BRB Nos. 12-0274 BLA
and 12-0274 BLA-A

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| LARRY J. WEDDING | ) | |
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| Claimant-Respondent | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
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| CR MINING COMPANY and AIU INSURANCE COMPANY | ) | DATE ISSUED: 01/30/2013 |
| | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| Cross-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | | |
| Respondent | | |
| Cross-Petitioner | | DECISION and ORDER |

Appeal of the Decision and Order Granting the Claimant's Request for Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer/carrier.

Richard A. Seid (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting the Claimant's Request for Modification (2009-BLA-5691) of Administrative Law Judge Alice M. Craft (the administrative law judge) awarding benefits on a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Initially, in this miner's claim, filed on December 6, 2004, Administrative Law Judge Thomas F. Phalen, Jr. accepted employer's stipulation that claimant had thirty-five years of coal mine employment. Judge Phalen further found that, although claimant established that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), he did not establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Judge Phalen, therefore, denied benefits on October 6, 2008. Claimant timely requested modification pursuant to 20 C.F.R. §725.310 on November 26, 2008.

Considering claimant's request for modification, the administrative law judge found the existence of legal pneumoconiosis[1] established pursuant to Section 718.202(a)(4) and, therefore, found claimant entitled to modification of the previous denial of his claim, inasmuch as a mistake in a determination of fact had been made pursuant to Section 725.310.[2] Considering the claim *de novo*, the administrative law judge found that claimant established legal pneumoconiosis, total respiratory disability, and disability causation pursuant to 20 C.F.R. §§718.202(a) and 718.204(b), (c).[3] The administrative law judge, therefore, awarded benefits to commence January 2004, the month in which she found the claim was filed.

[1] "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).

[2] We agree with the Director, Office of Workers' Compensation Programs, that "[a]lthough the [administrative law judge] did not make a specific finding of mistake of fact, her decision to credit evidence developed before the prior denial of benefits was issued constitutes an implicit finding of mistake." Director's Brief on Cross-Appeal at 5 n.3.

[3] The administrative law judge found both that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) based on his thirty-five years of coal mine employment and that a finding that pneumoconiosis arose out of coal mine employment was subsumed in her finding of legal pneumoconiosis. Decision and Order at 37.

On appeal, employer challenges the administrative law judge's finding that legal pneumoconiosis was established pursuant to Section 718.202(a) and, thereby, that modification was established pursuant to Section 725.310. Employer also challenges the administrative law judge's findings that claimant's pneumoconiosis arose out of coal mine employment and that his total disability is due to pneumoconiosis pursuant to Sections 718.203(b) and 718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response to employer's appeal. The Director has, however, filed a cross-appeal limited to the issue of the appropriate date for the commencement of benefits. Employer and claimant have not responded to the Director's cross-appeal.[4]

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.[5] 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3; 718.202; 718.203; 718.204. Failure to establish an element of entitlement precludes an award of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987).

Under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the fact-finder may, on the ground of a change in conditions or a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310. The intended purpose of allowing modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether

[4] We affirm, as unchallenged on appeal, the administrative law judge's acceptance of employer's stipulation that claimant had thirty-five years of coal mine employment, the administrative law judge's finding that the existence of clinical pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), and the administrative law judge's finding that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See* Decision and Order at 4, 29; Director's Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

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 (1971); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *accord V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008).

**Employer's Appeal**
**Legal Pneumoconiosis**

In finding the existence of legal pneumoconiosis[6] pursuant to Section 718.202(a)(4), the administrative law judge credited the opinions of Drs. Bergen, Simpao, and Baker, which she found to be "well-reasoned and documented," over the contrary opinions of Drs. Westerfield and Selby. Decision and Order at 36.

Employer, however, contests the administrative law judge's determination that the medical report of Dr. Bergen, together with those of Drs. Baker and Simpao,[7] establish

[6] Subsequent to the administrative law judge's decision, the United States Court of Appeals for the Sixth Circuit issued *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012), agreeing with the decisions of the United States Court of Appeals for the Third and Fourth Circuits in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) and *Island Creek Coal Co. v. Compton*, 11 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), in holding that, although 20 C.F.R. §718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether claimant suffers from the disease. *Hensley*, 700 F.3d at 881, 25 BLR at 2-218. The court reasoned that, while each of the four alternatives listed at 20 C.F.R. §718.202(a) *may* be sufficient to support a diagnosis of pneumoconiosis, that does not mean that any of the four kinds of evidence automatically proves the existence of pneumoconiosis in the face of contrary evidence. Instead, "whether or not a particular piece or type of evidence actually *is* a sufficient basis for finding pneumoconiosis will depend on the evidence [as a whole] in each case." *Hensley*, 700 F.3d at 881, 25 BLR at 2-218, quoting *Compton*, 211 F.3d at 209, 22 BLR at 2-171.

