BRB No. 10-0349 BLA

WILBUR E. HARKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/18/2011
	)	
PEABODY COAL COMPANY	)	
	)	
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 Award of Benefits on Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (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 Award of Benefits on Modification (09-BLA-5163) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) rendered on a claim 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*)). This case involves claimant's request for modification of the denial of his claim, filed on April 11, 2005. Director's Exhibit 2. Initially, Administrative Law Judge Pamela Lakes Wood (Judge Wood) denied benefits on December 28, 2007, because the evidence did not establish the existence of clinical or legal pneumoconiosis[1] pursuant to 20 C.F.R. §718.202(a)(1), (4). Director's Exhibit 66. Claimant timely requested modification on February 21, 2008, and submitted additional medical evidence. Director's Exhibit 67.

In considering claimant's modification request, the administrative law judge accepted the parties' stipulations that claimant had established at least twenty-one years of coal mine employment,[2] and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge considered the new evidence submitted in support of modification, in conjunction with the earlier evidence, and found that claimant established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure pursuant to Section 718.202(a)(4), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge concluded that modification was appropriate pursuant to 20 C.F.R. §725.310, based on a mistake in Judge Woods' prior determination of fact that claimant did not have pneumoconiosis. Consequently, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that claimant established that he has legal pneumoconiosis pursuant to Section 718.202(a)(4), and that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c).

[1] A finding of either clinical pneumoconiosis or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition 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).

[2] The record indicates that claimant's coal mine employment was in Kentucky. Hearing Transcript at 8; Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Employer also asserts that, if the case is remanded, additional consideration under Section 1556 is necessary.[3] Claimant responds, urging affirmance of the administrative law judge's award of benefits. Claimant agrees that Section 1556 applies to this claim, because he filed it after January 1, 2005, was credited with more than fifteen years of coal mine employment, and has a totally disabling respiratory impairment. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief, but stated that application of Section 1556 is moot if the Board affirms the award of benefits.[4] Employer filed a reply brief, reiterating its contentions on 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).

Based upon the parties' responses, and our review, we hold that Section 1556 does not affect the disposition of this case. For the reasons set forth below, we affirm the administrative law judge's award of benefits. Thus, there is no need to consider whether

[3] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Brief at 1. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[4] Employer had initially filed a motion to remand to the district director so that it could respond to the recent enactment of Section 1556. The Director responded to employer's motion, requesting that it be denied as premature because Section 1556 will apply only if the administrative law judge's award of benefits cannot be affirmed. The Board denied employer's motion to remand, informing employer that the impact of Section 1556 would be determined upon its review of employer's appeal. *Harkins v. Peabody Coal Co.*, BRB No. 10-0349 BLA (June 2, 2010)(unpub. Order).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings as to the length of claimant's coal mine employment, and that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *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).

claimant could establish entitlement with the aid of the presumption that was reinstated by Section 1556.

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, authorizes the modification of an award or denial of benefits based, in pertinent part, on a mistake in a determination of fact. 33 U.S.C. §922; 20 C.F.R. §725.310(a). Mistakes of fact may be 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, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge "has the authority, if not the duty, 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).

Employer initially asserts that the administrative law judge erred in his evaluation of the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer's Brief at 10-20. The administrative law judge considered the medical opinions of Drs. Baker[6] and Simpao,[7] that claimant suffers from

[6] Dr. Baker, who is Board-certified in Internal Medicine and Pulmonary Disease, opined that claimant's "smoking . . . has contributed perhaps more significantly than the coal dust to his pulmonary symptoms but his coal dust has been a significant and substantially aggravating condition." Director's Exhibit 74 at 3. At his deposition, Dr. Baker reiterated that coal mine dust exposure and smoking contributed to claimant's severe obstructive disease. Claimant's Exhibit 1 at 12.

[7] Dr. Simpao, who is a general practitioner, diagnosed claimant with clinical and legal pneumoconiosis. Dr. Simpao concluded that claimant's multiple years of coal mine dust exposure were the significant contributing factor to claimant's pulmonary impairment, but that claimant's smoking history was also an aggravating factor. Director's Exhibits 15; 17; 55 at 4, 15.

pneumoconiosis, together with the opinions of Drs. Fino[8] and Repsher,[9] that claimant does not have clinical or legal pneumoconiosis. Director's Exhibits 15, 17, 18 at 2, 52 at 2, 55 at 4; Claimant's Exhibit 1 at 12; Employer's Exhibits 2, 5. The administrative law found the opinion of Dr. Baker, as supported by Dr. Simpao, to be "well reasoned" because it was based on the results of physical examination, objective test results, occupational and medical histories, and because his rationale was consistent with the prevailing view of the medical community, as well as the medical literature, now codified in the revised regulations. Decision and Order at 5-8.

By contrast, the administrative law judge found the opinions of Drs. Fino and Repsher to be less persuasive than, and outweighed by, the opinions of Drs. Baker and Simpao, because neither of the former physicians had addressed the additive nature of smoking with coal mine dust exposure in concluding that claimant's twenty-one years of coal mine dust exposure played no role in his impairment. Decision and Order at 6-9.

