BRB No. 12-0300 BLA

BONNIE AUSTIN (Survivor of GEORGE W. AUSTIN) Claimant-Respondent v. ACTION COAL COMPANY, INCORPORATED and KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/27/2013 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Parkersburg, West Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington D.C., for employer/carrier.

Michelle S. Gerdano (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/carrier (employer) appeals the Decision and Order Awarding Benefits (10-BLA-5233) of Administrative Law Judge Thomas M. Burke rendered on a miner's subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The miner filed this claim for benefits on February 14, 2006.[1] Director's Exhibit 9.

In a Decision and Order issued on April 8, 2008, Administrative Law Judge Daniel L. Leland found that the medical evidence developed since the denial of the prior claim did not establish that the miner was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Judge Leland therefore determined that the miner failed to establish a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d), and he denied benefits. Pursuant to the miner's appeal, the Board affirmed Judge Leland's finding that the new evidence did not establish a change in the applicable condition of total disability under 20 C.F.R. §725.309(d), and affirmed the denial of benefits. *G.A.* [*Austin*] *v. Action Coal Co.*, BRB No. 08-0546 BLA (Mar. 26, 2009)(unpub.).

The miner timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibit 53. The district director denied modification and the miner requested a hearing, which was held by Administrative Law Judge Thomas M. Burke (the administrative law judge) on June 30, 2011.

In a Decision and Order dated February 24, 2012, which is the subject of the current appeal, the administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Congress reinstated the presumption of Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). Under

[1] The miner filed seven prior claims, all of which were finally denied. His most recent prior claim, filed on January 17, 2002, was denied by the district director on November 13, 2002, because the miner did not establish that he was totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 7. The miner filed this claim on February 14, 2006. He died on June 20, 2010, and his widow is pursuing his claim.

Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and establishes 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. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption, either by disproving the existence of pneumoconiosis, or by establishing that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge credited the miner with "at least 23 years of coal mine employment,"[2] all of which took place underground. Decision and Order at 12. The administrative law judge further found that the evidence submitted on modification, considered with the evidence originally submitted in the subsequent claim, established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), thereby demonstrating a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d). The administrative law judge therefore determined that claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Finding that the miner "met his burden to establish a mistake in a determination of fact by way of the rebuttable presumption set forth at 30 U.S.C. §921(c)(4)," the administrative law judge granted modification and awarded benefits. Decision and Order at 13. Finally, he determined that since the medical evidence did not establish the onset date of the miner's total disability due to pneumoconiosis, the miner was entitled to benefits commencing as of the filing date of his claim, February 14, 2006. *Id*.

On appeal, employer argues that the administrative law judge erred in his analysis of the evidence when he found that the miner was totally disabled, and therefore, erred in determining that claimant invoked the Section 411(c)(4) presumption.[3] Employer further asserts that the administrative law judge did not properly weigh all of the evidence of record in finding a change in the applicable condition of entitlement. In addition,

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 10.

[3] Employer's argument, that the applicability of amended Section 411(c)(4) could be affected by challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law 111-148, in *Florida v. HHS*, 648 F.3d 1235 (11th Cir. 2011) and similar cases, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

employer asserts that the administrative law judge failed to explain his finding of a mistake in a determination of fact, and erred in his determination of the commencement date for benefits. Finally, employer contends that the administrative law judge erred by failing to consider whether granting modification would render justice under the Act. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's argument that the administrative law judge erred in relying on a blood gas study contained in the miner's medical treatment records when he found total disability established. Further, if the Board does not affirm the award of benefits, the Director requests that this case be remanded to the district director so that the Director may fulfill his obligation to provide the miner with a complete pulmonary evaluation.

Employer replies to both claimant's and Director's responses, reiterating its arguments on appeal. In addition, employer contends that the Director waived the complete pulmonary evaluation issue by failing to raise it earlier in the claim proceedings.[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. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 7. Consequently, to obtain review of the merits of his claim, the miner had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d). Additionally, because the miner sought

[4] Employer does not challenge the administrative law judge's finding that the miner had at least twenty-three years of underground coal mine employment. That finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

modification of the denial of his subsequent claim for failing to satisfy the requirements of 20 C.F.R. §725.309, the administrative law judge was required to determine whether the new evidence submitted on modification, considered along with the evidence originally submitted in the current subsequent claim, established a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).

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

Employer argues that the administrative law judge erred in finding that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge noted that two new pulmonary function studies administered in 2006 and initially submitted in the subsequent claim were non-qualifying.[5] The administrative law judge further found that 2009 medical treatment records from Dr. Figueroa, submitted by the miner in support of his modification request, discussed a July 3, 2009 pulmonary function study but did not set forth its values in a manner sufficient to permit a determination of whether the study was qualifying.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that the two blood gas studies initially submitted in the subsequent claim, dated March 14 and April 13, 2006, were non-qualifying. The administrative law judge next considered the results of a blood gas study discussed by Dr. Figueroa in a July 3, 2009 progress report, and he found that this study was qualifying, both at rest and on exercise.[6] Director's Exhibit 53. Although the 2009 blood gas study was contained in a medical treatment record and did not comply with the standards set forth in 20 C.F.R. §718.105 for blood gas studies conducted in connection with a claim for benefits, the administrative law judge found that the study was sufficiently reliable to establish the existence of a totally disabling respiratory impairment. Relying on the 2009 blood gas study as the most recent objective evidence of the miner's condition, the administrative law judge found that the new blood gas study evidence established total disability.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

[6] It was undisputed before the administrative law judge and is undisputed on appeal that the 2009 blood gas study was qualifying.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new opinions of Drs. Mullins and Caffrey. Dr. Mullins, who examined the miner on behalf of the Department of Labor in 2006, considered the pulmonary function and blood gas studies and diagnosed the miner with a "moderate ventilatory impairment." Director's Exhibit 17. Dr. Caffrey reviewed the miner's autopsy report and slides in a March 2, 2011 report submitted by employer on modification, but did not address whether the miner was totally disabled. Employer's Exhibit 1. The administrative law judge found that "neither physician offered an opinion as to whether [the miner] was totally disabled from a pulmonary standpoint." Decision and Order at 10.

Weighing all of the evidence together, the administrative law judge found that "the most recent arterial blood gas study, although nonconforming, produced results sufficiently reliable to establish total disability under the regulations." Decision and Order at 10. The administrative law judge further found that, "although no physician offered an opinion on total disability, their opinions were not inconsistent therewith." *Id*. Specifically, the administrative law judge noted that Dr. Mullins diagnosed a "moderate ventilatory impairment," and that Dr. Figueroa diagnosed "significant hypoxemia," "moderate obstructive airway disease," "moderately deteriorated diffusion capacity," and concluded that the miner lacked the pulmonary capacity to undergo surgery. *Id*. The administrative law judge determined that the 2009 qualifying blood gas study established total disability, and that "Dr. Mullins's report and Dr. Figueroa's progress notes support such a finding." *Id*.

Employer contends that the administrative law judge erred in relying on the 2009 blood gas study, because that study did not comply with the quality standards set forth in 20 C.F.R. §718.105. Employer's Brief at 13-18. The Director responds that the quality standards for medical tests do not apply to hospital or treatment records. The Director argues that, contrary to employer's contention, the administrative law judge "was within his discretion in considering the non-conforming study so long as he found it sufficiently reliable." Director's Brief at 2. We agree with the Director.

The quality standards apply only to evidence developed in connection with a claim for benefits. 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Here, as noted by the administrative law judge, the record reflects that the 2009 blood gas study was performed as part of a series of tests conducted at the Beckley Veterans Administration Medical Center to determine whether the miner was a candidate for surgery for a pulmonary nodule that had recently been detected in his right lung. Director's Exhibit 53. Because the 2009 blood gas study was not generated in connection with the miner's claim for benefits, it is not subject to the quality standards set forth at 20 C.F.R. §718.105. *Stowers*, 24 BLR at 1-92. As the Director notes, the issue before the administrative law judge was whether the 2009 blood gas study was

sufficiently reliable, despite the inapplicability of the quality standards.[7] Therefore, we reject employer's assertion that the 2009 blood gas study could not be considered because it did not comply with the 20 C.F.R. §718.105 standards.

Employer next argues that substantial evidence does not support the administrative law judge's determination that the 2009 blood gas study was sufficiently reliable to support a finding of total disability. Employer's Brief at 16-18. We disagree. The administrative law judge considered employer's argument that the 2009 blood gas study was unreliable,[8] but found no support for that assertion in Dr. Figueroa's progress notes. Specifically, the administrative law judge noted that there was no indication of the existence of an acute illness or cardiac issue at the time of the testing, and he considered Dr. Figueroa's comment that the miner's "main limitation to exercise was ventilatory in nature due to underlying chronic obstructive pulmonary disease." Director's Exhibit 53. Additionally, the administrative law judge found it significant that Dr. Figueroa relied on the 2009 blood gas study to conclude that the miner had "severe hypoxemia," and thus, was a poor candidate for surgery. *Id*. The administrative law judge reasonably considered the circumstances surrounding the administration of the 2009 blood gas study, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we reject employer's allegation of error, and affirm the administrative law judge's discretionary determination that the 2009 blood gas study was sufficiently reliable to establish total disability.

Employer argues further that the administrative law judge failed to consider the contrary, probative evidence before finding total disability established. This argument lacks merit, as the administrative law judge specifically considered the earlier, non-qualifying blood gas studies, but reasonably relied on the most recent, qualifying blood gas study as more reflective of the miner's condition. *See Cooley v. Island Creek Coal*

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[7] The comments to the revised regulations explain that evidence not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by 20 CFR [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[8] Employer did not submit evidence addressing the reliability issue, such as a physician's review of the 2009 progress notes and testing.

Co., 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc); Decision and Order at 10. Further, the administrative law judge found that Dr. Mullins's report, which was based on the earlier objective testing, was not inconsistent with a finding of total disability, as Dr. Mullins diagnosed a moderate ventilatory impairment. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc). Additionally, we reject employer's argument that the administrative law judge was required to consider all of the evidence from the miner's prior claims in assessing whether there was a change in the applicable condition of total disability at 20 C.F.R. §725.309(d). Employer's Brief at 12; Brief in Reply to the Director's Response Brief at 3-4. The administrative law judge was required to determine whether a change in the applicable condition of total disability was established based on the new evidence in the subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

Therefore, we reject employer's allegations of error, and affirm the administrative law judge's determination that the new evidence established total disability and a change in the applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(d). Because claimant established that the miner had at least twenty-three years of underground coal mine employment and that he was totally disabled, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4); Decision and Order at 11.

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

After finding that claimant invoked the Section 411(c)(4) presumption, the administrative law judge noted that the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 12-13. Specifically, the administrative law judge accurately noted that employer stipulated that the miner suffered from pneumoconiosis, and submitted no evidence addressing the etiology of the miner's respiratory impairment. *Id*. We therefore affirm the administrative law judge's determination that employer did not rebut the presumption that the miner was totally disabled due to pneumoconiosis.[9] 30 U.S.C. §921(c)(4).

[9] Since we have affirmed the findings that the miner invoked the Section 411(c)(4) presumption and employer failed to rebut it, we need not address the Director's argument

Basis for Granting Modification, and the Commencement Date of Benefits

The basis for granting modification, whether mistake in fact or change in conditions, affects the date from which benefits commence. If modification is based on a change in conditions, claimant is entitled to benefits as of the month of onset of total disability due to pneumoconiosis, or if that date is not ascertainable, as of the date he requested modification. 20 C.F.R. §725.503(d)(2). If 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).

Employer contends that the administrative law judge erred by failing to explain how claimant established a mistake in a determination of fact under 20 C.F.R. §725.310. The intended purpose of 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 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 administrative law judge's authority to correct mistakes of fact extends to whether "the ultimate fact (disability due to pneumoconiosis) was wrongly decided . . . ." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994).