Here, however, the administrative law judge specified that her "conclusion would not change" if she "were to weigh the x-ray and medical opinion evidence together." Decision and Order at 37. As the administrative law judge's analysis encompassed the relevant evidence in this case, her finding of pneumoconiosis is not inconsistent with *Hensley*. *Id*. at 29, 37.

[7] Dr. Baker, who performed a pulmonary examination, diagnosed clinical pneumoconiosis, as well as a chronic obstructive pulmonary disease due to cigarette

the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, employer contends that Dr. Bergen's reference to "tunneling in the mines," indicates that he based his opinion of legal pneumoconiosis on his belief that claimant's coal mine employment involved underground coal mine employment, as opposed to surface coal mine employment. Employer contends, therefore, that the opinion is not well-reasoned. Employer's Brief at 9-10. We disagree.

The administrative law judge found that claimant's usual coal mine employment of running a bulldozer in surface mine pits and pumping water out of the pits involved heavy exposure to "rock dust from drilling and blasting the overburden." Decision and Order at 4; *see* July 15, 2010 Hearing Tr. at 15-17. Dr. Bergen, claimant's pulmonologist from 2002 to 2006, recorded a thirty-four year history of surface coal mining in his medical report of March 2000. Decision and Order at 4, 15-18, 33; Director's Exhibits 36 at 37, 44. Subsequently, Dr. Bergen opined that claimant's chronic obstructive pulmonary disease was due to a combination of cigarette smoking, inherent asthma, diesel smoke, and coal mine dust exposure. Decision and Order at 33; Director's Exhibit 44 at 246. The administrative law judge determined that "[b]ased on Dr. Bergen's identification of coal mine work as a contributing factor to the [c]laimant's obstructive disease, I construe this to be a diagnosis of legal pneumoconiosis." Decision and Order at 33.

Whether a medical opinion is documented and reasoned is properly a determination for the administrative law judge, *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987), and the administrative law judge's determination will be upheld unless it is unreasonable. *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985). Here, the administrative law judge reviewed Dr. Bergen's significant documentation, and found that his "identification of coal mine work as a contributing factor to the [c]laimant's obstructive disease," constituted a diagnosis of legal pneumoconiosis. Additionally, the administrative law judge found that Dr. Bergen's opinion was well-reasoned as it was consistent with the premises underlying the regulations, and in view of Dr. Bergen's "qualifications and his extensive familiarity with the [c]laimant," as a treating physician.[8] Decision and Order at 33; *see Wolf Creek*

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smoking and coal dust exposure in significant part. Decision and Order at 23; Director's Exhibit 57.

Dr. Simpao performed the Department of Labor sponsored pulmonary evaluation, and diagnosed chronic obstructive pulmonary disease due to coal dust exposure and cigarette smoking. Decision and Order at 20-21; Director's Exhibit 38.

[8] Considering Dr. Bergen's Board-certifications in "Internal Medicine, Pulmonary Disease, Critical Care Medicine and Sleep Medicine," the administrative law judge found him "well-qualified to provide an opinion." Decision and Order at 33. The

*Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1989); *Minnich v. Pagnotti Enterprises, Inc*., 9 BLR 1-89, 1-90 n.1 (1986).

Additionally, contrary to employer's contention, Dr. Bergen's opinion reflects that his diagnosis of legal pneumoconiosis was based, in part, on his recognition that claimant had a thirty-four year history of surface coal mining. Consequently, because substantial evidence supports the administrative law judge's evaluation of Dr. Bergen's opinion, we affirm her assignment of "great weight" to Dr. Bergen's diagnosis of legal pneumoconiosis. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Next, employer argues that the administrative law judge erred in determining that the opinions of Drs. Baker and Simpao support a finding of legal pneumoconiosis because they lacked a complete medical history of claimant. Specifically, employer contends that the doctors were unaware of claimant's history of asthma and were unaware that "Dr. Bergen had treat[ed] claimant's asthma for many years." Employer's Brief at 11. Employer argues that because Drs. Baker and Simpao did not diagnose asthma, and were "ignorant of Dr. Bergen's treatment records, which provides evidence of non-coal-dust related respiratory impairment in the form of asthma,"[9] their opinions are insufficient to support a finding of legal pneumoconiosis. *Id*.

The record shows, however, that both Drs. Baker and Simpao addressed the effect asthma might have on claimant and fully explained the bases of their findings that

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administrative law judge also detailed Dr. Bergen's length and course of treatment, and found that the physician "was aware of claimant's smoking history, and that he worked in the mines." Decision and Order at 33.

[9] Employer also argues that in the previous proceeding, Administrative Law Judge Phalen assigned less weight to the medical opinions of Drs. Baker and Simpao because they lacked knowledge of claimant's asthma. Employer, therefore, asserts that "the only thing that has changed is that [the administrative law judge] found them credible where [Judge] Phalen did not." Employer's Brief at 11. Contrary to employer's assertion, the findings in the prior proceeding are not binding in this adjudication, as modification proceedings are designed to allow for further reflection of evidence already in the previous hearing record. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *accord V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008). In this case, the administrative law judge specifically disagreed with Judge Phalen's construction of Dr. Simpao's deposition testimony, and determined that it was not ambiguous. Decision and Order at 34.

claimant's respiratory impairment is not related to asthma. Decision and Order at 22, 25; Director's Exhibits 38 at 6-7, 8, 14-15, 24-25, 37-38; 57 at 41-43, 49, 53, 55, 56-57, 62, 68-69.[10] Moreover, while the administrative law judge recognized that Dr. Baker did not have access to claimant's treatment records, she noted his explanation that "[t]he aim of treatment for asthma is to return pulmonary function to normal, but that never happened in the claimant's case, despite treatment with long-acting bronchodilators, cortical steroids, oral bronchodilators, cortical and rescue inhalers." Decision and Order at 25. Specifically, Dr. Baker indicated that while responsiveness to bronchodilators would indicate a component of asthma, he was uncertain whether claimant had asthma. *Id*. at 34-35. Further, Dr. Baker explained that the fact that coal dust exposure does not cause asthma, "did not mean the coal dust did not contribute to [claimant's][chronic obstructive pulmonary disease,]" and he would attribute part of claimant's impairment to dust exposure. *Id*. at 35. Additionally, Dr. Simpao opined that claimant's "test results, symptoms, and treatment were consistent with pneumoconiosis, as well as other conditions, and that there is no proven procedure to determine the extent that either factor contributed to [claimant's] pulmonary condition." Decision and Order at 21-22, 34. Drs. Baker and Simpao, therefore, both addressed the issue of asthma, as well as other causes of claimant's obstructive pulmonary disease, and described the aggravating and contributory effect of coal dust exposure on claimant's pulmonary disease. *Id*. at 21-22, 34-36.

It is the province of the finder-of-fact to evaluate and assess conflicting medical evidence, draw inferences, and assess probative value. *See Jericol Mining, Inc., v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(en banc). In this case, the administrative law judge found that Dr. Baker's opinion was supported "by the evidence available to him," and his "attribution of [claimant's] obstructive disease to a combination of factors is consistent with the regulations," and establishes that coal dust is a contributing cause of claimant's impairment, and constitutes a diagnosis of legal pneumoconiosis. Decision and Order at

[10] Dr. Simpao indicated that claimant had wheezing due to chronic bronchitis, and that he took a variety of breathing medications, but was not diagnosed, by history, with bronchial asthma. He opined that coal dust inhalation can aggravate other lung problems. Decision and Order at 20-22; Director's Exhibits 14, 38.

During his deposition, Dr. Baker was apprised that Dr. Westerfield had diagnosed asthma. However, Dr. Baker opined that claimant's pulmonary function testing results were not consistent with "pure asthma," and identified "several components" that, in his opinion, made it unlikely that claimant has asthma. Decision and Order at 21-22, 34; Director's Exhibits 38 at 24-25, 57 at 46-47, 57, 70.

