



BRB No. 17-0149 BLA

MARGIE NAPIER )  
(Widow of ELHANNON NAPIER) )  
) )  
Claimant-Respondent )  
) )  
v. )  
) )  
STAR FIRE COALS, INCORPORATED )  
) )  
and )  
) )  
OLD REPUBLIC INSURANCE COMPANY )  
) )  
Employer/Carrier- )  
Petitioners )  
) )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
) )  
Party-in-Interest )

DATE ISSUED: 01/25/2018

DECISION and ORDER

Appeal of the Decision and Order on Modification of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

Jeffrey S. Goldberg (Kate S. O'Scamlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and  
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Modification (2012-BLA-6087) of Administrative Law Judge Jennifer Gee awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on April 1, 2002.<sup>1</sup>

This case has a lengthy procedural history. In a Decision and Order dated March 28, 2007, Administrative Law Judge Thomas F. Phalen, Jr., credited the miner with at least ten years of coal mine employment.<sup>2</sup> Director's Exhibit 52. He found, however, that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* Assuming *arguendo* that the miner suffered from pneumoconiosis, Judge Phalen further found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. *Id.* Accordingly, he denied benefits.

Claimant timely requested modification on December 21, 2007. Director's Exhibit 54. Because claimant submitted no additional evidence, the district director denied her request on March 5, 2008. Director's Exhibit 59. Claimant filed another request for modification on July 17, 2008, this time accompanied by additional medical evidence.<sup>3</sup> Director's Exhibit 60. After considering the new evidence, the district director again denied benefits on December 11, 2008 because claimant failed to establish

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<sup>1</sup> Claimant is the widow of the miner, who died on November 9, 2001. Director's Exhibit 11.

<sup>2</sup> The miner's most recent coal mine employment was in Kentucky. Director's Exhibit 52. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>3</sup> Claimant submitted a June 2, 2008 report from Dr. Perper. Director's Exhibit 60. In response, employer submitted an October 8, 2008 report from Dr. Oesterling. Director's Exhibit 73.

a mistake in a determination of fact. Director's Exhibit 74. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 80.

In a Decision and Order dated April 29, 2011, Administrative Law Judge John P. Sellers, III, found that the autopsy evidence established the existence of "mild to moderate" clinical pneumoconiosis. Director's Exhibit 96. He also found that the evidence established the existence of legal pneumoconiosis, in the form of centrilobular emphysema due in part to coal mine dust exposure.<sup>4</sup> *Id.* Judge Sellers therefore found that Judge Phalen made a mistake in a determination of fact in finding that the miner did not have pneumoconiosis. 20 C.F.R. §725.310(a). He further found, however, that the evidence did not establish that the miner's death was due to pneumoconiosis, 20 C.F.R. §718.205, and he denied benefits.

Claimant timely requested modification on January 6, 2012. Director's Exhibit 97. In a Decision and Order on Modification dated November 25, 2016, Administrative Law Judge Jennifer Gee (the administrative law judge) agreed with Judge Sellers that the evidence established the existence of "mild to moderate" clinical pneumoconiosis. She also agreed with Judge Sellers that the miner had legal pneumoconiosis. Unlike Judge Sellers, however, the administrative law judge found that the miner's legal pneumoconiosis, in the form of severe emphysema, was a significant contributing cause of his death pursuant to 20 C.F.R. §718.205(b). She therefore found that claimant established a mistake in a determination of fact. 20 C.F.R. §725.310(a). The administrative law judge also found that granting claimant's request for modification would render justice under the Act, and she awarded benefits accordingly.

On appeal, employer requests that the Board vacate the administrative law judge's award of benefits because it contends that the case should have been assigned to Judge Sellers, the administrative law judge who issued the decision prior to claimant's most recent request for modification. Employer also argues that the administrative law judge erred in finding that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Finally, employer challenges the administrative law judge's determination that granting claimant's request for modification would render justice under the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response,

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<sup>4</sup> Administrative Law Judge John P. Sellers, III, found that the evidence did not establish that the miner's lung cancer and bronchitis were caused by coal mine dust exposure. Director's Exhibit 96. Judge Sellers therefore found that neither of these lung conditions constituted legal pneumoconiosis. *Id.*

urging the Board to reject employer's argument that the award of benefits must be vacated because the case was not assigned to Judge Sellers on modification. The Director further urges the Board to reject employer's contention that the administrative law judge erred in finding that granting claimant's request for modification rendered justice under the Act.

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

### **Employer's Request for Reassignment**

Employer initially contends that the award of benefits should be vacated and the case reassigned to Judge Sellers because he is the administrative law judge who adjudicated claimant's most recent prior request for modification. Having failed to raise the issue of reassignment before the administrative law judge, however, employer has waived its right to raise this issue on appeal to the Board.<sup>5</sup> See *Kalamazoo River Study Grp. v. Rockwell Int'l Corp.*, 355 F.3d 574, 587 n.5 (6th Cir. 2004); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986). Regardless, we agree with the Director that employer fails to cite any convincing authority for its position that only the administrative law judge who initially decided a claim must adjudicate any subsequent requests for modification. Director's Brief at 3-4.

### **Legal Pneumoconiosis and Death Due to Pneumoconiosis**

Employer contends that "[t]he administrative law judge's decision in this case – both in finding legal pneumoconiosis<sup>6</sup> and death due to pneumoconiosis<sup>7</sup> – violates the

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<sup>5</sup> As noted by the Director, Office of Workers' Compensation Programs, employer "raised no objection when the [Office of Administrative Law Judges] notified the parties that Judge Gee was assigned to the case, when the case came before [Judge Gee] for a formal hearing, and when [employer] filed its post hearing brief." Director's Brief at 2.

<sup>6</sup> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

<sup>7</sup> The administrative law judge found that the miner's death was due to legal pneumoconiosis, but she did not directly address whether the miner's death was also due to his "mild to moderate" clinical pneumoconiosis.

[Administrative Procedure Act] by playing doctor.” Employer’s Brief at 16. We disagree. In addressing a request for modification, an administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement.<sup>8</sup> *O’Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (administrative law judge is authorized “to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted”).

In this case, Drs. Chan, Kahn, Naeye, Perper, and Oesterling agreed that the miner had emphysema. Director’s Exhibits 13, 30, 34, 60, 73. However, only Drs. Perper and Oesterling addressed whether the miner’s emphysema constituted legal pneumoconiosis and whether pneumoconiosis contributed to the miner’s death.<sup>9</sup> Dr. Perper diagnosed legal pneumoconiosis, in the form of moderate to severe centrilobular emphysema due to coal mine dust exposure and cigarette smoking. Director’s Exhibit 60. He further opined that pneumoconiosis was a contributing cause and hastening factor in the miner’s death “both directly through direct pulmonary involvement and indirectly through the emphysema, pulmonary cancer and pneumonia due to poor immune body defense favoring pulmonary infections.”<sup>10</sup> *Id.* Dr. Oesterling did not dispute that the miner had centrilobular emphysema, a type of emphysema that he acknowledged was “seen in coalminers.” Director’s Exhibit 73. However, he also diagnosed “panlobular progressing to bullous pulmonary emphysema,” which he deemed to be “far more significant” than the miner’s centrilobular emphysema. *Id.* According to Dr. Oesterling, panlobular emphysema was the “probable cause of the miner’s lifetime respiratory symptomology” but the disease is unrelated to coal dust exposure.<sup>11</sup> Director’s Exhibit 73. He concluded

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<sup>8</sup> The sole ground for modification in a survivor’s claim is that a mistake in a determination of fact was made in the prior denial. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

<sup>9</sup> Dr. Chan, the autopsy prosector, diagnosed centriacinar emphysema, but did not address whether it arose out of the miner’s coal mine dust exposure. Director’s Exhibit 13. Drs. Kahn and Naeye, reviewing pathologists, also diagnosed emphysema, but did not classify it as either centrilobular or panlobular, and did not address whether it arose out of the miner’s coal mine dust exposure. Director’s Exhibits 30, 34.

<sup>10</sup> Although Dr. Kahn did not specifically address the etiology of the miner’s emphysema, he agreed that emphysema contributed to the miner’s death. Director’s Exhibit 30.

<sup>11</sup> Dr. Oesterling opined that the miner’s panlobular emphysema was “far more significant than the centrilobular emphysema which has been specified within the prosector’s protocol, as well as the protocols of Drs. Kahn and Perper.” Director’s

that the miner's coal dust exposure "was in no way a factor in producing his lifetime symptomology" and did not contribute to his death. *Id.*

The administrative law judge noted that Judge Sellers relied on Dr. Perper's opinion to find that the miner's centrilobular emphysema was significantly related to coal dust exposure and therefore constituted legal pneumoconiosis. Decision and Order on Modification at 7. She further noted that Judge Sellers found that the miner's legal pneumoconiosis did not contribute to his death based, in large part, on Dr. Oesterling's opinion that the miner also had a more severe type of emphysema, panlobular, that was unrelated to coal dust exposure. *Id.* The administrative law judge explained that, "[i]n essence, Judge Sellers credited both Dr. Perper's opinion that coal dust contributed to the [m]iner's emphysema and Dr. Oesterling's opinion that emphysema unrelated to coal dust exposure contributed to the [m]iner's death." *Id.* She determined, however, that Judge Sellers did not explain "how the [m]iner could have two types of emphysema and yet only one contributed to his death." *Id.* She also determined that, in crediting Dr. Oesterling's opinion over that of Dr. Perper, Judge Sellers "misinterpreted Dr. Perper's findings" and "did not give full weight to Dr. Perper's conclusions that silica dust is more harmful to lung tissue than fine, inert coal dust." *Id.* The administrative law judge therefore reconsidered the extent of the miner's legal pneumoconiosis and whether the miner's death was due to legal pneumoconiosis.

The administrative law judge found that Dr. Perper's opinion that the miner's emphysema was due to coal mine dust exposure was well-reasoned, noting that the doctor focused on the role that the miner's exposure to silica dust played in the development of his disease. Decision and Order on Modification at 9. After noting that Drs. Perper and Oesterling each opined that the miner's autopsy slides revealed the presence of silica and silicate crystals as well as coal dust-related macules, the administrative law judge found:

Dr. Perper's opinion emphasized the role of silica dust, and not just the role of pure coal dust, in the development of emphysema, which is consistent with the [m]iner's employment in strip mining. Dr. Perper explained that the major fibrogenic or scar-producing element in coal mine dust was silica, and heavy exposure over a considerable period of time would contribute [to] chronic emphysema.

*Id.* (citation omitted). The administrative law judge therefore found that Dr. Perper's

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Exhibit 73. In the prior decision, Judge Sellers interpreted this statement as Dr. Oesterling's accepting the diagnosis of centrilobular emphysema, but finding it to be less significant than the miner's panlobular emphysema. 2011 Decision and Order at 18.

opinion regarding the cause of the miner's emphysema was more probative than Judge Sellers previously found it to be.<sup>12</sup>

As the trier-of-fact, the administrative law judge has the authority to weigh the evidence and render credibility determinations, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's determination that Dr. Perper's opinion is sufficiently reasoned to establish that the miner's coal mine dust exposure, including his "more serious" silica dust exposure, was a significant contributor to his severe emphysema. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (holding that substantial evidence is such evidence "that a reasonable mind would accept to support a conclusion."); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order on Modification at 12.

Conversely, the administrative law judge questioned Dr. Oesterling's opinion that only the miner's centrilobular emphysema, but not his panlobular and bullous emphysema, was related to coal mine dust exposure. Dr. Oesterling based his opinion regarding the cause of the miner's emphysema on the type of emphysema that was diagnosed. Referencing a pathology textbook and the Surgeon General's website, Dr. Oesterling stated that while centrilobular emphysema can be caused by coal mine dust exposure, panlobular emphysema, by definition, is not related to coal mine dust exposure. Director's Exhibit 73 at 8-9. The administrative law judge noted that the Department of Labor (DOL), in the preamble to the 2001 regulations, recognized that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. Decision and Order on Modification at 9, 12; see 20 C.F.R. §718.201(a)(1), (2); 65 Fed. Reg. at 79,920, 79,943 (Dec. 20, 2000). Citing an unpublished Board decision, the administrative law judge also accurately noted that the DOL has not endorsed Dr. Oesterling's view that coal mine dust exposure cannot contribute to panlobular or bullous emphysema. Decision and Order on Modification at 8, citing *Baker v. Arch of W. Va.*, BRB No. 13-0511 BLA (June 6, 2014) (unpub.). The administrative law judge therefore found Dr. Oesterling's opinion to be "unconvincing." *Id.*

In considering Dr. Oesterling's opinion, the administrative law judge permissibly consulted the preamble as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive

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<sup>12</sup> The administrative law judge noted that by "constantly misreading Dr. Perper's references to silica dust exposure as 'coal dust,' Judge Sellers may have understated the importance of the [m]iner's more dangerous exposure to dust caused by quartz crystals in his analysis." Decision and Order on Modification at 9.

