U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 17-0442 BLA
and 17-0442 BLA-A

JOHN W. CUTRIGHT	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	
	)	DATE ISSUED: 06/18/2018
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

William S. Mattingly and Melissa M. Robinson (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2014-BLA-05807) of Administrative Law Judge Drew A. Swank rendered on claimant's request for modification of the previous denial of a subsequent claim[1] filed on May 31, 2010, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Administrative Law Judge Richard A. Morgan initially denied benefits on August 14, 2013, finding that claimant invoked the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] that he is totally disabled due to pneumoconiosis, but that employer rebutted the presumption by proving that he does not have pneumoconiosis and that his disability is not caused by pneumoconiosis. Director's Exhibit 40. Claimant appealed the denial to the Board, but then requested that his appeal be dismissed so that he could seek modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 41. The Board dismissed claimant's appeal and remanded the case to the district director, who denied claimant's request for modification on July 10, 2014. Director's Exhibits 42, 51. After claimant requested a hearing, the case was forwarded to the Office of Administrative Law Judges and assigned to Judge Swank (the administrative law judge). Director's Exhibit 52.

The administrative law judge found that claimant has more than fifteen years of employment at underground mines, out of at least twenty-eight years of coal mine employment,[3] and a totally disabling pulmonary impairment pursuant to 20 C.F.R.

[1] This is claimant's fifth claim for benefits. Director's Exhibits 1-4. His most recent prior claim, filed on January 25, 2001, was denied by Administrative Law Judge Richard A. Morgan on December 30, 2003, for failure to establish any element of entitlement. Director's Exhibit 4.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

[3] Claimant's last coal mine employment was in West Virginia. Director's Exhibits 10, 11. Accordingly, the Board will apply the law of the United States Court of Appeals

§718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement since the denial of his prior claim in 2003, pursuant to 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) presumption. The administrative law judge further found that employer failed to rebut the presumption, and that, pursuant to 20 C.F.R. §725.310, claimant therefore established a mistake in a determination of fact in Judge Morgan's 2013 denial of benefits. Accordingly, the administrative law judge granted claimant's request for modification and awarded benefits.

On appeal, employer contends that the administrative law judge erred by allowing claimant to exceed the evidentiary limitations applicable to his request for modification, and in finding that employer did not rebut the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in determining that granting claimant's request for modification rendered justice under the Act. Claimant responds in support of the award of benefits, and the Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal, arguing the administrative law judge did not err by granting claimant's request for modification. Employer has filed a reply brief, reiterating its contentions on appeal. Claimant has also filed a cross-appeal, challenging the administrative law judge's finding that, in attempting to rebut the Section 411(c)(4) presumption, employer established that claimant does not have clinical pneumoconiosis. Employer has filed a response in support of that finding.[4]

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for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] We affirm, as unchallenged on appeal: the administrative law judge's finding that claimant has at least twenty-eight years of coal mine employment, including more than fifteen years of underground coal mine employment; that he has a totally disabling respiratory or pulmonary impairment; and that he invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7, 10, 35.

Because we have affirmed the finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement since the denial of his previous claim, pursuant to 20 C.F.R. §725.309(c). Decision and Order at 6. Employer's argument that the administrative law judge erred in finding a change in an applicable condition of entitlement lacks merit. Employer's Brief at 31-42. Employer notes that claimant established that he was totally disabled in "the prior decision," and contends that "the same finding is not sufficient to establish an element of entitlement previously adjudicated against" claimant. *Id*. at 32. The "prior decision" to which

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).

Evidentiary Limitation on Modification

Modification of a denial of benefits may be granted because of a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). In reviewing the record on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The regulations permit a claimant to submit two affirmative medical reports when he files a claim and one additional affirmative medical report upon a request for modification. 20 C.F.R. §§725.414(a)(2)(i), 725.310(b). However, in *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227-28 (2007), the Board deferred to the Director's reasonable interpretation of 20 C.F.R. §725.414 and §725.310(b) and held that the two regulations work together "to allow a party to submit for the first time in a modification proceeding all of the evidence permitted by each regulation."

Employer argues that the administrative law judge erred by admitting not one but three new affirmative medical reports on claimant's request for modification, allowing him to "backfill" his full complement of evidence. Employer's Brief at 25-29, 31. Employer points out that claimant did not submit any affirmative reports when he filed this claim in 2010, and waited until after Judge Morgan's denial in 2013 to submit three affirmative medical reports with his request for modification. Employer's Brief at 27-29.

Employer's argument is foreclosed by *Rose*. Although employer argues that this case is distinct from *Rose* because claimant sought modification after his claim was denied by Judge Morgan, whereas the claimant in *Rose* sought modification after his claim was denied by the district director, employer has not explained why that distinction matters, and we cannot see why it should. Employer's Brief at 26. Accordingly, we hold that the

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employer apparently refers is Judge Morgan's 2013 denial of the current claim. However, a claimant who files a subsequent claim must demonstrate a change in an applicable condition of entitlement since the denial of "the prior *claim*[.]" 20 C.F.R. §725.309(c) (emphasis added). Judge Morgan denied claimant's prior claim in 2003 for failure to establish any element of entitlement, and claimant has now established a change in an applicable condition of entitlement by proving that he is totally disabled. *See* Decision and Order at 6, 31-35; Director's Exhibit 4.

administrative law judge did not err in admitting claimant's two affirmative case medical reports and an additional medical report on modification.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[5] or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i)-(ii). The administrative law judge determined that employer failed to establish rebuttal by either method, finding that employer failed to prove that claimant does not have legal pneumoconiosis or that he is not totally disabled due to pneumoconiosis.[6] Decision and Order at 11-30, 35-36.

Rebutting the presumed fact of legal pneumoconiosis required employer to prove that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(2)(i)(A). The administrative law judge considered the opinions of Drs. Rasmussen, Cohen, and Sood, who concluded that claimant has legal pneumoconiosis, and the opinions of Drs. Rosenberg, Tuteur, and Zaldivar, who concluded that he does not.[7] All of the physicians agreed that claimant has a mild restrictive impairment due to chest trauma from a car accident in 1954 or 1955 and coronary artery bypass graft surgery in 2004. Director's Exhibits 18, 30, 40; Claimant's

[5] "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). "Clinical pneumoconiosis" consists of "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).

[6] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis.

[7] Dr. Habre also diagnosed legal pneumoconiosis, but the administrative law judge discredited his opinion because his qualifications were not in the record. Decision and Order at 21 & n.27; Director's Exhibit 41 (Dr. Habre's November 10, 2013 report). We affirm that determination, which claimant has not challenged in his cross-appeal. *See Skrack*, 6 BLR at 1-711.

Exhibits 2-3; Employer's Exhibits 1, 3-6, 9-10. They also agreed that he has a totally disabling gas exchange impairment. *Id*.

The physicians disagreed, however, on the cause of claimant's gas exchange impairment. Drs. Rasmussen, Cohen, and Sood attributed it, at least in part, to coal mine dust exposure, and thus diagnosed legal pneumoconiosis. Director's Exhibits 18, 40; Claimant's Exhibits 2-3; Employer's Exhibit 9. In contrast, Drs. Rosenberg, Tuteur, and Zaldivar attributed the gas exchange impairment to claimant's car accident, his coronary artery bypass graft surgery, and the effects of aging. Director's Exhibits 30, 40; Employer's Exhibits 1, 3-6, 10. Dr. Tuteur also attributed it to claimant's heart disease and use of beta blockers. Director's Exhibit 40; Employer's Exhibits 3, 10.

The administrative law judge noted the physicians expressed contrary opinions about "the specific etiology of Claimant's gas exchange abnormality." Decision and Order at 29. He then summarized their opinions, highlighting some of their disagreements, and concluded that employer failed to disprove the existence of legal pneumoconiosis:

> Based on the defects set forth above, the undersigned finds that the evidence is insufficient to establish that Claimant's respiratory impairment is entirely unrelated to coal mine dust exposure. The undersigned notes that, if Claimant could not have relied upon the legal presumption of pneumoconiosis, he may have been unable to meet the requisite burden of proof. The medical opinions affirmatively diagnosing legal pneumoconiosis were also flawed but, because of the rebuttable presumption, these are not necessarily determinative. Nevertheless, the presumption is applicable in this case and Employer has failed to meet its burden of proving the absence of legal pneumoconiosis by a preponderance of the evidence. 20 C.F.R. §718.305(a).

Decision and Order at 30.

Employer argues that the administrative law judge erred by finding that employer failed to rebut the presumed fact that claimant has legal pneumoconiosis without explaining why he discredited the opinions of Drs. Rosenberg, Tuteur, and Zaldivar. Employer's Brief at 43-54. We agree. The administrative law judge found that their opinions were not persuasive because they contained "defects," but it is not apparent from the Decision and Order what defects the administrative law judge identified. Decision and Order at 29-30. After reviewing the administrative law judge's summary of the six physicians' opinions we infer that he found the opinions of Drs. Rasmussen, Cohen, and Sood more persuasive. *Id*. But he determined that their opinions were "also flawed," without identifying the flaws. *Id*. As a result, we are unable to discern the administrative law judge's reasons for finding

the opinions of Drs. Rosenberg, Tuteur, and Zaldivar less credible than the opinions of Drs. Rasmussen, Cohen, and Sood.

Because the administrative law judge did not adequately explain his finding, his decision did not comply with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). We must therefore vacate his determination that employer failed to establish that claimant does not have legal pneumoconiosis, and instruct him to reconsider this issue on remand and set forth his findings in detail, including the underlying rationale for why he credits certain medical opinions over others. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Furthermore, given the administrative law judge's error in weighing the medical opinion evidence regarding the existence of legal pneumoconiosis, we must also vacate his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's totally disabling respiratory impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 35-36.

On remand, the administrative law judge should determine whether employer has affirmatively established the absence of legal pneumoconiosis. Because claimant has invoked the Section 411(c)(4) presumption, it is presumed that claimant has legal pneumoconiosis. 20 C.F.R. §718.305(c)(1); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018). To rebut the presumption, employer must present evidence to persuade the administrative law judge that claimant's impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[8] 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2), (b); *Smith*, 880 F.3d at

[8] Employer argues that the administrative law judge applied an improper standard when he found that employer failed to establish that claimant does not have legal pneumoconiosis, pointing to his determination that "the evidence is insufficient to establish that Claimant's respiratory impairment is *entirely unrelated* to coal mine dust exposure." Decision and Order at 30 (emphasis added); Employer's Brief at 42, 54-58. Although that was a misstatement of employer's burden on rebuttal, we note that in the same paragraph, the administrative law judge correctly stated that "the Act does not require that coal mine dust exposure be the sole cause of a claimant's respiratory impairment." Decision and Order at 30 (citing *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013). Because we have vacated the administrative law judge's finding on other grounds, we need not address whether his misstatement of employer's burden affected his

699. The administrative law judge must evaluate the credibility of the medical opinions in light of the physicians' qualifications, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Because we are remanding this case, we address claimant's argument in his cross-appeal that the administrative law judge erred in finding, based on the weight of the x-ray and medical opinion evidence, that employer rebutted the presumed fact of clinical pneumoconiosis. Claimant's Cross-Petition at 9-11; Decision and Order at 10-28. Claimant contends that the administrative law judge erred in finding that the weight of the x-ray evidence was negative for clinical pneumoconiosis.[9] Claimant's Cross-Petition at 9-11. We disagree.

The administrative law judge considered twelve readings of four x-rays taken on June 11, 2010, November 3, 2010, October 10, 2013, and May 12, 2014. Decision and Order at 14; Director's Exhibits 18, 30, 40, 41, 46, 50; Claimant's Exhibits 1, 4; Employer's Exhibit 1. To weigh the evidence, the administrative law judge ranked the physicians who provided the readings, based on the physicians' "[B]oard-certification, B-reader status, radiology experience and publications related to coal workers' pneumoconiosis and/or with miners, professorships, publications, and affiliations with a sizeable teaching hospital." Decision and Order at 13. The administrative law judge essentially sorted the physicians into four tiers, determining that Drs. Meyer and Tarver were the "best qualified"; that Drs. Alexander, Miller, and Seaman were in the second tier; that Dr. Halbert was in the third tier; and that Drs. Rasmussen, Rosenberg and Zaldivar were the "least qualified," because they were B readers but not Board-certified radiologists.[10] *Id*.

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finding. On remand, the administrative law judge should apply the correct standard, as set forth above, in accordance with 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2), (b).

[9] We affirm, as unchallenged by claimant in his cross-appeal, the administrative law judge's finding that the medical opinion evidence supported a finding that claimant does not have clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). *See Skrack*, 6 BLR at 1-711; Decision and Order at 28.

[10] Drs. Meyer, Tarver, Alexander, Miller, Seaman, and Halbert are dually-qualified as B readers and Board-certified radiologists. Decision and Order at 12-13.

After weighing the interpretations of each x-ray, the administrative law judge found that the June 11, 2010 and November 3, 2010 x-rays were negative for pneumoconiosis, based on negative readings by Dr. Meyer, and that the October 10, 2013 x-ray was negative, based on a negative reading by Dr. Tarver. Decision and Order at 13-15; Director's Exhibits 40, 50. He also found that the May 12, 2014 x-ray was positive for pneumoconiosis, based on a positive reading by Dr. Halbert. Decision and Order at 15; Claimant's Exhibit 4. The administrative law judge declined to give the most recent x-ray the most weight because he found that the majority of the x-rays were negative for pneumoconiosis, and that a majority of the negative readings were provided by the "better qualified physicians." *Id*. at 15. The administrative law judge thus found that the x-ray evidence supported a finding that claimant does not have clinical pneumoconiosis. *Id*.

Claimant argues that the administrative law judge erred, and that the weight of the x-ray evidence was positive for the existence of clinical pneumoconiosis. In claimant's view, the readings of the November 3, 2010 and October 10, 2013 x-rays were in equipoise because equal numbers of dually-qualified physicians provided positive and negative readings of each. Claimant's Cross-Petition at 10. Moreover, claimant contends that the administrative law judge should have found the June 11, 2010 x-ray positive for clinical pneumoconiosis because the conflicting readings of the dually-qualified readers, Drs. Meyer and Alexander, "cancel each other out," and the remaining positive interpretation by Dr. Rasmussen weighs in claimant's favor. *Id*. at 10-11. Claimant also argues that the administrative law judge should have given the most weight to the positive reading of the most recent x-ray, taken on May 12, 2014. *Id*. at 11.

Claimant's arguments lack merit. The administrative law judge was not required to accord determinative weight to the most recent x-ray evidence of record. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988). Nor was he required to find the November 3, 2010 and October 10, 2013 x-rays in equipoise, or the June 11, 2010 x-ray positive for pneumoconiosis. The administrative law judge permissibly took the differences in the physicians' radiological qualifications into account and gave the greatest weight to the readings of Drs. Meyer and Tarver, who read those x-rays as negative for pneumoconiosis.[11] *See Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-300 (2003); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); Decision and Order at 13-15. We therefore affirm the administrative law judge's finding that employer established that claimant does not have clinical pneumoconiosis.

[11] We affirm the administrative law judge's ranking of the physicians based on their radiological qualifications, which claimant has not challenged on appeal. *See Skrack*, 6 BLR at 1-711.

Consequently, if the administrative law judge finds on remand that employer has disproved the existence of legal pneumoconiosis, employer will have rebutted the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. However, if employer fails to establish that claimant does not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must then determine whether employer has rebutted the presumed fact of disability causation by establishing that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. 718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-21 (4th Cir. 2015); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015).

Finally, because we have vacated the administrative law judge's award of benefits, we vacate his finding that granting claimant's request for modification renders justice under the Act. Decision and Order at 5. If the administrative law judge determines on remand that claimant has established entitlement to benefits, he must consider whether granting claimant's request for modification renders justice under the Act before awarding benefits.[12] *See Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 327-28, 25 BLR 2-157,

[12] Employer argues that by submitting three affirmative medical reports on modification, claimant engaged in an improper "piecemeal presentation of evidence" that, in employer's view, is evidence of a lack of diligence or an improper motive that precludes a finding that granting claimant's request for modification would render justice under the Act. Employer's Brief at 27-31. Employer points to no other evidence of a lack of diligence or improper motive, however, and thus its argument lacks merit, given our holding above that claimant permissibly submitted his evidence under *Rose v. Buffalo Mining Co.*, 23 BLR 1-221 (2007).

We also reject employer's contention that, "[p]rior to adjudicating a modification petition on the merits, the ALJ is required to make a threshold determination about the propriety of the petition based upon a 'render justice under the [A]ct' standard." Employer's Brief at 23-25. Nothing in the regulations or case law requires a threshold determination. Although it might make sense to make a threshold determination in cases of obvious bad faith, for example, it does not follow that a threshold determination is appropriate where there is no indication of an improper motive. In such a case, the administrative law judge should first consider the merits. If there is no basis to grant the relief requested in a modification petition, there is no reason to determine whether that relief would render justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (the plain purpose of modification is to vest an adjudicator "with

2-173-74 (4th Cir. 2012); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-33, 24 BLR 2-56, 2-67-68 (4th Cir. 2007).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.").