The administrative law judge found that the miner established a mistake in a determination of fact because he invoked the Section 411(c)(4) presumption and employer failed to rebut it:

> Claimant has met his burden of establishing a mistake in a determination of fact by way of the rebuttable presumption set forth at 30 U.S.C. §921(c)(4). As such, he has met his burden of establishing a total pulmonary disability from a pulmonary condition caused by coal dust exposure. Claimant's request for modification is granted and he is entitled to benefits.

Decision and Order at 13. Since mistake-in-fact modification extends to the ultimate fact of entitlement, we reject employer's argument that the administrative law judge "failed to offer *any* valid explanation" for finding that claimant established a mistake in a

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that Dr. Mullins's 2006 medical report did not satisfy the Director's obligation to provide the miner with a complete pulmonary evaluation.

determination of fact. Employer's Brief at 19 (emphasis added); *see Worrell*, 27 F.3d at 230, 18 BLR at 2-996.

Employer, however, also argues that the administrative law judge's actual analysis of the evidence suggests that he found a change in conditions established since Judge Leland's decision. Specifically, employer argues that the administrative law judge did not find a mistake in Judge Leland's analysis of the 2006 evidence, which did not establish total disability, and he relied on the most recent evidence from 2009 submitted on modification to find that the miner invoked the Section 411(c)(4) presumption. Therefore, employer argues, a change in conditions was established, and the earliest that the miner should have been found entitled to benefits was as of the date he requested modification in July 2009.

Given the circumstances of this case, we agree that the administrative law judge has not adequately explained his finding as to the specific basis for granting modification. In finding that the more recent evidence submitted on modification was entitled to greater weight than the older evidence, and that it established total disability and invocation of the Section 411(c)(4) presumption, the administrative law judge arguably granted modification based on a change in condition. If, as the administrative law judge also found, the medical evidence did not establish when the miner became totally disabled due to pneumoconiosis, the miner would have been entitled to benefits as of the date he requested modification in July 2009. 20 C.F.R. §725.503(d)(2). However, in also finding that there was a mistake as to the ultimate fact, the administrative law judge granted modification based on a mistake of fact, and awarded benefits as of the filing of the claim in February 2006. Because the administrative law judge's decision is unclear as to his basis for granting modification, as related to the date from which benefits commence, we vacate the administrative law judge's commencement date finding, and remand this case for further consideration. *See* 20 C.F.R. §725.503(d). On remand, the administrative law judge must specifically explain his basis for granting modification, and then determine the commencement date for benefits in accordance with 20 C.F.R. §725.503(d).

Justice Under the Act

Finally, employer contends that the administrative law judge erred in failing to specifically address whether granting claimant's request for modification would render justice under the Act. We agree. The modification of a claim does not automatically flow from a finding that a mistake was made in an earlier determination, and should be made only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (holding that the purpose of modification is to "render justice"); *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429

(7th Cir. 2002); *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-106 (6th Cir. 1982). In this case, after finding that a mistake in a determination of fact was established, the administrative law judge failed to render specific findings as to whether reopening the denial of benefits in the miner's claim would render justice under the Act. *See Banks*, 390 U.S. at 464; *Sharpe*, 495 F.3d at 128, 24 BLR at 2-66. In this regard, although the administrative law judge has the authority "to reconsider all the evidence for any mistake of fact," *Worrell*, 27 F.3d at 230, 18 BLR at 2-296, the Board has held that "[an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68, 72 (1999), *citing Wash. Soc'y for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991). Consequently, we vacate the administrative law judge's finding that claimant was entitled to modification pursuant to 20 C.F.R. §725.310, and remand this case for consideration of whether reopening this claim will render "justice under the [A]ct." *Blevins*, 683 F.2d at 142, 4 BLR at 2-108.

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.[10]

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[10] Claimant's request to expedite this appeal is moot, in view of our issuance of this Decision and Order.