

BRB No. 14-0089 BLA

ALLEN W. COLLINS)
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 Claimant-Respondent)
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 v.)
)
 COASTAL COAL COMPANY, LLC) DATE ISSUED: 09/24/2014
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 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 Granting Modification and Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Modification and Benefits (2012-BLA-05188) of Administrative Law Judge Pamela J. Lakes with respect to a request for modification filed pursuant to the provisions of the Black Lung Benefits Act,

as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹ The administrative law judge credited claimant with twenty-four years of underground coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i), (iv) and, therefore, invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² The administrative law judge also concluded that employer did not rebut the presumption. Therefore, the administrative law judge found that claimant established a mistake in a determination of fact at 20 C.F.R. §725.310, and that granting his modification request would render justice under the Act. Accordingly, the administrative law judge awarded benefits, commencing in November 2007.

On appeal, employer asserts, in its brief and reply brief, that the administrative law judge erred in finding that employer did not rebut the amended Section 411(c)(4) presumption. In addition, employer contends that, even if benefits were properly awarded, the administrative law judge erred in determining the onset date. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a limited brief, contending that, because the administrative law judge granted modification based on a mistake in a determination of fact, it was not error for

¹ Claimant filed a prior claim for benefits but it was withdrawn. Director's Exhibit 1. Claimant filed his current claim for benefits on November 21, 2007, which was denied by Administrative Law Judge Richard T. Stansell-Gamm on January 12, 2010, as he found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment, and total disability, but did not establish that he was totally disabled due to pneumoconiosis. Director's Exhibits 2, 44. Claimant filed his request for modification on December 17, 2010, which was denied by the district director. Claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 45, 52, 54.

² Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes 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), as implemented by 20 C.F.R. §718.305. Employer does not dispute that claimant is totally disabled by a respiratory or pulmonary impairment and has at least fifteen years of underground coal mine employment and, therefore, is entitled to application of the presumption.

her to award benefits beginning in November 2007, the month in which claimant filed this claim.³

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

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. 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). With respect to a mistake in a determination of fact, a claimant need not allege specific error made by the administrative law judge in order to establish a basis for modification. Rather, the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). The 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." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). 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

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-four years of underground coal mine employment and that he is totally disabled, thereby invoking the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

justice under the Act. *See Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 327-28, 25 BLR 2-157, 2-173-74 (4th Cir. 2012), *cert.denied*, 133 S.Ct. 2852 (2013).

I. Rebuttal of the Amended Section 411(c)(4) Presumption

A. Clinical Pneumoconiosis

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant’s pulmonary or respiratory impairment “did not arise out of, or in connection with,” his coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have either clinical or legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), or by establishing that “no part of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201.”⁵ 20 C.F.R. §718.305(d)(1)(ii).

The administrative law judge considered the newly submitted interpretations of two x-rays, dated January 18, 2010 and February 24, 2011. Dr. Cohen, a B reader, interpreted the January 18, 2010 x-ray as positive for pneumoconiosis, while Dr. Meyer, who is dually qualified as a B reader and Board-certified radiologist, interpreted the same x-ray as negative. Director’s Exhibit 45; Employer’s Exhibit 1. Giving more weight to Dr. Meyer’s interpretation, as she found him more qualified, the administrative law judge determined that this x-ray is negative for pneumoconiosis. Decision and Order at 9. Dr.

⁵ The regulation at 20 C.F.R. §718.201(a)(1) provides:

“Clinical pneumoconiosis” consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). Pursuant to 20 C.F.R. §718.201(a)(2), “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).

Meyer interpreted the February 24, 2011 x-ray as negative for pneumoconiosis, while Dr. Alexander, who is also dually qualified as a B reader and Board-certified radiologist, interpreted the x-ray as positive. Director's Exhibits 49, 51. The administrative law judge determined that the February 24, 2011 x-ray is inconclusive concerning the existence of clinical pneumoconiosis, as the physicians interpreting the x-ray are equally qualified. Decision and Order at 9. Considering the new x-ray evidence, along with the x-ray evidence considered by Administrative Law Judge Richard T. Stansell-Gamm in connection with his January 12, 2010 denial of benefits, the administrative law judge determined that the x-ray evidence is in equipoise at 20 C.F.R. §718.202(a)(1). *Id.* at 10. The administrative law judge further found, therefore, that employer did not rebut the Section 411(c)(4) presumption that claimant has clinical pneumoconiosis.⁶ *Id.*

The administrative law judge noted that, because there is no biopsy evidence or evidence of complicated pneumoconiosis, subsections (2) and (3) of 20 C.F.R. §718.202(a) are not relevant to this claim. Decision and Order at 10. Weighing the newly submitted medical opinions of Drs. Cohen and Jarboe at 20 C.F.R. §718.202(a)(4), the administrative law judge observed that the physicians were equally qualified. *Id.* The administrative law judge determined that neither physician addressed the issue of clinical pneumoconiosis and, therefore, she concluded that both the newly submitted evidence, and the evidence considered by Judge Stansell-Gamm, were insufficient to rebut the presumption that claimant has clinical pneumoconiosis.⁷ *Id.* at 11.

Employer alleges that the administrative law judge erred in finding that it did not rebut the presumed existence of clinical pneumoconiosis, arguing that the fact that Dr. Alexander interpreted the June 12, 2008 x-ray as possibly showing a Category A opacity of complicated pneumoconiosis detracted from the credibility of his diagnosis of simple pneumoconiosis. *See* Director's Exhibit 40. Employer's contention is without merit, as

⁶ Judge Stansell-Gamm determined that the August 10, 2007, February 25, 2008, and October 31, 2008 x-rays were inconclusive concerning the existence of clinical pneumoconiosis. Director's Exhibit 44 at 10. However, Judge Stansell-Gamm determined that the June 12, 2008 x-ray was positive for pneumoconiosis and found that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id.*

⁷ Judge Stansell-Gamm gave less weight to the opinions of Drs. Dahhan and Jarboe, that claimant does not have clinical pneumoconiosis, because he found they relied on "inaccurate documentation." 2010 Decision and Order at 16. The administrative law judge determined that Dr. Forehand's newly submitted opinion diagnosing claimant with clinical pneumoconiosis, was well documented and reasoned and concluded that it supported a finding of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id.*

the administrative law judge is not required to discredit a positive reading for simple pneumoconiosis on the ground that the physician's diagnosis of complicated pneumoconiosis conflicted with the administrative law judge's finding. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(en banc). Therefore, the administrative law judge permissibly determined that the June 12, 2008 x-ray "may be deemed to be positive for pneumoconiosis," as two dually-qualified physicians, including Dr. Alexander, interpreted the x-ray as positive for pneumoconiosis and one dually-qualified physician and one B reader found that it was negative. Decision and Order at 10; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

We also reject employer's contention that the administrative law judge erred in finding that the February 24, 2011 x-ray was insufficient to rebut the presumed existence of clinical pneumoconiosis. The administrative law judge considered the conflicting interpretations of Drs. Meyer and Alexander, both dually qualified radiologists, and rationally concluded that the February 24, 2011 x-ray was "inconclusive" concerning the existence of pneumoconiosis. Decision and Order at 9; *Adkins*, 958 F.2d at 52, 16 BLR at 2-66. Although the administrative law judge could have considered, as employer argues, that Dr. Meyer also interpreted the January 18, 2010 film as negative for pneumoconiosis, she was not required to do so. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993).

