BRB No. 10-0451 BLA

ROSETTA SARGENT (on behalf of FLOYD DUNCAN) Claimant-Petitioner v. DIXIE FUEL COMPANY and BITUMINOUS CASUALTY CORPORATION Employer/Carrier Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/30/2012 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits and Granting Employer's Request for Modification of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Rosetta Sargent, Ages, Kentucky, pro se.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order – Denying Benefits and Granting Employer's Request for Modification (2006-BLA-00009) of Administrative Law Judge Kenneth A. Krantz, issued with respect to a miner's subsequent claim[2] filed 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 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[3] In adjudicating employer's modification request, the administrative law judge initially rejected employer's argument that delay in the processing of its modification request resulted in a due process violation, since employer was unable to obtain a re-examination of the miner, prior to his death. The administrative law judge ruled that employer failed to establish prejudice to its case, because it had the opportunity to obtain two prior examinations of the miner, and did not present any evidence that the miner's refusal to attend a third examination, on modification, was unreasonable.[4] Pursuant to 20 C.F.R. §725.310

[1] Claimant is the daughter of Floyd Duncan, the miner, who died on July 15, 2004.

[2] The miner filed a claim on December 4, 1987, which was denied by Administrative Law Judge Daniel J. Roketenetz on March 31, 1992. Director's Exhibit 32. The denial was affirmed by the Board on appeal. *Duncan v. Dixie Fuel Co.*, BRB No. 92-1523 BLA (Apr. 26, 1994) (unpub.). The miner next filed a duplicate claim on April 28, 1995. Director's Exhibit 1. In a Decision and Order on Remand issued on May 12, 2000, Judge Roketenetz determined that the miner established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis and awarded benefits. Director's Exhibit 5. Pursuant to employer's appeal, the Board affirmed the award of benefits. *Id.*; *see Duncan v. Dixie Fuel Co.*, BRB No. 00-1019 BLA (Aug. 31, 2001) (unpub.). Employer filed both a Petition for Modification with the district director and an appeal of the Board's decision with the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 5. Employer's request for modification did not progress beyond the district director's office, before the Sixth Circuit issued an order on November 8, 2004, remanding the case to the district director with instructions to resolve the issue of modification. *Id*. The district director denied employer's Petition for Modification on July 19, 2005. *Id*. Employer requested a hearing and the case was assigned to Administrative Law Judge Kenneth A. Krantz. *Id*.

[3] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as the miner's claims were filed prior to January 1, 2005.

[4] Employer scheduled an examination with Dr. Fino, but the miner refused to attend. Director's Exhibit 34 at 324; Decision and Order at 10.

(2000),[5] the administrative law judge found that employer proved that there was a mistake in a determination of fact with regard to whether the miner had legal pneumoconiosis, and thus, denied benefits on the grounds that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and a material change in conditions at 20 C.F.R. §725.309 (2000).

Claimant filed a pro se appeal with the Board, and the Director, Office of Workers' Compensation Programs (the Director), filed a cross-appeal.[6] When acknowledging the notices of appeal, the Board inadvertently sent the letter intended for claimant to the Director and the letter intended for the Director to claimant. Employer was served with a copy of both acknowledgment letters. In the letter that claimant received, she was erroneously instructed to file a brief in support of her appeal, and in the letter that the Director received, he was erroneously instructed that he did not need to filed a brief in support of his appeal. *Sargent v. Dixie Fuel Co.*, BRB No. 10-0451 BLA and BLA-A (May 5, 2010) (unpub. Order).

Claimant did not submit a Petition for Review or Brief, as directed by the acknowledgment letter she received. The Director informed the Board that he had received the Board's "acknowledgement of [claimant's] pro se appeal," but that he would not file a substantive response, unless requested to do so by the Board. *See* Director's June 10, 2010 Response Letter. Employer did not respond to claimant's appeal. On June 10, 2010, the Director's appeal was withdrawn at his request. *Sargent v. Dixie Fuel Co.*, BRB No. 10-0451 BLA-A (June 10, 2010) (unpub. Order). The Board subsequently issued a Decision and Order vacating the denial of benefits and remanding the case for further consideration, wherein the Board noted that employer had not responded to

[5] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The revised regulations at 20 C.F.R. §§725.309 and 725.310 do not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

[6] Jerry Murphree, a benefits counselor with Stone Mountain Health Services, filed the notice of appeal on claimant's behalf on April 23, 2101, but he is not representing claimant before the Board. *See* Claimant's Notice of Appeal; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order). The Director, Office of Workers' Compensation Programs (the Director), filed a cross-appeal on April 30, 2010.

claimant's appeal. *Sargent v. Dixie Fuel Co.*, BRB No. 10-451 BLA, slip op. at 3 (Apr. 28, 2011) (unpub. Order).

On May 7, 2010, employer filed a timely request for reconsideration, urging the Board to vacate its Decision and Order because employer had been deprived of an opportunity to file a response brief. Employer explained that it did not respond to claimant's appeal because claimant failed to submit a Petition for Review and Brief, as directed by the Board in the acknowledgment letter. On August 1, 2011, the Board granted employer's motion for reconsideration, vacated the April 28, 2011 Decision and Order, and gave employer and the Director thirty days to file briefs addressing the issues presented in claimant's appeal. *Sargent v. Dixie Fuel Co.*, BRB No. 10-0451 BLA (Aug. 1, 2011) (unpub. Order). Employer's response brief has been received by the Board but the Director has not filed a brief. We will now reconsider claimant's appeal and the arguments advanced by employer in its response brief. [7]

Claimant generally contends on appeal that the administrative law judge erred in granting employer's request for modification and in denying benefits. Employer contends that the administrative law judge permissibly exercised his discretion in finding that there was a mistake in a determination of fact as to whether the miner had pneumoconiosis. Employer argues that the administrative law judge correctly determined that Dr. Baker's opinion, which was the only opinion that provided a basis for an award of benefits, "lacked credibility considering the newly submitted proof" by employer. Employer's Response Brief at 11. Employer specifically contends that the administrative law judge properly credited Dr. Vuskovich's opinion, that there was insufficient evidence to justify a diagnosis of legal pneumoconiosis, over the contrary opinion of Dr. Baker. Employer asserts that claimant still bears the burden to establish his entitlement to benefits and since Dr. Baker's opinion was properly rejected by the administrative law judge, employer has satisfied its burden to establish a mistake in fact pursuant to 20 C.F.R. §725.310 (2000). Employer further contends that, if the case is remanded for any reason, the administrative law judge should be directed to reconsider whether employer was denied due process because it could not obtain a re-examination of the miner, grant employer's discovery request, and reconsider whether the claim was timely filed.[8]

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[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 1.

[8] We reject employer's assertion that it was denied due process because it did not obtain a re-examination of the miner, as the administrative law judge rationally concluded that employer has not been prejudiced by any delay in the processing of its modification request. *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); Decision and Order at 8-11. We also reject employer's

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence and consistent with applicable law. 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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310 (2000), a party may seek modification of an award or denial of benefits based, in pertinent part, on a mistake in a determination of fact. The intended purpose of modification on this basis is to vest the fact-finder "with 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); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). As the party seeking modification, employer is the "proponent of the order with the burden of establishing a [mistake in a determination of

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argument that the administrative law judge erred in denying employer's discovery request for scientific support from the Department of Labor for the proposition that legal pneumoconiosis is a latent and progressive disease. Decision and Order at 4-5. The administrative law judge observed correctly that employer's request was "aimed at a challenge to the regulations" and that he did not have authority to consider the validity of the regulations. *Id.* at 4; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Additionally, there is no merit to employer's contention that the administrative law judge erred in finding that the subsequent claim was timely filed. In *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009), the Sixth Circuit held that a medical determination of total disability due to pneumoconiosis does not begin the running of the three-year statute of limitations, if it was discredited or found outweighed by other evidence in the prior denied claim. *Hatfield*, 556 F.3d at 483, 24 BLR at 2-154. Applying that rule in this case, we reject employer's contention that the diagnosis of total disability due to pneumoconiosis rendered by Dr. Clarke in 1987 triggered the statute of limitations at 20 C.F.R. §725.308, as the miner was subsequently denied benefits in 1992, and Dr. Clarke's opinion constitutes a "misdiagnosis" under *Hatfield*. *Id.*

fact] justifying modification." *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *see also Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996) .

However, the modification of a claim does not automatically flow from a finding that a mistake was made in the prior decision. Although an administrative law judge may find a mistake in a determination of fact, the administrative law judge must ultimately determine whether reopening a claim will render justice under the Act. *O'Keeffe*, 404 U.S. at 255; *see Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-106 (6th Cir. 1982). The courts that have addressed the issue, have recognized that an adjudicator, in considering whether to reopen a claim, must exercise the discretion granted under 20 C.F.R. §725.310 (2000), by assessing any factors relevant to the rendering of justice under the Act. *Sharpe*, 495 F.3d at 132-133, 24 BLR at 2-62-63; *Hilliard*, 292 F.3d at 547, 22 BLR at 2-452; *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33 (2008). These factors include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Id.*

After consideration of the administrative law judge's Decision and Order, employer's response brief and the record evidence, we must vacate the administrative law judge's finding that employer established a basis for modification of the award of benefits, as the administrative law judge erred in failing to place the burden of persuasion on employer to establish a mistake in a determination of fact under 20 C.F.R. §725.310 (2000). *See Rambo*, 521 U.S. at 139; *Branham*, 20 BLR at 1-34. The administrative law judge reviewed the evidence and concluded that "[c]laimant has not met the burden of proof" and that claimant's only medical opinion was "insufficient to overcome the weight" of employer's evidence. Decision and Order at 26. Because the administrative law judge did not properly allocate the burden of proof, we vacate his determinations that employer established a mistake in a determination of fact, and that claimant failed to establish, based on the newly submitted evidence, the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, therefore, a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).

In the interest of judicial economy, we will also address the administrative law judge's credibility determinations. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the medical opinions of Drs. Baker, Broudy, Dahhan, Rosenberg, Tuteur and Vuskovich, relevant to the existence of legal pneumoconiosis.[9]

[9] Pursuant to 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as any chronic lung disease or impairment and its sequelae arising out of coal mine employment

Decision and Order at 16-23; Director's Exhibits 11, 12, 34; Employer's Exhibits 1, 3, 5. Dr. Baker examined the miner in 1995 and diagnosed chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure. Director's Exhibits 11, 34. Drs. Broudy, Dahhan, Rosenberg, Tuteur and Vuskovich opined that the miner's lung condition was unrelated to coal dust exposure. Director's Exhibit 12; Employer's Exhibits 1, 3, 5.

The administrative law judge initially determined that the newly submitted medical opinion evidence was sufficient to establish that the miner "had a chronic lung disease in the form of COPD." Decision and Order at 23. In assessing the credibility of the medical opinions, the administrative law judge noted that Dr. Baker reported on the miner's condition in 1995, before the miner quit smoking and before he received a coronary bypass graft, both of which improved his pulmonary function. *Id*. The administrative law judge acted within his discretion in according less weight to Dr. Baker's opinion, "[s]ince substantial medical changes occurred after Dr. Baker's examination that affected the [m]iner's pulmonary functions [sic], and . . . [knowledge of] these changes [might] have affected Dr. Baker's analysis of the medical evidence." Decision and Order at 23-24; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

The administrative law judge determined that the opinions of Drs. Broudy, Dahhan, Rosenberg, and Tuteur were entitled to diminished weight. The administrative law judge found that Dr. Broudy, who had reviewed a coal mine history of thirty-nine years, did not explain how he determined that the miner's COPD was not caused, in part, by coal dust exposure. Decision and Order at 24. Regarding Dr. Dahhan's opinion, the administrative law judge determined that his finding, that the miner did not have a pulmonary impairment, was not supported by the objective evidence of record. *Id*. The administrative law judge concluded that Dr. Rosenberg's opinion was not well-reasoned or persuasive, as he did not reconcile his finding, that the miner's pulmonary function values were consistent with an impairment caused solely by smoking, with the findings in the medical journal article that he cited in support of his opinion. *Id*. at 26. With respect to Dr. Tuteur's opinion, the administrative law judge determined that his statements regarding the link between coal dust exposure and COPD were not well-supported and

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and includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment," denotes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(b).

conflicted with the view of the Department of Labor (DOL) regarding the accepted medical literature on this issue. *Id*. at 25.

We reject employer's argument that the administrative law judge erred in relying upon the findings of the DOL in the preamble to the amended regulations as a basis for rejecting Dr. Tuteur's opinion. Contrary to employer's suggestion, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Maddaleni v. Pittsburg & Midway Coal Mining Co*., 14 BLR 1-135, 139 (1990). Rather, the preamble sets forth the DOL's resolution of questions of scientific fact involving the definition, and diagnosis, of pneumoconiosis. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An administrative law judge may determine, therefore, the weight to which a medical opinion is entitled by assessing the extent to which it is consistent with the DOL's discussion of sound medical science in the preamble. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

With respect to Dr. Tuteur's opinion, the administrative law judge noted correctly that he excluded coal dust exposure as a cause for the miner's obstructive respiratory condition, based on his belief that pneumoconiosis causes restrictive impairment. Decision and Order at 25; Employer's Exhibit 3. The administrative law judge properly found, however, that Dr. Tuteur's opinion does not account for the legal definition of pneumoconiosis, which may include a purely obstructive impairment caused by coal dust exposure. Decision and Order at 25, *citing* 65 Fed. Reg 79,939 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Obush*, 24 BLR at 1-125-26; *Groves*, 277 F.3d at 836, 22 BLR at 2-330. Thus, we affirm the administrative law judge's finding that Dr. Tuteur's opinion, that the miner did not have legal pneumoconiosis, is entitled to little weight. Decision and Order at 25. We also affirm the administrative law judge's rejection of the opinions of Drs. Broudy, Dahhan and Rosenberg, since the administrative law judge permissibly explained why he found their conclusions, that the miner did not have legal pneumoconiosis to be insufficiently explained and not well-reasoned. *See Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

With respect to Dr. Vuskovich's opinion, that there was insufficient evidence to justify a diagnosis of legal pneumoconiosis, the administrative law judge rationally found it was entitled to greater weight than Dr. Baker's opinion, because it was based on a more

complete view of the miner's medical history and was well-reasoned and well-documented.[10] Decision and Order at 26. The administrative law judge explained:

> Dr. Vuskovich noted that the [m]iner quit smoking in 1995, and that his lung condition substantially improved after he quit smoking. He then explained that lung impairments due to coal dust exposure are irreversible, but that impairments due to smoking may improve after smoking has ceased. Therefore, he concluded that, due to the reversible nature of the [m]iner's impairment, his exposure to coal dust did not cause his lung impairments. I find Dr. Vuskovich's reasoning to be persuasive. The pulmonary function studies show an increase in lung function after the [m]iner ceased smoking.

Id.

Contrary to the administrative law judge's analysis, however, evidence of some improvement in the miner's pulmonary function does not necessarily preclude the existence of legal pneumoconiosis, nor does it show that coal dust exposure did not exacerbate a miner's smoking-related impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. 2004); Decision and Order at 26. Because the administrative law judge has not considered whether Dr. Vuskovich adequately explained why coal dust exposure was not an aggravating factor in the miner's respiratory condition, we vacate the administrative law judge's reliance on Dr. Vuskovich's opinion to find that the miner did not suffer from legal pneumoconiosis.

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[10] Dr. Vuskovich diagnosed a mild obstructive impairment that was not totally disabling. Employer's Exhibit 5. Regarding the source of the miner's impairment, Dr. Vuskovich stated:

> Clinical and legal coal workers' pneumoconiosis are irreversible diseases. Smoking cessation would not reverse pulmonary impairment caused by coal mine dust exposure or by clinical coalworkers' pneumoconiosis. Smoking cessation improved [the miner's] pulmonary function because cigarette smoking was responsible for his pulmonary impairment. Demonstrated by 4/25/96 valid spirometry results removing cigarette smoke induced bronchial inflammation improved his measured FEV1.

Id.

On remand, the administrative law judge must determine whether employer has proffered medical evidence sufficient to satisfy its burden on modification. In reconsidering Dr. Vuskovich's opinion, the administrative law judge must determine whether he has ruled out coal dust exposure as a causative or aggravating factor in the miner's respiratory disease. If the administrative law judge concludes that employer has established that the miner did not have legal pneumoconiosis, the administrative law judge is required to determine whether reopening the case will render justice under the Act.[11] He cannot grant employer's request for modification unless he finds that to do so would be in the interest of justice. *Banks*, 390 U.S. at 464; *Blevins*, 683 F.2d at 142, 4 BLR at 2-106. In this regard, although the administrative law judge has the authority "to reconsider all the evidence for any mistake of fact," *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994), the Board has held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68, 72 (1999), *citing Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991). [12]

[11] We reject employer's contention that because the Sixth Circuit has not explicitly ruled on this issue, it is unnecessary for the administrative law judge to determine whether reopening a case pursuant to 20 C.F.R. §725.310 would render justice under the Act. There is judicial precedent for this inquiry by the administrative law judge. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-106 (6th Cir. 1982).

[12] We reject employer's assertion that the administrative law judge should be directed to reweigh the x-ray evidence, as he found that it failed to establish the existence of clinical pneumoconiosis, and employer has the burden to establish on modification that the miner was not totally disabled due to legal pneumoconiosis.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge