Drs. Kleinerman, Renn, Morgan and Fino "as having inferior credentials in the area of [interstitial pulmonary fibrosis] without considering the vast experience that these doctors have researching, diagnosing and treating diseases that meet the relevant regulatory standard" of a chronic lung disease arising out of coal mine employment pursuant to 20 C.F.R. §718.201. *Id*. In addition, the Fourth Circuit held that Judge Leland's finding, that "Drs. Jennings and Rose did not rely on the flawed [Honma, Iwai, and Monso] articles in coming to their conclusions[,] is not supported by substantial evidence." *Id*. The court concluded that '"no reasonable mind could have interpreted the evidence and credited the [medical opinions] as [Judge Leland] did." *Id.* at 378 (internal citations omitted). Thus, the Fourth Circuit reversed the award "[b]ecause there remains no evidence upon which to base a finding of entitlement." *Id*.

On January 19, 2005, claimant filed a timely request for modification. Director's Exhibit 103. The district director awarded benefits and employer requested a hearing, which was ultimately held on April 27, 2011.[5] In his Decision and Order issued on May 9, 2012, Judge Burke (the administrative law judge) considered the newly submitted evidence, in conjunction with the prior evidence before Judge Leland, and found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 21. Accordingly, benefits were awarded.

In the current appeal, employer argues that it was deprived of due process of law because the district director and the administrative law judge did not rule on its evidentiary requests. Employer maintains that the administrative law judge violated the law of the case doctrine in granting modification based on a mistake in a determination of fact. Employer contends, alternatively, that the administrative law judge's finding of a mistake in a determination of fact is not rational. Specifically, employer asserts that the medical opinions of Drs. Dauber, Jennings, and Rose, which support the administrative law judge's award, are based on flawed medical articles. Employer also contends that the administrative law judge erred in relying on evidence outside of the record to resolve the conflict in the medical opinions, that he erred in referencing the preamble to the regulations, and that he did not properly explain the weight he accorded to all of the relevant evidence. Additionally, employer asserts that the administrative law judge erred in failing to address whether granting claimant's request for modification would render justice under the Act. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). After analyzing all of employer's contentions, we have determined that the last two have merit: the administrative law judge did not explain the weight he accorded relevant pathology evidence and he failed to determine whether granting claimant's request for modification was in the interest of justice. Nevertheless, we shall address each argument in turn.

[5] The case was continued, at the joint request of the parties, due to claimant's June 3, 2006 lung transplant and until the Supreme Court of Appeals of West Virginia issued a final ruling on claimant's workers' compensation claim on March 31, 2010. Director's Exhibits 117, 118.

## I. EVIDENTIARY CHALLENGE

We first address employer's evidentiary challenges with respect to the processing of the case by the district director. On January 27, 2005, the district director issued an Order directing the parties to show cause why claimant's modification request should not be granted. In a letter dated February 13, 2005, employer raised seven enumerated objections and requests, which are summarized as follows: 1) Employer asked that the district director rule on whether the deposition testimony of Drs. Parker and Doyle, obtained in conjunction with claimant's state claim, was admissible as evidence in this federal claim. Employer asked that the depositions be stricken or, alternatively, that it be allowed to depose those physicians, prior to any decision by the district director. Employer asserted that a ruling was necessary in order to develop its case. 2) Employer asserted that multiple medical opinions proffered by claimant were cumulative and should be striken. 3) Employer asserted that claimant did not comply with the "evidentiary limitations provided in [current] 20 C.F.R. §725.310 (2004)." 4) Employer asked that claimant submit to a pulmonary evaluation with a physician of its choosing. 5) Employer asked that the record be held open for 120 days following a ruling by the district director on its objections. 6) Employer objected to "the partial report from Dr. Doyle dated 12 August 2001," indicating that it had three pages and "all pages of this report should be proffered." 7) Employer asserted that any state claim evidence that was in existence at the time of the prior litigation of this claim before Judge Leland was inadmissible as evidence in support of modification.

On February 24, 2005, the district director granted an extension of time, until May 16, 2005, for employer to submit evidence. A Proposed Decision and Order awarding benefits was issued on May 24, 2005, and employer requested a hearing. At the April 27, 2011 hearing, employer did not raise any objection to the admission of the Director's Exhibits or claimant's evidence. In a post-hearing brief dated August 31, 2011, employer asserted that if benefits were awarded, it should be dismissed as a party to the claim, based upon the district director's failure to address its objections and requests. The administrative law judge made no reference to employer's dismissal argument in the Decision and Order.

In this appeal, employer generally asserts that the failure of the district director to rule on its evidentiary requests violated due process because employer "was unable to prepare its defense." Employer's Brief in Support of Petition for Review at 83. There is no merit to this argument.

A fundamental requirement of due process is the opportunity to be heard to ensure a fair disposition of the case. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The Fourth Circuit has applied "a straightforward test for determining whether an employer has been denied due process by the government's processing of a claim: [d]id the government

deprive the employer of 'a fair opportunity to mount a meaningful defense to the proposed deprivation of its property.'" *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183, 21 BLR 2-545, 2-559-60 (4th Cir. 1999), *quoting Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807, 21 BLR 2-302, 2-322 (4th Cir. 1998).

The fact that the district director did not specifically respond to employer's request for clarification regarding the applicability of 20 C.F.R. §725.414 does not establish that employer's right to due process was violated. The revised regulations clearly state that the evidentiary limitations set forth at 20 C.F.R. §725.414 do not apply to claims, such as the instant claim, that were pending on January 19, 2001. 20 C.F.R. §725.2(c); *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-56 n.5 (2004) (en banc). Furthermore, any error by the district director in not specifically addressing employer's evidentiary arguments is harmless, as the district director's role was to process the modification request and to include the parties' evidentiary submissions in the record. Thereafter, the regulations provide that all documents transferred by the district director to the Office of Administrative Law Judges (OALJ) "shall be placed into evidence by the administrative law judge, subject to objection by any party." 20 C.F.R 725.456(a). As employer had the opportunity to object to the admission of the Director's Exhibits and Claimant's Exhibits while the case was pending before the OALJ, or more specifically, at the hearing held on April 27, 2011, but did not do so, employer has failed to demonstrate how it was prejudiced. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995).

Furthermore, there is no merit to employer's argument that claimant should have been precluded from submitting medical evidence developed in conjunction with his state workers' compensation case, based on employer's contention that the state agency applied different standards of proof in assessing its credibility. It is a matter within the administrative law judge's discretion to determine the weight to give evidence from a state workers' compensation claim. *See Schegan v. Waste Management and Processors, Inc.*, 18 BLR 1-41 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Moreover, we hold that claimant was not precluded from submitting evidence that was developed, or was otherwise available, while the case was before Judge Leland, as "a modification request cannot be denied because it contains an argument or evidence that could have been presented at an earlier stage in the proceeding[.]" *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533 547, 22 BLR 2-429, 2-454 (7th Cir. 2002).

Lastly, although employer indicated before the district director that it wanted to exercise its right to have claimant examined and to depose the physicians who prepared opinions for the state claim, it does not appear from the record that employer scheduled an examination which claimant refused to attend, or that employer made any attempt to schedule depositions with the physicians associated with the state claim. Because employer has not shown how it was prejudiced in the development of its case, we reject

employer's assertion of a due process violation. *See Borda*, 171 F.3d at 183, 21 BLR at 2-559-60.

## II. MODIFICATION

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated an award in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence of record. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). 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 Westmoreland Coal Co. v. Sharpe*, 692 F. 3d 317, 327-28, 25 BLR 2-157, 2-173-174 (4th Cir. 2012), *cert. denied*, 570 U.S. (2013); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007).

### A. Law of the Case

Employer argues that claimant is precluded from establishing modification by application of the doctrine of the law of the case.[6] Employer asserts that, insofar as the Fourth Circuit reversed the award of benefits, the court has determined, as a matter of law, that claimant's total disability is unrelated to coal dust exposure and the administrative law judge is without authority to modify that holding on the grounds of a

[6] The doctrine of the "law of the case" is a discretionary rule of practice based on the policy that once an issue is litigated and decided, the matter should not be re-litigated. *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). Specifically, "the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J. dissenting).

mistake in a determination of fact under 20 C.F.R. §725.310. Employer states that to permit modification of a circuit court decision deprives employer of due process and the "ability to ensure, through appellate review, that its right to a full and fair proceeding is honored." Employer's Brief in Support of Petition for Review at 20-21.

It is well-settled that a lower court is required to give full effect to the execution of an appellate court's mandate, both expressed and implied, and without altering, amending or examining the mandate. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-415 (4th Cir. 2005); *Piambino v. Bailey*, 757 F.2d 1112, 1119-1120 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). As the Board stated in *Hall v. Director, OWCP*, 12 BLR 1-80 (1988), "the United States judicial system relies on the most basic of principles, that a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it." *Hall*, 12 BLR at 1-82; s*ee Briggs v. Pennsylvania R.R.*, 334 U.S. 304 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993).

In *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999), the United States Court of Appeals for the Sixth Circuit suggested that the law of the case doctrine might foreclose modification by an administrative law judge of an issue previously decided by a superior tribunal. *Milliken*, 200 F.3d at 950, 22 BLR at 2-58. The Sixth Circuit observed that agencies and administrative law judges are not free to ignore the court's mandates and described the mandate rule as part of the law of the case doctrine. *Id*. But in *Milliken*, the court specified that if an appellate court has not actually decided a particular issue, nothing forecloses a subsequent administrative law judge from modifying a compensation order based on that issue. *Milliken*, 200 F.3d at 950-51, 22 BLR at 2-59-60.

In this case, the Fourth Circuit decided, based on the record before the court, that claimant did not establish that his disabling interstitial pulmonary fibrosis arose from coal dust exposure. *Latusek II*, 89 F. App'x at 377-78. The court disagreed with Judge Leland that the opinions of Drs. Jennings and Rose were not influenced by their reliance on the flawed medical articles. *Id*. at 377. The court also held that Judge Leland did not properly consider the credentials of the physicians relevant to their experience diagnosing and treating coal-dust related diseases. *Id.*

As discussed *infra*, in considering claimant's request for modification, the administrative law judge was not presented with the identical record that was before the Fourth Circuit court. The administrative law judge also did not challenge any of the conclusions of the Fourth Circuit with respect to the prior evidence reviewed by the court. Because the administrative law judge did not set aside, collaterally attack or ignore any of the holdings of the Fourth Circuit, we reject employer's argument that the administrative law judge's action in considering claimant's modification request was

contrary to the law of the case doctrine and resulted in a due process violation. *Grannis*, 234 U.S. at 394; *Borda*, 171 F.3d at 183, 21 BLR at 2-559-60.

**B. Mistake in a Determination of Fact**

The administrative law judge noted initially that "[c]laimant's request for modification of the denial asserted a mistake of fact in the earlier denial of benefits by contending that medical science has progressed in its understanding of the etiology of [c]laimant's pulmonary disease since the hearing on his claim on February 25, 1997." Decision and Order at 25, *citing* Director's Exhibit 103. The crux of the issue before the administrative law judge was whether claimant's interstitial pulmonary fibrosis is idiopathic in origin or caused by his exposure to coal dust.

The administrative law judge noted that claimant submitted the following evidence to support his modification request: a pathology report of claimant's lung transplant; additional medical articles to support a link between coal dust exposure and interstitial pulmonary fibrosis; the December 6, 2004 deposition testimony of Dr. Parker; the April 21, 2011 deposition testimony of Dr. Dauber, claimant's treating physician; and the July 6, 2011 deposition testimony of Dr. Rose, also claimant's treating physician.[7] The administrative law judge further noted that employer submitted the following: a February 17, 2006 report by Dr. Renn; a June 13, 2006 report and July 15, 2011 deposition testimony by Dr. Rosenberg; a June 4, 2006 report and April 26, 2011 deposition testimony by Dr. Spagnolo; a March 21, 2011 report by Dr. Tuteur, and a June 7, 2006 report by Dr. Repsher. The administrative law judge also considered the opinions of Drs. Kleinerman, Morgan, Fino and Spagnolo, which were before Judge Leland.

The administrative law judge observed that, subsequent to the Fourth Circuit's reversal, claimant underwent a lung transplant.[8] Decision and Order at 3-4. He also

[7] Claimant was first diagnosed with a respiratory condition in 1990 and was treated by Dr. Renn. February 25, 1997 Hearing Transcript at 28. Dr. Renn referred claimant to the National Jewish Hospital in Denver, Colorado, where he was treated by Dr. Rose and Dr. Jennings from September 1993 to August 1996. *Id*. at 25-26. In September of 1996, claimant moved his treatment to the University of Pittsburgh Medical Center and was seen by Dr. Dauber, who placed claimant on the lung transplant list. August 2, 2006 Hearing Transcript at 16. Dr. Dauber treated claimant every four to six months, and claimant was taken off the list in 1998 because his condition appeared to level off. *Id*. at 18. Claimant testified that his condition remained stable until 2006. He underwent a single left lung transplant on July 3, 2006. *Id*. at 21.

[8] The July 3, 2006 lung transplant report identified the following: usual interstitial pneumonia pattern of the lung of uncertain etiology; hamartoma (3.0 centimeters in

observed that claimant received a West Virginia workers' compensation award for partial disability due to pneumoconiosis. *Id*. at 8. The administrative law judge found that the state award was based, principally, on the opinion of Dr. Parker, that claimant suffered from pneumoconiosis and pulmonary fibrosis caused by his coal dust exposure.[9] Decision and Order at 8; *see* Director's Exhibit 103.

Reviewing the opinions of claimant's treating physicians, the administrative law judge noted that Dr. Dauber, a former "Professor of Medicine, Director of the Pulmonary Transplant Program and Medical Director of the Center for Interstitial Lung Disease, [University of Pittsburgh Medical Center (UPMC)]," testified that claimant's clinical course was atypical for idiopathic pulmonary fibrosis. Decision and Order at 21; *see* Employers' Exhibit 12. Dr. Dauber opined that coal dust contributed to claimant's interstitial fibrosis, based on the pathology of the lung transplant which showed anthracosilicotic nodules. Employer's Exhibit 12. Dr. Dauber reasoned that claimant's coal dust-related lung condition was not benign or he would not have nodules. *Id*. He explained that when nodules form, they cause inflammation that can affect other processes in the lung. *Id*. Dr. Dauber further testified that, under the standards set by the

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diameter) in the left lower lobe; and multiple hilar lymph nodes with focally calcified anthracosilicotic nodules. The gross description stated: pleural surface was tan to red and anthracotic; the surrounding lymph nodes were anthracotic but of normal size; a firm mass was identified in the left lobe; the adjacent parenchyma was red to anthracotic and soft. *See* Employer's Exhibit 1.

[9] Dr. Parker testified that he worked for National Institute for Occupational Safety and Health (NIOSH) as Chief/Acting Chief of the clinical investigation branch and the coal workers' surveillance and B reader certification programs, which he ran from 1991 to 1998. Director's Exhibit 103. Dr. Parker examined claimant in May 2001, and reviewed claimant's medical records, including the 1992 biopsy reports. *Id*. He testified that the course of claimant's respiratory disease was atypical for idiopathic pulmonary fibrosis: "by the time I saw him he was nine years out from a biopsy and not very impaired. Most people with pulmonary fibrosis, it's quite typical to die within five years rather than to survive." Director's Exhibit 103 at 21. Dr. Parker further testified that it is "slowly becoming more broadly accepted" that coal miners may develop interstitial fibrosis in the absence of, or with minimal evidence of, traditional coal macules or silicotic nodules. Director's Exhibit 103 at 14. Based on the fact that claimant is a lifetime nonsmoker, and has "pathological changes consistent with the typical response to coal mine dust," Dr. Parker stated, "I feel quite comfortable that [claimant's] lung function abnormality was a result of his coal mine dust exposure and not the idiopathic variety of pulmonary fibrosis." Director's Exhibit 103 at 21.

American Thoracic Society, the presence of interstitial pulmonary fibrosis in the lungs is considered idiopathic in origin only when no other cause can be determined. *Id*. at 31.

The administrative law judge summarized Dr. Rose's July 6, 2011 deposition testimony. Decision and Order at 11-13. Dr. Rose is Board-certified in internal medicine and pulmonary medicine and treated claimant at the National Jewish Hospital for Immunology and Respiratory Medicine in Denver, Colorado. Claimant's Exhibit 1. Most recently, Dr. Rose reviewed claimant's medical records, the lung transplant report, and pathology reports of Drs. Naeye and Crouch. She considered the lung transplant pathology to be consistent with claimant's 1992 biopsy, showing an end-stage fibrotic lung disease of the airways, with areas of pigmentation and coal macules, consistent with the inhalation of coal dust. Claimant's Exhibit 1 at 33.

Dr. Rose stated that "an article by Drs. K. McConnochie, F.H.Y. Green and V. Ballyathan et al., *Interstitial Fibrosis in Coal Workers – Experience in Wales and West Virginia*, [(McConnochie study)] has particular relevance to [c]laimant's case as the article showed that coal miners who developed interstitial fibrosis developed it at a statistically younger age than what is reported as the mean age of diagnosis for people with non-occupational related idiopathic pulmonary fibrosis." Decision and Order at 22; *see* Claimant's Exhibit 1 at 21. Dr. Rose described the McConnochie study as showing a prevalence of interstitial fibrosis in both Welsh and West Virginia coal miners that "was substantially higher than you would expect, given what we know about the prevalence of diffuse interstitial fibrosis in a general population." Claimant's Exhibit 1 at 18. She further testified that the study showed that miners who suffered from severe interstitial fibrosis "had a fairly benign course," similar to claimant's course, as "[a]bout two-thirds of them . . . survived for ten years, which was a much better survival duration than what occurs in patients who have idiopathic pulmonary fibrosis." *Id*. at 22. Dr. Rose also testified that recent studies have shown that, while the classic form of coal workers' pneumoconiosis is radiographic evidence of rounded opacities in the upper lung, a minority of coal miners, such as claimant, may present with lower lobe irregular or linear interstitial opacities. *Id*. Dr. Rose concluded that claimant suffered from a small airways injury due to his coal mine employment that resulted in epithelium damage, which further led to the development of diffuse interstitial fibrosis. She stated, "our thinking based on recent studies of patients with pulmonary fibrosis is that it's not due simply to inflammation but to epithelial damage that triggers this cascade of fibroproliferation and end-stage lung disease." *Id.* at 35-36.

With respect to employer's medical experts, the administrative law judge found that Dr. Renn, Board-certified in internal and pulmonary medicine, opined that claimant is totally disabled by a restrictive impairment caused by usual interstitial pneumonitis. *See* Employer's Exhibits 2, 11. He testified that, based on his interpretation of the medical literature and a statement on idiopathic pulmonary fibrosis by the American

Thoracic Society in 2000, it was his opinion that coal dust exposure is not a causative factor for claimant's disability. Employer's Exhibit 11.

Dr. Rosenberg, Board-certified in internal and pulmonary medicine, opined that claimant has idiopathic pulmonary fibrosis and that coal dust exposure does not cause this condition, because "coal workers' pneumoconiosis" begins as nodules and progresses, while idiopathic fibrosis is a diffuse fibrosis that spreads out and forms honeycombing. Employer's Exhibit 17 at 20. Dr. Rosenberg specifically criticized the validity of the McConnochie study. *Id*. at 24-25.

Dr. Spagnolo, Board-certified in internal and pulmonary medicine, testified that the lung transplant pathology showed no evidence of coal dust-induced lung disease. Employer's Exhibit 13 at 15. He explained that the calcified anthracosilicotic nodules in the multiple hilar lymph nodes cannot be used to diagnose coal workers' pneumoconiosis, as he noted that "[y]ou have got to see [coal workers' pneumoconiosis] in the lungs." *Id*. Based on the absence of coal macules in the lung tissue, he opined that claimant has interstitial fibrosis related to "hypersensitivity disease" and not coal dust exposure. *Id*. at 24, 40.

Dr. Tuteur, Board-certified in internal and pulmonary medicine, reviewed certain medical records and pathology evidence. Employer's Exhibit 9. Dr. Tuteur opined that claimant is totally disabled due to idiopathic usual interstitial pneumonitis, and that a specific etiology cannot be ascribed to that condition. *Id*. He also opined that claimant suffers from coal workers' pneumoconiosis, but of an insufficient severity and profusion to cause either clinical symptoms or impairment. *Id*. Dr. Tuteur acknowledged that it was rare for idiopathic pulmonary fibrosis to have slow progression over nearly two decades, but stated that is was not "unheard of." *Id.* He explained that he excluded coal dust exposure as a cause of claimant's interstitial fibrosis because the fibrosis progressed over time, whereas the pneumoconiosis did not progress from the biopsy in 1992 to the lung transplant. *Id*. He expected both to progress equally if coal dust exposure were a causative factor for claimant's respiratory impairment. *Id.*

Dr. Repsher reviewed certain medical records and opined that claimant has "mild coal workers' pneumoconiosis of no clinical significance. Employer's Exhibit 4. He opined that there is nothing in the medical literature to support the position of claimant's experts that coal dust exposure can cause "UIP/IPF." *Id*.

After summarizing the conflicting medical opinions, the administrative law judge concluded that "evidence is available that was not part of the record before Judge Leland that shows coal dust exposure can and did cause [c]laimant's interstitial pulmonary fibrosis." Decision and Order at 25. The administrative law judge observed that the Fourth Circuit required consideration of the physicians' experiences in researching,

diagnosing and treating diseases that meet the regulatory standard of chronic dust disease of the lung arising out of coal mine employment. The administrative law judge found that Dr. Rose has "extensive experience in the treatment and research of occupational diseases as well as interstitial fibrosis. Further, the qualifications of Dr. Green and Dr. Parker are extensive in the treatment and study of pulmonary diseases[.]" *Id*. at 27. The administrative law judge concluded that "the record supports Dr. Parker's testimony that it has slowly become more broadly accepted that interstitial fibrosis can be caused by occupational dust exposure."[10] *Id*.

The administrative law judge also indicated that he gave controlling weight to the opinions of Drs. Parker, Rose and Dauber over employer's experts for three reasons. First, the administrative law judge stated that he was persuaded, in light of the McConnochie study, that claimant's experts had credible support for their position that claimant's condition is distinguished from idiopathic pulmonary fibrosis, based on *the early onset* of claimant's interstitial fibrosis in his mid-thirties, whereas "idiopathic pulmonary fibrosis strikes older people, rarely before the age of [fifty]." Decision and Order at 22. Second, the administrative law judge determined that the McConnochie study supported the opinions of claimant's experts that claimant's disease *progression* is atypical for idiopathic pulmonary fibrosis, since the median survival for idiopathic pulmonary fibrosis is three years, whereas claimant is still alive and was treated for sixteen to eighteen years before requiring a lung transplant. *Id*.; *see* Claimant's Exhibit 1 at 21; Employer's Exhibit 17 at 48-54. Third, the administrative law judge observed that a November 6, 2008 article by Drs. Cohen, Patel and Green, *Lung Disease Caused by Exposure To Coal Mine and Silica Dust*, (Green study) states that "diffuse interstitial fibrosis 'is a recognized type of pneumoconiosis following exposure to coal dust, silica, and dusts containing a mixture of minerals (mixed dust pneumoconiosis).'" Decision and Order at 26, *quoting* Employer's Exhibit 17 at 50. The administrative law judge noted that the pathology evidence showed nodules of anthracosilicosis and further noted that claimant's "work history of exposure to sandstone in the drilling and long wall work is consistent with silicosis-induced lung disease." Decision and Order at 28.

Taking into consideration all of the relevant evidence on modification, along with the previously submitted evidence, the administrative law judge found that claimant satisfied his burden to establish that his disabling pulmonary fibrosis was caused by his coal dust exposure. Accordingly, the administrative law judge found that claimant

[10] The administrative law judge noted Dr. Rose's testimony that NIOSH has recognized that interstitial fibrosis with irregular opacities, and without classical findings of nodular opacities, are occurring in coal miners and that the website of the National Institute of Health mentions that coal dust exposure is associated with risk for idiopathic pulmonary fibrosis. Decision and Order at 27-28; *see* Claimant's Exhibit 1 at 25.

established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, with respect to the issues of the existence of legal pneumoconiosis and disability causation, and awarded benefits.

**C. Theories of Modification**

Employer devotes a major portion of its brief to arguing that claimant has not raised a proper "theory" to support modification.[11] Contrary to employer's contention, claimant need not advance any particular theory to support his modification request. Rather, modification, based on a mistake in a determination of fact, vests 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.*" *Jessee*, at 5 F.3d at 725, 18 BLR at 2-28 (emphasis added). When a request for modification is filed, the administrative law judge may "reconsider all the evidence for *any mistake of fact*," including whether "*the ultimate fact*" of entitlement was wrongly decided. *Id*. (emphasis added).

**D. Weight Assigned Medical Literature**

Citing *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), employer asserts that the administrative law judge abdicated his duty as "gatekeeper" by failing to ensure that the scientific evidence relied upon by claimant's experts in rendering their opinions was valid and reliable. The Board has held that *Daubert* is applicable only in the context of cases subject to Rule 702 of the Federal Rules of Evidence, because an administrative law judge in black lung adjudications is not bound by "common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. §554 and this subpart." 20 C.F.R. §725.455(b); *see Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-76 (1997). Notwithstanding, we conclude that the administrative law judge properly considered the reliability of the medical studies and articles underlying the opinions of claimant's experts in this case.[12]

[11] Employer asserts that because the McConnochie study was available at the time of the 1997 hearing, it cannot support a change in medical science theory as alleged by claimant.

[12] Employer argues that "by continuing to credit Drs. Jennings and Rose in this modification proceeding, [the administrative law judge] rejects the Fourth Circuit's holding about the Honma, Monso and Iwai articles' evidentiary value." Employer's Brief in Support of Petition for Review at 18. Because Dr. Jennings did not provide a new medical report or testimony in conjunction with claimant's modification request, we agree that the administrative law judge erred in relying on Dr. Jennings's opinion to

Employer argues that the administrative law judge failed to address criticisms of the McConnochie study in the record. We disagree. The administrative law judge noted correctly that the physicians fundamentally disagree as to the value of the McConnochie study. Contrary to employer's argument, the administrative law judge addressed Dr. Rosenberg's position that the McConnochie study does not "prove that [idiopathic pulmonary fibrosis] is coal mine dust related." Employer's Exhibit 17; *see* Decision and Order at 16-17, 26. The administrative law judge noted that "Dr. Rosenberg testified that generalized statements on coal miners and [idiopathic pulmonary fibrosis] cannot be made as these [autopsy samples] were 'selected pathology specimens,' not randomly selected." Decision and Order at 16, *quoting* Employer's Exhibit 17. The administrative law judge specifically noted Dr. Rosenberg's conclusion that the study is of no probative value since the authors specifically state, "[t]here is no doubt that interstitial pulmonary fibrosis occurs in coal miners, but it is unknown whether this is related to coal dust inhalation." Decision and Order at 26, *quoting* Employer's Exhibit 17.

Despite Dr. Rosenberg's criticisms, the administrative law judge observed correctly that the findings of the McConnochie study have been stated in several medical articles.[13] Decision and Order at 26. The administrative law judge acted within his discretion, as fact finder, in determining that the findings reached by the McConnochie study, in relation to early onset and disease progression of pulmonary fibrosis seen in coal miners, lend support to the opinions of Drs. Parker and Rose. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-286-87 (4th Cir. 2010); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 25-26. Specifically, the administrative law judge permissibly found that the study supports the position that claimant's clinical course is atypical for idiopathic pulmonary fibrosis found in the general population, but that it is consistent with interstitial pulmonary fibrosis seen in certain coal miners exposed to silica. *Id.*

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award benefits. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). However, contrary to employer's argument, Drs. Rose and Parker provided support for their opinions, unrelated to the Honma, Monso and Iwai articles. Claimant's Exhibit 1.

[13] The administrative law judge observed that the textbook, Third Edition of Occupational Lung Disorder, by Dr. W. Raymond Parkes, published in 1994, stated that, "[a]n interesting point to emerge from the [McConnochie study] is the survival after diagnosis was significantly longer in miners with [diffuse interstitial pulmonary fibrosis] than reported in some of the earlier series of cases of idiopathic [diffuse interstitial pulmonary fibrosis] in the general population." Decision and Order at 27, *quoting* Director's Exhibit 17.

Accordingly, we reject employer's contention that the administrative law judge did not properly consider the reliability of the McConnochie article in weighing the conflicting medical opinions.

**E. Qualifications**

The administrative law judge determined that Dr. Rose "is most qualified to offer an opinion on the cause of [c]laimant's pulmonary condition." Decision and Order at 11. Employer challenges that finding and asserts that the Fourth Circuit has decided in this case that employer's experts are the most qualified. Employer's Brief in Support of Petition for Review at 17-18. We disagree.

The Fourth Circuit majority reversed Judge Leland's award of benefits because Judge Leland focused his analysis on the credentials of the physicians in the area of interstitial pulmonary fibrosis and did not provide any findings with respect to the qualifications of the physicians for the diagnosis and treatment of a chronic lung disease arising out of coal mine employment. *See Latusek II*, 89 F. App'x at 377. The Fourth Circuit majority observed:

> Our dissenting colleague notes that Drs. Jennings and Rose have some experience with patients having coal dust exposure. The [administrative law judge], however, credited Drs. Jennings and Rose's opinions because he found their credentials regarding [interstitial pulmonary fibrosis] superior to the credentials of Drs. Kleinerman, Renn, Morgan, and Fino. *We must review the findings that the* [*administrative law judge*] *actually made*.

*Id.* The majority did not rule on whether claimant's experts were more or less qualified in diagnosing a coal dust-related lung disease, in comparison to employer's experts, as the issue had not been addressed by Judge Leland.

In considering claimant's modification request, the administrative law judge noted the Fourth Circuit's ruling and summarized all of the relevant qualifications of the physicians. Decision and Order at 10-22, 27. The administrative law judge permissibly assigned controlling weight to Drs. Rose[14] and Dauber because they "have most impressive backgrounds in the treatment, study and publication of articles involving interstitial pulmonary diseases *and occupational exposure to coal mine dust*." *Id.* at 21 (emphasis added); *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the

[14] The administrative law judge found that "the testimony of Dr. Rose shows that she does have extensive experience in the treatment and research of *occupational lung disease* as well as interstitial fibrosis." Decision and Order at 21 (emphasis added).

administrative law judge considered the physicians' experience in diagnosing a chronic dust-related lung disease, his analysis is consistent with the Fourth Circuit's ruling in *Latusek II*. Decision and Order at 21; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *see also Dudas*, 413 F.3d at 414-415; *Milliken*, 200 F.3d at 950-51, 22 BLR at 2-59-60.

Additionally, we specifically reject employer's assertion that the administrative law judge erred in relying on evidence outside the record to find that Dr. Green, co-author of the Green study discussed *supra*, has "excellent qualifications in occupational and pulmonary medicine." Decision and Order at 28, *citing* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see* Employer's Brief in Support of Petition for Review at 54-57. Contrary to employer's contention, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice to the parties and an opportunity to respond. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). The administrative law judge properly observed that Dr. Green has been recognized as an expert in his field by the Department of Labor (DOL).[15] *See* 65 Fed. Reg. at 79,943. We, therefore, affirm the administrative law judge's findings as they pertain to the weight accorded the medical experts, based on their qualifications.

**E. Pathology Evidence**

The administrative law judge determined that the pathology evidence in this case was consistent with the findings of the McConnochie study and the Green article, because the pathology showed silica in the lungs. The administrative law judge observed:

> [H]istologic findings by Dr. Waldren included abundant polarized silicates within the alveolar space out of proportion, silicate crystals implicated the presence of the silicates in the pathogenesis of the large number of

[15] The preamble to the regulations discusses *Pathology of Occupational Lung Disease* (2d ed. 1998) by Drs. Chung and Green. In response to a criticism raised by commenters to the revised regulations that the articles noted in the preamble are not supported by "peer-reviewed" scientific and medical studies, the Department of Labor (DOL) noted that all articles cited in the preamble have appeared in peer-reviewed journals and the that "textbooks relied upon are authored and edited by highly respected professionals in the field. Textbook editors serve as peer-reviewers of the relevant published literature because they comprehensively survey, evaluate the validity of, and comment on, the literature." 65 Fed. Reg. 79,943 (Dec. 20, 2000).

> inflammatory cells within the lung, and silicate deposits observed with the areas of honeycomb, *strongly indicating silicates in the pathogenesis of the fibrotic process.*

Decision and Order at 28 (emphasis added). The administrative law judge further noted that "Dr. Honma, who has extensive experience in silicosis-induced lung disease, found the [1992] biopsy to be consistent with silica-diffuse interstitial lung disease." *Id*.

Employer contends that while the administrative law judge concluded that the pathology evidence supported a coal dust-related lung disorder as the causative factor for claimant's interstitial fibrosis, he did not properly address the pathology reports of Drs. Naeye and Crouch, "finding little coal dust deposition and ruling out occupational dust exposure" as the cause of claimant's interstitial fibrosis. Employer's Brief in Support of Petition for Review at 60. Employer's assertion of error has merit.

The administrative law judge noted that Dr. Naeye performed a microscopic review of the pathology slides of the "explanted lung" and "found no black pigment and no very tiny birefringent crystals of toxic silica associated with the fibrosis." Decision and Order at 6; *see* Employer's Exhibit 14. Dr. Naeye indicated that the absence of fibrosis in the lymph nodes was "categorical confirmation" that the fibrosis was not coal-dust related, explaining that when silica or other environmental fibrotic agents damage lung tissue, they eventually drain into nearby lymph nodes, where they produce fibrosis. *Id*. He opined that, with one small exception, the lymph nodes available for review were free of the lesions that are present in the lung tissue. *Id*. The administrative law judge also noted that Dr. Crouch found "a few coal dust macules, but no larger dust related lesions, and there is also no concordance between the distribution of dust and the distribution or severity of the observed fibrosis." Decision and Order at 6; *see* Employer's Exhibit 15. Dr. Crouch reported that the lung showed end-stage remodeling and pulmonary fibrosis, which is most severe in the lower lobes. Employer's Exhibit 15. She noted that claimant had an unusually long survival rate for someone with idiopathic pulmonary fibrosis and stated, "[t]his raises the possibility of other less aggressive disorders, but does not suggest a contributing role of coal dust." *Id*.

Although the administrative law judge initially summarized the opinions of Drs. Naeye and Crouch, he did not explain the weight he accorded their findings. Because the administrative law judge's Decision and Order does not explain the weight he accorded all of the relevant evidence, as required by the Administrative Procedure Act (APA),[16] we

[16] 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 means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law.

are compelled to vacate his finding that claimant established a mistake in a determination of fact with regard to the issue of disability causation at 20 C.F.R. §718.204(c), and a basis for modification pursuant to 20 C.F.R. §725.310 (2000).

Furthermore, employer asserts correctly that the administrative law judge erred in awarding benefits without specifically addressing whether granting claimant's modification request would render justice under the Act, as required by *Sharpe*, 692 F. 3d at 327-28, 25 BLR at 2-173-174; *Sharpe*, 495 F.3d at 131-132, 24 BLR at 2-67-68. We, therefore, vacate the award of benefits and remand the case for further consideration. On remand, the administrative law judge must explain the weight he accords all of the pathology evidence in accordance with the APA and determine whether claimant satisfied his burden of proving a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). As necessary, the administrative law judge should also render a specific finding as to whether granting modification would render justice under the Act.

Accordingly, the administrative law judge's Decision and Order Awarding 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