We decline to address employer's allegation that the administrative law judge erred in crediting Dr. Cohen's opinion that claimant has clinical pneumoconiosis.⁸ Because employer bears the burden of rebutting the amended Section 411(c)(4) presumption, error, if any, in the administrative law judge's weighing of Dr. Cohen's opinion is harmless. *See Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66; *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); 30 U.S.C. §902(b). Moreover, the administrative law judge acted within her discretion in finding that the opinion of Dr. Jarboe, employer's expert, was insufficient to satisfy employer's burden to rebut the presumed existence of clinical pneumoconiosis, as Dr. Jarboe's newly submitted opinion does not "squarely address[] the issue" of whether claimant has clinical pneumoconiosis. Decision and Order at 11; *see Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 25 BLR 2-115 (4th

⁸ Employer argues that the administrative law judge did not explain how Dr. Cohen's reliance on his positive interpretation of the January 18, 2010 x-ray, which the administrative law judge ultimately determined was negative for pneumoconiosis, could constitute a documented and reasoned opinion. Employer also generally asserts that Dr. Jarboe's opinion establishes that claimant does not have clinical pneumoconiosis. However, as the administrative law judge correctly noted, Dr. Jarboe's newly submitted opinion does not "squarely address[] the issue." Decision and Order at 11.

Cir. 2012). Accordingly, we affirm the administrative law judge's finding that employer did not rebut the presumed existence of clinical pneumoconiosis.

B. Legal Pneumoconiosis and Disability Causation

On the issue of legal pneumoconiosis,⁹ the administrative law judge noted that, unlike the record before Judge Stansell-Gamm,¹⁰ the newly submitted evidence contained a reasoned and documented opinion by Dr. Cohen that claimant has legal pneumoconiosis. Decision and Order at 13. The administrative law judge further observed that the burden of proof is different in the case before her, as employer bears the burden of establishing that claimant does not have either clinical or legal pneumoconiosis. *Id.* The administrative law judge stated that Dr. Jarboe “had the advantage of reviewing additional medical records,” but determined that Dr. Jarboe did not explain how this review substantiated his opinion that claimant’s respiratory impairment was unrelated to coal dust exposure, particularly when he discussed these records only in an addendum to his report. *Id.* The administrative law judge further found that the opinions of Drs. Jarboe and Dahhan were entitled to less weight, as they “focused on whether the Claimant’s pulmonary and respiratory problems, and his disability, were more likely the result of cigarette smoking or coal mine dust exposure,” without offering an opinion as to whether coal dust exposure was a contributing cause of claimant’s impairment. *Id.* Consequently, the administrative law judge determined that the evidence was in equipoise concerning whether coal dust contributed to claimant’s chronic obstructive pulmonary disease/emphysema and, as a result, employer did not rebut the presumed existence of legal pneumoconiosis. *Id.* Relying on her findings that employer did not rebut the presumed existence of legal pneumoconiosis, the administrative law judge also found that employer did not rebut the presumption that claimant’s totally disabling respiratory impairment is due to pneumoconiosis. *Id.* at 14.

Employer argues that the administrative law judge erred in finding that the conflicting opinions on the existence of legal pneumoconiosis were in equipoise. Employer asserts that the administrative law judge did not explain how the objective evidence supported Dr. Cohen’s conclusion that claimant has legal pneumoconiosis. In contrast, employer states that Dr. Jarboe provided a well-reasoned opinion that claimant’s

⁹ 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).

¹⁰ Judge Stansell-Gamm determined that no physician diagnosed legal pneumoconiosis and, therefore, he relied on the opinions of Drs. Jarboe and Dahhan to conclude that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Director’s Exhibit 44 at 16.

respiratory impairment is due solely to cigarette smoking, and that his opinion was supported by the similar opinion of Dr. Dahhan.

Contrary to employer's arguments, the administrative law judge acted within her discretion in giving less weight to the opinions of Dr. Jarboe and Dr. Dahhan, as she found that they did not adequately explain whether, or how, they excluded coal dust exposure as a contributing cause of claimant's respiratory impairment. *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). In addition, because employer bears the burden of rebutting the presumed existence of legal pneumoconiosis, it is not necessary to address the administrative law judge's weighing of Dr. Cohen's opinion. *See Barber*, 43 F.3d at 900-01, 19 BLR at 2-67. Consequently, we affirm the administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis. In addition, as the administrative law judge's finding that employer failed to rebut the presumption that claimant is totally disabled due to pneumoconiosis was based on her findings concerning legal pneumoconiosis, and employer has not raised any additional arguments concerning this issue, we affirm the administrative law judge's finding on the issue of disability causation. Moreover, because we have affirmed the administrative law judge's finding that employer did not rebut the presumption that claimant is totally disabled due to pneumoconiosis, we affirm her finding that claimant established a basis for modification at 20 C.F.R. §725.310.¹¹

II. Commencement of Benefits

Regarding the issue of onset of the appropriate date for the commencement of benefits, the administrative law judge stated:

I have found that Claimant has established that he is totally disabled due to pneumoconiosis based upon the 15-year presumption revived by the [Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010)] and I have also found that the presumption has not been rebutted. I therefore find that, taking the newly submitted evidence into account and applying the existing law, Claimant has established a mistake in a determination of fact in the prior decision.

Decision and Order at 14. The administrative law judge further stated, "it is unclear when the Claimant became totally disabled, but he was likely totally disabled by the time

¹¹ Judge Stansell-Gamm denied claimant's initial claim, as he found that claimant did not establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 44.

he filed for benefits on November 21, 2007.” *Id.* at 17. Therefore, the administrative law judge awarded benefits commencing on November 1, 2007. *Id.*

Employer contends that “[a]t best, the evidence supports a change in the miner’s condition, not a ‘mistake of fact’ to support modification of the prior denial.” Employer’s Brief in Support of Petition for Review at 9-10. Consequently, employer argues that the earliest onset date is December 1, 2010, the month in which claimant filed his modification request. In support of this contention, employer notes that the administrative law judge initially found that there was no mistake in a determination of fact in Judge Stansell-Gamm’s decision, but subsequently concluded that claimant had established such a mistake, and did not provide an explanation for this inconsistency. Further, employer asserts that there is evidence in the record, in the form of non-qualifying objective studies and Dr. Jarboe’s opinion, that claimant was not totally disabled in November 2007.¹²

Employer’s arguments have merit, in part. As employer alleges, the administrative law judge initially stated, “[b]ased upon my review of Judge Stansell-Gamm’s decision and the evidence upon which it was premised, I do not find a mistake in a determination of fact. I must therefore determine whether the newly submitted evidence establishes either a change in condition or mistake of fact.” Decision and Order at 5. The administrative law judge subsequently concluded, “I therefore find that, taking the newly submitted evidence into account and applying the existing law, Claimant has established a mistake in a determination of fact in the prior decision.” *Id.* at 14. Additionally, the administrative law judge noted that “the new evidence is more supportive of a finding of total disability than the evidence previously of record,” and determined correctly that there were no medical opinions before Judge Stansell-Gamm containing a diagnosis of total disability due to pneumoconiosis. *Id.* at 7, 13. This language suggests that the administrative law judge granted modification based on a change in condition. Moreover, as employer argues, the administrative law judge has not analyzed the evidence with respect to disability onset and has not provided, as required by the Administrative Procedure Act (APA),¹³ an explanation of her conclusion that it is

¹² As employer has not argued that the administrative law judge erred in her consideration of whether modification would render justice under the Act, we affirm this finding. *Skrack*, 6 BLR at 1-711.

¹³ The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, 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), as incorporated into the Act by 30 U.S.C. §932(a).

unclear when claimant became totally disabled, but he was likely totally disabled as of the time he filed for benefits on November 21, 2007.

Because the administrative law judge's decision is unclear as to the basis for granting modification, we must vacate her determination as to the commencement of benefits and remand the case for reconsideration of this issue. On remand, the administrative law judge must specifically identify the basis for granting modification, and then determine the commencement date for benefits in accordance with 20 C.F.R. §725.503(d).¹⁴ Finally, the administrative law judge is required to set forth her findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

¹⁴ If modification is based on a change in conditions, claimant is entitled to benefits as of the month of onset of total disability due to pneumoconiosis, or if that date is not ascertainable, as of the date that claimant requested modification. 20 C.F.R. §725.503(d)(2). If modification is based on the correction of a mistake in a determination of fact, claimant is entitled to benefits from the date he became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Eifler v. Peabody Coal Co.*, 926 F.3d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

Accordingly, the administrative law judge's Decision and Order Granting Modification and Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge