

BRB No. 09-0111 BLA

P. P. L.)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 08/21/2009
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denying Request for Modification and Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Request for Modification and Denying Benefits (08-BLA-0003) of Administrative Law Judge Ralph A. Romano on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Noting that the Director, Office of Workers' Compensation Programs (the Director), stipulated to eleven years of coal mine employment and conceded the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, the administrative law judge concluded that the issue before him on modification was whether the newly

submitted evidence established total respiratory disability¹ at 20 C.F.R. §718.204(b), the element previously adjudicated against claimant. The administrative law judge found that because the newly submitted pulmonary function study and medical opinion evidence was insufficient to establish total respiratory disability at Section 718.204(b)(2)(i) and (iv), claimant failed to establish a basis for modification by showing a change in conditions² at Section 725.310 (2000).³ Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.

On appeal, claimant challenges the administrative law judge's determination that the new evidence fails to establish total respiratory disability under Section 718.204(b)(2)(i) and (iv). Claimant also argues that the administrative law judge failed to address the relevant evidence at 20 C.F.R. §718.204(b)(2)(iii). Claimant contends that the new evidence establishes total respiratory disability under Section 718.204(b)(2) and that claimant has, therefore, established a basis for modification, *i.e.*, a change in conditions under Section 725.310 (2000). In response, the Director has filed a Motion to Remand, arguing that the administrative law judge's decision should be vacated and the case remanded because the administrative law judge erred in analyzing the new pulmonary function study and medical opinion evidence. In a reply brief, claimant agrees with the Director's allegations of error with respect to the administrative law judge's analysis of the pulmonary function study and medical opinion evidence, and requests that the Board reverse the administrative law judge's decision denying benefits.

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,

¹ This case involves claimant's sixth petition for modification, filed on May 2, 2007, of a claim filed on June 14, 1989. Director's Exhibits 1, 254. The lengthy procedural history of this case is set forth in the Board's Decision and Order in [*P.P.L.*] v. *Director, OWCP*, BRB Nos. 05-0411 BLA and 03-0373 BLA (Dec. 23, 2005) (unpub.) affirming the denial of the earlier request for modification, Director's Exhibit 248, and the Decision and Order of the administrative law judge denying modification and benefits, currently on appeal.

² The administrative law judge noted that claimant did not allege, as a basis for modification, that a mistake in a determination of fact had been made in the prior decision pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 3.

³ Because this claim was pending on January 19, 2001, the effective date of the revisions to the regulations, the former version of 20 C.F.R. §725.310 applies to this claim. 20 C.F.R. §725.2(c).

and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Pursuant to Section 22 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may, in pertinent part, request modification within one year of a denial based on a change in conditions. In determining whether claimant has established a change in conditions pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

In finding that total respiratory disability was not established at Section 718.204(b)(2), the administrative law judge accorded greater weight to the December 21, 2007 non-qualifying pulmonary function study and the medical opinion of Dr. Dittman, that claimant was not totally disabled, than to the contrary evidence of record. Specifically, in addressing the pulmonary function study evidence at Section 718.204(b)(2)(i), the administrative law judge accorded little weight to the April 23, 2007 pulmonary function study, based on Dr. Spagnolo’s invalidation of the study. Regarding the December 13, 2007 pulmonary function study, the administrative law judge accorded greater weight to the “after bronchodilator” results than to the “before bronchodilator” results. The administrative law judge accorded little weight to the December 20, 2007 pulmonary function study because it was outweighed by the other contemporaneous studies, which demonstrated higher values.

Regarding the new medical opinion evidence, the administrative law judge accorded less weight to the opinions of Drs. Kraynak, Simelaro and Desai, finding claimant totally disabled, because they relied, in part, on questionable pulmonary

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant’s coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director’s Exhibit 2.

function studies. The administrative law judge also found that even though Dr. Kraynak was claimant's treating physician, his opinion did not show that he had better knowledge of claimant's respiratory condition, pursuant to 20 C.F.R. §718.104(d), and he was not as well-qualified as Dr. Dittman, who was a Board-certified Internist. Decision and Order at 7. The administrative law judge also accorded less weight to the opinion of Dr. Wychulis because he did not discuss whether claimant's pulmonary condition would preclude him from performing his usual coal mine employment and he did not review the December 21, 2007 non-qualifying pulmonary function study. Instead, the administrative law judge credited the opinion of Dr. Dittman, that claimant was not totally disabled, as it was the best supported and reasoned new opinion. The administrative law judge, therefore, found that the medical opinion evidence did not establish total respiratory disability at Section 718.204(b)(2)(iv).