Employer asserts that the administrative law judge erred in crediting the opinions of Drs. Baker and Simpao, and in discrediting the opinions of Drs. Fino and Repsher. Specifically, employer asserts that the opinions of Drs. Baker and Simpao are equivocal and unreasoned. Employer's Brief at 10-18. We disagree.

Initially, we reject employer's contention that Dr. Baker's opinion, that claimant's pulmonary disease was "consistent with legal pneumoconiosis," is too equivocal to support claimant's burden to establish the existence of the disease. Employer's Brief at 12. Dr. Baker ultimately concluded that coal mine dust exposure and smoking contributed to claimant's pulmonary disease, and clearly testified that claimant has legal pneumoconiosis. Director's Exhibit 74 at 3; Claimant's Exhibit 1 at 10 Therefore, the administrative law judge was not required to find that Dr. Baker's opinion is equivocal. *See Perry v. Mynu Coals, Inc*., 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006)(use of cautious language does not necessarily reflect equivocation by the doctor).

Nor is there merit to employer's contention that Dr. Baker based his opinion on generalities and "presumptive evidence" of pneumoconiosis, and "admitted that in every case where a [smoking] miner develops emphysema it would be caused by his coal mine dust exposure." Employer's Brief at 10-11. A review of Dr. Baker's deposition testimony reveals that, on cross-examination, Dr. Baker agreed with the proposition that

[8] Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, opined that claimant suffers from severe chronic obstructive pulmonary disease (COPD), entirely due to smoking. Employer's Exhibits 5, 52.

[9] Dr. Repsher, who is Board-certified in Internal Medicine and Pulmonary Disease, diagnosed severe COPD entirely due to smoking. Employer's Exhibits 2, 18.

"coal dust would be a factor in the emphysema" of a smoking miner. Claimant's Exhibit 1 at 31. However, Dr. Baker also acknowledged that a smoking miner's emphysema "can be due solely to his coal dust exposure or it could be [due] solely to his cigarette smoking, but most likely it's due to the combination of both," in proportion to the duration of each exposure, and consistent with the results of medical studies demonstrating the additive effects of smoking and coal mine dust in the development of COPD. Claimant's Exhibit 1 at 13, 30-31. Thus, Dr. Baker did not opine that coal dust always plays a role in the development of an impairment in every smoking miner. Nor did Dr. Baker rely on any presumption of contribution to conclude that coal mine dust contributed to claimant's COPD. Rather, as the administrative law judge properly found, in addition to medical studies, Dr. Baker based his diagnosis of legal pneumoconiosis on claimant's coal mine employment and smoking histories, his clinical examination, pulmonary function study and blood gas study results, and the inability to differentiate between the potential causes of the miner's impairment, in this case.[10] *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Director's Exhibits 40, 74; Claimant's Exhibit 1 at 1-15, 39-40, 45-47. The administrative law judge, therefore, properly found that Dr. Baker provided a persuasive rationale for his conclusion that claimant's respiratory impairment was due to both smoking and coal mine dust exposure. 20 C.F.R. §718.201(b); *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Gross*, 23 BLR at 1-18; Decision and Order at 9. Contrary to employer's contention, the administrative law judge permissibly concluded that Dr. Baker's opinion was well-reasoned because Dr. Baker took into account both claimant's smoking and coal mine dust exposure histories,[11] and supported his conclusion that both exposures had contributed to the development of claimant's COPD with references to medical studies,[12] consistent with the Department of Labor's recognition

[10] Dr. Baker explained that smoking and coal mine dust exposure cause similar physical abnormalities, and that the effects are additive. Claimant's Exhibit 1 at 13, 26, 39-40.

[11] The administrative law judge acknowledged, but did not find significant, the fact that Dr. Baker relied on an understated smoking history of forty to forty-four years, when the record reflected forty-nine to fifty-one years, and also relied on an overstated coal mine employment history of twenty-two and three-quarter years, when the miner was credited with twenty-one years. Decision and Order at 7; Claimant's Exhibit 1 at 5, 12.

[12] Dr. Baker testified that "the effects on the lungs and its functions when you have both smoking and coal dust inhalation, when the two are combined" "appear to be

that smoking miners, as was claimant, have an additive risk for developing significant obstructive lung disease. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 Fed. Appx. 757 (6th Cir. Nov. 29, 2007)(unpub.); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); Decision and Order at 6-7, 9; Claimant's Exhibit 1 at 25-26.

We also reject employer's contention that Dr. Simpao's opinion, that both smoking and coal dust contributed to claimant's pulmonary impairment, is too equivocal to support claimant's burden of proof. Employer's Brief at 18. A physician is not required to specifically apportion the extent to which various causal factors contribute to a respiratory or pulmonary impairment. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Gross*, 23 BLR at 1-18-19. Further, the determination of whether a physician's opinion is reasoned and documented is committed to the discretion of the administrative law judge. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Clark*, 12 BLR at 1-155. In evaluating Dr. Simpao's opinion, the administrative law judge correctly noted that Dr.

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additive or synergistic." Claimant's Exhibit 1 at 13. In support of his opinion, Dr. Baker explained that a medical study reported on May 7, 2009 in the American Journal of Respiratory and Critical Care Medicine, Volume 180, at pages 257-264, had concluded that:

> Cumulative coal mine dust exposure or coal dust lung burden, cigarette smoking, age [at] death and race were statistically significant predictors of emphysema severity in this study of autopsied miners and non-miners. Coal dust exposure and cigarette smoking had similar additive effects on emphysema severity in these models at cohort average values. The role of dust exposure on emphysema severity in coal miners is relevant to regulatory decision making and medical determinations.

Claimant's Exhibit 1 at 13. Thus, there is no merit to employer's contention that Dr. Baker failed to explain how the 2009 medical study supported his opinion that one-third of claimant's pulmonary disease was due to coal mine dust exposure, and two-thirds was due to smoking. Employer's Brief at 13-16.

Further, while the study relied upon by Dr. Baker does not appear in the record, as employer conceded that the study concluded that coal mine dust and smoking have an additive effect in the development of COPD. Claimant's Exhibit 1 at 26. Moreover, the administrative law judge was not prohibited from referencing the study cited by Dr. Baker. Fed. R. Evid. 803.

Simpao lacked any specialized credentials, but permissibly concluded that his opinion was rational in light of the accepted medical science, and supported that of Dr. Baker as to the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.104(d)(5); *Rowe*, 710 F.2d at 254, 5 BLR at 2-102; Decision and Order at 9. The administrative law judge, therefore, permissibly found that the opinion of Dr. Baker, as supported by that of Dr. Simpao, is entitled to probative weight. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Contrary to employer's arguments, the administrative law judge was not required to adhere to Judge Wood's determination to discredit the opinions of Drs. Baker and Simpao. Because a mistake in a determination of fact can be based on wholly new evidence, cumulative evidence, or merely further reflection of the evidence initially submitted, the administrative law judge, in this case, was not bound by Judge Wood's prior credibility determinations. *See O'Keeffe*, 404 U.S. at 256; *King*, 246 F.3d at 825, 22 BLR at 2-310.

We further reject employer's assertion that the administrative law judge failed to state a valid reason for discounting the opinions of Drs. Fino and Repsher, that claimant's obstructive lung disease is due entirely to smoking. Employer's Brief at 18-20. Contrary to employer's contention, the administrative law judge permissibly concluded that the opinions of Drs. Fino and Repsher were entitled to less weight than that of Dr. Baker because, unlike Dr. Baker, they did not address the additive risk of coal mine dust exposure with smoking and, therefore, did not adequately account for claimant's twenty-one years of coal mine dust exposure. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *accord Beeler*, 521 F.3d at 726, 24 BLR at 2-104-05; Decision and Order at 8, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000). Employer is also mistaken in asserting that the administrative law judge substituted his own opinion for that of the physicians when he determined that the study cited by Drs. Fino and Repsher did not support their opinions. Decision and Order at 7, 8; Employer's Brief at 14, 17. The administrative law judge was properly discharging his duty to determine the credibility of the doctors' opinions. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because they are supported by substantial evidence, we affirm the administrative law judge's permissible credibility determinations. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. As the administrative law judge provided a valid rationale for rejecting the opinions of Drs. Fino and Repsher, we affirm the administrative law judge's discounting of their opinions. *See Kozele v. Rochester & Pittburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Consequently, we affirm the administrative law judge's finding that legal pneumoconiosis was established pursuant to Section 718.202(a)(4), and, thus, that a mistake of fact pursuant to Section 725.310 was made in the prior determination that legal pneumoconiosis was not established.

Employer further challenges the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c).[13] Employer's Brief at 10. Drs. Baker and Simpao opined that claimant's total disability is due, in part, to coal dust exposure, while Drs. Fino and Repsher attributed claimant's total disability solely to his smoking history. Decision and Order at 5-10; Director's Exhibits 15, 17, 18, 40, 44, 52, 74; Claimant's Exhibit 1; Employer's Exhibits 2, 5. Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Fino and Repsher because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 10; Employer's Brief at 18-20. Moreover, as the administrative law judge rationally relied on the reasoned and documented opinion of Dr. Baker, as supported by the opinion of Dr. Simpao, to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally relied on Dr. Baker's opinion to find that claimant is totally disabled due to legal pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c).

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[13] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

Because we have affirmed the administrative law judge's finding that claimant established legal pneumoconiosis pursuant to Section 718.202(a)(4), and total disability due to legal pneumoconiosis pursuant to Section 718.204(c), we affirm the administrative law judge's award of benefits.[14]

Accordingly, the administrative law judge's Decision and Order Award of Benefits on Modification is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[14] Our affirmance of the administrative law judge's award of benefits renders moot employer's request for reassignment of the case to a different administrative law judge upon remand.