35; *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). She, therefore, concluded that Dr. Baker adequately supported his medical conclusion that claimant's chronic obstructive pulmonary disease was due in part to coal dust exposure. Decision and Order at 23, 25, 34-35; 20 C.F.R. §718.201(a)(2); *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Next, the administrative law judge reviewed Dr. Simpao's "consistent opinion, which … found … that both smoking and coal dust contributed to claimant's pulmonary condition [and is] … supported by the information available to him." Decision and Order at 34. She also found Dr. Simpao's "attribution of [claimant's] obstructive disease to a combination of factors … consistent with the regulations," and sufficient to establish that coal dust is a contributing cause of claimant's impairment and, therefore, constitutes legal pneumoconiosis. *Id*.; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). As substantial evidence supports these findings, the administrative law judge's determination to assign "probative weight" to the medical opinions of Drs. Baker and Simpao is affirmed. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer next argues that the administrative law judge erred in finding that the medical opinions of Drs. Westerfield[11] and Selby[12] failed to establish that claimant does not suffer from legal pneumoconiosis. *See* Employer's Brief at 14-15. The administrative law judge in giving less weight to Dr. Westerfield's opinion identified several aspects of the opinion that were inconsistent with the regulations. *See* Decision and Order at 36.

First, Dr. Westerfield opined that a clinically significant respiratory impairment does not occur in miners without chest x-ray changes of pneumoconiosis, a view contrary to the premise underlying the regulations, i.e., that coal dust can cause obstructive disease in the absence of clinical pneumoconiosis. Decision and Order at 36; *see* Director's Exhibits 43 at 14, 53 at 5. Second, because claimant left the mines in 1998, and Dr.

[11] Dr. Westerfield, who performed a pulmonary examination, diagnosed asthma and emphysema from cigarette smoking, and opined that claimant's impairment is not due to inhalation of coal dust. Decision and Order at 22-23, 25-26, 35-36; Director's Exhibits 36, 43 at 13, 53.

[12] Dr. Selby, who performed a pulmonary examination, opined that claimant does not have clinical or legal pneumoconiosis, or any respiratory or pulmonary impairment due to coal dust. He diagnosed chronic bronchial asthma, which can be severe at times. Decision and Order at 26-27, 36; Director's Exhibit 53; Employer's Exhibit 6.

Bergen's treatment of claimant did not begin until 2000,[13] Dr. Westerfield ruled out aggravation of claimant's condition by coal dust exposure.[14] Director's Exhibits 36 at 5-6; 43 at 18-19, 28, 34, 41-42, 43, 46-48, 51-54. Third, Dr. Westerfield, based on his views that "smoking could account for [c]laimant's emphysema," and that "smoking and coal dust do not have additive effects," excluded coal mine dust exposure as a cause of claimant's respiratory impairment. Decision and Order at 36; Director's Exhibits 36 at 5-6; 43 at 15-16, 18, 21-24, 28, 34; 53 at 4.

The Department of Labor (DOL) has approved scientific evidence demonstrating that both coal mine dust-induced respiratory impairment and cigarette smoke-induced obstructive respiratory impairments occur through similar mechanisms, and that coal mine dust and smoking have additive effects. *See* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). The DOL recognized, therefore, that coal dust exposure can cause chronic obstructive pulmonary disease, such as emphysema, in a way similar to that in which cigarette smoking causes emphysema. *Id*. The DOL further stated that a doctor's opinion that fails to comport with the DOL position that coal dust exposure can cause a clinically significant obstructive impairment, and produces an

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[13] Moreover, the administrative law judge observed that Dr. Westerfield did not have access to treatment records showing chronic bronchitis "as early as 1992." Decision and Order at 36.

[14] Dr. Westerfield was questioned about his diagnoses of asthma, emphysema and possible bronchitis:

> Q. …I'm talking about irritating or aggravating the condition. Now, do you accept that as a fact, that coal dust can aggravate these conditions?
>
> A. It can aggravate while the individual is exposed to it, yes, sir, much like the asthmatic that goes to church and sits behind a highly perfumed woman can be aggravated such that he will have bronchospasm, and have to leave the service. But when he gets outside into the fresh air, his symptoms resolve. So it's that type of aggravation that I would attribute to coal dust.

Director's Exhibit 43 at 40-43; *see also* Director's Exhibit 36 at 4; Decision and Order at 24; *cf. Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 1998) (physician must adequately explain why coal dust exposure did not exacerbate the miner's condition).

additive effect, may be assigned less probative weight. *See* Decision and Order at 22, 24; 65 Fed. Reg. at 79,942; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26. Additionally, the view that pneumoconiosis does not progress after the cessation of coal mine employment is inimical to the tenets of the Act, as pneumoconiosis "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Finally, the DOL recognizes that coal dust exposure can produce disabling chronic obstructive lung disease, even in the absence of clinical pneumoconiosis demonstrated on x-ray. *See* 65 Fed. Reg. at 79920, 79939, 79944; *Obush*, 24 BLR at 1-125-26.

