BRB Nos. 01-0364 BLA
and 03-0134 BLA

JAMES C. MITCHELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DANIELS COMPANY	)	
	)	DATE ISSUED: 02/12/2004
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, and the Decision and Order on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth, Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order (2002-BLA-0186) of Administrative Law Judge Linda S. Chapman and the Decision and Order on Remand (1999-BLA-0320) of Administrative Law Judge Stuart A. Levin on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] This case involves employer's appeal of the administrative law judge's denial of employer's request for modification (BRB No. 03-0134 BLA), as well as the reinstatement of employer's appeal of Judge Levin's prior decision in this claim (BRB No. 01-0364 BLA).

In the initial Decision and Order, Judge Levin credited claimant with twelve years of coal mine employment and determined that the Daniels Company (employer) met all of the requirements for designation as responsible operator, based on an agreement of the parties. 1999 Decision and Order at 1-2; Director's Exhibit 40. In addition, Judge Levin found that the parties agreed that claimant established the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment and that claimant is totally disabled. *Id*. Judge Levin stated that he found all of the stipulations to be supported by substantial evidence. *Id*. He further found that claimant established the existence of complicated pneumoconiosis, thus, invoking the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304. 1999 Decision and Order at 5; Director's Exhibit 40. Accordingly, Judge Levin awarded benefits, commencing as of January 1, 1997.

Employer appealed, and the Board vacated Judge Levin's award of benefits and remanded the case for further consideration. *Mitchell v. Daniels Company*, 22 BLR 1-73 (2000); Director's Exhibit 59. In particular, the Board vacated Judge Levin's finding that the medical evidence was sufficient to establish the existence of complicated pneumoconiosis and remanded the case for Judge Levin to weigh all of the evidence relevant to the issue of complicated pneumoconiosis pursuant to Section 718.304(a)-(c). *Mitchell*, 22 BLR at 1-79. However, the Board rejected employer's contention that Judge Levin erred in failing to notify employer explicitly of its right to be represented by counsel at the formal hearing, and affirmed the designation of employer as responsible operator. *Mitchell*, 22 BLR at 1-76-77.

[1] The Department of Labor has 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.

On remand, Judge Levin found that the weight of the relevant medical evidence, including the x-ray evidence, lung biopsies, CT scan evidence and medical opinions, established the existence of complicated pneumoconiosis pursuant to Section 718.304(a)-(c). 2000 Decision and Order at 6-7; Director's Exhibit 65. Accordingly, Judge Levin again awarded benefits. On appeal, employer challenged Judge Levin's award of benefits.

Subsequent to briefing by all of the parties, employer informed the Board that it had filed a petition for modification with the district director and requested the Board to remand the case to the district director for modification proceedings.[2] Director's Exhibits 77-79. By Order dated May 7, 2001, the Board granted employer's motion and remanded the case to the district director for consideration of employer's request for modification.[3] *Mitchell v. Daniels Company*, BRB No. 01-0364 BLA (May 7, 2001)(Order)(unpub.).

Following the district director's denial of employer's request for modification, Director's Exhibit 86, the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 88. After a formal hearing, Administrative Law Judge Linda S. Chapman (the administrative law judge) issued a Decision and Order awarding benefits. In her decision, the administrative law judge found that Judge Levin's determinations that claimant was a miner, that he had twelve years of coal mine employment, and that employer is the responsible operator, have been affirmed by the Board, *see Mitchell*, 22 BLR at 1-77, and, therefore, these findings are "law of the case" and cannot be challenged by employer. 2002 Decision and Order at 5. The administrative law judge further found that since "there has been no showing that Judge Levin's findings were clearly erroneous and that their continued application would constitute a manifest injustice," a departure from the doctrine of "law of the case" was not required. 2002 Decision and Order at 5. Therefore, the administrative law judge again found that claimant was a miner, that he was employed for twelve years as a miner and that employer is properly designated as the responsible operator. 2002 Decision and Order at 6. With regard to the merits of entitlement, the administrative law judge reviewed the new medical evidence of record, in conjunction with the previously submitted medical evidence, and found that there was no mistake of fact in Judge Levin's determination that claimant established the existence of complicated pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

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[2] The amendments to the regulations at 20 C.F.R. §725.310 (2000) do not apply to claims, such as this claim, which were pending on January 19, 2001. 20 C.F.R. §725.2.

[3] The Board informed employer that its appeal of Judge Levin's Decision and Order on Remand would be reinstated only if employer requested reinstatement. *Mitchell v. Daniels Company*, BRB No. 01-0364 BLA (May 7, 2001)(Order)(unpub.).

On appeal, employer challenges the administrative law judge's award of benefits arguing that the administrative law judge erred in refusing to modify any of the prior findings of fact regarding the length of claimant's coal mine employment, the responsible operator or Judge Levin's finding of complicated pneumoconiosis. In response, claimant urges affirmance of the administrative law judge's denial of modification and award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's finding that there was no mistake in a determination of fact in Judge Levin's finding regarding the existence of complicated pneumoconiosis. In addition, the Director argues that the Board should reject employer's contention that the administrative law judge erred in finding both twelve years of coal mine employment and that employer was properly named the responsible operator, as the parties had stipulated to these findings in the prior proceeding.

Employer also sought reinstatement of its appeal of Judge Levin's 2000 Decision and Order, docketed as BRB No. 01-0364 BLA. By Order dated October 24, 2002, the Board granted employer's request for reinstatement of the prior appeal. *Mitchell v. Daniels Company*, BRB No. 01-0364 BLA (Oct. 24, 2002)(Order)(unpub.). In its brief challenging Judge Levin's award of benefits, employer argues that Judge Levin failed to properly weigh the medical evidence in finding that claimant established the existence of complicated pneumoconiosis. Employer's 2001 Petition for Review and Brief at 5-6. In addition, employer reiterates its contention that Judge Levin erred in failing to notify employer of its right to be represented by counsel at the 1998 formal hearing. Employer also argues that Judge Levin, in his prior decision, erred in finding that employer was bound by the stipulations entered into at the informal conference and that the Board should reverse its prior decision affirming Judge Levin's findings on the issues involved. In response, claimant urges affirmance of Judge Levin's award of benefits as supported by substantial evidence. The Director states that he will not respond to employer's arguments on the merits of entitlement as they do not implicate the Director's responsibility for proper administration of the Act. The Director, however, addresses the question of whether the revised Black Lung regulations would have an impact on this case, and states that they do not.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address employer's allegations of error regarding the findings in both Judge Levin's 2000 Decision and Order on Remand and Judge Chapman's 2002 Decision and Order, that claimant is suffering from complicated pneumoconiosis. Employer

contends that Judge Levin erred in weighing the medical evidence of record by finding that claimant has established the existence of complicated pneumoconiosis. In particular, employer contends that it was irrational for Judge Levin to conclude that "the treatment records diagnosing the infamous infectious pulmonary disease of tuberculosis are irrelevant." Employer's 2001 Petition for Review and Brief at 5. Additionally, employer contends that Judge Levin failed to properly consider and weigh the relevant evidence of record as he did not evaluate the credibility of the x-ray readings "in light of the minimal exposure to coal dust documented in this case." Employer's 2001 Petition for Review and Brief at 6. We disagree.

Contrary to employer's contention, Judge Levin discussed claimant's medical history in great detail, particularly his hospitalizations between 1988 and 1990 and his history of treatment with anti-tuberculosis medication, and determined that, ultimately, claimant's diagnosis was not pulmonary tuberculosis, but rather meningeal tuberculosis. 2000 Decision and Order at 2-4. Specifically, Judge Levin found that claimant had undergone repeated testing for tuberculosis, but that none of the laboratory tests confirmed the presence of the disease and that none of the physicians who read the chest x-rays interpreted them as showing pulmonary tuberculosis. *Id*. Since Judge Levin discussed all of the relevant evidence and provided reasonable bases for the weight he accorded this evidence, we reject employer's contention that it was irrational for Judge Levin to find the evidence regarding tuberculosis to be irrelevant. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Furthermore, contrary to employer's contention, the medical evidence contained in the record at the time of Judge Levin's Decision and Order on Remand does not provide diagnoses in terms of the length of claimant's coal mine employment or coal dust exposure. In arguing that Judge Levin erred in not providing a credibility determination of the x-ray evidence in light of claimant's "minimal exposure" history, employer fails to recognize that Judge Levin did not find a "minimal exposure" history. Judge Levin found that employer's evidence established "at least 670 hours at the tipples" and that employer did not address the approximately thirteen years of previous coal mine employment. 1999 Decision and Order at 2. Furthermore, employer's argument would require prescience of Judge Levin since none of the diagnoses in the record at that time was set forth in terms of the effect that a different coal dust exposure history would have on the interpretations. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Therefore, contrary to employer's contention, the administrative law judge properly evaluated the medical evidence of record based on the terms of their written diagnoses. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg*, 12 BLR 1-77; *Kuchwara*, 7 BLR 1-167. The remainder of employer's contentions are merely requests to reweigh the medical evidence of record, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We,

therefore, decline to address these contentions. *Id*.

Employer also requested modification based on the newly submitted medical evidence, alleging that Judge Levin's finding of complicated pneumoconiosis is a mistake in a determination of fact. On appeal, employer contends that the administrative law judge erred in finding this was not a mistake in fact because she found the new medical opinions were based solely on "too limited [a] view of the amount of Claimant's coal dust exposure." Employer's 2002 Petition for Review and Brief at 12. In challenging the administrative law judge's determination, employer asserts that the 130 days of coal dust exposure relied upon by the reviewing physicians was appropriate and, therefore, the administrative law judge erred in not crediting these physicians' opinions.

In determining whether a mistake in a determination of fact has been established under Section 725.310 (2000), the burden is on the party seeking modification to establish the mistake.[4] 20 C.F.R. §725.310 (2000); *Branham v. Bethenergy Mines, Inc*., 20 BLR 1-27 (1996); *see also* 20 C.F.R. §725.103. Employer bears the burden of establishing that there was a mistake in Judge Levin's determination that claimant suffers from complicated pneumoconiosis.

In her Decision and Order on modification, the administrative law judge reviewed all of the evidence of record and found that employer has not established that Judge Levin erred in finding that claimant established the existence of complicated pneumoconiosis. 2002 Decision and Order at 13. In particular, the administrative law judge found that the newly submitted medical opinions were based on the assumption that claimant had only 670 hours of coal dust exposure, whereas Judge Levin had found that this figure represents only the minimum length of time claimant was exposed to coal dust during his employment with Daniels Company. 2002 Decision and Order at 12. Therefore, the administrative law judge found that the opinions of Drs. Wiot, Branscomb, Fino, Meyer and Zaldivar are not sufficient to affirmatively establish that the opacities on claimant's chest x-rays do not represent complicated pneumoconiosis because they were

[4] Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. This provision is a broad reopening provision, and the United States Supreme Court has held that modification may be based on new evidence, cumulative evidence, or merely further reflection on the evidence in the original record. *O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993).

based on an inaccurate exposure history.[5] *Id*.

[5] In his response brief, the Director notes that claimant was also exposed to a sandblasting product known as "Black Beauty" which contains silicon. Director's letter dated March 17, 2003 at 3. The Director further states that silicosis is a form of pneumoconiosis and, therefore, claimant's additional exposure provides an alternate basis for affirming the administrative law judge's finding that the newly submitted medical opinions are entitled to little weight as none of these physicians discussed this additional exposure. Director's letter dated March 17, 2003 at 3-4. We decline, however, to consider this assertion because the Director's argument was not addressed by the administrative law judge. The Director believes it necessary to explore this additional, alternative exposure in order to affirm the administrative law judge's rejection of Dr. Fino's opinion that the x-ray evidence does not establish pneumoconiosis. Director's letter dated March 17, 2003 at 3. According to the Director, Dr. Fino reported that claimant's x-rays should be read as negative for complicated pneumoconiosis if claimant had fewer than ten years of dust exposure. It appears to us that the administrative law judge correctly determined that Dr. Fino's opinion was premised on 130 days of exposure:

> Clearly, the medical records show a significant abnormality on the chest x-ray. Based on the chest x-ray readings alone, the presence of both simple and complicated pneumoconiosis would obviously have to be considered. The mitigating factor against the diagnosis of pneumoconiosis is information that I have received which documents only 130 days of work in a coal preparation plant over 15 years. Also, I understand that the coal preparation plant was not in operation when this man worked there.
>
> Based on this information, I can state with a reasonable degree of medical certainty that this man's chest x-ray abnormalities are not, and could not, be due to coal mine dust inhalation. Even at the face, an exposure to coal dust for 130 days is insufficient to produce the dramatic changes seen on the chest x-ray. In fact, with reasonable certainty, that degree of exposure is insufficient to cause any type of coal dust related pulmonary condition.

Employer's Exhibit 2 at 14.

Employer relies upon the last statement in Dr. Fino's conclusion:

As the administrative law judge properly stated, the burden of proof is on employer, as the party seeking modification, to establish a mistake in a determination of fact in Judge Levin's finding of complicated pneumoconiosis. 20 C.F.R. §725.310 (2000); *Branham*, 20 BLR 1-27; *see also* 20 C.F.R. §725.103. The administrative law judge discussed the newly submitted evidence as well as Judge Levin's finding that claimant worked at least 670 hours at the tipple during his employment with Daniels Company. 2002 Decision and Order at 11. However, the administrative law judge found that the records upon which this figure is based, as well as the testimony of employer's representative, cover only a portion of claimant's employment history. 2002 Decision and Order at 12. Therefore, the administrative law judge, within a reasonable exercise of her discretion as trier-of-fact, found that these records, dated between 1979 and 1986, merely established the minimum amount of time that claimant was exposed to coal dust during his employment since they do not cover claimant's employment as a miner for employer from 1966-1978, nor his employment as a miner for employer from 1987-1988. 2002 Decision and Order at 12; Director's Exhibit 42; Employer's Exhibit 1; *see Fagg*, 12 BLR 1-77; *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). The administrative law judge thus rationally found that, even assuming the accuracy of employer's calculation of 670 hours of coal dust exposure between 1979 and 1986, the new evidence does not account for the entirety of claimant's employment as a miner and therefore does not prove that claimant's exposure was not more than 670 hours. *Id*. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish that claimant had no significant periods of coal dust exposure or that the frequency of his coal dust exposure was so light that it could not have caused pneumoconiosis as these records failed to encompass the entirety of claimant's work history. 2002 Decision and Order at 12, 13.

Based on her determination that the record merely establishes the minimum amount of claimant's coal dust exposure, the administrative law judge found that the opinions of Drs. Wiot, Branscomb, Fino, Meyer and Zaldivar, are not sufficient to

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> Even if this man was found to have 15 years of coal mine employment, my opinions regarding diagnosis, impairment and disability would not change.

Employer's Exhibit 2 at 15.

But in light of Dr. Fino's earlier statements, the administrative law judge could not reasonably credit Dr. Fino's statement, that his diagnosis rejecting complicated pneumoconiosis would not change, even if claimant had had fifteen years of coal mine employment, unless the doctor provided an explanation, which he did not.

establish that the opacities on claimant's x-ray do not represent complicated pneumoconiosis and, thus, fail to establish a mistake in Judge Levin's finding. 2002 Decision and Order at 12-13. Contrary to employer's contention, the administrative law judge reasonably found the opinions of Drs. Wiot, Branscomb, Fino, Meyer and Zaldivar did not affirmatively establish that claimant did not have complicated pneumoconiosis because they based their opinions on the minimum amount of coal dust exposure established by the evidence: their opinions were based on the false assumption that claimant had only 130 days of coal mine employment. 2002 Decision and Order at 12-13; *see Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400 (1984); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Because the administrative law judge has considered the relevant evidence and rationally found that the newly submitted evidence is not credible on the issue of the existence of complicated pneumoconiosis in this case, we affirm her determination that employer failed to establish a mistake in Judge Levin's finding that the medical evidence establishes the existence of complicated pneumoconiosis. *See Fagg*, 12 BLR 1-77; *Kuchwara*, 7 BLR 1-167; *see generally Branham*, 20 BLR 1-27; 20 C.F.R. §725.103. Consequently, we affirm the administrative law judge's finding that claimant has established the existence of complicated pneumoconiosis and, thus, affirm her finding of entitlement to benefits.

In addition to its allegations of error regarding the merits of entitlement, employer challenges its designation as responsible operator and the finding that credited claimant with twelve years of coal mine employment. In both its challenge to Judge Levin's 2000 Decision and Order and the administrative law judge's 2002 Decision and Order, employer argues that the evidence of record does not support a finding that claimant has established twelve years of coal mine employment or that the Daniels Company is properly designated as the responsible operator. Although employer did not renew its challenges to these issues before Judge Levin on remand following the Board's 2000 Decision and Order, nonetheless, in its appeal of Judge Levin's 2000 Decision and Order, employer argues that it was error for Judge Levin to find that the Daniels Company was the responsible operator and that claimant was a coal miner for twelve years. Employer also argues that the administrative law judge in her 2002 Decision and Order erred in holding that these findings rendered by Judge Levin constituted law of the case where employer had requested modification of those prior findings.

In the reinstated appeal of Judge Levin's 2000 Decision and Order, employer reiterates its challenge of the findings rendered by Judge Levin in his 1999 Decision and Order and the Board's findings in response to employer's prior appeal. Employer again contends that Judge Levin erred in failing to notify employer of its right to be represented by counsel at the 1998 formal hearing and that Judge Levin erred in finding that employer was bound by the stipulations entered into at the informal conference. Employer also argues that the Board should reverse its prior decision affirming Judge

Levin's findings on the issues involved. These contentions lack merit.

In order for the Board to alter a previous holding, employer must set forth an exception to the law of the case doctrine, *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or a manifest injustice. *See Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). Employer, in its 2001 Petition for Review and Brief, has not set forth any valid exception to the law of the case doctrine, and merely restates its arguments from the prior appeal. We, therefore, adhere to our previous holdings on these issues and decline to address employer's contentions.[6] *See Coleman*, 18 BLR 1-9; *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *overruled on other grounds sub nom. Peabody Coal Co. v. Director, OWCP [Brinkley]*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984).

In its appeal of the administrative law judge's 2002 Decision and Order, employer contends that the administrative law judge erred in finding that the issues of responsible operator and length of claimant's coal mine employment were not reviewable on the basis of the "law of the case" doctrine where employer had sought modification of these prior findings. In particular, employer contends that the administrative law judge should have reviewed these findings as they were findings of fact and, thus, subject to re-evaluation in conjunction with employer's request for modification. 2003 Employer's Petition for Review and Brief at 8.

In her decision, the administrative law judge determined that because Judge Levin's findings with respect to whether claimant was a miner, the length of claimant's coal mine employment and employer's status as the responsible operator, had previously been affirmed by the Board, they constituted "law of the case" and are not subject to challenge by employer in modification proceedings. 2002 Decision and Order at 5-6.

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[6] In its prior decision, the Board rejected employer's contention that Judge Levin failed to notify employer of its right to be represented by counsel as neither the Act nor the regulations require an administrative law judge to inform an unrepresented employer of its right to counsel. *See* 20 C.F.R. §725.362(b); *Mitchell*, 22 BLR at 1-76. Additionally, the Board held that employer was bound by the findings of the district director as these were not challenged within the required 30-day time period after the informal conference and, thus, affirmed Judge Levin's determinations that employer was the properly designated responsible operator and that claimant was a miner within the Act. *Mitchell*, 22 BLR at 1-77.

We hold, however, the administrative law judge's consideration of employer's petition for modification and submission of new evidence required additional findings.

Given the nature of modification, the "law of the case" doctrine is generally not applicable. Rather, it has been routinely held that the "'principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits." *Jessee*, 5 F.3d at 725, 18 BLR at 2-29, *citing Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 461-65 (1968). Thus, where a request for modification has been properly filed, it is the duty of the second administrative law judge to conduct a *de novo* review of all of the facts in order to determine whether there was a mistake in the judge's determination of fact in the prior decision. *See Banks*, 390 U.S. 459; *Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Jessee*, 5 F.3d 723, 18 BLR 2-26. The issue in this case, however, is not whether a judicially determined fact is binding when modification is requested – it is not – the issue herein is whether the stipulation of the parties is binding in a modification proceeding.

Initially, we note that it is a well-established principle that stipulations are binding on the parties that entered into them, for the duration of the litigation. 73 AM. JUR.2d Stipulations §8 (1974); *see Hagan v. McNallen* (*In re McNallen*), 62 F.3d 619 (4th Cir. 1995); *American Title Insurance Co. v. Lacelaw Corp.*, 861 F.2d 224 (9th Cir. 1988); *see also Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT)(4th Cir. 1994). However, in order for a stipulation to be binding, it must be determined that the stipulation was fairly entered into by all of the parties. *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), *citing Fisher v. First Stamford Bank & Trust Co.*, 751 F.2d 519, 523 (2d Cir. 1987)("[A] stipulation of fact that is fairly entered into is controlling on the parties and the court is bound to enforce it."). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a claimant was bound in a modification proceeding by the terms of his prior stipulation of fact, which formed the basis for his original award of benefits; the court explained that petitions for modification are designed to prevent injustices arising from erroneous factual determinations rendered by officials, such as an administrative law judge, and not to remedy errors made by the parties themselves. *Sullivan v. Newport News Shipbuilding and Dry Dock Co.*, 120 F.3d 262 (4th Cir. 1997)(Table).

In *Sullivan*, based upon a stipulation entered into by the parties while the case was before the district director, claimant received an award of benefits under the Longshore and Harbor Workers' Compensation Act for an injury to his "upper left extremity." Specifically, the parties entered into a stipulation that claimant had "sustained a permanent partial disability equivalent to 5% loss of use of his left upper extremity." *Id.* at 120 F.3d 262. Claimant was therefore awarded temporary disability compensation, as

well as permanent partial disability benefits, pursuant to 33 U.S.C. §908(c)(19), compensation for the five percent permanent loss of use of his left arm. *Id*. Subsequent to the issuance of the district director's compensation order, claimant sought modification of the award, arguing that the injury was not to his left arm, but specifically to his left shoulder and, therefore, the parties mistakenly agreed to use 33 U.S.C. §908(c)(19) as the basis for the permanent award, rather than 33 U.S.C. §908(c)(21), the appropriate subsection for non-scheduled injuries. Claimant's petition for modification was denied by an administrative law judge, finding that the "mistake in the order was primarily the responsibility of claimant's counsel and that employer's interest in the finality of the compensation order outweighed the interest in correcting litigation mistakes." *Id.* The Fourth Circuit held that it was not an abuse of the administrative law judge's discretion to deny Sullivan's petition for modification. Specifically, the court stated that the stipulation was not based on a mistaken belief as to the nature of the injury. Rather, at the time of the stipulation, claimant was fully aware that the injury was to his left shoulder, but, nonetheless, stipulated that the injury was to his left arm. *Id.* at 120 F.3d 263. Thus, regardless of the reason claimant entered into the stipulation for an injury to his left arm and not to his left shoulder, the stipulation was entered into knowingly by claimant and, therefore, the court affirmed the administrative law judge's denial of claimant's petition for modification. The court stated, "Section 22 petitions are designed to prevent injustice resulting from the erroneous fact-finding officials such as an ALJ, not to save litigants from the consequences of their counsel's mistakes." *Sullivan*, 120 F.3d at 263 (Table), *citing Verdane v. Director, OWCP*, 772 F.2d 775, 780 (11th Cir. 1985).

In this case, at an informal conference while the case was in the Office of Workers' Compensation Programs, the parties agreed that claimant was a coal miner within the meaning of the Act, that he had twelve years of coal mine employment and that the Daniels Company met all of the requirements for designation as responsible operator. Director's Exhibit 29. Thereafter, employer did not object to these determinations within the thirty days provided by the regulations at 20 C.F.R. §725.417(d). Judge Levin, in his 1999 Decision and Order, found that these stipulations were supported by the record, 1999 Decision and Order at 1-2, and this finding was affirmed by the Board in its original Decision and Order. *See Mitchell*, 22 BLR 1-73. Employer sought modification, arguing *inter alia,* that Judge Levin's decision was based on a mistake in a determination of fact regarding these issues and that as a matter-of-law its petition for modification should be granted.

Contrary to its contention, employer is not entitled to the granting of its request for modification as a matter of law. *See* Employer's 2003 Petition for Review and Brief at 8. The facts at issue herein were established based on stipulations of the parties; under Fourth Circuit law, the parties may be bound by these stipulations for the pendency of the claim, including this petition for modification. *See Sullivan*, 120 F.3d 262 (Table); *see also In re McNallen*, 62 F.3d 619; *Simonds*, 27 BRBS 120 (1993), *aff'd,* 35 F.3d 122, 28

BRBS 89. The Fourth Circuit made clear in *Sullivan* that the administrative law judge did not abuse his discretion in finding it was not in the interest of justice to correct a mistake in fact when the erroneous fact was set forth in a stipulation which the parties had knowingly entered into. *Sullivan*, 120 F.3d 262 (Table); *see also Richardson*, 94 F.3d 164, 21 BLR 2-373; *Fisher*, 751 F.2d 519.

In the present case, employer contends that it did not knowingly enter into the disputed stipulations. Neither Judge Levin nor the administrative law judge has determined the relevant facts and found whether the stipulations were fairly entered into and therefore binding upon the parties. Therefore, we vacate the administrative law judge's determination that Judge Levin's findings are not reviewable and remand the case for the administrative law judge to determine whether the stipulation regarding whether employer meets all of the requirements of being the responsible operator had been fairly entered into by the parties. *See Richardson*, 94 F.3d 164, 21 BLR 2-373; *see also Sullivan*, 120 F.3d 262 (Table). If, on remand, the administrative law judge finds that the parties fairly entered into the stipulation, then she may permissibly hold that there was no mistake in a determination of fact in Judge Levin's acceptance of the parties' stipulations. *Id*. If, however, the administrative law judge finds that the record does not support a determination that the stipulations were fairly entered into by the parties, then on remand, she must render findings on whether employer meets the requirements of being named the responsible operator under the regulations and the length of claimant's coal mine employment.[7]

Finally, even if the administrative law judge determines that the stipulations are not valid, such findings do not impact the administrative law judge's findings on entitlement to benefits as employer's evidence is still incomplete because it does not show that claimant did not have more than 130 days of coal dust exposure, the figure relied upon by the physicians in their opinions.

[7] In the current appeal, employer does not specifically challenge the affirmance of the finding that claimant was a miner within the meaning of the Act. Therefore, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Accordingly, the finding of entitlement to benefits is affirmed. However, the case is remanded to the administrative law judge for further proceedings on the issues of responsible operator and length of coal mine employment consistent with the holdings in this opinion.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

_____
BETTY JEAN HALL
Administrative Appeals Judge

GABAUER, J., concurring in part and dissenting in part:

I concur with my colleagues' decision in part, respecting the remand as to whether the stipulations were fairly entered into. I respectfully dissent, however, that even if, on remand, the administrative law judge finds that the stipulations were not valid, such findings would not impact on the administrative law judge's finding of entitlement. Rather, I would also hold that it is within the administrative law judge's discretion to revisit the issue of entitlement to determine what, if any, impact her findings with regard to the length of claimant's coal mine employment have on her credibility determinations thereunder.

_____
PETER A. GABAUER, JR.
Administrative Appeals Judge