BRB No. 09-0803 BLA

HAROLD E. PEARCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED ENERGIES INCORPORATED/ HARRISBURG COAL COMPANY	)	
	)	DATE ISSUED: 08/26/2010
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Sandra Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Rita Roppolo (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (99-BLA-0987) of Administrative Law Judge Donald W. Mosser denying employer's request for modification of the award of benefits on a duplicate claim that was filed on February 18, 1994, 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).[1] This claim is before the Board for the fourth time.[2]

In the most recent appeal, the Board affirmed in part, and vacated in part, Administrative Law Judge Robert L. Hillyard's 2003 Decision and Order on Remand denying, for the second time, employer's request for modification. Specifically, the Board affirmed Judge Hillyard's rejection of employer's request to develop evidence regarding the latency and progressivity of pneumoconiosis, his denial of employer's request to depose Dr. Tuteur, and his exclusion of Dr. Rosenberg's deposition. *Pearce v. United Energies, Inc.*, BRB No. 05-0297 BLA, slip op. at 5-7 (Nov. 3, 2005)(unpub.). Further, the Board rejected employer's contention that Judge Hillyard did not apply the correct standard in assessing whether there was a mistake in the prior determination that a material change in conditions was established pursuant to 20 C.F.R. §725.309(d)(2000).[3]

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[1] By Order dated May 20, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. The parties agree that the recent amendments to the Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner's claim filed before January 1, 2005.

[2] The complete procedural history of this claim is set forth in the Board's prior decisions. *Pearce v. United Energies Inc*, BRB No. 97-0456 BLA (Dec. 18, 1997)(unpub.), *aff'd on recon., Pearce v. United Energies, Inc.*, BRB No. 97-0456 BLA (May 22, 1998)(unpub.); *Pearce v. United Energies, Inc.*, BRB No. 01-0243 BLA (November 30, 2001)(unpub.); *Pearce v. United Energies, Inc.*, BRB No. 05-0297 BLA (Nov. 3, 2005) (unpub.), *aff'd on recon., H.E.P.* [*Pearce*] *v. United Energies, Inc.*, BRB No. 05-297 BLA (Dec. 19, 2007)(unpub.).

[3] Revised regulations implementing the Act became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2010). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations. The revisions that were made to 20 C.F.R. §725.309 do not apply to claims, such as this one, that were pending on January 19, 2001. *See* 20 C.F.R. §725.2(c).

Id. at 7. The Board therefore affirmed Judge Hillyard's determination that the prior finding, that claimant established the existence of pneumoconiosis by the new x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), was correct. *Id.* at 7-8. The Board also rejected employer's contention that an award of benefits was precluded because the Department of Labor's 1989 denial of claimant's prior claim established that claimant was totally disabled by a respiratory impairment unrelated to coal mine dust exposure. *Id.* at 8-9.

The Board vacated, however, Judge Hillyard's denial of employer's request to compel claimant to appear for a physical examination in connection with employer's request for modification. Specifically, the Board remanded the case for Judge Hillyard to reconsider whether claimant's refusal to appear for an examination was reasonable under 20 C.F.R. §718.402 (2000) and the holding of the United States Court of Appeals for the Seventh Circuit in *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002).[4] *Pearce*, slip op. at 3-5. The Board further held that Judge Hillyard did not engage in the requisite *de novo* consideration of whether there was a mistake of fact in the prior determination that claimant established that he has legal pneumoconiosis and is totally disabled by it. The Board, therefore, instructed Judge Hillyard to reconsider those issues on remand. *Id.* at 8. Subsequently, the Board denied employer's motion for reconsideration, and reaffirmed its decision. *H.E.P.* [*Pearce*] *v. United Energies, Inc.*, BRB No. 05-0297 BLA (Dec. 19, 2007)(unpub.).

On remand, due to Judge Hillyard's unavailability, the case was reassigned, without objection, to Judge Mosser (the administrative law judge). The administrative law judge initially found that claimant reasonably refused employer's request to submit to a new physical examination. Weighing the evidence *de novo*, the administrative law judge further found that employer did not establish a mistake of fact in the prior determination that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment. Accordingly, the administrative law judge denied employer's request for modification of the award of benefits.

On appeal, employer initially asserts that the administrative law judge erred in rejecting its request that claimant submit to a new physical examination. Employer also renews its prior argument that Judge Hillyard erred in rejecting its request to develop

[4] Pursuant to employer's 2002 appeal following the first denial of its modification request, the United States Court of Appeals for the Seventh Circuit had remanded the case for Judge Hillyard to consider employer's modification request in light of the court's recently issued decision in *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). *United Energies, Inc. v. Director, OWCP*, No. 02-1177 (7th Cir. Nov. 22, 2002)(Order).

evidence regarding the latency and progressivity of pneumoconiosis. Further, employer asserts that the administrative law judge erred by declining to revisit the issue of clinical pneumoconiosis, and in declining to accept into evidence the curricula vitae of Drs. Abramowitz, Wershba, Gogineni, and Binns. Employer also reiterates its prior contention that an award of benefits is precluded in this case. Regarding the merits of entitlement, employer asserts that the administrative law judge erred in weighing the medical opinion evidence relevant to the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), and relevant to whether claimant's disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's denial of modification. The Director, Office of Workers' Compensation Programs, declined to file a response brief in claimant's appeal.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

We will first address employer's assertion that the administrative law judge erred in denying employer's motion to compel claimant to appear for a physical examination. In considering, on remand, whether claimant's refusal to submit to an examination was reasonable, the administrative law judge noted that claimant, who was then eighty-three, contended that a new pulmonary examination would be "too difficult and invasive for this frail and elderly man." Decision and Order on Remand at 4; Claimant's Brief on Remand at 10. Claimant also contended that a new examination was unnecessary, as the record already contained two physical examination reports and numerous consultative medical reports. Decision and Order on Remand at 4; Claimant's Brief on Remand at 10-11. The administrative law judge also considered employer's contentions, in support of its motion, that the last pulmonary examination in the record was conducted fifteen years ago, and that a new examination could resolve the inconsistent diagnoses in the record. Decision and Order on Remand at 4; Employer's Reply Brief on Remand at 3.

Reviewing the parties' arguments, the administrative law judge noted that the record is "replete" with numerous medical opinions by pulmonary specialists who reviewed the pulmonary examination results, the treatment records, and the objective evidence of record, and who agree that claimant suffers from a totally disabling respiratory impairment. Decision and Order on Remand at 4. Further noting that "the

[5] The Director, Office of Workers' Compensation Programs, however, filed a response to the Board's May 20, 2010 Order. *See* n.1, *supra.*

physicians' inconsistent diagnoses [as to the cause of claimant's respiratory impairment] would remain inconsistent regardless of the amount of medical evidence they review," the administrative law judge concluded that, "in light of the marginal utility a new pulmonary examination would provide and claimant's assertions that submitting to another complete pulmonary examination would be difficult and invasive, it is not reasonable to require the claimant to undergo an additional pulmonary examination." Decision and Order on Remand at 5.

In the absence of statutory or regulatory provisions authorizing an employer to compel a miner to appear for a physical examination in a modification proceeding, whether an employer's request for a new examination is appropriate in a particular case is an issue that falls within the discretion of the administrative law judge. *See Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37 (2000)(*en banc*); *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999). Under the facts of this case, where claimant was eighty-three years old at the time of the administrative law judge's decision, the administrative law judge's determination, that claimant reasonably refused to undergo a new physical examination because it would be too difficult and invasive for him, constitutes a permissible exercise of the administrative law judge's discretion. *See Hilliard*, 292 F.3d at 548, 22 BLR at 2-455-56; *Stiltner*, 22 BLR at 1-40-42; *Selak*, 21 BLR at 1-177-78; Decision and Order on Remand at 5. We, therefore, hold that the administrative law judge permissibly denied employer's request to have claimant reexamined. 20 C.F.R. §718.404(b) (2000); *see Stiltner*, 22 BLR at 1-40-42.

We next address employer's remaining procedural arguments. Initially, the Board declines to revisit its prior holding that employer was not entitled to develop additional evidence as to the latency and progressivity of pneumoconiosis, as recognized in the amended version of Section 718.201. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). As the Board previously held, Judge Hillyard acted within his discretion in denying employer's request to admit evidence that casts doubt upon the Department of Labor's conclusion that pneumoconiosis can be latent and progressive. *Pearce*, BRB No. 05-0297 BLA, slip op. at 5-7, *aff'd on recon. Pearce*, BRB No. 05-0297, slip op. at 3-4.

Next, employer asserts that the administrative law judge, on remand, erred by declining to revisit the issue of clinical pneumoconiosis. On remand, employer attempted to submit the curricula vitae of Drs. Abramowitz, Wershba, Gogineni, and Binns, in order to establish their radiological qualifications. The administrative law judge declined to admit this evidence, on the grounds that the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) had been affirmed by the Board and was not an issue for his determination on remand. Decision and Order on Remand at 4 n.4.

Employer challenges this determination, asserting that the Board's prior holding, that clinical pneumoconiosis was established by x-ray, is not binding because, in affirming Judge Hillyard's finding, the "Board overlooked that the record did contain the doctors' credentials – a cover letter transmitting their readings stated that the doctors are board-certified in radiology." Employer's Brief at 13. Employer also asserts that, in declining to admit the physicians' radiological credentials, the administrative law judge placed finality above accuracy in a modification proceeding, contrary to *Hilliard*, 292 F.3d at 546-547, 22 BLR at 2-452-53. Employer contends that the administrative law judge's failure to reconsider the issue of clinical pneumoconiosis thus perpetuated the errors made by Judge Hillyard in his analysis of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1).

Contrary to employer's argument, as the administrative law judge found, in its prior decision, the Board specifically held that employer's description of the physicians' qualifications in a cover letter did not constitute evidence establishing their qualifications as Board-certified radiologists and B readers, and that Judge Hillyard was not required to look outside the record to ascertain the physicians' radiological qualifications. *Pearce*, BRB No. 05-0297 BLA, slip op. at 7-8; *aff'd on recon., Pearce,* BRB No. 05-0297, slip op. at 4-5. Moreover, as employer's evidence was not submitted in support of its request for modification, but rather, was submitted on remand, after the Board had affirmed Judge Hillyard's finding that there was no mistake in the prior determination that the existence of clinical pneumoconiosis was established at 20 C.F.R. §718.202(a)(1), the administrative law judge acted within his discretion in declining to reopen the record, on the ground that the proffered evidence was not relevant to the remaining issues before him for resolution.[6] *Clark*, 12 BLR at 1-153; *Morgan*, 8 BLR at 1-493.

Turning to the merits of entitlement, we note that claimant previously established that he is totally disabled due to pneumoconiosis arising out of coal mine employment, and, therefore, was awarded benefits. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. While employer may establish a basis for modification of the award of benefits by establishing either a change in conditions since the issuance of the previous decision or a mistake in a determination of fact in the previous decision, 20 C.F.R. §725.310(a); *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993), the burden of proof to establish a basis for modifying the award of benefits rests with employer. Claimant

[6] As the issue of clinical pneumoconiosis was not before the administrative law judge, we further reject employer's assertion that the administrative law judge erred in failing to consider newly submitted x-ray and computerized tomography scans, contained in medical treatment records. *See Amax Coal Co v. Director, OWCP* [*Chavis*], 772 F.2d 304, 8 BLR 2-46 (7th Cir. 1985); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 13.

does *not* have the burden to reestablish his entitlement to benefits. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997). Employer, as the proponent of an order terminating an award of benefits, bears the burden of disproving at least one element of entitlement. *Id.*; *see also Branham v. Bethenergy Mines*, 20 BLR 1-27 (1996).

Employer contends that the administrative law judge erred in finding that employer did not demonstrate a mistake in fact in the prior finding that the existence of legal pneumoconiosis[7] was established pursuant to 20 C.F.R. §718.202(a)(4). Considering the medical opinions at 20 C.F.R. §718.202(a)(4), the administrative law judge properly found that, while all the physicians agree that claimant suffers from severe chronic obstructive pulmonary disease (COPD), Dr. Cohen attributed claimant's COPD to both coal dust exposure and smoking, while Drs. Tuteur, Fino, Rosenberg, Renn, Sanjabi, and Selby opined that claimant's COPD is due solely to smoking. Finding that Dr. Cohen supported his opinion with clinical findings, objective testing, and medical studies, and that his opinion was consistent with claimant's thirty-six years of coal mine employment,[8] claimant's "less than average smoking history," and the prevailing medical view that coal dust can cause obstructive disease and clinically significant impairment, the administrative law judge accorded Dr. Cohen's opinion "great probative weight." Decision and Order at 7, 9-10.

By contrast, the administrative law judge found the opinions of Drs. Tuteur, Fino, and Rosenberg to be inadequately explained, and divergent from the prevailing view of the medical community and scientific literature, relied upon by the Department of Labor (DOL), and thus entitled to little probative value. Decision and Order on Remand at 8-9. The administrative law judge also discounted the opinions of Drs. Renn, Sanjabi, and Selby, that claimant's COPD is unrelated to coal dust exposure, finding them to be inadequately explained, equivocal, or speculative and, therefore, entitled to little weight. Decision and Order on Remand at 7-8. Weighing all of the medical opinion evidence together, the administrative law judge concluded that the opinion of Dr. Cohen was entitled to greater weight than the opinions of Drs. Tuteur, Fino, Rosenberg, Renn,

[7] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[8] The administrative law judge correctly noted that Administrative Law Judge Robert L. Hillyard's prior finding of thirty-six years of coal mine employment was affirmed by the Board. Decision and Order on Remand at 6; *Pearce*, BRB No. 97-0456 BLA, slip op. at 2.

Sanjabi, and Selby, and that employer failed to demonstrate a mistake in the prior determination that claimant established legal pneumoconiosis. Decision and Order on Remand at 9-10.

Employer asserts that the administrative law judge erred in crediting Dr. Cohen's opinion and in discrediting the opinions of Drs. Tuteur, Fino, Rosenberg, Renn, and Sanjabi.[9] Specifically, employer asserts that Dr. Cohen's opinion is unreasoned and insufficient to establish legal pneumoconiosis, because Dr. Cohen did not provide a valid basis for attributing claimant's COPD to coal dust exposure, or adequately link the medical literature concerning coal mine dust and obstruction to claimant's specific case. Employer further asserts that the administrative law judge erred in crediting Dr. Cohen's opinion as consistent with the medical literature cited by DOL in amending its regulations. Employer's Brief at 27. Employer's arguments lack merit.

Contrary to employer's assertion, the administrative law judge accurately observed that, in affirmatively attributing claimant's COPD to both smoking and coal mine dust exposure, Dr. Cohen diagnosed legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); Decision and Order on Remand at 7; Claimant's Exhibit 4. Further, substantial evidence supports the administrative law judge's finding that Dr. Cohen based his opinion on clinical findings and objective evidence; he explained his opinion in the context of the prevailing medical view that coal mine dust can cause clinically significant obstructive impairment; and he considered all of the known risk factors for lung disease applicable to claimant, including smoking and coal dust exposure. The administrative law judge, therefore, permissibly found that Dr. Cohen's opinion was well-reasoned and entitled to great probative weight.[10] *See Livermore v. Amax Coal Co.*, 297 F.3d 668, 672, 22 BLR

[9] Employer does not challenge the administrative law judge's discrediting of Dr. Selby's opinion as equivocal, or his conclusion that the medical treatment records do not contain any discussion as to the cause of claimant's obstructive impairment, and, therefore, are of no probative value for determining the existence of legal pneumoconiosis. Those findings are, therefore, affirmed. *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).

[10] The administrative law judge accurately stated that Dr. Cohen relied, in part, on a "13.8-20 pack year [smoking] history," which Dr. Cohen characterized as "very relatively modest." Claimant's Exhibit 4 at 8. Therefore, there is no merit to employer's contention that the administrative law judge substituted his judgment for that of a physician when he characterized claimant's smoking history as "less than average." Employer's Brief at 14 n.4. Moreover, as the administrative law judge correctly noted, Judge Hillyard found that claimant smoked "one pack or more of cigarettes weekly" between 1943 and 1989, and employer has not challenged that finding, or explained why it would be inconsistent with Dr. Cohen's view that the smoking history was "relatively

2-399, 2-408 (7th Cir. 2002); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48 (7th Cir. 1992).

Nor is there merit to employer's argument that the administrative law judge erred in referring to the preamble to the amended regulations. The preamble to the amended regulations sets forth how DOL has chosen to resolve questions of scientific fact. *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 evaluate expert opinions, therefore, in conjunction with DOL's discussion of sound medical science in the preamble to the amended regulations. *See generally 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). In addition, 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). Accordingly, we hold that the administrative law judge did not err in discussing the preamble to the amended regulations, when weighing the medical opinions relevant to the issue of legal pneumoconiosis. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117, 125-26 (2009).

Thus, in this case, the administrative law judge permissibly discounted the opinions of Drs. Tuteur and Fino, that coal mine dust exposure rarely causes clinically significant obstructive impairment in the absence of clinical pneumoconiosis or progressive massive fibrosis, because they are inconsistent with the medical literature that was credited by DOL when it revised the regulatory definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See* 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000)*; Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *see also Stalcup v. Peabody Coal Co*., 477 F.3d 482, 484, 24 BLR 2-35, 2-37, (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); Decision and Order at 8-9; Employer's Exhibits 1 at 5; 8 at 14, 17; 14 at 18-19, 23-26; 16 at 9, 22, 26; 9 at 30. As the administrative law judge's findings are supported by substantial evidence, we reject employer's assertion that the administrative law judge mischaracterized the opinions of Drs. Tuteur and Fino in this respect. *See Beasley*, 957 F.2d at 327, 16 BLR at 2-48; Employer's Exhibits 1 at 5; 8 at 14, 17; 14 at 18-19, 23-26; 16 at 9, 22, 26; 9 at 30; Employer's Brief at 19.

Similarly, the administrative law judge permissibly discounted Dr. Rosenberg's opinion that, when COPD is associated with pneumoconiosis it occurs in association with a coal macule in the form of focal emphysema, as inconsistent with DOL's recognition

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modest." Decision and Order on Remand at 6.

that coal mine dust can contribute significantly to a miner's obstructive lung disease, independent of clinical pneumoconiosis. *See* 65 Fed. Reg. 79939; *Beeler*, 521 at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26; Decision and Order at 9; Employer's Exhibit 7 at 17, 18. Therefore, we affirm the administrative law judge's finding that Dr. Rosenberg's opinion is entitled to little probative value.

We further reject employer's assertion that the administrative law judge failed to state valid reasons for discounting the opinions of Drs. Renn and Sanjabi. The administrative law judge acted within his discretion as the fact-finder when he determined that Dr. Renn did not adequately explain why he excluded claimant's thirty-six years of coal mine dust exposure as a possible contributor to his emphysema. *See Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 336, 22 BLR 2-581, 2-589 (7th Cir. 2002); Decision and Order on Remand at 7. The administrative law judge also permissibly found that Dr. Sanjabi's statement, that he could not conclude within a reasonable degree of medical certainty that claimant's thirty-six years of coal dust exposure did not contribute to his impairment, rendered his opinion equivocal and, therefore, entitled to little weight. *See Summers*, 272 F.3d at 483, 22 BLR at 2-280; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order on Remand at 7; Employer's Exhibit 16 at 49.

Because the administrative law judge provided valid reasons for crediting Dr. Cohen's opinion and for discounting the opinions of Drs. Tuteur, Fino, Rosenberg, Renn, and Sanjabi, we need not address employer's other arguments challenging the administrative law judge's weighing of these opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). We, therefore, affirm the administrative law judge's finding that employer did not establish a mistake in fact in the finding of the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), as it is supported by substantial evidence. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

We next address employer's contention that the administrative law judge erred in finding that employer did not meet its burden to demonstrate that a mistake in fact was made in the prior determination that claimant's total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Employer asserts that the administrative law judge erred in crediting the opinion of Dr. Cohen, and in discrediting the opinions of Drs. Tuteur, Renn, and Fino. We disagree.

First, contrary to employer's contention, as the administrative law judge permissibly found the opinion of Dr. Cohen sufficient to establish the existence of legal pneumoconiosis, the administrative law judge rationally relied on his opinion, that claimant's totally disabling impairment is due, in part, to coal mine dust exposure, to find that claimant is totally disabled due to legal pneumoconiosis. *See* 20 C.F.R.

§§718.201(a)(2), 718.204(c)(1); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997).

Moreover, the administrative law judge rationally discounted the opinions of Drs. Tuteur, Renn, and Fino because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4). *See Stalcup*, 477 F.3d at 484, 24 BLR at 2-37; *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318; *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355, (7th Cir. 1990). Contrary to employer's contention, the fact that Drs. Tuteur, Renn, and Fino stated that their opinions would remain the same even assuming that coal mine dust contributed to claimant's COPD, does not compensate for their opinions, discredited by the administrative law judge, that coal mine dust does not cause clinically significant, disabling obstructive lung disease. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *see also Stalcup*, 477 F.3d at 484, 24 BLR at 2-37; *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318; Decision and Order at 8-10; Employer's Exhibits 1 at 5; 8 at 14, 17; 9 at 30; 14 at 18-19, 23-26; 15 at 53-54; 16 at 9, 22, 26. We, therefore, affirm the administrative law judge's finding that employer failed to establish a mistake in fact in the prior finding that claimant is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). *See Villain*, 312 F.3d at 335, 22 BLR at 2-589; Decision and Order at 21. Thus, we affirm the denial of employer's modification request.

Additionally, we decline to address employer's renewed contention that the 1989 letter in which the district director notified claimant that his initial application for benefits, filed on October 1, 1988, was denied, set forth information precluding an award of benefits in this claim. The Board resolved this issue in its previous decision.[11] Employer has not shown a basis for an exception to the law of the case doctrine; it merely restates its arguments from the prior appeal. We, therefore, adhere to our previous holding on this issue. *See Coleman*, 18 BLR at 1-15.

[11] The Board held that the information contained in the district director's denial letter did not establish that claimant was totally disabled due to a respiratory impairment that was unrelated to pneumoconiosis. *Pearce*, BRB No. 05-0297 BLA, slip op. at 8-9; *aff'd on recon.*, *Pearce*, BRB No. 05-0297, slip op. at 5. The Board also held that, even if employer's characterization of the letter were correct, an award of benefits was not precluded, because total disability due to pneumoconiosis is established where the miner suffers from several conditions, each of which is independently sufficient to render the miner totally disabled, as long as one of the conditions is related to dust exposure in coal mine employment. *Pearce*, BRB No. 05-0297 BLA, slip op. at 9; *aff'd on recon.*, *Pearce*, BRB No. 05-0297, slip op. at 5, *citing Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 496, 23 BLR 2-18, 2-35-36 (7th Cir. 2004).

Finally, claimant's counsel has filed a complete, itemized statement, requesting a total fee of $4,587.00, representing 20.85 hours of attorney services at an hourly rate of $220.00 for work performed in the prior appeal. No objection to the fee petition was filed. Upon review of the fee petition, the Board finds the requested fee to be reasonable in light of the services performed and approves a fee of $4,587.00, to be paid directly to claimant's counsel by employer. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed, and claimant's counsel is awarded a fee of $4,587.00.

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