Claimant contends that the administrative law judge erred in finding that the pulmonary function study evidence failed to establish total respiratory disability at Section 718.204(b)(2)(i). Specifically, claimant argues that the administrative law judge erred in determining whether the new studies were qualifying or non-qualifying,⁵ based on a finding that claimant's height was 66.5 inches.⁶ Claimant contends that this is error because the administrative law judge should have considered the fact that claimant's earlier pulmonary function studies were evaluated based on a finding that claimant's height was 67 inches. Thus, claimant argues that the administrative law judge's adjustment of claimant's height affects his determination as to whether the new pulmonary function studies are qualifying, and that the administrative law judge should have considered both the adjusted height and the previous height before evaluating the new pulmonary function studies.

The Director agrees. The Director notes that since claimant was previously found to be 67 inches tall by Administrative Law Judge Robert Kaplan when Judge Kaplan found that the earlier pulmonary function studies did not establish total disability, the administrative law judge erred in evaluating whether the newly submitted pulmonary

⁵ A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i).

⁶ The administrative law judge determined that claimant was 66.5 inches tall because the pulmonary function studies conducted on April 23, 2007 and on December 20, 2007 listed claimant's height as 66 inches and the pulmonary function studies conducted on December 13, 2007 and on December 21, 2007 listed claimant's height as 67 inches. Director's Exhibits 253, 263; Claimant's Exhibits 4, 10.

function studies were qualifying, based on a height of 66.5 inches. Specifically, the Director avers that, while the administrative law judge “explained that he arrived at the latter figure [66.5 inches] by averaging the heights on the four [pulmonary function studies] submitted on modification, he did not explain why it was appropriate to focus only on those tests, given the prior finding that the miner’s height is 67 inches.” Director’s Motion to Remand at 2-3. The Director asserts, therefore, that the administrative law judge’s finding that the new pulmonary function study evidence did not establish total respiratory disability at Section 718.204(b)(2)(i) must be vacated, and the case remanded for the administrative law judge to explain his evaluation of the new pulmonary function studies in light of the discrepancy in claimant’s height. Director’s Motion to Remand at 3.

It is well established that where there are substantial differences in the recorded heights among the pulmonary function studies, the administrative law judge must make a factual finding to determine claimant’s actual height and use the actual height to determine whether the reported values are qualifying. *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-80-81 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). In this case, in evaluating the new pulmonary function studies, the administrative law judge calculated claimant’s height to be 66.5 inches, as that was the average height derived from the heights listed on the new tests. Decision and Order at 5. As claimant and the Director contend, however, claimant’s height was previously determined to be 67 inches. Consequently, we agree with claimant and the Director that the administrative law judge should have explained why it was appropriate to consider whether the new pulmonary function studies were qualifying or non-qualifying based on an adjusted height of 66.5 inches, without reference to the fact that claimant’s height was previously found to be 67 inches. The height used by the administrative law judge may affect his determination as to whether the pulmonary function studies are qualifying or not. The administrative law judge is charged with considering the new evidence in conjunction with the old evidence in determining whether modification is established. *See Nataloni*, 17 BLR at 1-84. The administrative law judge, therefore, erred in not discussing his new finding on height in light of the prior finding on height. Accordingly, we vacate the administrative law judge’s finding that the pulmonary function studies did not establish total respiratory disability at Section 718.204(b)(2)(i), and remand the case for reconsideration of the issue thereunder. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Protopappas*, 6 BLR at 1-223.

Claimant also argues that the administrative law judge committed several additional errors in his specific analysis of each of the four pulmonary function studies. In order to avoid the repetition of error on remand, we will address these allegations of error. First, claimant argues that, in according little weight to the qualifying pulmonary function study of April 23, 2007, the administrative law judge erred in crediting Dr.

Spagnolo's invalidation of the study,⁷ as showing less than optimal effort, cooperation and comprehension based on the tracings, over the validations of the study by Drs. Venditto and Prince.⁸ Specifically, claimant contends that the administrative law judge erred in finding Dr. Spagnolo's invalidation more credible than the validations of Drs. Venditto and Prince because the latter physicians did not discuss "the particulars of the test in detail as did Dr. Spagnolo." Decision and Order at 4. Claimant contends that the record shows that Dr. Spagnolo's invalidation report consists of checked boxes on a one page pre-printed government form and one "unexplained" sentence, while the validation reports of Drs. Venditto and Prince together also contain discussion as to why they found the April 23, 2007 test valid. Claimant also argues that Dr. Kraynak, the administering physician, found that the tracings indicated good effort, cooperation, and comprehension by claimant when performing the test. Claimant contends that Dr. Kraynak disputed each of Dr. Spagnolo's criticisms and concluded that the tracings showed good effort, cooperation and comprehension.⁹ Thus, claimant contends that Dr. Kraynak's findings support the validations of Drs. Venditto and Prince. Consequently, claimant contends that substantial evidence does not support the administrative law judge's finding that the validations of Drs. Venditto and Prince, as well as that of Dr. Kraynak, were entitled to less weight than the invalidation of Dr. Spagnolo. The administrative law judge's finding must be supported by the record. See 30 U.S.C. §932(a), 20 C.F.R. §802.301(a); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); see also *Harris v. Director, OWCP*, 3 F.3d 103, 106, 18 BLR 2-1, 2-5 (4th Cir. 1993); *Szafraniec v. Director, OWCP*, 7 BLR 1-397, 1-400 (1984). Accordingly, on remand, the administrative law judge must reconsider the reports of Drs. Spagnolo, Venditto, Prince and Kraynak regarding the validity of the study and fully explain the reasons for his credibility determinations.

⁷ Dr. Spagnolo found that the April 23, 2007 pulmonary function study was not acceptable due to less than optimal effort, cooperation, and comprehension. Specifically, Dr. Spagnolo noted: "Excessive variation in MVV" and "Trial flow/vol tracing show incomplete inspiration and hesitation." Director's Exhibit 255.

⁸ Dr. Venditto stated that the test was acceptable. Claimant's Exhibit 3. In a report dated January 3, 2008, Dr. Prince opined that the April 23, 2007 pulmonary function study revealed a moderately reduced FEV₁ value that was 49% of predicted and that the test was valid and conforming because its tracings were uniform, consistent, and reproducible within the Part 718 standards. Claimant's Exhibit 7.

⁹ Dr. Kraynak noted: the two largest FEV₁ values vary by less than 100 ml; there is "very good agreement" with the MVV maneuvers; and the tracings demonstrate "very good" inspiratory and expiratory effort. Claimant's Exhibit 2.

Second, claimant argues that the administrative law judge erred in finding that the December 13, 2007 study, administered by Dr. Simelaro, was non-qualifying. Claimant asserts that the administrative law judge erred by mischaracterizing the FEV₁ value when he concluded that the best FEV₁ value was 1.73, rather than 1.61. The Director disagrees, arguing that the reported FEV₁ result was, in fact, 1.73, as found by the administrative law judge. We agree with the Director that the administrative law judge correctly found that the best FEV₁ value reported on the December 13, 2007 pulmonary function study was 1.73. Claimant's specific argument in this regard is, therefore, rejected. Decision and Order at 5; Claimant's Exhibit 10. Nevertheless, because remand of the case is required for the administrative law judge to reconsider the pulmonary function study evidence in light of claimant's determined height, we vacate the administrative law judge's finding that the December 13, 2007 pulmonary function study was non-qualifying. On remand, the administrative law judge must reconsider whether this study was qualifying or non-qualifying, after appropriate consideration of claimant's height.¹⁰

¹⁰ We note that during the December 13, 2007 pulmonary function study, the first trial produced an FEV₁ value of 1.61 and an FVC value of 2.67, and the second trial produced an FEV₁ value of 1.73 and an FVC value of 2.51. Claimant's Exhibit 10. In his summary of the pulmonary function studies, the administrative law judge erroneously stated that during the trial that produced the FEV₁ of 1.73, the FVC obtained was 2.67 when, in fact, it was 2.51. Decision and Order at 4.

Third, claimant argues that the administrative law judge erred in according little weight to the qualifying pulmonary function study of December 20, 2007, administered by Dr. Kraynak, solely because it “was outweighed by other tests conducted contemporaneously on which the Claimant demonstrated higher values,” Decision and Order at 5. Claimant contends that the administrative law judge erred because the values on this study were, in fact, very similar to the values obtained on the other studies. Additionally, claimant contends that, in rejecting this study, the administrative law judge failed to consider and discuss Dr. Spagnolo’s comments validating the FEV₁ and FVC values on the study,¹¹ as well as Dr. Kraynak’s finding, on review of Dr. Spagnolo’s comments,¹² that the FEV₁, FVC, and MVV values were all valid.

Consistent with claimant’s contention, a review of all four newly submitted pulmonary function studies, three of which were administered within a few days of each other, reveals that the tests resulted in similar values.¹³ Director’s Exhibits 253, 263;

¹¹ In a report dated February 10, 2008, Dr. Spagnolo reviewed the December 20, 2007 pulmonary function study and indicated that the “vents are not acceptable for only FVC, FEV₁ values” because “poor MVV breath (poor effort) small volume of each breath.” Director’s Exhibit 268. However, in an email dated March 18, 2008, Dr. Spagnolo clarified his initial opinion, stating “...the confusion was due to my error. The FVC and the FEV₁ values are valid. Only the MVV was not valid ...due to poor effort during the test that showed the tidal breaths were very small... .” [no exhibit number].

¹² On April 17, 2008, Dr. Kraynak reviewed Dr. Spagnolo’s opinion clarifying his review of the December 20, 2007 pulmonary function study. However, Dr. Kraynak mistakenly referred to the December 20, 2007 pulmonary function study as one that was conducted on January 12, 2007. Dr. Spagnolo stated, “As you know, I had reviewed a PFT, dated 1/12/07, which was also reviewed by Dr. Spagnolo. Dr. Spagnolo has clarified his review of the study, and felt that the FEV₁ and FVC values were valid. I would agree with this. He states the MVV is reduced in comparison to the FEV₁. From my review, they approximate each other. I feel the MVV value is valid.” Claimant’s Exhibit 11.

¹³ The best values obtained on the April 23, 2007 pulmonary function study included an FEV₁ value of 1.44, an FVC value of 2.10, and an MVV value of 20.49. Director’s Exhibit 253. The best values obtained on the December 13, 2007 pulmonary function study consisted of an FEV₁ value of 1.73, an FVC value of 2.51, and an MVV value of 47.2. Claimant’s Exhibit 10. The best values on the December 20, 2007 pulmonary function study consisted of an FEV₁ value of 1.54, an FVC value of 2.11, and an MVV value of 40.74. Claimant’s Exhibit 4. The best values on the December 21, 2007 pulmonary function study consisted of an FEV₁ value of 1.61, an FVC value of 2.28, and an MVV value of 42.95. Director’s Exhibit 263.

Claimant's Exhibits 4, 10. Accordingly, on remand, the administrative law judge should consider any similarity in the values on the pulmonary function studies when he weighs them. See *Andruscavage v. Director, OWCP*, No. 93-3291, *slip op.* at 9-10 (3d Cir. Feb. 22, 1994) (unpub.). Further, the administrative law judge should consider Dr. Spagnolo's finding that the FEV₁ and FVC values on the December 20, 2007 study were valid, but that the MVV values were suboptimal, along with Dr. Kraynak's finding that the FEV₁, FVC, and MVV values on the study were all valid. Decision and Order at 4; see *Wojtowicz*, 12 BLR at 1-165; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); see also *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); Decision and Order at 4-5; Director's Exhibit 268; Claimant's Exhibits 4, 11. Consequently, we vacate the administrative law judge's accordance of little weight to the December 20, 2007 study and instruct him to consider all of the relevant evidence concerning the study's validity. See *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987).

Fourth, claimant contends that the administrative law judge erred in crediting the December 21, 2007 non-qualifying pulmonary function study, administered by Dr. Dittman, based on the administrative law judge's adjustment of claimant's height from 67 inches to 66.5 inches. The administrative law judge noted that even though the "after bronchodilator" FEV₁ was qualifying, he found the fact that claimant demonstrated non-qualifying values on the "before bronchodilator" portion of the test to be persuasive. Claimant asserts that the administrative law judge unreasonably credited the non-qualifying pre-bronchodilator results, which exceeded the qualifying standards by a mere .01, based only on the altered height assessment. In response, the Director asserts that, even assuming the study is non-qualifying based on a height of 66.5 inches, "the FEV₁ result missed the qualifying value by only one-hundredth of a milliliter (.01)" and "as the claimant points out, the [new pulmonary function study] results are fairly consistent." Director's Motion to Remand at 3.

In considering the December 21, 2007 study, the administrative law judge found the non-qualifying pre-bronchodilator results "more persuasive" because they were administered prior to the use of a bronchodilator and because they were supported by the pre-bronchodilator results of the December 13, 2007. Decision and Order at 5. However, in light of our decision to vacate the administrative law judge's reliance on a height of 66.5 inches in determining whether or not the pulmonary function studies were qualifying, as discussed *supra*, we must also vacate the administrative law judge's accordance of greater weight to the December 21, 2007 pulmonary function study as non-qualifying. On remand the administrative law judge must consider this study in light of his finding regarding claimant's height. See *Wojtowicz*, 12 BLR at 1-165; *Protopappas*, 6 BLR at 1-223. Additionally, the administrative law judge must consider the reports of Drs. Simelaro and Venditto and the deposition testimony of Dr. Kraynak validating the

results of the December 21, 2007 study. *See* Claimant's Exhibits 8, 9 at 13.

In conclusion, we vacate the administrative law judge's finding that the new pulmonary function study evidence did not establish total disability at Section 718.204(b)(2)(i) and remand the case for the administrative law judge to reconsider the relevant evidence.

Pursuant to Section 718.204(b)(2)(iii), claimant argues that the administrative law judge erred in not addressing the medical opinion evidence diagnosing the presence of cor pulmonale. Specifically, claimant argues that the administrative law judge erred in failing to discuss the opinion of Dr. Simelaro, claimant's treating physician, the opinion of Dr. Kraynak, and the opinion of a pulmonologist employed at the Veterans Administration Center, all of whom diagnosed the presence of cor pulmonale. A review of the newly submitted medical opinion evidence, however, does not reveal a diagnosis of cor pulmonale *with right-sided congestive heart failure*, which is required to establish total respiratory disability under Section 718.204(b)(2)(iii). 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); *see* Claimant's Exhibits 8, 9. Claimant's argument that the administrative law judge failed to consider the evidence at Section 718.204(b)(2)(iii) is, therefore, rejected.

Pursuant to Section 718.204(b)(2)(iv), claimant argues that the administrative law judge erred in finding that the newly submitted medical opinion evidence failed to establish total respiratory disability. Specifically, claimant argues that the administrative law judge erred in discounting the opinions of Drs. Wychulis, Kraynak, Desai and Simelaro, all of whom diagnosed a totally disabling respiratory impairment. Claimant raises multiple arguments with respect to the administrative law judge's weighing of the opinions of the aforementioned physicians and, consequently, asserts that the administrative law judge's ultimate crediting of the opinion of Dr. Dittman, who opined that claimant's mild impairment was not totally disabling, is neither rational nor supported by substantial evidence.

Because the administrative law judge erred in his consideration of the pulmonary function study evidence pursuant to Section 718.204(b)(2)(i), and this finding influenced his determination regarding the credibility of the new medical opinions, *see* Decision and Order at 7-8, we must also vacate his finding that the medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). After considering the pulmonary function study evidence and medical opinion evidence separately at Section 718.204(b)(2)(i) and (iv) to determine whether it demonstrates total respiratory disability, he must then consider whether the new evidence, when weighed together, establishes total respiratory disability at Section 718.204(b), and thereby, establishes a change in conditions at Section 725.310 (2000). *See Fields v. Island Creek*

Coal Co., 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). If, on remand, the administrative law judge finds that claimant has established a basis for modification, he must then weigh all of the evidence of record on the issue of total respiratory disability at Section 718.204(b) and, if reached, on disability causation at 20 C.F.R. §718.204(c) to determine if claimant is entitled to benefits.

Accordingly, the Decision and Order – Denying Request for Modification and Denying Benefits of the administrative law judge is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge