BRB No. 04-0647 BLA

ELDON K. NEWPORT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SAM DAUGHERTY/DAUGHERTY TRUCKING COMPANY	)	
	)	
and	)	
	)	
UNITED STATES FIDELITY & GUARANTY	)	DATE ISSUED: 05/26/2005
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Approval of Modification Request Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Herbert B. Williams (Stokes, Rutherford, Williams, Sharp & Davies, PLLC), Knoxville, Tennessee, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 appeals the Decision and Order Approval of Modification Request Award of Benefits (02-BLA-0400) of Administrative Law Judge Richard T. Stansell-Gamm in a miner's 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).[1] Initially, the administrative law judge credited claimant[2] with "just over 27 years of coal mine employment." Decision and Order at 6. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* at 25. Therefore, the administrative law judge found that claimant established a change in

[1]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.

[2]Claimant is Eldon K. Newport, the miner, who filed his claim for benefits on October 15, 1990. Director's Exhibit 1. Administrative Law Judge E. Earl Thomas denied benefits on May 10, 1994 because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 106. On June 7, 1994, claimant filed a petition for modification, which was eventually denied by Judge Jeffrey Tureck. Director's Exhibits 107, 124. Claimant appealed, and the Board vacated Judge Tureck's denial of benefits. Director's Exhibits 126, 131. On remand, Judge Tureck again denied modification on February 28, 1997 because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 133. Claimant appealed, and while his appeal was pending before the Board, he filed a petition for modification on May 26, 1997 with the district director. Director's Exhibits 134, 136. As a result, the Board dismissed claimant's appeal and remanded the case to the district director. Director's Exhibit 137. On June 6, 1999, Judge Tureck denied claimant's second modification request, and claimant appealed. Director's Exhibits 158, 159. On appeal, the Board affirmed Judge Tureck's denial of benefits because the evidence did not establish the presence of pneumoconiosis. Director's Exhibit 162. Claimant filed two motions for reconsideration, which the Board denied on September 27, 2000 and December 20, 2000. Director's Exhibits 163, 165, 166, 168. On January 17, 2001, claimant filed his third petition for modification, which the district director denied. Director's Exhibits 169, 188. Thereafter, claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 189.

conditions pursuant to 20 C.F.R. §725.310 (2000).[3] *Id.* Considering all of the evidence in the record, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). *Id.* at 36-41. Accordingly, benefits were awarded on modification, commencing November 2000. *Id.* at 42.

On appeal, employer asserts that the administrative law judge erred in his interpretation and application of *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000)[4] to the instant case to support a finding of a change in conditions and entitlement on the merits. Employer's Brief at 6-15. Specifically, employer alleges that the administrative law judge erred in applying the *Cornett* court's holdings, regarding the sufficiency of the reasoning of the opinions of Drs. Baker and Fino, to determine the weight to be accorded to these same physicians' opinions in the instant case. *Id.* Claimant has not responded to employer's appeal of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge improperly applied *Cornett* in the instant case.[5] Director's Brief at 1.

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).

To establish a change in conditions, an administrative law judge must determine if the new evidence, considered in conjunction with the old evidence, is sufficient to

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[3]Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.310 in the new regulations, these revisions only apply to claims filed after January 19, 2001, and thus do not apply to the instant case.

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Tennessee. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[5]We affirm the administrative law judge's finding of "just over 27 years of coal mine employment" and his finding that claimant failed to demonstrate a change in conditions at 20 C.F.R. §718.202(a)(1)-(a)(3), as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

establish at least one of the elements of entitlement that defeated entitlement in the prior decision. *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Administrative Law Judge Jeffrey Tureck previously denied benefits because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 158. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

Employer asserts that the administrative law judge improperly applied *Cornett* to find that claimant has established the existence of legal pneumoconiosis and a change in conditions. In considering whether claimant established legal pneumoconiosis and, therefore, a change in conditions, the administrative law judge conducted two separate reviews of the newly submitted medical opinion evidence of Drs. Baker, Sullivan, and Fino.[6] In his first discussion, the administrative law judge did not apply *Cornett* to the instant case and found the evidence insufficient to establish the existence of legal pneumoconiosis. In his second discussion, the administrative law judge applied *Cornett* and found the evidence sufficient to establish the existence of legal pneumoconiosis and a change in conditions.