The administrative law judge properly concluded, therefore, that Dr. Westerfield "explicitly rejected the [above] premises underlying the regulations." Decision and Order at 36. The administrative law judge, therefore, rationally assigned Dr. Westerfield's opinion "little weight" on the issue of legal pneumoconiosis. Decision and Order at 35-36, 37; s*ee* 65 Fed. Reg. at 79,940; *Greene v. King James Coal Mining*, Inc., 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009); *Summers*, 272 F.3d at 473, 22 BLR at 2-280-81.

Lastly, employer challenges the administrative law judge's determination that, while Dr. Selby's medical opinion deserved "some weight," it was "outweighed by the opinion of Dr. Bergen, [as] supported by Drs. Simpao and Baker." Decision and Order at 37. Specifically, employer asserts that "Dr. Bergen's, Dr. Simpao's and Dr. Baker's opinions are too poorly supported to outweigh Dr. Selby's." Employer's Brief at 14, 15. However, the administrative law judge permissibly found that, although Dr. Selby did not deny the additive effects of dust exposure and cigarette smoking, he "never sufficiently addressed why coal dust was not also a factor in the irreversible portion of [claimant's] impairment." Decision and Order at 37; *Barrett*, 478 F.3d at 356, 23 BLR at 2-483-84. We conclude, therefore, that employer's arguments regarding Dr. Selby's opinion are, essentially, a request that the Board reweigh the opinion, which it cannot do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Bizzarri v. Consolidation Coal Co.*, 775 F.2d 751, 753, 8 BLR 2-65, 2-67-68 (6th Cir. 1985). As we have affirmed the administrative law judge's evaluation of the medical opinions of Drs. Bergen, Baker and Simpao, we reject employer's argument that the administrative law judge erred in finding that they outweighed the opinion of Dr. Selby.

In sum, we affirm the administrative law judge's finding that the most probative medical opinion evidence of record establishes legal pneumoconiosis.[15] Consequently,

[15] Employer argues that, because the administrative law judge "improperly found that [c]laimant had established the presence of legal pneumoconiosis," her corresponding findings with respect to disease etiology and disability causation should be vacated and the case remanded for further consideration pursuant to 20 C.F.R. §§718.203(b) and

we affirm the administrative law judge's grant of claimant's request for modification and the award of benefits.

**The Director's Cross-Appeal**
**Commencement Date of Benefits**

The Director appeals the administrative law judge's finding that January, 2004 is the correct date from which benefits commence. In the instant case, the administrative law judge determined that, while she could not determine when claimant first became totally disabled due to pneumoconiosis, the record reflects that claimant was already totally disabled due to pneumoconiosis when he was examined by Dr. Simpao in December, 2004, and that there is no evidence that he was not disabled after December, 2004. Decision and Order at 41.

Where modification is based on the correction of a mistake in fact, claimant is entitled to benefits from the date he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Eifler v. Peabody Coal Co.*, 926 F.3d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In this case, the credited medical evidence establishes only that claimant became totally disabled due to pneumoconiosis at some time prior to the date of Dr. Simpao's December, 2004 examination, and there is no credited evidence that he was not disabled after Dr. Simpao's December, 2004 examination. *See* 20 C.F.R. §725.503(b); *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). The administrative law judge, therefore, properly determined that benefits should commence as of the beginning of the month the claim was filed. However, the record establishes that, this claim was filed in December, 2004, not in January 2004, as found by the administrative law judge. *See* Director's Exhibit 2 at 1, 4. Consequently, the date for the commencement of benefits is modified from January 2004, to the beginning of December 2004, the month and year in which the miner filed his claim. 20 C.F.R. §725.503(b); *Owens*, 14 BLR at 1-49; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

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718.204(c). Employer's Brief at 15. A finding that pneumoconiosis arose out of coal mine employment is, however, subsumed in a finding of legal pneumoconiosis. Claimant need not, therefore, establish that his pneumoconiosis arose out of coal mine employment. *See Kiser v. L & J Equipment Co.*, 23 BLR 1-246 (2006). Further, as employer has not made any specific arguments concerning the administrative law judge's evaluation of the evidence on the issue of disability causation, the argument is insufficiently briefed and we need not consider it. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Accordingly, the Decision and Order Granting the Claimant's Request for Modification and awarding benefits is affirmed in part and modified in part, to reflect the beginning of December 2004 as the commencement date of benefits.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge