



BRB Nos. 15-0186 BLA and
15-0293 BLA

THELMA O. JASPER)	
(Widow of and o/b/o FRANK V. JASPER))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 05/24/2016
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Modification Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

BOGGS, Administrative Appeals Judge:

Employer appeals the Decision and Order on Modification Awarding Benefits (2010-BLA-05273) of Administrative Law Judge Drew A. Swank, rendered on a miner's claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In the administrative law judge's Decision and Order, he initially found that justice under the Act would be served by considering employer's request for modification of an award of benefits in the miner's claim.¹ The administrative law judge credited the miner with over fifteen years of employment in one or more underground mines and found that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). However, the administrative law judge determined that the miner was not entitled to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),² because employer's post-January 1, 2005 petition for modification relates back to a claim filed before January 1, 2005. Rather, the administrative law judge

¹ The miner filed a claim for benefits on February 11, 2003. Miner's Claim (MC) Director's Exhibit 2. The district director issued a Proposed Decision and Order Denying Benefits on September 4, 2003. MC Director's Exhibit 24. The miner submitted a petition for modification on August 4, 2004, which the district director granted. MC Director's Exhibits 24, 27-28, 52. Subsequent to a hearing conducted at employer's request, Administrative Law Judge Edward Terhune Miller issued a Decision and Order denying benefits on September 19, 2007. MC Director's Exhibits 53, 60. The miner filed a motion for reconsideration, and Judge Miller granted the request and awarded benefits on February 5, 2008. MC Director's Exhibit 62. On January 14, 2009, the miner died. Director's Exhibit 63. Pursuant to employer's appeal, the Board issued a Decision and Order affirming Judge Miller's award of benefits on March 26, 2009. *F.J. [Jasper] v. Consolidation Coal Co.*, BRB No. 08-0417 BLA (Mar. 26, 2009) (unpub.); Director's Exhibit 61. Employer requested modification on September 22, 2009, asserting that newly developed autopsy evidence established that the miner was not totally disabled due to pneumoconiosis. MC Director's Exhibit 63.

² Section 411(c)(4) of the Act applies to claims filed after January 1, 2005, that were pending on March 23, 2010. Section 411(c)(4) provides a rebuttable presumption that a miner's total disability or death was due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b). The administrative law judge correctly determined that Section 411(c)(4) is not available in the miner's claim, based on the filing date. 20 C.F.R. §718.305(a).

placed the burden of proof on claimant³ and found that she established the existence of coal workers' pneumoconiosis arising out of coal mine employment and total disability due to coal workers' pneumoconiosis. Based on these findings, the administrative law judge determined that employer failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and denied its request for modification.

On appeal, employer argues that the administrative law judge erred in finding that the miner's totally disabling respiratory impairment was due to pneumoconiosis. Claimant responds, urging affirmance of the denial of employer's request for modification. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.⁴

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.⁵ 33 U.S.C. §921(b)(3), as incorporated into the

³ Claimant is the widow of the miner, and she is pursuing his claim on behalf of his estate. She is also pursuing a survivor's claim filed on February 17, 2009, on her own behalf. Survivor's Claim Director's Exhibit 2. On April 23, 2015, Administrative Law Judge Thomas M. Burke issued a Decision and Order Awarding Survivor Benefits, relying on Section 422(l), which provides that a survivor of a miner, who was determined to be eligible to receive benefits at the time of his or her death, is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. See 30 U.S.C. §932(l) (2012). On June 18, 2015, the Board granted employer's motion to consolidate the miner's and survivor's claims. *Jasper v. Consol. Coal Co.*, BRB Nos. 15-0186 BLA and 15-0293 BLA (June 18, 2015) (Order). Employer does not reference the award of benefits in the survivor's claim in the present appeal.

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had more than fifteen years of coal mine employment, in one or more underground mines; suffered from clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b); and had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ The record reflects that the miner's coal mine employment was in Ohio. MC Director's Exhibit 2. Accordingly, this case arises within the jurisdiction 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).

Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 in a miner’s claim, based on a change in conditions or a mistake in a determination of fact. With respect to a mistake in a determination of fact, the administrative law judge has broad discretion “to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.” *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). This broad discretion includes the power to correct a mistake in the ultimate fact of entitlement. See *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994).

Upon weighing the medical opinions relevant to the issue of total disability causation at 20 C.F.R. §718.204(c), the administrative law judge accorded the greatest weight to Dr. Lenkey’s opinion, that coal workers’ pneumoconiosis was a substantially contributing cause of the miner’s totally disabling respiratory impairment, and found that employer did not establish a basis for modifying the award of benefits in the miner’s claim. Decision and Order at 31; Director’s Exhibits 16, 27. Employer alleges that, because the Section 411(c)(4) presumption is not applicable in this case, claimant has the burden of proof on disability causation. Employer also maintains that the administrative law judge erred in finding that Dr. Lenkey’s opinion was sufficient to establish that the miner’s totally disabling respiratory impairment was due to pneumoconiosis under 20 C.F.R. §718.204(c). Employer additionally asserts that the administrative law judge did not provide valid rationales for discrediting the opinions in which Drs. Nassar, Tuteur, and Tomashefski indicated that the miner’s pneumoconiosis did not cause any functional impairment.

As an initial matter, we hold that employer is incorrect in stating that the miner retained the burden of proof on modification. When a request for modification of an award of benefits is filed by a party opposing entitlement, the miner is not required to re-establish his or her entitlement to benefits. See *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). Rather, employer, as the proponent of an order terminating the award of benefits in the miner’s claim, bears the burden of establishing a mistake in the determination of the ultimate fact of entitlement, applying the original burden of proof, i.e., that a preponderance of the evidence does not show that the miner is entitled to benefits. 20 C.F.R. §725.310(a); see *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

With respect to the administrative law judge's finding that employer did not satisfy its burden, we reject employer's contention that the administrative law judge erred in giving diminished weight to Dr. Nassar's opinion, that the clinical pneumoconiosis evident on autopsy was too mild to have caused, or contributed to, the miner's totally disabling respiratory impairment. The administrative law judge's credibility determination was within his discretion, based on his accurate finding that Dr. Nassar relied solely on his autopsy findings and, unlike the other physicians of record, did not review the medical evidence relevant to the miner's respiratory or pulmonary total disability.⁶ See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 30-31; Director's Exhibit 63.

However, there is merit to employer's allegation that the administrative law judge's erred in crediting Dr. Lenkey's total disability causation opinion. As employer argues, there is an unresolved conflict between the administrative law judge's decision to discredit Dr. Lenkey's opinion on the existence of a totally disabling respiratory impairment and his crediting of the same opinion on total disability causation.⁷ The administrative law judge gave less weight to Dr. Lenkey's opinion at 20 C.F.R. §718.204(b)(2) because the physician did not explain whether his initial assessment of a twenty-percent impairment meant that the miner could not perform his usual coal mine work. Decision and Order at 23. The administrative law judge also found that Dr. Lenkey's opinion on the issue of total disability was equivocal, because he stated, after his second examination of the miner, that his "functional status [was] greatly impaired."

⁶ We note that in an October 22, 2014 Order Denying Claimant's Objections to Employer's Evidence, the administrative law judge admitted Dr. Nassar's autopsy report pursuant to the "good cause" exception at 20 C.F.R. §725.456(b).

⁷ Dr. Lenkey became one of the miner's treating physicians after he examined the miner at the request of the Department of Labor. MC Director's Exhibit 58. In his report of this examination, performed on April 24, 2003, Dr. Lenkey concluded that the miner was twenty-percent disabled from performing his last coal mining job. *Id.* At his deposition, Dr. Lenkey stated, "I just sort of guessed at [twenty] percent." Director's Exhibit 48 at 24. In Dr. Lenkey's report of his second examination of the miner on March 25, 2004, he reported that the miner's "functional status is greatly impaired." Director's Exhibit 27. The administrative law judge determined that "because his medical opinions are both equivocal and poorly explained, Dr. Lenkey's assessment is not entitled to great weight in assessing whether [c]laimant has a totally disabling respiratory impairment." Decision and Order at 23.

Id. at 23, quoting Director’s Exhibit 27; see Director’s Exhibits 16, 48. When considering Dr. Lenkey’s opinion at 20 C.F.R. §718.204(c), however, the administrative law judge emphasized his status as the miner’s treating physician and found that he satisfied the factors set forth in 20 C.F.R. §718.104. Decision and Order at 27. The administrative law judge determined that Dr. Lenkey provided “strong evidence” that the miner was totally disabled due to pneumoconiosis because he “concluded that coal workers’ pneumoconiosis contributed ‘20%’ to [the miner’s] respiratory or pulmonary impairment.” *Id.*, quoting Director’s Exhibit 16; see also Director’s Exhibit 48 at 20. Consistent with employer’s allegation of error, therefore, the administrative law judge did not comply with the Administrative Procedure Act (APA)⁸ by explaining how Dr. Lenkey’s opinion was insufficient to establish total disability but entitled to significant weight on the issue of total disability causation.⁹ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1985).

Concerning Dr. Tuteur’s opinion, that pneumoconiosis did not contribute to the miner’s respiratory impairment, the administrative law judge gave it “moderate” weight, but found that it was not as persuasive as Dr. Lenkey’s opinion because Dr. Tuteur never personally examined the miner. Decision and Order at 29-30; MC Employer’s Exhibits 7-8. We agree with employer that the administrative law judge did not satisfy the APA’s requirement that he set forth his rationale for finding that Dr. Lenkey’s examinations of the miner gave him an advantage that Dr. Tuteur did not have, particularly when Dr. Tuteur reviewed Dr. Lenkey’s records, other hospital and treatment records, the reports from the 2004 lung biopsy and the 2009 autopsy, and the results of several objective studies. See *Collins v. J & L Steel (LTV Steel)*, 21 BLR 1-182, 1-189 (1999); *Wojtowicz*, 12 BLR at 1-165; see MC Employer’s Exhibit 7. However, we note that the opinion of a treating physician may be afforded determinative weight based on proper consideration of the factors at 20 C.F.R. §718.104(d). 20 C.F.R. §718.104(d)(5).

⁸ The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of “findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented.” 5 U.S.C. §557(c)(3)(A).

⁹ The issues of pneumoconiosis, total respiratory or pulmonary disability, and disability causation must be considered separately, and a finding that a physician’s opinion is not well-reasoned on one issue does not necessarily indicate that the opinion cannot be credited on a separate issue. See *Luketich v. Director, OWCP*, 8 BLR 1-477, 1-480 n.3 (1986). However, the administrative law judge is required by the APA to explain his credibility determinations as they relate to each element of entitlement. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1985).

Regarding Dr. Tomashefski's April 12, 2010 medical report, he reviewed the miner's medical records and objective studies, the 2004 lung biopsy report, the slides from Dr. Nassar's 2009 autopsy, and the death certificate. MC Employer's Exhibit 1. He concluded that the miner did not have coal workers' pneumoconiosis. *Id.* On March 22, 2011, Dr. Tomashefski prepared a supplemental report, based on a review of the slides from the miner's 2004 surgical lung biopsy and lymph node biopsies, and stated:

[I]t is now my opinion, within reasonable medical certainty, that [the miner] had mild simple coalworkers' pneumoconiosis. It is also my opinion that he had silicotic nodules in his hilar lymph nodes. It is my opinion that [the miner's] mild coalworkers' pneumoconiosis is too mild and of too limited extent to have caused him any significant respiratory dysfunction or to have been a cause or a contributory factor in his death.

MC Employer's Exhibit 6. The administrative law judge discredited Dr. Tomashefski's opinion on the ground that he was equivocal on the issue of the existence of pneumoconiosis, and relied on a premise contrary to the regulations in excluding pneumoconiosis as a cause of the miner's disabling respiratory impairment. As employer alleges, however, the administrative law judge did not consider that Dr. Tomashefski explained that the change in his opinion was based on a review of additional evidence in the form of the lung biopsy slides. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 1-185-186 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-52 (6th Cir. 1989). We further agree with employer's contention that the administrative law judge did not adequately explain his characterization of Dr. Tomashefski's opinion as being in conflict with the regulations. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); Decision and Order at 31. In his April 12, 2010 report, Dr. Tomashefski indicated that the normal pulmonary function studies and normal blood gas studies obtained prior to the miner's 2004 lung biopsy supported a determination that any silicosis present in the miner's lungs did not contribute to his cardiorespiratory failure. MC Employer's Exhibit 1. Contrary to the administrative law judge's finding, Dr. Tomashefski did not further suggest that the normal studies prior to 2004 precluded the subsequent development of pneumoconiosis and total disability due to the disease. *Id.*

In light of employer's meritorious allegations of error, we vacate the administrative law judge's finding that the miner's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c) and, therefore, also vacate the administrative law judge's determination that employer established modification at 20 C.F.R. §725.310. On remand, the administrative law judge must reconsider the medical opinion evidence relevant to the issue of total disability causation, while putting the burden on employer to establish a basis for modification under 20 C.F.R. §725.310 by showing that the determination that the miner's totally disabling impairment was due to pneumoconiosis

was mistaken. In this context, the administrative law judge must specifically address whether the medical opinions of Drs. Tuteur and Tomashefski are adequately reasoned and documented on the issue of total disability causation, based on a review of the entirety of their opinions. See *Groves*, 277 F.3d at 836, 22 BLR at 2-330. If the administrative law judge determines that the opinions of Drs. Tuteur and Tomashefski are entitled to probative weight, he must weigh them against Dr. Lenkey's opinion. However, the administrative law judge must first reconsider his prior finding that Dr. Lenkey's opinion is entitled to determinative weight, based on his status as treating physician. Pursuant to 20 C.F.R. §718.104(d)(5), "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole."¹⁰ 20 C.F.R. 718.104(d)(5); see *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002) ("[T]he opinions of treating physicians get the deference they deserve based on their power to persuade."). In rendering his findings on remand, the administrative law judge must set them forth in detail, including the underlying rationale. See *Wojtowicz*, 12 BLR at 1-165. Should the administrative law judge find employer has met its burden of demonstrating a mistake of fact in the prior decision, the administrative law judge should then re-consider whether granting employer's modification renders justice under the Act. See *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

¹⁰ Employer maintains that Dr. Lenkey's opinion is entitled to less weight than the opinions of Drs. Tuteur and Tomashefski because he did not review the findings from Dr. Nassar's 2009 autopsy of the miner. MC Director's Exhibits 16, 27, 48.

Accordingly, the administrative law judge's Decision and Order on Modification 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.¹¹

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

¹¹ On August 6, 2014, the administrative law judge issued an Order Granting Continuance and Holding Survivor's Case in Abeyance pending the outcome in the miner's claim. In response to claimant's request, subsequent to the issuance of the Decision and Order denying employer's request for modification of the award in the miner's claim, the administrative law judge issued a Decision and Order awarding benefits in the survivor's claim, based on the application of Section 422(*l*). If the administrative law judge denies employer's modification request on remand, he need not alter the award of benefits in the survivor's claim. However, should the administrative law judge grant employer's modification request, and deny benefits in the miner's claim on remand, he must consider whether claimant can independently establish entitlement to survivor's benefits, including whether claimant is entitled to the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4).

ROLFE, Administrative Appeals Judge, concurring:

I concur in the majority's decision to remand this case to reweigh the medical opinion evidence to determine whether employer can establish a mistake in a determination of fact in the prior award. I also concur in the majority's decision that if the employer establishes such a mistake, the administrative law judge must then consider the separate question of whether granting modification would render justice under the Act. I write separately to explain my view that if the administrative law judge reaches that second question, his current rationale that modification would not be futile because "the claimant is currently receiving benefits, and the survivor claim brought forth by [the miner's] widow has been held in abeyance until this case is resolved", Decision and Order at 5, cannot be affirmed.

The employer seeks modification in the miner's claim, not the survivor's claim. Modification remedies are available on benefits payments made, or to be made, on the claim in which modification is sought. 20 C.F.R. §725.310(d) (an order issued on modification "may terminate, continue, reinstate, increase or decrease benefit payments or award benefits."). Moreover, where an award has become final, the regulations preclude recovery of overpayments made prior to the date that modification is requested. *Id.*

The miner passed away on January 14, 2009. Director's Exhibit 63. The last month he was entitled to benefits, therefore, was December 2008. 20 C.F.R. §725.203(b)(1). The award in the miner's claim became final in May 2009, by virtue of the Board's affirmance of Judge Miller's award of benefits. 20 C.F.R. §802.406. Employer did not file for modification, however, until September 2009. Director's Exhibit 63. Employer, therefore, cannot recover any overpayments in the miner's claim. Under these circumstances, the administrative law judge's conclusory statement fails to adequately explain why employer's request to modify the miner's claim is not futile, nor does the administrative law judge sufficiently explain why other factors might outweigh that futility.

JONATHAN ROLFE
Administrative Appeals Judge