BRB No. 09-0467 BLA

BOBBY DAWSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/30/2010
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

Anne Marie Scarpino (M. Patricia Smith, Solicitor of Labor; 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: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Modification Denying Benefits (2006-BLA-05496) of Administrative Law Judge Jeffrey Tureck rendered on a subsequent claim filed on April 10, 2003,[1] pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124

[1] Claimant filed an initial claim for benefits on August 16, 1991, which was denied by the district director on June 3, 1992, because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1.

Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] In a Proposed Decision and Order issued on December 11, 2003, the district director found that the newly submitted evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, the claim was denied by the district director on the ground that claimant failed to establish that he was totally disabled. Claimant subsequently filed a request for modification on July 17, 2004, which was denied by the district director on December 7, 2005. Thereafter, claimant requested a hearing, and the case was assigned to the administrative law judge, who issued his Decision and Order on Modification on February 19, 2009.[3] The administrative law judge credited claimant with seventeen and one-half years of coal mine employment, as stipulated by the parties, and adjudicated this claim under the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish either a change in conditions or a mistake in a determination of fact with regard to the prior denial pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification and benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and the prerequisites for modification under 20 C.F.R. §725.310. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the denial of 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 and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as it was filed prior to January 1, 2005.

[3] The administrative law judge granted a motion filed by the parties to decide the case on the record without a hearing.

[4] The record indicates that claimant's last coal mine employment was in Illinois. Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to 20 C.F.R. §725.310(a), a miner may, at any time before one year after the denial of a claim, file a request for modification of the denial of benefits. A miner may establish a basis for modification in his or her claim by establishing either a change in conditions or a mistake in a determination of fact. *See* 20 C.F.R. §725.310. In considering whether a change in conditions has been established pursuant to 20 C.F.R. §725.310, an 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 at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). If a change is established, the administrative law judge must then consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim. *Nataloni*, 17 BLR at 1-84. In addition, the administrative law judge has the authority to consider all the evidence for any mistake in a determination of fact, including the ultimate fact of entitlement. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 546, 547, 22 BLR 2-429, 2-452, 2-453 (7th Cir. 2002) (Wood, J., dissenting); *Zeigler Coal Co. v. Sieberg*, 839 F.2d 1280, 11 BLR 2-80 (7th Cir. 1988).

In considering whether claimant established the prerequisites for modification, the administrative law judge noted that claimant was required to establish that he is totally disabled in order to demonstrate either a mistake in a determination of fact or a change in conditions. The administrative law judge initially found that none of the pulmonary function tests or arterial blood gas studies submitted in conjunction with the subsequent claim or claimant's modification request was qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii), and that claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii), as there was no evidence in the record to establish that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 4. The administrative law judge also found that claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304.[5] *Id*. Thus, the administrative law judge focused his analysis on whether

[5] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant was unable to establish total disability pursuant to 20

claimant established total disability based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Dr. Reddy examined claimant on June 19, 2003, at the request of the Department of Labor, and opined that claimant is not totally disabled. Director's Exhibits 9-10, 47. Dr. Houser examined claimant on April 5, 2004, and diagnosed mild to moderate airway obstruction, but he did not offer any opinion as to whether claimant is totally disabled. Director's Exhibit 29.

Dr. Istanbouly examined claimant on August 29, 2007. Claimant's Exhibit 2 at Exhibit 1.[6] In his report, Dr. Istanbouly noted that claimant was a non-smoker and worked in the coal mines for twenty-one years. *Id*. He described that claimant's last coal mine employment involved "bolting roofs[,] and it was a physical job including standing on his feet all of the time, lifting, shoveling, and holding." *Id*. He also noted that at the time of his retirement from the mines, claimant "was getting short of breath by walking for only 1-2 blocks." *Id*. A pulmonary function test (PFT) was obtained and revealed "moderate nonspecific ventilatory limitation, suggestive of restrictive lung disease [versus] mixed restrictive obstructive pattern." *Id*. Dr. Istanbouly opined that claimant suffers from coal workers' pneumoconiosis and a severe respiratory impairment, although he also acknowledged that claimant "may have other medical problems which could be contributing to his respiratory symptoms, including coronary artery disease . . . uncontrolled obstructive sleep apnea, allergic rhinitis, and uncontrolled gastroesophageal reflux disease." *Id.* (emphasis omitted).

In a letter to claimant's counsel dated September 19, 2007, Dr. Istanbouly advised that he had ordered an echocardiogram to rule out significant cardiac dysfunction contributing to claimant's respiratory impairment, and it showed "mild pulmonary hypertension, mild pulmonic regurgitation, mild tricuspid regurgitation, and mild aortic

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C.F.R. §718.204(b)(2)(i)-(iii), and that he is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and therefore was unable to establish a change in conditions or a mistake in a determination of fact by these methods. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Claimant's Exhibit 2 is the transcript of Dr. Istanbouly's December 14, 2007 deposition. Attached to the transcript are three deposition exhibits. Exhibit 1 consists of Dr. Istanbouly's August 29, 2007 examination report. Exhibit 2 consists of Dr. Istanbouly's September 29, 2007 report. Exhibit 3 consists of a pulmonary function test and chest x-ray dated August 29, 2007, and an echocardiogram dated August 31, 2007.

regurgitation." Claimant's Exhibit 2 at Exhibit 2. Dr. Istanbouly opined that claimant "has a total[ly] disabling respiratory impairment, which seems to be related to Coal Worker's [sic] Pneumoconiosis in addition to his other co[-]morbidities." *Id*.

In a deposition conducted on December 14, 2007, Dr. Istanbouly was asked to clarify the basis for his opinion that claimant is totally disabled and stated:

> Now, the moderate [impairment] is based on his PFT. The patient . . . has been on home oxygen continuously for a few years, and he was dyspneic after walking for a few steps only in the office. So based on clinical evaluation, history, plus the most objective finding would be the pulmonary function test I did on the same day of evaluation [sic].

Claimant's Exhibit 2 at 25. On cross-examination, Dr. Istanbouly was asked if he was aware that the FEV1 and FVC values obtained during his pulmonary function testing were non-qualifying for total disability. *Id*. at 26. He responded, "Well, my understanding [is that] they are borderline." *Id*. Dr. Istanbouly testified that he did not know why claimant was placed on oxygen therapy. *Id*. at 28-29. When asked why he did not obtain an arterial blood gas study to reassess claimant's need for oxygen, Dr. Istanbouly explained, "I [tried] to get [a] six minute walk test in the office to reassess his need for oxygen, [but] he couldn't walk." *Id.* at 29.

In weighing the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that Dr. Reddy's opinion supported a finding that claimant was not totally disabled, while Dr. Houser had provided no opinion regarding disability.[7] Decision and Order at 7. With respect to Dr. Istanbouly, the administrative law judge found that his opinion, that claimant is totally disabled from working as a roof bolter, was based on an "incomplete" examination. Decision and Order at 6. The administrative law judge noted that, although Dr. Istanbouly "relied extensively on the results of his PFT in concluding that [claimant] is totally disabled," that test "did not include results obtained after the administration of a bronchodilator; and the PFTs since the denial of the initial claim which do contain both pre[-bronchodilator] and post-bronchodilator results show significant improvement post[-]bronchodilator." *Id*. at 5-6 (citations omitted). The administrative law judge also specifically criticized Dr. Istanbouly's characterization of claimant's PFT results as "borderline" for total disability, noting that "the most recent PFT aside from Dr. Istanbouly's showed an increase of 18% in the FVC and 30% in the FEV1 post-bronchodilator, and clearly [is] not 'borderline' for

[7] The administrative law judge also found the treatment records did not contain a physician's opinion regarding claimant's disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 7.

total disability under Appendix B to Part 718." *Id*. at 6. The administrative law judge observed that Dr. Istanbouly did not conduct an arterial blood gas study, and that claimant's arterial studies performed "since the denial of the initial claim have consistently been either at or near normal." *Id*.

The administrative law judge also described Dr. Istanbouly's opinion as "highly flawed" and explained:

> Dr. Istanbouly stated that[,] in addition to the moderate impairment based on the PFT, he relied on [c]laimant's use of "home oxygen continuously for a few years, and he was dyspneic after walking for a few steps only in the office." [Claimant's Exhibit] 2, at 25. But Dr. Istanbouly has no knowledge of why [claimant's] is using oxygen ([*Id.*] at 28-29). Further, he notes in his September 19 report that [claimant] gets short of breath in walking one or two blocks, not a few feet. Moreover, in his August 29, 2007 report, Dr. Istanbouly points out the at rest and exercise results of the May 21, 2003 [arterial blood gas study] as well as the pre[-bronchodilator] and post-bronchodilator results of the May 29, 2003 PFT, both of which appear to be inconsistent with his conclusion that [claimant] is totally disabled. But he does not refer to these test results in concluding that [claimant's] respiratory impairment is severe and he is totally disabled.

Decision and Order at 6. Thus, the administrative law judge concluded that Dr. Istanbouly's opinion had no probative value at 20 C.F.R. §718.204(b)(2)(iv), and that claimant failed to establish total disability. *Id*. The administrative law judge therefore denied claimant's modification request, finding that "[s]ince none of the evidence of claimant's condition since the initial claim was denied in 1992 supports a finding that he has a totally disabling respiratory or pulmonary impairment, [c]laimant has failed to prove either a change in conditions or a mistake in a determination of fact in connection with the denial of his subsequent claim." *Id*. at 7.

Claimant asserts that the administrative law judge cited improper reasons for rejecting Dr. Istanbouly's opinion that claimant's respiratory impairment disables him from performing the work of a roof bolter. The Director, however, maintains that the administrative law judge permissibly exercised his discretion in determining that Dr. Istanbouly's opinion was not reasoned on the issue of total disability. After considering the evidence of record, the administrative law judge's Decision and Order, and the briefs of the parties, we must vacate the administrative law judge's Decision and Order as we agree with claimant that the administrative law judge has failed to properly explain why Dr. Istanbouly's opinion is entitled to no probative weight.

The administrative law judge rejected Dr. Istanbouly's disability opinion because: 1) it was based on an incomplete pulmonary examination which did not include a PFT after bronchodilator; 2) Dr. Istanbouly did not address the prior arterial blood gas and PFT results that are apparently inconsistent with his opinion; 3) he failed to explain his finding of severe pulmonary impairment in light of testimony he provided that the PFT during his examination showed a moderate impairment; 4) Dr. Istanbouly relied on claimant's use of home oxygen, but admitted that he did not know why claimant was prescribed oxygen; and 5) he gave inconsistent statements regarding how far claimant was able to walk before becoming dyspneic. Decision and Order at 5-6.

There is merit to claimant's assertion that the administrative law judge placed undue emphasis on the need for post-bronchodilator testing in this case. The administrative law judge noted that while Dr. Istanbouly "relied extensively on the results of his PFT" in concluding that claimant is totally disabled, his "PFT did not include results obtained after the administration of a bronchodilator." Decision and Order at 5. The administrative law judge questioned the validity of Dr. Istanbouly's characterization of the results of the PFT as "borderline" for total disability in light of earlier, post-bronchodilator studies that he described as showing "significant improvement" in claimant's respiratory condition and that he found "clearly are not 'borderline' for total disability under Appendix B to Part 718." *Id*. at 5-6, citing Director's Exhibit 29 (April 5, 2004 PFT).[8] Contrary to the administrative law judge's analysis, however, the Department of Labor has specifically stated that the use of a bronchodilator "does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." *See* 45 Fed. Reg. 13682 (1980).

Claimant also argues that, because pneumoconiosis is a progressive disease, the administrative law judge erred in relying on tests performed in 2001, 2003 and 2004 to find that the credibility of Dr. Istanbouly's opinion was undermined when the doctor's opinion was based on testing performed several years later, in 2007. In view of the determination by the United States Court of Appeals for the Seventh Circuit to credit the Department of Labor's scientific findings that pneumoconiosis is a latent and progressive

[8] Claimant contends that the administrative law judge "seriously misread" the earlier testing and confused the percentages of change between the pre-bronchodilator and post-bronchodilator values obtained in the April 5, 2004 PFT: "In terms of percentage of predicted[,] the increase in FVC [after the administration of a bronchodilator] was only 12% while the increase in the FEV1 was 17%." Claimant's Brief at 8 n.1; *see* Director's Exhibit 29. Claimant concludes: "In any event, even post[-]bronchodilator[,] the testing showed an abnormality that could only be attributed to coal dust exposure." *Id*.

disease, *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-25-26 (7th Cir. 2004), and the court's holding that the relevant inquiry is claimant's condition at the time of the hearing, *Freeman v. United Coal Co. v. Benefits Review Board* [*Wolfe*], 912 F.2d 164, 171, 14 BLR 2-53, 2-62 (7th Cir. 1990), we hold that the administrative law judge erred in discrediting the doctor's opinion based upon the earlier tests without consideration of the dates they were administered.

The administrative law judge has also failed to explain his findings with regard to the arterial blood gas study evidence. The administrative law judge criticized Dr. Istanbouly for not obtaining an arterial blood gas study, but the administrative law judge did not address the fact that Dr. Istanbouly testified as to why he had to omit the test. On cross-examination by Director's counsel, Dr. Istanbouly explained:

> Q. Did you ever order any arterial blood gas studies to document the need for oxygen?
>
> A. No. I [tried] to get [a] six minute walk test in the office to reassess his need for oxygen, he couldn't walk.

Claimant's Exhibit 2 at 29.[9] Dr. Istanbouly also explained that he did not consider earlier arterial blood gas studies when rendering his diagnosis, because they were "a few years ago," and the only study to include an exercise test had to be terminated prematurely because of claimant's significant fatigue. *Id*. at 24. Because the administrative law judge's analysis does not reflect his consideration of Dr. Istanbouly's testimony, we agree that the administrative law judge erred in finding that Dr. Istanbouly's examination was incomplete, for failure to obtain an arterial blood gas study or consider the earlier arterial blood gas study evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

As an additional basis for rejecting Dr. Istanbouly's diagnosis of total disability, the administrative law judge noted that Dr. Istanbouly "relied on [c]laimant's use of 'home oxygen continuously'" to support his opinion, but "has no knowledge of why [claimant] is using oxygen." Decision and Order at 6. While Dr. Istanbouly stated that he was unaware of the reason that claimant was initially prescribed oxygen by a prior physician, the administrative law judge has not explained why this information is necessary to render Dr. Istanbouly's disability opinion credible. *See Wojtowicz*, 12 BLR at 1-165. The administrative law judge must also explain the basis for his credibility

[9] Dr. Istanbouly's decision not to have claimant undergo an arterial blood gas study is consistent with the Department of Labor's instruction in Appendix C to 20 C.F.R. Part 718, that an arterial blood gas study should not be performed when a doctor determines that a miner's condition prohibits it.

determination, in light of Dr. Istanbouly's specific testimony that, when he attempted to assess claimant's need for oxygen, claimant could not walk due to shortness of breath. *Id*.; Claimant's Exhibit 2 at 29.

Finally, the administrative law judge erred in rejecting Dr. Istanbouly's opinion, in part, because he believed Dr. Istanbouly made contradictory statements regarding claimant's ability to walk. The administrative law judge noted that Dr. Istanbouly opined that claimant was totally disabled because claimant became "dyspneic after walking for a few steps only in the office." Decision and Order at 6, quoting Claimant's Exhibit 2 at 25. The administrative law judge believed this statement was contradicted by the doctor's "September 19, [2007] report that the claimant gets short of breath in walking one or two blocks, not a few feet." Decision and Order at 6. The administrative law judge, however, did not fully address Dr. Istanbouly's September 19, 2007 report. After stating that claimant left the coal mines in 1989, Dr. Istanbouly also stated in the September 19, 2007 report, "[h]e currently gets short of breath by walking for only 1-2 blocks." Claimant's Exhibit 2 at Exhibit 2. Four sentences later, Dr. Istanbouly indicated that claimant "currently gets short of breath by walking for only 10-15 steps compared to 1-2 blocks in 1989." *Id*. In his report of August 29, 2007, Dr. Istanbouly also clearly stated that at the time of claimant's retirement he "was getting short of breath by walking for only 1-2 blocks" and that "[he] currently gets short of breath by walking for only 10-15 steps." Claimant's Exhibit 2 at Exhibit 1. Thus, to the extent that the administrative law judge selectively analyzed portions of Dr. Istanbouly's September 19, 2007 report in concluding that his opinion was contradictory, we vacate the administrative law judge's finding that Dr. Istanbouly's opinion was insufficiently reasoned to support claimant's burden of proving that he is totally disabled.

The administrative law judge has committed several errors, discussed *supra*, and his Decision and Order does not satisfy the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires that an administrative law judge provide an explanation for all of his findings of fact and conclusions of law. *See Wojtowicz*, 12 BLR at 1-165. We therefore vacate his finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Because we vacate the administrative law judge's finding that claimant is not totally disabled, we vacate his finding that claimant failed to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. We instruct the administrative law judge, on remand, to reconsider whether Dr. Istanbouly's opinion is adequately reasoned and documented to carry claimant's burden of establishing that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-9, 22 BLR 2-311, 2-318 (7th Cir. 2001); *Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990). If necessary, the administrative law judge must then render findings on the issue of disability causation pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to remand this case for reconsideration. My review of the record reveals that every reason the administrative law judge gave to discredit Dr. Istanbouly's opinion is invalid, a condition which further explanation cannot change. Where, as here, the administrative law judge has improperly discredited relevant evidence that claimant has a totally disabling respiratory impairment and there is no contrary evidence, it is appropriate to reverse the administrative law judge's determination. Accordingly, I would reverse the administrative law judge's decision and remand the case for payment of benefits.

The only relevant medical evidence in the case at bar consists of the opinion of Dr. Istanbouly, together with its supporting documentation. Dr. Istanbouly is a Board-certified pulmonologist who, for three years, has been retained by the Department of Labor to conduct pulmonary examinations in Black Lung cases. Claimant's Exhibit 2 at 6. The doctor examined claimant on August 29, 2007, and obtained claimant's medical, employment and smoking histories. Claimant's Exhibit 2 at Exhibit 1. At that time, he performed a pulmonary function test which showed a moderate impairment. *Id*. Based on his observation of claimant's condition, the doctor did not order an arterial blood gas study; he did, however, order an echocardiogram and he took an x-ray, which showed

mild scarring; and he noted that it had been read in the past as positive for pneumoconiosis by a B reader. *Id*. Dr. Istanbouly concluded that claimant's respiratory impairment disabled him from performing his usual coal mine work as a roof bolter. *Id*. After obtaining the results of the echocardiogram, the doctor was able to determine that the principal cause of claimant's respiratory impairment was his coal dust exposure for more than fifteen years. Claimant's Exhibit 2 at 22, and Exhibit 2.

The record contains two other medical reports. On April 5, 2004, Dr. Houser diagnosed claimant with chronic bronchitis and chronic obstructive pulmonary disease, mild to moderate. Director's Exhibit 29. He attributed these conditions to both smoking and claimant's coal mine employment. *Id*. In response to a letter from claimant, Dr. Houser amended his report on June 10, 2004, to reflect that claimant had never smoked cigars or cigarettes and that he was on oxygen twenty-four hours a day, although he had not been on oxygen when seen by the doctor. *Id*. The other report was provided by Dr. Reddy, in response to a letter from the district director. Director's Exhibits 10, 47. Following a pulmonary evaluation on June 19, 2003, Dr. Reddy diagnosed simple coal workers' pneumoconiosis, based on an x-ray and employment history, and chronic bronchitis, which the doctor attributed to claimant's employment in the coal mines and welding. *Id*. Dr. Reddy opined that claimant had a ten percent pulmonary impairment which was not totally disabling, but the doctor nowhere indicated knowledge of claimant's last coal mine employment. *Id*.

On appeal, claimant argues that all of the various reasons cited by the administrative law judge for finding the credibility of Dr. Istanbouly's opinion undermined lack merit: the doctor failed to consider pulmonary function testing and arterial blood gas study results obtained several years earlier; he failed to order a post-bronchodilator study; he failed to order an arterial blood gas study; he relied on a pulmonary function test showing only moderate impairment; he also relied on claimant's history of oxygen use and his dyspnea brought on by walking a few steps. The Director, Office of Workers' Compensation Programs (the Director), does not address any of claimant's specific arguments. The majority discusses some, but not all of them. I believe that review of all of the administrative law judge's criticisms of Dr. Istanbouly's opinion, when considered in the context of the record and in light of applicable law, reveals that they are devoid of merit.

The majority acknowledges that the administrative law judge erred in relying on test results obtained in 2001, 2003 and 2004 to discredit Dr. Istanbouly's opinion of claimant's condition in August – September 2007, because the earlier tests are not probative of the issue to be determined, i.e., claimant's condition at the time the record

was closed, March 5, 2008.[10] *See Freeman United Coal Mining Co. v. Benefits Review Board* [*Wolfe*], 912 F.2d 164, 171, 14 BLR 2-53, 2-62 (7th Cir. 1990).[11]

The majority also acknowledges that it was error for the administrative law judge to find Dr. Istanbouly's opinion deficient for failing to order a post-bronchodilator study or an arterial blood gas study. The majority opinion has closed the door on repetition of those errors, but it has left the door open for the administrative law judge to repeat his erroneous criticism of the bases, cited by the doctor, for his disability opinion: a pulmonary function study showing a moderate impairment, claimant's history of oxygen use, and dyspnea after walking only a few steps.

Most importantly, the majority does not even address the administrative law judge's criticism of Dr. Istanbouly's opinion for finding a severe or moderately severe impairment when the pulmonary function test shows a moderate impairment. *See* Claimant's Exhibits 2, 3. The doctor provided an explanation at his deposition that, according to the American Thoracic Society's guidelines, claimant's FEV1, showing 63.8 percent predicted, indicates a moderate defect. Claimant's Exhibit 2 at 17. The doctor further explained that when he considered claimant's pulmonary function testing, together with his history, he concluded that claimant has a moderately severe ventilatory impairment. *Id*. at 18. It was entirely proper for the doctor to modify claimant's classification based upon his clinical judgment. The American Thoracic Society has declared that spirometric classification "is intended to be applicable to populations . . . and not to substitute [for] clinical judgment in the evaluation of the severity of disease in individual patients." American Thoracic Society/ European Respiratory Society Taskforce: Standards for the Diagnosis and Management of Patients with COPD [Internet]. Version 1.2 at 10. New York: American Thoracic Society; 2004 [updated 2005 September 8]. Thus, the administrative law judge's concern that Dr. Istanbouly had mischaracterized claimant's condition as "severe" is unfounded.

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[10] The administrative law judge reopened the record on April 18, 2008 in order to admit Dr. Reddy's supplemental medical report dated May 14, 2008 and his letter dated May 20, 2008, both of which were based upon his pulmonary evaluation of June 19, 2003. Director's Exhibit 47.

[11] In *Wolfe*, the Seventh Circuit declared that the relevant inquiry is whether a claimant is disabled on the date of the hearing. *Freeman United Coal Mining Co. v. Benefits Review Board* [*Wolfe*], 912 F.2d 164, 171, 14 BLR 2-53, 2-62 (7th Cir. 1990), *citing Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Since the parties waived a hearing in the case at bar, the issue must be claimant's condition on the date the record closed.

Moreover, the administrative law judge's focus on semantics reflects a fundamental misunderstanding of the issue: a determination of total disability is based on a factual understanding of the exertional requirements of claimant's last coal mine job and medical evidence of claimant's work capacity. *See Killman v. Director, OWCP*, 415 F.3d 716, 722, 23 BLR 2-250, 2-259 (7th Cir. 2005); *Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 507, 15 BLR 2-116, 2-120 (7th Cir. 1990). Terminology, i.e., mild, moderate, or severe, is irrelevant.

The administrative law judge implies that it was unreasonable of Dr. Istanbouly to find claimant totally disabled based upon a non-qualifying pulmonary function test showing a moderate impairment. Again, the administrative law judge's decision betrays a basic misunderstanding of the Black Lung Benefits Act, which permits a claimant to establish total disability based upon medical opinion evidence where disability cannot be established based on objective tests, because there are jobs in coal mines which require a better than ordinary respiratory capacity. *Killman*, 415 F. 3d at 721, 23 BLR at 2-259; *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990). In *Killman*, the Seventh Circuit quoted with approval the Board's declaration in that case that "the [administrative law judge] could not substitute his opinion for that of the physician, '*where the physician has an adequate understanding of the Miner's job duties . . .*' (emphasis added)." *Killman*, 415 F.3d at 721, 23 BLR at 2-259.

In the case at bar, there is no dispute that claimant's last coal mine employment was as a roof bolter, which entailed lifting seventy to eighty pounds regularly. Decision and Order at 2. Dr. Istanbouly was well-aware that claimant's last job in the mines was that of roof bolter and the doctor testified that claimant's pulmonary impairment rendered him totally disabled from performing this job which required lifting seventy to eighty pounds. Claimant's Exhibit 2 at 19-20. Because Dr. Istanbouly was well-aware of the exertional requirements of claimant's job as a roof bolter, the administrative law judge erred in discrediting the doctor's disability opinion based upon the non-qualifying pulmonary function test showing a moderate impairment. *See Killman*, 415 F.3d at 721, 23 BLR at 2-259; *Poole*, 897 F.2d at 893, 13 BLR at 2-355. The administrative law judge's criticism of the doctor's disability opinion because he diagnosed a severe or moderately severe pulmonary condition when the pulmonary function test showed a moderate impairment, reveals a lack of attention to the record, and more importantly, a lack of understanding of the Black Lung Benefits Act. The majority's failure to recognize this error is an invitation to its repetition.

Although the majority acknowledges that the administrative law judge erred in criticizing Dr. Istanbouly's disability opinion for his reliance on claimant's oxygen use, the majority suggests that further explanation can cure this defect. The majority instructs the administrative law judge on remand to explain why Dr. Istanbouly must know the reason that claimant was prescribed oxygen in order for his disability opinion to be held

credible. However, any explanation the administrative law judge might offer would be irrelevant.

Although the doctor did not know the reason that claimant had been prescribed oxygen originally, the record reflects that, on completion of his pulmonary examination, the doctor directed claimant to continue oxygen treatment. Claimant's Exhibit 2 at Exhibit 1, p.3. Having determined that claimant required oxygen treatment, the doctor properly considered claimant's oxygen dependence in finding him totally disabled. In light of this evidence, remand of the case for further explanation is pointless.

Finally, the majority recognizes the administrative law judge's error in selectively analyzing Dr. Istanbouly's opinion, but not the magnitude of that error. The administrative law judge questioned the credibility of Dr. Istanbouly's total disability opinion based upon a conflict between the doctor's deposition testimony, stating that claimant "was dyspneic after walking for a few steps only in the office," Decision and Order at 6, quoting Claimant's Exhibit 2 at 25, and the doctor's statement, in his September 19, 2007 report, that claimant gets short of breath after walking one or two blocks, which the administrative law judge observed, was not just a few feet. *Id*. at 6. As the majority points out, the statement that claimant was capable of walking one or two blocks was contradicted by another statement in the same report, in addition to a statement in the August 29, 2007 report, as well as the doctor's deposition testimony. Dr. Istanbouly's finding that claimant could walk only a few steps before becoming dyspneic was corroborated by claimant's deposition testimony in February, 2008 that he could walk "10 feet maybe" before stopping. Claimant's Exhibit 1 at 10, 14, 17. Further corroboration of Dr. Istanbouly's observation, that claimant could walk only a few feet, is found in Dr. Houser's April 5, 2004 report, written three years before Dr. Istanbouly's opinion, in which Dr. Houser stated: "He is short of breath walking a few feet on level ground . . . ." Director's Exhibit 29. Thus, the record is pellucid that Dr. Istanbouly correctly understood that claimant's respiratory impairment prevented him from walking more than ten to fifteen feet, and the doctor reasonably determined that this indicated a severe respiratory impairment. In highlighting an obviously editorial error in one of Dr. Istanbouly's reports, the administrative law judge failed to demonstrate a flaw in the doctor's opinion; he succeeded, however, in demonstrating the highly selective nature of his analysis and thereby undermined the credibility of his decision. Like the administrative law judge in *Wolfe*, the administrative law judge in the instant case egregiously erred by selectively rejecting relevant medical evidence. *Wolfe*, 912 F.2d at 170, 14 BLR at 2-62. It is noteworthy that the administrative law judge in the instant case was also the administrative law judge in *Sprague v. Director, OWCP*, 310 F. App'x 890, WL 292844 (7th Cir. 2009), whose bias against claimant was so obvious that, in

vacating his decision, the court urged the Director to assign a new administrative law judge to the case.[12]

As discussed *supra*, the administrative law judge's suggestion that Dr. Istanbouly's opinion was unclear on whether claimant was capable of walking one or two blocks, was entirely specious. The uncontradicted evidence is that at the time the case was submitted, claimant became dyspneic after walking only a few feet. The evidence is also uncontradicted that claimant's last coal mine work was as a roof bolter, which entailed, *inter alia*, lifting seventy to eighty pounds of five or eight foot bolts, inserting bolts into the holes in the roof, attaching sixty inch boards to the bolts, putting up the roof bolter and bolting it to the roof, which was rock. Claimant's Exhibit 1 at 14-15. Regardless of Dr. Istanbouly's terminology, the administrative law judge should have found claimant totally disabled by comparing his physical limitations with the exertional requirements of the roof bolter job. *See Killman*, 415 F.3d at 721, 23 BLR at 2-259; *Shelton*, 933 F.2d at 507, 15 BLR at 2-120. The administrative law judge's determination that claimant is not disabled from performing the work of a roof bolter is irrational.

In discrediting Dr. Istanbouly's total disability opinion, the administrative law judge discussed old pulmonary function studies, post-bronchodilator studies, old arterial blood gas studies, the absence of a current arterial blood gas study, as well as bases cited by the doctor as support for his opinion: a pulmonary function test showing a moderate impairment, claimant's history of oxygen dependence and inability to walk more than a few feet without dyspnea. Review of the administrative law judge's criticisms of Dr. Istanbouly's opinion reveals that they are all without merit. His opinion was based on a recent physical examination; a pulmonary function test showing a moderate impairment; an x-ray; an echocardiogram; an employment history of eight years in welding, followed by many years in coal mining, last working as a roof bolter; an insignificant smoking history; physical symptoms; a history of oxygen use; and an inability to walk more than a few steps without dyspnea. That Dr. Istanbouly's opinion was both documented and reasoned under 20 C.F.R. §718.204(b)(2)(iv) cannot be denied. *See Mitchell v. Director, OWCP*, 25 F.3d 500, 508, 18 BLR 2-257, 2-274 (7th Cir. 1994); *Poole*, 897 F.2d at 893, 13 BLR at 2-355. Nevertheless, the administrative law judge rejected the doctor's opinion. Where, as here, the administrative law judge has improperly discredited the relevant medical opinion evidence that claimant has a totally disabling respiratory impairment and there is no contrary evidence, it is appropriate to reverse the

[12] The administrative law judge was identified in the Board's decision, *R.S.*[*Sprague*] *v. Freeman United Mining Company*, BRB No. 07-0358 BLA (Jan. 24, 2008), which claimant appealed to the Seventh Circuit. On remand from the court, Administrative Law Judge Adele H. Odegard issued a decision awarding benefits. *Sprague v. Director, OWCP*, Case No. 2003-BLA-0580 (Feb. 17, 2010).

administrative law judge's determination. *Mitchell*, 25 F.3d at 508-09, 18 BLR at 2-274-276, *citing Underhill v. Peabody Coal Co.*, 687 F.2d 217, 223, 4 BLR 2-142, 2-150 (7th Cir. 1982) (holding that it was error to refuse to credit a physician's opinion based on examination and test results in the absence of contradictory evidence); a*ccord Logsdon v. Director, OWCP*, 853 F.2d 613, 11 BLR 2-186 (8th Cir. 1988). Because the record demonstrates a totally disabling respiratory impairment, which is a change in conditions, claimant has also established a basis for modification of the prior decision denying benefits. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 546, 22 BLR 2-429, 2-452-3 (7th Cir. 2002) (Wood, J., dissenting).

Even though the administrative law judge never addressed the issue of causation, it is unnecessary to remand the case for his determination, given the Seventh Circuit's teaching that causation is a medical determination, *see Compton v. Inland Steel Co.*, 933 F.2d 477, 15 BLR 2-79 (7th Cir. 1991), and, in the absence of contradictory evidence, an administrative law judge is prohibited from refusing to credit a physician's report based on an examination and test results. *Mitchell*, 25 F.3d at 508, 18 BLR at 2-274; *Wetherill v. Director, OWCP*, 812 F.2d 376, 382, 9 BLR 2-239, 2-247 (7th Cir. 1987); *Underhill*, 687 F.2d at 223, 4 BLR at 2-150. The record in the case at bar unequivocally establishes that pneumoconiosis was a substantially contributing cause of the claimant's total disability. The Director stipulated to the existence of pneumoconiosis arising out of coal mine employment. Decision and Order at 3. Dr. Istanbouly attributed the claimant's respiratory disability to his coal dust exposure, based upon his significant coal mine employment history, positive x-ray, pulmonary function test abnormality and symptoms. Claimant's Exhibit 2 at Exhibit 2. The doctor was aware of claimant's eight years in welding and his coronary artery disease, as well as claimant's insignificant smoking history, and he insisted that the principal cause of claimant's respiratory impairment was coal dust exposure. Claimant's Exhibit 2 at 22, 25, 27. Both Dr. Houser in 2004, and Dr. Reddy in 2003, attributed claimant's chronic bronchitis to his coal mine employment. Director's Exhibits 1, 29. There is no relevant, contradictory evidence. Accordingly, the only conclusion which the record will support is that pneumoconiosis is a substantially contributing cause of claimant's totally disabling respiratory impairment. *See Mitchell*, 25 F.3d at 508, 18 BLR at 2-274; *Wetherill*, 812 F.2d at 382, 9 BLR at 2-247; *Underhill*, 687 F.2d at 223, 4 BLR at 2-150. There is no reason to remand the case when the outcome is preordained. *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997). Hence, the administrative law judge's decision denying benefits should be reversed. *See Wolfe*, 912 F.2d at 171-172, 14 BLR at 2-62-63. The Seventh Circuit affirmed, in *Wolfe*, the Board's decision reversing the administrative law judge's denial of benefits where there was no relevant, probative evidence to support denial of the claim. For the same reason, the court reversed in *Mitchell* and *Chastain*, the Board's decisions affirming denials of benefits. *See Mitchell*, 25 F.3d at 501, 18 BLR at 2-257-258; *Chastain v. Freeman United Coal Mining Co.*, 919 F.2d 485, 14 BLR 2-130 (7th Cir. 1990), *pet. for reh'g denied*, 927 F.2d 969 (7th Cir. 1990).

In sum, the only relevant medical evidence in the instant claim is Dr. Istanbouly's opinion, finding claimant totally disabled due to pneumoconiosis. The administrative law judge rejected the doctor's opinion and denied benefits. On appeal claimant raises several, specific arguments that the administrative law judge erred in discrediting Dr. Istanbouly's opinion. In response, the Director does not address any of claimant's arguments. Review of the record reveals that the administrative law judge selectively analyzed the evidence, and that his meticulous scrutiny of the doctor's opinion uncovered no valid criticism. The case at bar is like *Mitchell*, where the Seventh Circuit held that the administrative law judge had improperly rejected medical opinions which the court stated were sufficiently reasoned; in the absence of contrary evidence, the court reversed the denial of benefits. *Accord Chastain*, 919 F.2d at 485, 14 BLR at 2-130; *Logsdon*, 853 F.2d at 615, 11 BLR at 2-18. Where the ultimate conclusion is inevitable, there is no reason to remand the case. Therefore, reversal is proper and in the interest of judicial economy. *See Amax Coal Co. v. Director, OWCP* [*Rehmel*], 993 F.2d 600, 603, 17 BLR 2-91, 2-95-96 (7th Cir. 1993). In view of the foregoing, I would reverse the administrative law judge's Decision and Order denying benefits and remand the case for payment of benefits.

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REGINA C. McGRANERY
Administrative Appeals Judge