BRB No. 02-0622 BLA

MIKE L. KENNEDY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EXPANSION COAL COMPANY	)	DATE ISSUED:
		_____
	)	
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 on Employer's Request for Modification of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge.

Employer appeals[1] the Decision and Order on Employer's Request for

[1] The procedural history of this case is as follows. Claimant filed a claim for benefits on January 16, 1991, Director's Exhibit 1. On January 7, 1993, Administrative Law Judge Samuel J. Smith issued a Decision and Order awarding benefits. Subsequent to an appeal by employer, the Board issued a Decision and Order affirming the award of benefits. *Kennedy v. Expansion Coal Co.*, BRB No. 93-

Modification (00-BLA-0043) of Administrative Law Judge Edward Terhune Miller denying the request for modification and awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] Considering both the newly submitted evidence and the previously submitted evidence, the administrative law judge again found that all of the elements of entitlement were established. The administrative law judge, therefore, denied employer's request for modification and awarded benefits.

On appeal, employer contends that the administrative law judge failed to properly weigh the evidence of record in conjunction with its request for modification. Specifically, employer contends that the administrative law judge erred in several respects: in finding the existence of pneumoconiosis established through the medical opinion evidence; in failing to weigh all relevant evidence in a manner consistent with the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); in failing to provide an affirmable basis for crediting the opinion of Dr. Rasmussen over the contrary opinions of record; and in failing to address fully the issue of whether claimant's totally disabling respiratory impairment was due to pneumoconiosis.[3] Employer also argues that the case should be reassigned to another administrative law judge on remand for a *de novo* review of the evidence because of Judge Miller's demonstrated bias against the employer's right to modification. Claimant responds, urging affirmance of the award of benefits.[4] The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has not filed a brief in this appeal.

0963 BLA (Oct. 27, 1994)(unpub.). The decisions of the administrative law judge and the Board were subsequently affirmed by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. *Expansion Coal Co. v. Kennedy*, 166 F.3d 1213, 1998 WL 840 (6th Cir. 1998). On February 23, 1999, employer filed a request for modification. On October 10, 2002, the administrative law judge issued the Decision and Order denying employer's request for modification and awarding benefits from which employer now appeals.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001 and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The administrative law judge's determination that claimant suffered from a totally disabling respiratory impairment is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Claimant filed a cross-appeal on June 24, 2002, which was assigned case number 02-0622 BLA-A. On September 6, 2002, the Board granted the claimant's request to withdraw his cross-appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification of an award of benefits on the grounds of either a change in conditions or a mistake in a determination of fact.[5] Moreover, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that if a party merely alleges that the ultimate fact was wrongly decided, the administrative law judge may accept this contention and modify the final order accordingly, *i.e.*, there is no need for a smoking gun factual error, changed conditions or startling new evidence. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994), *citing Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Employer first contends that just because "the new evidence" submitted to the district director together with his petition for modification was available at the time of the initial hearing, the administrative law judge was not justified in refusing to consider whether the new evidence demonstrated a mistake in fact in the prior determination. Rather, employer asserts it had every right to submit new evidence in conjunction with its modification request and that the administrative law judge was obligated to consider that evidence in determining whether a mistake in fact was made in the prior award of benefits. Contrary to employer's argument, the record shows that the administrative law judge recognized the employer's right to have all newly developed evidence considered in conjunction with a request for modification, even if that evidence could have been developed and produced at the initial hearing; the administrative law judge engaged in a *de novo* review of all the evidence of record in determining whether a basis for modification had been established. Decision and Order at 5-21.[6] Accordingly, we reject employer's assertion that the

[5] This case involves a request for modification filed pursuant to 20 C.F.R. §725.310 (2000), but not pursuant to the revised regulation at 20 C.F.R. §725.310, which is applicable only to claims filed after January 19, 2001, *see* 20 C.F.R. §725.2(c).

[6] Although the administrative law judge stated that the opinions of Drs. Branscomb, Castle and Garzon did "not differ significantly, for the most part, from the opinions and ultimate conclusions of the five doctors previously engaged by

administrative law judge was prejudiced against employer and failed to consider employer's new evidence in determining whether employer had established a mistake in fact.

Employer next argues that the administrative law judge erred in not considering the x-ray evidence and medical opinion evidence together pursuant to *Compton*, *supra* in finding that the existence of pneumoconiosis was established. Employer also contends that the administrative law judge erred in determining that claimant established the existence of pneumoconiosis based solely on the opinion of Drs. Rasmussen, while improperly discounting the contrary opinions of Drs. Branscomb, Garzon, and Castle. Director's Exhibit 18; Claimant's Exhibit 4. Specifically, employer contends that the administrative law judge provided no rational basis for crediting Dr. Rasmussen's opinions over the contrary evidence of record, and asserts that such a failure violates the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of the findings of fact and conclusions of law and the basis therefor. Instead, employer contends that the new opinions of Drs. Branscomb, Garzon and Castle, all of whom concluded that claimant did not suffer from pneumoconiosis, Employer's Exhibits 1, 4, are more credible than the opinion of Dr. Rasmussen, based on their credentials and the completeness of the underlying documentation upon which they relied. Likewise, employer argues that the previously submitted opinions of Drs. Fino, Dahhan, Vuskovich and Anderson, all of whom concluded that claimant did not suffer from pneumoconiosis, Director's Exhibits 30, 31, 40; Employer's Exhibits 3, 4, 9, are also entitled to greater weight than the opinion of Dr. Rasmussen.

We reject employer's argument that the administrative law judge should have weighed the x-ray and medical opinion evidence together pursuant to the holding of the United States Court of Appeals for the Fourth Circuit in *Compton*, *supra*, in this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. That court has recognized that 20 C.F.R. §718.202(a) contains four district provisions to establish the existence of pneumoconiosis. *Eg*., *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR (6th Cir 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

In considering the medical opinion evidence as to the existence of pneumoconiosis, the administrative law judge found that Dr. Rasmussen's opinion, finding the existence of pneumoconiosis, was the best reasoned opinion of record.

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[e]mployer[,]" Decision and Order at 18, the administrative law judge nevertheless considered and discussed extensively the probative value of the new opinions. Decision and Order at 18-21.

The administrative law judge found that the newly submitted opinion of Dr. Branscomb, (that a distinction between the effects of coal dust exposure and cigarette smoking can be made because the effects of coal mine dust are restrictive, while the effects of smoking are obstructive) was entitled to little probative weight because it ran afoul of the holdings of the United States Court of Appeals for the Fourth Circuit in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) and *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Decision and Order at 19. The administrative law judge found Dr. Castle's opinion, that claimant did not suffer from pneumoconiosis, entitled to little weight because Dr. Castle failed to fully explain the basis of his conclusions and because his generalizations regarding the alleged invalidity of several tests of record were not helpful. Decision and Order at 19; Employer's Exhibit 14. Regarding Dr. Garzon's opinion, that claimant did not suffer from clinical or legal pneumoconiosis, the administrative law judge found that it was entitled to little weight because Dr. Garzon failed to explain fully his conclusions or relate them to particular objective evidence. The administrative law judge also noted: that Dr. Garzon was not a pulmonary expert; that there was no indication he had reviewed any of claimant's medical records; and that various aspects of Dr. Garzon's opinion were questioned by Dr. Castle. Accordingly, the administrative law judge determined that the new medical opinions failed to show that a mistake in the prior finding of pneumoconiosis had been made. This was rational. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985).

Employer's argument is tantamount to a request to reweigh the evidence which the Board is not empowered to do. *Anderson*, *supra*; *Worley*, *supra*. Where the record reflects that that administrative law judge has carefully considered all of the evidence, the Board cannot substitute its judgment for that of the administrative law judge. *Knuckles v. Director, OWCP*, 869 F.2d 996, 998, 12 BLR 2-217, 2-219 (6th Cir. 1989). The administrative law judge, as fact-finder, must determine the credibility of a medical report, *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). The administrative law judge found that the credibility of Dr. Branscomb's opinion was undermined by the doctor's view that pneumoconiosis does not cause an obstructive impairment, *see Warth*, *supra*. Although the doctor did not specifically say that pneumoconiosis never causes an obstructive impairment, we need not decide whether Dr. Branscomb's opinion was stated in such a way that the Fourth Circuit would find it less credible in accord with *Stiltner*, because the case at bar arises within the jurisdiction of the Sixth Circuit. That court accords the administrative law judge broad discretion in making credibility determinations, *e.g.*, *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002). The administrative law judge further found that the credibility of Dr.

Branscomb's opinion was questionable because Dr. Branscomb could not unequivocally diagnose a totally disabling respiratory impairment, despite the virtual consensus among the physicians that claimant had a totally disabling respiratory impairment and because Dr. Branscomb peremptorily dismissed the findings of the medical literature upon which Dr. Rasmussen relied, showing that pneumoconiosis causes both restrictive and obstructive impairments. Contrary to employer's argument, this was rational. *See Anderson*, *supra*; *Worley*, *supra*; *Brown*, *supra*. Hence, we disagree with our dissenting colleague's view that the case must be remanded for the administrative law judge to reconsider Dr. Branscomb's opinion in light of *Stiltner*.

We likewise reject our dissenting colleague's view that the administrative law judge must also reconsider the opinions of Drs. Fino and Dahhan in light of *Stiltner.* Initially, we note that Administrative Law Judge Samuel J. Smith's determination that Dr. Rasmussen's opinion outweighed the opinions of Drs. Fino and Dahhan as well as the opinions of Drs. Vuskovich, Anderson and Lane was affirmed by both the Board and the Sixth Circuit.

On modification, the administrative law judge considered the previously submitted evidence in conjunction with the evidence submitted in support of modification and found that Dr. Rasmussen, who concluded that claimant suffered from pneumoconiosis, Director's Exhibits 18, 40, offered the most credible opinion of record because it was the best supported opinion and because Dr. Rasmussen was claimant's treating physician. Decision and Order at 20. This was rational. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993)("opinions of treating physicians are entitled to greater weight than those of non-treating physicians"); *accord. Groves*, *supra*.

In addition to finding that the previously submitted opinion of Dr. Fino, Employer's Exhibit 4, was entitled to little weight because the physician's "categorical conclusion that the absence of restrictive effect" was contrary to the holdings in *Warth* and *Stiltner*, Decision and Order at 21, the administrative law judge also found the reliability of Dr. Fino's opinion questionable as the physician failed to address the issue of legal pneumoconiosis. Decision and Order at 21, *see* 20 C.F.R. §718.201. Similarly, while the administrative law judge found that the previously submitted opinion of Dr. Dahhan, Director's Exhibits 31, 35, was in "stark conflict with the rubric of *Warth*," the administrative law judge also noted that Dr. Dahhan did not take the definition of legal pneumoconiosis into account when discussing the characteristics of the disease and did not provide a reasoned opinion because he did not sufficiently disclose the basis for his findings. Decision and Order at 21. Regarding Dr. Vuskovich's opinion, Employer's Exhibit 9, the administrative law judge found it entitled to little weight because it was inconsistent with the credible findings and opinions by all of the physicians of record and further

because Dr. Vuskovich failed to provide explicit reasoning for his conclusions. Decision and Order at 21. Lastly, the administrative law judge found the opinion of Dr. Anderson diagnosing the absence of pneumoconiosis, Employer's Exhibit 3, was "tautological and unpersuasive" as the physician failed to provide a basis for his conclusions. Decision and Order at 21. Accordingly, the administrative law judge found that the previously submitted medical opinions considered in conjunction with the new evidence failed to support a finding of pneumoconiosis. This was rational. *Cornett*, *supra*; *Clark*, *supra*; *Lucostic*, *supra*; *Peskie*, *supra*; *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Anderson*, *supra*.

Our dissenting colleague articulates the view that the administrative law judge erred in concluding that the opinions of Drs. Fino and Dahhan ran afoul of the holdings in *Stiltner* and *Warth.* Dr. Fino specifically indicated that "in this case there is no restriction, but pure obstruction." Employer's Exhibit 4. The physician further stated that such a conclusion "argues against" a finding of pneumoconiosis because pneumoconiosis "causes a restrictive ventilatory defect, not an obstructive ventilatory defect." Employer's Exhibit 4. Dr. Dahhan indicated that "pulmonary disability" due to coal mine dust exposure is "manifested by restrictive impairment." Director's Exhibit 35. As was the case with the newly submitted opinion of Dr. Branscomb, *see discussion, supra*, we need not decide whether these opinions were stated in such a way that the Fourth Circuit would find them less credible in accordance with the holdings in *Stiltner* and *Warth.* Rather, the basis for our review of these opinions is whether the administrative law judge has abused his discretion in according the opinions less weight. We conclude that no such abuse of discretion has occurred in the analysis of the opinions of Dr. Fino and Dr. Dahhan. Accordingly, we affirm the administrative law judge's determination that employer has failed to establish a mistake in the prior finding that claimant established the existence of pneumoconiosis based on the medical opinion evidence of record as the administrative law judge engaged in a thorough review of all the relevant medical opinion evidence, both old and new.

Employer also contends that the administrative law judge erred in not finding that the opinions of Drs. Branscomb, Garzon and Castle established that smoking, not pneumoconiosis was the cause of claimant's total disability, particularly when Dr. Castle expressly stated that even if claimant had pneumoconiosis, it would not have been the cause of claimant's disability.

In finding that disability causation was established, the administrative law judge made the same credibility determinations which we discussed *supra*; he relied on the opinion of Dr. Rasmussen, that coal dust exposure was at least a major contributing factor to claimant's totally disabling respiratory impairment, as he found

it better reasoned than the other opinions of record. This was rational. *See Anderson*, *supra*; *Clark*, *supra*; *Lucostic*, *supra*; *Peskie*, *supra*; *Cooper*, *supra*; *York*, *supra*. We will not reweigh the evidence or substitute our judgment for that of the administrative law judge. *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 606, 22 BLR 2-288 (6th Cir. 2001). Accordingly, we affirm the administrative law judge's finding that employer failed to establish that a mistake was made in the determination that claimant established disability causation. The administrative law judge's finding that claimant was totally disabled due to pneumoconiosis is, accordingly, affirmed. *See* 20 C.F.R. §718.204(c).

Finally, employer contends that the case should be reassigned to a new administrative law judge on remand because employer was biased against employer's right to pursue modification. This contention is rendered moot by our decision to affirm the administrative law judge's decision. Moreover, even if remand of the case had been warranted, we would not have remanded it to a new administrative law judge because employer did not prove bias on the part of the administrative law judge. While the administrative law judge noted his concern with the potential for abuse of the modification procedure, he nonetheless recognized employer's right to request modification and his obligation to consider all of the evidence of record. The administrative law judge's criticism of the current state of the law of modification cannot be reasonably construed as a demonstration of bias against employer. Decision and Order at 2-5; *Worrell*, *supra*; *Jessee*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Employer's Request for Modification denying employer's request for modification and awarding benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring in part and dissenting in part:

I must respectfully dissent from my colleagues' decision to affirm the award of benefits. I agree that the administrative law judge need not weigh together all evidence in determining whether the existence of pneumoconiosis has been established pursuant to the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). As my colleagues stated, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has continued to adhere to the view that the methods for establishing the existence of pneumoconiosis found at Section 718.202(a)(1)-(4) are distinct and alternative, rather than cumulative. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 200); *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*); *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*). Accordingly, the failure of the evidence to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), does not preclude a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4). I therefore concur with my colleagues in rejecting employer's assertion in this regard.

I disagree, however, with my colleagues' view that the administrative law judge's finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4) may be affirmed. It is my view that the administrative law judge's rejection of the opinions of Drs. Branscomb, Fino and Dahhan because they run afoul of the holdings in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) and *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) is erroneous.

In *Warth*, the Fourth Circuit held that medical opinions based on the assumption that obstructive disorders cannot be caused by coal mine employment are inimical to the Act since pneumoconiosis is defined, *inter alia*, as a chronic lung disease or impairment arising out of coal mine employment. *See Warth*, 60 F.3d at 174, 19 BLR at 2-269. The Fourth Circuit later clarified its position in *Warth* by holding that opinions which are based on a thorough review of all of the medical evidence of record, rather than an assumption that coal mine employment can never cause chronic obstructive pulmonary disease, are not hostile to the Act and may be relied on by the administrative law judge to find the existence of a respiratory impairment arising out of coal mine employment. *See Stiltner* 86 F.3d 337, 341, 20 BLR at 2-255.

A review of the opinions in question shows that each physician specifically focused on claimant's condition and did not express the unqualified opinion that obstructive disorders cannot be caused by coal mine employment. Dr. Branscomb opined that claimant did not suffer from any coal mine employment related disease and exhibited "signs, symptoms, findings and test values [that] are absolutely typical of one of the most common diseases in the general population, chronic obstructive pulmonary disease due to cigarette smoking." Director's Exhibit 79. Dr. Branscomb

at no point stated that obstructive disorders could not be caused by coal mine employment. Dr. Fino indicated that claimant did not suffer from pneumoconiosis and that he suffered from a totally disabling respiratory impairment due to smoking. Employer's Exhibit 4, Director's Exhibit 40. While Dr. Fino indicated that in this case there is "no restriction but pure obstruction," at no point did Dr. Fino specifically preclude the possibility that an obstructive defect might cause chronic obstructive pulmonary disease. Dr. Dahhan found that claimant suffered from no coal mine employment related disease and that claimant suffered from chronic obstructive lung disease due to a thirty-pack year smoking history. Director's Exhibit 31. Like Drs. Branscomb and Fino, however, Dr. Dahhan made no statement precluding the possibility that an obstructive defect might, in other circumstances, cause chronic obstructive pulmonary disease. It is therefore my view that the administrative law judge erred in rejecting the opinions of Drs. Branscomb, Dahhan and Fino as running afoul of the holdings in *Stiltner* and *Warth* since none of these physicians categorically ruled out the possibility of an obstructive impairment causing chronic obstructive pulmonary disease. *See Stiltner*, *supra*; *Warth*, *supra*. Thus, while I concur with my colleagues' holdings regarding the administrative law judge's analysis of the remainder of the opinions on the existence of pneumoconiosis, it is my view that because the administrative law judge has erred in concluding that the opinions of Drs. Branscomb, Fino and Dahhan run afoul of the *Stiltner/Warth* standard, the administrative law judge's weighing of the medial opinion evidence is tainted and the case requires remand for reconsideration of the evidence on this issue.

Further, because I would vacate the administrative law judge's finding of the existence of pneumoconiosis at Section 718.202(a)(4), I would also vacate the administrative law judge's finding that disability causation was established pursuant to 20 C.F.R. §718.204(c). I would instruct the administrative law judge that, if reached on remand, he must again consider whether the evidence establishes disability causation. 20 C.F.R. §718.204(c).

Finally, while I believe that a remand of this case is required, I do not believe that reassignment to another administrative law judge is necessary. I believe that employer has failed to affirmatively demonstrate bias on the part of the administrative law judge. For that reason, I would decline to reassign this case to another administrative law judge. *See* 20 C.F.R. §725.352; *Cochran v. Consolidation Coal Co*., 16 BLR 1-101, 1-107-08 (1992); *Zamora v. C.F. & I. Steel Corp*., 7 BLR 1-568, 1-572 (1984).

Accordingly, I would affirm the administrative law judge's Decision and Order on Employer's Request for Modification in part, vacate the finding in part, and remand the case to the administrative law judge for further consideration.

ROY P. SMITH
Administrative Appeals Judge