

BRB No. 12-0099 BLA

LINDA CHRISTIAN (o/b/o JACKIE D. CHRISTIAN))	
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Claimant-Respondent)	
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v.)	
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ENERGY DEVELOPMENT CORPORATION)	DATE ISSUED: 11/20/2012
)	
)	
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 Granting Request for Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Request for Modification (2010-BLA-5202) of Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered on a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The miner's claim for benefits was filed on March 9, 2004. Administrative Law Judge Richard A. Morgan found that at least thirteen years of coal mine employment were established and

that, although the miner established that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he did not establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Judge Morgan, therefore, denied benefits on June 29, 2007. On August 13, 2007, the miner timely requested modification pursuant to 20 C.F.R. §725.310. The miner died on April 3, 2008, however, while his request for modification was pending and his widow (claimant) is now pursuing the claim.

The administrative law judge found the existence of clinical, but not legal, pneumoconiosis established pursuant to Section 718.202(a) and, therefore, granted the modification request, on the basis that a mistake in a determination of fact had been made pursuant to Section 725.310. Considering the claim *de novo*, the administrative law judge found the existence of clinical pneumoconiosis, that the clinical pneumoconiosis arose out of coal mine employment, total respiratory disability, and disability causation established pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b), (c). The administrative law judge, therefore, awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the existence of clinical pneumoconiosis¹ was established pursuant to Section 718.202(a) and, thereby, that modification was established pursuant to Section 725.310. Employer also challenges the administrative law judge's finding that disability causation was established pursuant to Section 718.204(c). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not responded to the appeal.²

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,

¹ 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). This definition "includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." *Id.*

² We affirm, as unchallenged on appeal, the administrative law judge's findings that at least thirteen years of coal mine employment were established, and that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.³ 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 miner’s claim under the Act, the miner must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Under Section 22 of the Longshore and Harbor Workers’ Compensation Act (Longshore Act), 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the fact-finder may, on the ground of a change in conditions or a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310. The intended purpose of allowing modification based on a mistake in a determination of fact is to vest the fact-finder “with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.” *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *accord V.M. [Matney] v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008).

Employer contests the administrative law judge’s determination that the pathology report of Dr. Caffrey, together with those of Drs. Dennis and Perper,⁴ established the

³ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See* Decision and Order at 17 n.5; Director’s Exhibit 3; *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

⁴ In his autopsy report, Dr. Caffrey found: “a mild amount of anthracotic pigment and a rare slide of a moderate amount of anthracotic pigment,” and “evidence of anthracotic pigment present which would have been as a result of [the miner’s] coalmine (sic) employment, but [stated] I do not identify the lesion of simple coal workers’ pneumoconiosis. ... In my review of these [pathology] sections, I do not see where anthracotic pigment stimulated the production of reticulin or collagen. There are definitely no micro or macronodules, and there are no lesions of complicated coal workers’ pneumoconiosis. Therefore, I am not making a diagnosis of clinical pneumoconiosis.” Dr. Caffrey stated, that “[i]n a number of areas there is focal subpleural fibrosis where there is associated bullous emphysema.” Employer’s Exhibit 2 at 3-4; *see* Decision and Order at 9-10, 19.

existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a).⁵ Employer also asserts that the administrative law judge mischaracterized the autopsy reports of Drs. Caffrey and Oesterling,⁶ substituted his own opinion for that of the medical experts, and failed to explain his findings in view of material conflicts in the testimony, in violation of the Administrative Procedure Act (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), 30 U.S.C. §932(a).

Dr. Dennis, the autopsy prosector, found emphysematous changes, minimal black pigment deposition, and nodules of fibrinous connective tissue, and diagnosed coal workers' pneumoconiosis, a weakened lung, and fibrosis. He testified that "pulmonary congestive edema developed secondary to coal workers' pneumoconiosis, that is, it developed from the degenerative change that occurs with anthracosilicosis and progressive massive fibrosis." He opined that the miner's bronchopneumonia developed as a result of the underlying pulmonary disability, and was secondary to the miner's coal worker's pneumoconiosis. Dr. Dennis identified coal workers' pneumoconiosis in greater than seventy-five percent of the miner's lungs, and diagnosed "an expression of pathology of [coal workers' pneumoconiosis] with focal autopsy exam of anthracosilicosis, simple variety coal workers' pneumoconiosis with focal expressions bordering on early progressive massive fibrosis." Decision and Order at 7-8, 19; Employer's Exhibit 1 at 40-41; Claimant's Exhibit 2.

Dr. Perper, who reviewed the autopsy slides, the miner's 2004 Department of Labor medical evaluation, and various medical treatment records, diagnosed simple clinical coal workers' pneumoconiosis with "some macule development," primarily of the interstitial fibro-anthractic type with macules and micronodules; severe centrilobular emphysema and paracinar emphysema, sclerosis of small intrapulmonary vessels consistent with pulmonary hypertension and cor pulmonale, and a few small, fresh, pulmonary thrombo-emboli. He opined that the emphysema was due to smoking and coal dust exposure. Decision and Order at 8; Claimant's Exhibit 1 at 22-24, 25, 27, 32.

Drs. Dennis and Perper found macule formations and fibro-anthraxis throughout the lungs, and fibro-anthractic micronodules containing birefringent silica crystals measuring at least 1.0 to 4.0 mm. Decision and Order at 19.

⁵ The administrative law judge's evaluation of the autopsy reports of Drs. Dennis and Perper is affirmed, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

⁶ Dr. Oesterling found "very mild anthracotic pigmentation" of the pleural surfaces, insufficient to warrant a diagnosis of coal workers' pneumoconiosis, and with no interstitial changes secondary to dust inhalation. He diagnosed chronic obstructive pulmonary disease in the form of panlobular emphysema due to smoking. Employer's Exhibits 3 at 2, 5, 7; Decision and Order at 10-11, 19.

Specifically, employer argues that the administrative law judge misconstrued Dr. Caffrey's finding of "focal subpleural fibrosis where there is associated bullous emphysema" as a diagnosis of clinical pneumoconiosis, "[d]espite Dr. Caffrey's unequivocal statement that the slides did not show clinical pneumoconiosis." Employer's Brief at 7; Employer's Exhibit 2 at 3-4. Employer argues that the administrative law judge improperly "reinterpret[ed]" Dr. Caffrey's findings as constituting a diagnosis of anthracosis. Employer's Brief at 7; Decision and Order at 19. Claimant concedes that Dr. Caffrey did not diagnose anthracosis but asserts, nonetheless, that Dr. Caffrey's identification of subpleural anthracotic pigment and fibrosis are consistent with the definition of clinical pneumoconiosis set forth in 20 C.F.R. §718.201(a)(1).

Employer also asserts that the administrative law judge mischaracterized the evidence in determining that Dr. Oesterling is the only physician who did not find fibrosis, and that he ruled out a diagnosis of pneumoconiosis based on the location of the dust deposits. Claimant asserts that Dr. Oesterling's report includes a finding of fibrosis, but argues that it was properly discredited as inconsistent with the definition of pneumoconiosis because Dr. Oesterling identified the pleura as the location of the observed changes.

Section 718.201(a)(1) requires that any disease that satisfies the definition of clinical pneumoconiosis must be "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). Moreover, the regulation specifically defines clinical pneumoconiosis as requiring a "fibrotic reaction of the lung tissue" and provides that a finding on autopsy or biopsy of anthracotic pigmentation is not sufficient, by itself, to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2); *see Hapney v. Peabody Coal Co.*, 22 BLR 1-104, 1-111 (2001)(en banc)(Dolder & Smith, JJ., concurring and dissenting).

The administrative law judge stated that Drs. Dennis and Perper, who diagnosed coal workers' pneumoconiosis, "found macule formations and fibro-anthracois throughout the miner's lungs[.]" and "noted fibro-anthracois micronodules containing birefringent silica crystals that measured at least 1.0 to 4.0 mm..." Decision and Order at 19.

The administrative law judge also stated that "Dr. Caffrey believes that the miner did suffer from [chronic obstructive pulmonary disease] or emphysema, but that the emphysema could not have been caused by the amount of anthracotic pigment found in the lungs." Decision and Order at 10. The administrative law judge acknowledged that Dr. Caffrey found no lesions or macules of coal worker's pneumoconiosis, and that the physician opined that the miner did not suffer from clinical pneumoconiosis. Decision and Order at 19.

In conclusion, the administrative law judge determined:

A review of the autopsy reports support a finding of clinical pneumoconiosis. Drs. Dennis and Perper both found fibrosis and associated coal dust deposits. Dr. Caffrey found subpleural fibrosis in a ‘number of areas’ as well as anthracotic pigmentation due to coal dust inhalation. The Board has recognized subpleural fibrosis associated with anthracosis as falling within the definition of clinical pneumoconiosis. *See Hapney v. Peabody Coal Co.*, 22 BLR at 1-104 (2001)(en banc)(Smith and Dolder, Administrative Appeals Judges, dissenting in part and concurring in part). Thus the opinions of Drs. Dennis, Perper and Caffrey all support a finding of clinical pneumoconiosis.

Id.

Contrary to the administrative law judge’s analysis, however, Dr. Caffrey did not make a finding of “subpleural fibrosis associated with anthracosis.” *Id.* While Dr. Caffrey identified the presence of anthracotic pigment, and a number of areas of subpleural fibrosis, he explained that a diagnosis of clinical pneumoconiosis was not indicated because no lesions of simple pneumoconiosis, and “definitely no micro [nodules] or macronodules,” were present, and because the anthracotic pigment did not stimulate the production of reticulin or collagen. Claimant’s Exhibit 2 at 3. Moreover, while Dr. Caffrey linked the anthracotic pigment to the miner’s coal mine employment, he did not suggest an etiology for the subpleural fibrosis. Therefore, to the extent that the administrative law judge equated Dr. Caffrey’s findings to a diagnosis of “subpleural fibrosis associated with anthracosis,” we agree with employer that the administrative law judge has mischaracterized the evidence.

As neither a finding of anthracotic pigment, nor a finding of fibrosis, absent a finding of causal nexus to coal mine employment, meets the definition of clinical pneumoconiosis at Section 718.202(a), we conclude that, in adding the language “associated with” to link Dr. Caffrey’s findings of anthracotic pigment and fibrosis to coal mine employment, the administrative law judge erred in evaluating the medical opinion evidence, and substituted his opinion for that of Dr. Caffrey. *See Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). The administrative law judge’s analysis is further belied by Dr. Caffrey’s specific explanation as to why he could not make a diagnosis of clinical pneumoconiosis in this case. *See Employer’s Exhibit 2.* Therefore, the administrative law judge relied on an inaccurate characterization of Dr. Caffrey’s autopsy evidence, as consistent with the reports of Drs. Dennis and Perper, to find the existence of clinical pneumoconiosis established. We, therefore, agree with employer that the administrative law judge’s determination that Dr.

Caffrey's opinion supports a finding of clinical pneumoconiosis is in error. The administrative law judge's finding of clinical pneumoconiosis must, therefore, be vacated and the case remanded for a reweighing of the evidence. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985);⁷ Decision and Order at 19.

Similarly, the administrative law judge mischaracterized the autopsy opinion of Dr. Oesterling, who stated that autopsy photo nine "shows fibrosis, but does not show black pigment." Employer's Exhibit 3 at 3; *see* Decision and Order at 11. Therefore, the administrative law judge erred in finding that "Dr. Oesterling's opinion is contrary to the weight of the evidence, as he is the only physician who did not find fibrosis." Decision and Order at 19. In view of the administrative law judge's mischaracterization of the opinion, we conclude that the administrative law judge's evaluation of the opinion of Dr. Oesterling is inadequate, fails to comport with the requirements of the APA, and must be vacated and remanded for an accurate interpretation of the evidence. *See Tackett*, 7 BLR at 1-706.

Consequently, we vacate the administrative law judge's finding that clinical pneumoconiosis was established pursuant to Section 718.202(a), and his finding that modification was, therefore, established pursuant to Section 725.310. On remand, the administrative law judge must reconsider whether the autopsy evidence is sufficient to establish the existence of clinical pneumoconiosis. In so doing, the administrative law judge must reconsider the opinions of Drs. Caffrey and Oesterling, provide accurate summaries of the opinions, determine whether they are documented and reasoned, and weigh them together with the pathology opinions of Drs. Dennis and Perper and the additional evidence of record relevant to the existence of clinical pneumoconiosis pursuant to Section 718.202(a).⁸ *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-334 (4th Cir. 1998).

Further, because the administrative law judge relied, in part, on his finding of clinical pneumoconiosis to find that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c), we also vacate that finding and remand the case for reconsideration of the evidence thereunder.

⁷ In evaluating the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. S718.202(a)(4), the administrative law judge specifically credited the opinions of Drs. Caffrey and Oesterling, that the miner's emphysema was not caused by his coal dust exposure, and determined that the pathology reports and medical opinions failed to establish legal pneumoconiosis. Decision and Order at 21.

⁸ The administrative law judge found that the x-ray, CT scan, and treatment record evidence failed to establish the existence of coal workers' pneumoconiosis.

In conclusion, therefore, we remand this case to the administrative law judge to reweigh the evidence in view of the foregoing discussion, to reconsider the evidence pursuant to Sections 718.202(a)(2), 718.204(c), and 725.310, and to render findings in accord with the requirements of the APA.⁹ *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Hicks*, 138 F.3d at 532 n. 9, 21 BLR at 2-335 n. 9; *Matney*, 24 BLR at 1-70-71.

Accordingly, the administrative law judge's Decision and Order Granting Request for Modification is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁹ Modification of a claim does not automatically flow from a finding that a mistake was made in an earlier determination; rather, it should be granted only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968)(the purpose of modification under the Longshore Act, also applicable to the Black Lung Benefits Act, is to "render justice."); *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007). Therefore, if the administrative law judge finds a mistake in a determination of fact established on remand, he must address whether granting modification of the previous denial of the miner's claim will render justice under the Act.