In his first analysis of the newly submitted medical opinion evidence by Drs. Baker, Sullivan, and Fino,[7] the administrative law judge stated that "he would give

[6]The administrative law judge permissibly found Dr. Narula's opinion, that claimant's coal mine employment "may have very well contributed to his underlying lung disease," to be equivocal. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *see Church v. Eastern Assoc. Coal Corp.*, 21 BLR 1-51, 1-56 (1997), *rev'g in part and aff'g in part on recon.*, 20 BLR 1-8 (1996). None of the parties has challenged the administrative law judge's discrediting of Dr. Narula's opinion.

[7]Dr. Baker found that claimant's obstructive airway disease is due to his coal dust exposure. Director's Exhibit 181; Claimant's Exhibits 6, 14. Dr. Sullivan opined that one cause of claimant's severe obstructive airway disease is his coal dust exposure. Director's Exhibit 181; Claimant's Exhibit 13. Dr. Fino found that claimant does not suffer from an occupationally acquired pulmonary condition. Director's Exhibit 187; Employer's Exhibits 2, 4. Dr. Narula stated that claimant's coal mine employment "may have very well contributed to his underlying lung disease." Claimant's Exhibit 11. After reviewing the x-ray and CT scan evidence, Dr. Wheeler found no evidence of pneumoconiosis and stated that the conditions seen on claimant's x-rays were not caused by coal dust exposure. Employer's Exhibits 3, 1 at 8, 10, 24.

diminished probative value to the conclusions of Dr. Baker and Dr. Sullivan because neither doctor provided an explanation, or reasoning, for their diagnosis." Decision and Order at 21. Conversely, the administrative law judge noted that Dr. Fino "examined the potential relationship between [claimant's] exposure to coal dust and his present obstructive pulmonary impairment." *Id.* at 22. Therefore, the administrative law judge stated that he would have accorded greater probative weight to Dr. Fino's detailed opinion over "the unexplained, contrary conclusions by Drs. Baker and Sullivan." *Id.*

Moreover, the administrative law judge stated that even if he had found Dr. Sullivan's opinion to be reasoned, he would have found that "the seemingly varying nature of [Dr. Sullivan's] coal workers' pneumoconiosis diagnosis interjects sufficient equivocation to diminish its probative value." *Id.* The administrative law judge noted that Dr. Sullivan did not make a diagnosis of pneumoconiosis during the first year and a half that he treated claimant and that when he initially diagnosed pneumoconiosis, he stated it was probable. *Id.* The administrative law judge further noted that although Dr. Sullivan became more certain of his view about black lung disease by 2001 and 2002,[8] he diagnosed only chronic bronchitis and emphysema, with no mention of coal workers' pneumoconiosis, in his last three treatment notes of record dated May 13, 2002, August 27, 2002, and February 3, 2003. *Id.* at 22-23.

Thus, the administrative law judge stated:

> In light of the above analysis, before the Benefits Review Board and most U.S. Circuit Courts of Appeal, I would find that the preponderance of the more probative medical opinion, represented by Dr. Fino's assessment, does not support a finding that [claimant] has legal pneumoconiosis. . . . Consequently, I would have determined that since neither the preponderance of the chest x-ray evidence nor probative medical opinion established the presence of either clinical or legal pneumoconiosis, [claimant] failed to prove a change in condition. Likewise, considering all the evidence in the record, I would not have found a mistake of fact in the prior adjudication. Accordingly, I would have denied [claimant's] modification request.

[8]The administrative law judge noted that Dr. Sullivan "typically presented [claimant's] pulmonary diagnosis as chronic bronchitis, emphysema and coal workers' pneumoconiosis" in his treatment notes in 2001 and 2002. Decision and Order at 22.

Id. at 23.

In his second analysis of the newly submitted medical opinion evidence by Drs. Baker and Fino,[9] the administrative law judge applied *Cornett*, and determined that he could not dismiss Dr. Baker's opinion as poorly reasoned because this physician "provided at least as much 'reasoning' as Dr. Baker and Dr. Vaezy did in the *Cornett* case." *Id.* at 24. The administrative law judge reasoned that the *Cornett* court's statement that Dr. Baker explained that "there is sufficient objective and clinical evidence to justify a diagnosis of coal workers' pneumoconiosis notwithstanding a negative x-ray" compelled him to find the diagnosis of legal pneumoconiosis by Dr. Baker, who supplied similar objective evidence on claimant in this case, to be legally sufficient. *Id*. Moreover, based on the court's reasoning in *Cornett*, the administrative law judge concluded that "Dr. Fino's opinion has diminished probative value." *Id.* at 25. In doing so, the administrative law judge focused on the *Cornett* court's statement that the administrative law judge failed to consider that Dr. Fino used the more restrictive medical definition of pneumoconiosis when this physician found that Cornett's obstructive lung disease was due solely to cigarette smoking, because the pulmonary function tests were not consistent with fibrosis, as would be expected in simple coal workers' pneumoconiosis. *Id.* at 24. The administrative law judge stated:

> By attempting to provide a rational explanation in objective medical terms, based on his understanding of pulmonary functions and the interaction of coal dust with lung tissue, Dr. Fino trips over the *Cornett* court's concern that such an explanation sounds too much like clinical pneumoconiosis.

Id. at 25. Therefore, the administrative law judge concluded that "based on the more probative evidence" of Dr. Baker, claimant has proven that he has legal pneumoconiosis and a change in conditions since the previous denial of his claim. *Id.*

Employer asserts that the administrative law judge erred in applying *Cornett* to determine that Dr. Baker's finding, that claimant has legal pneumoconiosis, is entitled to greater probative value than Dr. Fino's explanation of why claimant does not have legal

[9]The administrative law judge found that the Sixth Circuit court's opinion in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) does not allow him to dismiss Dr. Sullivan's opinion because it is poorly reasoned. Decision and Order at 24. However, the administrative law judge stated that *Cornett* "does not alter [his] earlier assessment that Dr. Sullivan's opinion still suffers loss of probative value due to the equivocation associated with his pneumoconiosis diagnosis." *Id.* at 25.

pneumoconiosis. Employer's Brief at 9-13. The Director maintains that the administrative law judge has misread *Cornett*. Director's Brief at 1. In particular, the Director points out that the Sixth Circuit in *Cornett* did not hold that Dr. Baker's opinion was reasoned and documented. *Id.* Rather, the Director asserts that the court "merely held that the ALJ erred by concluding that Dr. Baker based his diagnosis of pneumoconiosis solely on an x-ray and the history of dust exposure." *Id.*

The assertions of employer and the Director have merit. Regarding Dr. Baker's opinion, contrary to the administrative law judge's findings, none of the court's statements in *Cornett* require this administrative law judge to find Dr. Baker's opinion to be reasoned. The *Cornett* court was admonishing the administrative law judge for overlooking the documentation and reasoning Dr. Baker supplied in his report in that case.[10] The court was not implying that Dr. Baker's opinion, in future cases, should be considered reasoned based on their decision in *Cornett.* Because the documentation and reasoning a physician supplies with a report in one case may differ from that submitted in another case, an administrative law judge, as fact-finder, can only determine whether a physician's opinion is reasoned and documented based on the record before him. Accordingly, we hold that the administrative law judge misapplied *Cornett* to find that claimant established the existence of legal pneumoconiosis and demonstrated a change in conditions based on Dr. Baker's report.

Regarding Dr. Fino's report, the *Cornett* court stated that the administrative law judge did not consider whether Dr. Fino, by attributing Cornett's obstructive lung disease solely to cigarette smoking because the pulmonary function tests were not consistent with "fibrosis," was using the more restrictive medical definition when he determined that Cornett did not suffer from the disease. Employer states the same concern is not evident in the instant case because Dr. Fino "says nothing about fibrotic changes." Employer's Brief at 10.

[10]In *Cornett*, the Sixth Circuit court found that by rejecting the opinions of Drs. Baker and Vaezy as poorly reasoned, the administrative law judge mischaracterized these physicians' opinions in critical respects. First, the court stated that, contrary to the administrative law judge's finding, Drs. Baker and Vaezy did not base their finding of coal workers' pneumoconiosis on their x-ray interpretations and Cornett's coal mine employment history, but rather the court noted that these physicians also considered Cornett's physical examination, his smoking history, and his pulmonary function studies. *Cornett*, 227 F.3d at 575-76, 22 BLR at 2-120. Second, the court stated that the administrative law judge erred by finding the opinions of Drs. Baker and Vaezy to be insufficient because neither physician opined that coal dust was the *only* cause of Cornett's current respiratory problems. *Cornett*, 227 F.3d at 576, 22 BLR at 2-122.

In the instant case, Dr. Fino, in his opinion dated October 10, 2001, quoted the clinical and legal definitions of pneumoconiosis. Director's Exhibit 187 at 13. In his October 2001 report and during his deposition, Dr. Fino thoroughly explained why he found that claimant did not suffer from an occupationally acquired pulmonary condition from coal dust exposure. Director's Exhibit 187 at 14; Employer's Exhibit 2 at 7-10. The administrative law judge noted in his first analysis of the medical evidence that Dr. Fino explained how he concluded that the obstructive defects identified in claimant's pulmonary function studies were inconsistent with a coal dust-related pulmonary obstruction. Decision and Order at 22. Moreover, in considering whether "Dr. Fino's opinion might be too focused on clinical pneumoconiosis," the administrative law judge stated that "the definition of legal pneumoconiosis requires an actual and significant connection between the pulmonary condition and coal dust exposure." *Id.* Therefore, in his initial analysis of the evidence, the administrative law judge concluded that "an opinion, such as Dr. Fino's assessment, that examines in detail both the nature and extent of the requisite connection [between claimant's pulmonary condition and coal dust exposure] is exceptionally probative on the issue of legal pneumoconiosis." *Id.* Notwithstanding his earlier conclusion, after reviewing *Cornett*, the administrative law judge accorded diminished weight to Dr. Fino's opinion. *Id.* Specifically, the administrative law judge found that in "attempting to provide a rational explanation in objective medical terms, based on his understanding of pulmonary functions and the interaction of coal dust with lung tissue, Dr. Fino trips over the *Cornett* court's concern that such an explanation sounds too much like clinical pneumoconiosis." *Id.* However, given that Dr. Fino's explanation for not finding the existence of legal pneumoconiosis in the *Cornett* case -- that the pulmonary function tests were not consistent with fibrosis -- is not present in the instant case, it is unclear, without further elaboration, what in *Cornett* and in Dr. Fino's opinions, caused the administrative law judge to change his mind. Therefore, we remand this case for the administrative law judge to reconsider his determination that Dr. Fino's opinion is entitled to "diminished probative value" in light of *Cornett.*

In light of the above-referenced errors, we vacate the administrative law judge's findings of the existence of legal pneumoconiosis pursuant to Sections 718.201(a)(2) and 718.202(a)(4) and a change in conditions pursuant to Section 725.310 (2000), and remand this case for further consideration.[11] *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

[11]Subsequent to the administrative law judge's issuance of his Decision and Order, the Sixth Circuit published *Martin v. Ligon Preparation Co.*, F.3d , 2005 WL 492241 (6th Cir. Mar. 4, 2005). We instruct the administrative law judge to consider the impact, if any, *Martin* has on the administrative law judge's analysis of the evidence pursuant to Sections 718.201(a)(2) and 718.202(a)(4).

Because the administrative law judge's finding of legal pneumoconiosis affects his consideration of the merits of this case,[12] we also vacate the administrative law judge's award of benefits. Therefore, we instruct the administrative law judge on remand to first reconsider whether claimant established a change in conditions or a mistake in a determination of fact. *Napier,* 17 BLR at 1-113; *Nataloni*, 17 BLR at 1-84; *see Worrell,* 27 F.3d at 231, 18 BLR at 2-296. If the administrative law judge, on remand, again finds that claimant demonstrated either a change in conditions or a mistake in fact, he must then reconsider the merits of this case.

In order to avoid repetition of error on remand, we instruct the administrative law judge regarding the following. First, in considering whether the opinions of Drs. Baker and Sullivan are sufficient to establish the existence of clinical pneumoconiosis, the administrative law judge accorded their opinions "little probative value" because he found that these physicians relied on "incorrect documentation." Decision and Order at 20. In doing so, the administrative law judge stated that the "conclusions [of Drs. Baker and Sullivan] about the radiographic documentation conflicts [sic] with my determination that the preponderance of the chest x-ray evidence is negative for the presence of pneumoconiosis." *Id.* An administrative law judge may not discredit a physician's opinion solely on the ground that it is based, in part, upon an x-ray reading which is at odds with the administrative law judge's finding with respect to the x-ray evidence of record. *Church v. Eastern Assoc. Coal Corp.*, 21 BLR 1-51, 1-54 (1997), *rev'g in part and aff'g in part on recon.*, 20 BLR 1-8 (1996); *see Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). *But see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). *See generally Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Therefore, we vacate the administrative law judge's finding that claimant failed to establish clinical pneumoconiosis pursuant to Section 718.202(a)(4) and instruct the administrative law judge, on remand, to reconsider the opinions of Drs. Baker and Sullivan regarding this issue.

Second, employer asserts that the administrative law judge erred in discrediting Dr. Wheeler's opinion regarding the existence of legal pneumoconiosis. Employer's Brief at 15. The administrative law judge discredited Dr. Wheeler's opinion, that the

[12]The administrative law judge's finding of the existence of legal pneumoconiosis on the merits is based upon his earlier finding that the presence of legal pneumoconiosis is established by the newly submitted medical opinion evidence. Decision and Order at 36. Additionally, in his weighing of all of the medical opinion evidence pursuant to 20 C.F.R. §718.204(c), the administrative law judge applied his flawed analysis of *Cornett* to find that Dr. Baker's opinion is sufficient to establish that claimant's respiratory disability is due to his legal pneumoconiosis. *Id.* at 41.

conditions seen on claimant's x-rays were not caused by coal dust exposure, because he found that this physician focused on too narrow a definition of legal pneumoconiosis. Decision and Order at 20. Specifically, the administrative law judge found that "Dr. Wheeler stated that coal dust does not cause emphysema." *Id.* However, contrary to the administrative law judge's finding, Dr. Wheeler never definitively testified that emphysema can never be caused by coal dust exposure; he merely testified that the emphysema exhibited on claimant's x-ray was not caused by coal dust exposure. Employer's Exhibit 1 at 8, 10; Employer's Exhibit 3. Accordingly, the administrative law judge erred in discounting Dr. Wheeler's opinion on this basis. Moreover, because Dr. Wheeler only reviewed CT scan and chest x-ray evidence in rendering his opinion regarding the existence of pneumoconiosis, we instruct the administrative law judge to determine on remand whether this physician's opinion constitutes a reasoned medical opinion at Section 718.202(a)(4). *See Anderson*, 12 BLR at 1-113; *Taylor*, 9 BLR at 1-24.

Finally, employer's contention, that the administrative law judge erred in "discount[ing] all of the prior medical evidence before November 1998 that was insufficient to demonstrate the presence of pneumoconiosis," has merit. Employer's Brief at 14. In considering the merits of claimant's claim, the administrative law judge dismissed "the medical assessments contained in the record prior to November 1998 which were insufficient to demonstrate the presence of pneumoconiosis [as having] little relevant probative value." Decision and Order at 32-33. Considering the progressive nature of pneumoconiosis, the administrative law judge stated that the most recent medical opinion evidence was the most relevant regarding the present condition of claimant's lungs. *Id.* The administrative law judge noted that "most of the physicians to consider [claimant's] pulmonary condition from 1981 through 1998 only diagnosed COPD, unrelated to coal dust exposure." *Id.* at 36. The administrative law judge concluded that these "dated" opinions are now "outweighed by the more probative, recent" opinion of Dr. Baker. *Id.* Therefore, the administrative law judge found that claimant has proven the presence of legal pneumoconiosis. *Id.* Although the progressive nature of pneumoconiosis and the date of the medical evidence are important when considering whether claimant has or does not have clinical pneumoconiosis or a lung disease, these factors are not as relevant when considering the *etiology* of that lung disease in determining whether claimant has legal pneumoconiosis. 20 C.F.R. §718.201(a)(2). In light of the foregoing, we therefore instruct the administrative law judge to reconsider all of the relevant medical opinion evidence to determine if claimant has established the existence of legal pneumoconiosis on the merits, if this issue is reached again on remand.

Accordingly, the administrative law judge's Decision and Order Approval of Modification Request Award of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

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