impairments arising out of coal mine employment. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012). Taking into account the DOL's recognition that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, the administrative law judge permissibly found that Dr. Oesterling's reasoning for excluding coal mine dust exposure as cause of a portion of the miner's emphysema was not persuasive. *See Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 672, BLR (4th Cir. 2017) (holding that it is an administrative law judge's general prerogative to discount medical opinions at odds with the conclusions adopted by the agency itself). Because the administrative law judge permissibly credited Dr. Perper's opinion and rejected Dr. Oesterling's opinion, we affirm her finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of severe emphysema due in part to coal mine dust exposure. 20 C.F.R. §718.202(a)(4).

The administrative law judge next found that the miner's death was due to pneumoconiosis based on the medical opinions of Drs. Kahn, Perper, and Oesterling. Dr. Kahn reasoned that the miner's severe emphysema, in combination with the miner's other lung conditions (cancer, chronic bronchitis, bronchopneumonia, and clinical pneumoconiosis) hastened his death:

Each of the disease processes . . . would contribute to a loss of pulmonary function. The combination of processes results in substantially aggravating the effects of every individual disease process so they wind up with the individual effects combining to cause the decompensation of the lung in a synergistic way; each of the adverse effects gets multiplied by the effects of the other diseases that were present. The combination of the effects of each disease is not additive to the effects of the others, but rather is multiplicative and this combination of disease conditions culminated in hastening and producing [the miner's] death.

Director's Exhibit 30.

Dr. Perper similarly opined that the miner's pneumoconiosis "was a contribut[ing] cause of death and a hastening factor in death both directly through direct pulmonary involvement and *indirectly through the emphysema*, pulmonary cancer and pneumonia due to poor immune body defenses favoring pulmonary infections." Director's Exhibit 60 (emphasis added). Although Dr. Oesterling did not directly address the cause of the miner's death, except to exclude coal dust exposure as a factor, he found that the miner's emphysema was the "probable cause" of his respiratory problems. Director's Exhibit 73 at 8.

The administrative law judge found that “the pathology evidence overwhelmingly show[ed] that the [m]iner’s extensive emphysema contributed to his death, in tandem with his non-small carcinoma with brain metastases.” Decision and Order on Modification at 12. Other than to argue that the miner’s emphysema was not legal pneumoconiosis, employer has not set forth any allegations of error with respect to the administrative law judge’s finding that the miner’s extensive emphysema contributed to his death. Because it is supported by substantial evidence, and in light of our affirmance of the administrative law judge’s finding that the miner’s severe emphysema constituted legal pneumoconiosis, we affirm the administrative law judge’s finding that legal pneumoconiosis was a substantially contributing cause of the miner’s death pursuant to 20 C.F.R. §718.205(b)(2). See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); *Conley v. Nat’l Mines Corp.*, 595 F.3d 297, 303-04, 24 BLR 2-257, 2-266 (6th Cir. 2010); Decision and Order on Modification at 12. Consequently, we affirm the administrative law judge’s finding that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.

### **Justice Under The Act**

Even where an administrative law judge finds a mistake in a determination of fact, she must ultimately determine whether reopening a claim will render justice under the Act. *O’Keeffe*, 404 at 255. In *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), the Board held that “while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge’s exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice.” *Kinlaw*, 33 BRBS at 72, citing *Wash. Soc’y for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991).

Courts have recognized that an adjudicator, in considering whether to reopen a claim, must exercise the discretion granted under 20 C.F.R. §725.310 by assessing any factors relevant to the rendering of justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *D.S. [Stiltner] v. Ramey Coal Co.*, 24 BLR 1-33 (2008). These relevant factors include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Id.*

We reject employer’s contention that the administrative law judge erred in finding that granting modification would render justice under the Act. Citing the relevant factors, the administrative law judge found that “[c]laimant sought modification in a timely manner,” and found that “the need for accuracy . . . clearly weighs in favor of granting [c]laimant’s request for modification.” Decision and Order on Modification at 12. The administrative law judge also found that claimant’s request was “clearly not futile or

moot, as she is now entitled to benefits.” *Id.* at 13. Because we discern no abuse of discretion in the administrative law judge’s determination that granting modification would render justice under the Act, it is affirmed. *Kinlaw*, 33 BRBS at 72.

Accordingly, the administrative law judge's Decision and Order on Modification awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge