BRB No. 00-1083 BLA

ROY R. HALL)
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Claimant-Respondent)
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v.)
)
DOMINION COAL CORPORATION) 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 Awarding Benefits On Request for Modification of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Roy R. Hall, Big Rock, Virginia, *pro se*.

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

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits On Request for Modification (99-BLA-1340) of Administrative Law Judge Daniel F. Sutton 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). This case is before the Board for the second time. The administrative law judge permissibly considered claimant's request for

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] Claimant originally filed a claim on August 28, 1995, Director's Exhibit 1. In a Decision and Order issued on February 4, 1997, Administrative Law Judge Frederick D. Neusner found not less than nineteen years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718, Director's Exhibit 42. Judge Neusner found that the existence of pneumoconiosis was established by the x-ray evidence of record pursuant to 20 C.F.R. §718.202(a)(1), but further found that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

Claimant appealed and the Board initially affirmed Judge Neusner's finding that the existence of pneumoconiosis was established by the x-ray evidence of record pursuant to Section 718.202(a)(1) as unchallenged, Director's Exhibit 52. *Hall v. Dominion Coal Corp.*, BRB No. 97-0766 BLA (Jan. 28, 1998)(unpub.). The Board further held that Judge Neusner permissibly found, within his discretion, that because the blood gas study results of record overall indicated improvement in claimant's condition, *i.e.*, the more recent blood gas study results of record at that time, from Dr. Sargent, did not indicate disability, *see* Director's Exhibits 27, 32, then Dr. Forehand's prior blood gas study results and medical opinion indicating disability did not establish that claimant was totally disabled as of the date of the hearing. Thus, the Board affirmed Judge Neusner's finding that total disability was not established pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2), and, therefore, affirmed Judge Neusner's Decision and Order denying benefits. The Board

modification on the record, based on the parties' waiver of their right to a hearing, *see* 20 C.F.R. §725.461(a); *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 390, 21 BLR 2-284, 2-388-389 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000). Initially, the administrative law judge found that no mistake in a determination of fact was established pursuant to 20 C.F.R. §725.310 (2000), *see also* 20 C.F.R. §725.2(c), in Judge Neusner's finding that the evidence, before him, did not establish total disability pursuant to 20 C.F.R. §718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2), *see* Director's Exhibits 42, 52, 55. Next, the administrative law judge considered whether the newly submitted evidence of record on modification established total disability and, therefore, a change in conditions pursuant to Section 725.310 (2000), *see also* 20 C.F.R. §725.2(c). The administrative law judge found that the newly submitted x-ray and CT scan evidence was insufficient to establish the existence of complicated pneumoconiosis and therefore, entitlement to the irrebuttable presumption of totally disabling pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, but that the relevant newly submitted blood gas study and medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iv), and, therefore, a change in conditions. The administrative law judge, therefore, considered all the evidence of record and found that the existence of pneumoconiosis was established, *see* 20 C.F.R. §718.202(a), that pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §718.203(b) and that total disability due to pneumoconiosis was established by the medical opinion evidence, *see* 20 C.F.R. §718.204(c), formerly 20 C.F.R. §718.204(b)(2000). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the newly submitted blood gas study and medical opinion evidence was sufficient to establish total disability and, therefore, a change in conditions. Claimant, without the assistance of counsel, responds, urging that the administrative law judge's Decision and Order Awarding Benefits On Request for Modification be affirmed. Alternatively, claimant contends that the administrative law judge erred in finding that claimant failed to establish the existence of complicated pneumoconiosis and, therefore, entitlement to the irrebuttable presumption of totally disabling pneumoconiosis, and erred in finding that no mistake in a determination of fact had been made in Judge Neusner's prior determination that the evidence before him, did

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also denied a motion for reconsideration filed by claimant, Director's Exhibit 55. *Hall v. Dominion Coal Corp.*, BRB No. 97-0766 BLA (Mar. 25, 1998)(unpub. order).

Subsequently, on April 27, 1998, claimant filed a request for modification, along with new evidence, pursuant to 20 C.F.R. §725.310 (2000), applicable to the instant claim that was pending on January, 19, 2000, *see* 20 C.F.R. §725.2(c), which is at issue herein, Director's Exhibit 56.

not establish total disability. Claimant also contends that the administrative law judge erred in excluding evidence that claimant offered for the purpose of discrediting the newly submitted medical opinion and pulmonary function study of Dr. Castle, which had been submitted by employer, *see* Employer's Exhibit 1, *i.e.*, evidence relating to claimant's allegation that a technician utilized by Dr. Castle lacked an appropriate license. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, also responds, urging the Board to affirm the administrative law judge's finding that the newly submitted blood gas study and medical opinion evidence was sufficient to establish total disability and, therefore, a change in conditions. Thus, the Director urges the Board to affirm the administrative law judge's award of benefits, even though the Director also contends that the administrative law judge erred in finding that no mistake in a determination of fact was established.

In an appeal filed by a claimant without the aid of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1985). If the findings of fact and conclusions of law of the administrative law judge 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 also* 20 C.F.R. §725.2(c), a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. In considering whether a claimant has established a change in conditions, an administrative law judge must consider all of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision, *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held, however,

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[3] We note employer's concerns regarding claimant's *pro se* status, expressed in its letter dated December 14, 2000. As claimant, however, has filed an affidavit in which he affirmatively states that he is proceeding without the assistance of counsel, we will continue to evaluate this appeal under the general standard of review, *see* 20 C.F.R. §§802.211(e); 802.220.

[4] The administrative law judge determined that because claimant's coal mine employment occurred in Virginia, the law of the United States Court of Appeals for the Fourth Circuit would apply, Decision and Order at 3. However, a review of the record indicates that, although claimant worked at least nineteen years for employer in Virginia,

that if a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, 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 Corp. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993).

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204, the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Initially, the administrative law judge found that the newly submitted x-ray and CT scan evidence from equally qualified physicians, who were both board-certified radiologists and B-readers, was conflicting regarding the existence of complicated pneumoconiosis.

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claimant's most recent coal mine employment for approximately six months was with Twin Pines, Incorporated, in Kentucky, which lies within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, *see* Director's Exhibits 2, 5-7; 1996 Hearing Transcript, Director's Exhibit 39, at 14-15, 20-21, 26, 31. While the Sixth Circuit has held that the place where a miner is exposed to coal dust is the circuit in which the injury occurred and, therefore, the circuit in which jurisdiction is proper pursuant to 33 U.S.C. §921(c), as incorporated into the Act by 30 U.S.C. §932(a), the court further stated that they "express[ed] no opinion as to the proper forum or forums when a claimant is exposed to coal dust in more than one circuit," *see Danko v. Director, OWCP*, 846 F.2d 366, 368 n. 2, 11 BLR 2-157, 2-159 n. 2 (6th Cir. 1988). Subsequently, the Board held in *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989), that the law of the circuit in which the miner most recently performed his or her coal mine employment would apply. In any event, where the miner has worked in more than one circuit and the laws of those circuits are compatible, it is unnecessary to determine which circuit law applies, *see Shupe*, *supra*.

[5] Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1.

[6] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established

Decision and Order at 7-8. The administrative law judge found that the newly submitted x-ray evidence raised serious doubt and/or was inconclusive as to the existence of complicated pneumoconiosis, and that the record provided no objective basis for favoring one set of x-ray interpretations over the other. *See* Director's Exhibits 56-58, 62, 65, 68, 70; Claimant's Exhibits 2, 4; Employer's Exhibits 1-3, 5, 7, 9. Similarly, the administrative law judge found the newly submitted CT scan evidence from equally qualified radiologists was conflicting and provided no objective basis for crediting one interpretation over the other. *See* Director's Exhibit 70, 74-75; Claimant's Exhibit 3. Consequently, the administrative law judge found that the existence of complicated pneumoconiosis was not established by a preponderance of the relevant newly submitted x-ray and CT scan evidence and, therefore, that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis.

In his response brief, claimant contends that the record does provide a basis for discrediting those physicians who did not diagnose complicated pneumoconiosis. Claimant contends that some of the physicians who did not diagnose complicated pneumoconiosis on the newly submitted x-rays or CT scans attributed the results to possible, old, healed tuberculosis and/or granulomatous disease, but either did not do so consistently or did not consider whether their findings could nevertheless establish the existence of complicated pneumoconiosis as defined in the Act. None of the physicians who found no evidence of complicated pneumoconiosis on the x-rays of record, however, indicated evidence of one or more large opacities greater than one centimeter in diameter, and none of the physicians who found no evidence of complicated pneumoconiosis on the CT scan evidence indicated evidence of lesions that would appear as opacities greater than one centimeter on an x-ray or "massive lesions," *see* Director's Exhibits 16, 57-58, 65, 68, 74-75; Employer's Exhibits 1-3, 5, 7, 9. Thus, their interpretations are insufficient to establish complicated pneumoconiosis pursuant to Section 718.304(a)-(b), as defined at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), *see Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999). Consequently, since claimant must establish the existence of complicated pneumoconiosis by a preponderance of all of the relevant evidence, *see Gray*, *supra*, in accordance with the holding of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*

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by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[7] Inasmuch as claimant was satisfied with the result of the administrative law judge's decision, he was not required to file a cross-appeal pursuant to 20 C.F.R. §802.201(a)(2), but can make arguments in his response brief pursuant to 20 C.F.R. §802.212(b) which are not in support of the administrative law judge's reasoning, but which support the result the administrative law judge reached, *i.e.*, claimant's entitlement to benefits. *See Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*).

[Ondecko], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), we affirm the administrative law judge's findings that the existence of complicated pneumoconiosis was not established by a preponderance of the relevant newly submitted x-ray and CT scan evidence and, therefore, that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304.

Second, the administrative law judge found that the relevant, newly submitted blood gas study and medical opinion evidence was sufficient to establish total disability. Dr. Forehand administered the only new blood gas study of record on February 4, 1998, which the administrative law judge noted yielded qualifying results during exercise after nine minutes, while yielding non-qualifying results: at rest; during exercise after five minutes; and after exercise, Director's Exhibit 70; Claimant's Exhibit 1. Thus, having previously administered a blood gas study in 1995 which also yielded qualifying results during exercise, *see* Director's Exhibits 11, 13, Dr. Forehand concluded that claimant was suffering from a totally disabling respiratory impairment arising out of his coal mine employment which was "still present," as it had been "seen on two occasions over two years apart," Director's Exhibit 70; Claimant's Exhibit 1.

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[8] In *Ondecko*, the Supreme Court held that the reference to the "burden of proof" in §7(c) of the APA, 5 U.S.C. §556(d), refers to the burden of persuasion, and therefore held that when the evidence is evenly balanced, the claimant must lose pursuant to Section 7(c), *see Ondecko*, *supra*.

[9] Inasmuch as the administrative law judge's findings that the results of the only newly submitted pulmonary function study of record from Dr. Castle, Employer's Exhibit 1, were insufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(1), as revised at 20 C.F.R. §718.204(b)(2)(i), and that there was no evidence of cor pulmonale with right-sided congestive heart failure to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(3), as revised at 20 C.F.R. §718.204(b)(2)(iii), Decision and Order at 9-10, are not challenged by any party on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In addition, inasmuch as the administrative law judge's findings that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to Sections 718.202(a) and 718.203(b) are not challenged by any party on appeal, they are affirmed, *see Skrack*, *supra*.

[10] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively . A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i)-(ii), formerly 20 C.F.R. §718.204(c)(1)-(2)(2000).

On modification, employer submitted contrary evidence from Drs. Castle and Fino. Dr. Castle examined claimant in 1999, but, as the administrative law judge noted, claimant refused to submit to another blood gas study during his examination by Dr. Castle, Employer's Exhibit 1. Dr. Castle found that claimant had no respiratory disability from any cause, based in part, on the results of a non-qualifying pulmonary function study. Dr. Fino reviewed all of the evidence of record and opined that claimant was not disabled from a respiratory standpoint and that there had been no change in his condition, Employer's Exhibit 9. Although Dr. Fino noted that there had been a "slight decrease" in the results of the blood gas study obtained by Dr. Forehand during exercise, Dr. Fino opined that the results of the blood gas study obtained by Dr. Forehand did "not make clinical sense" because: previous blood gas study results obtained by Dr. Sargent "at rest" in 1996, had yielded higher values; claimant's diffusing capacity results of record were normal; and, since claimant refused to submit to a blood gas study by Dr. Castle on modification, the qualifying results of Dr. Forehand's blood gas study on modification "could not be replicated," *id*.

The administrative law judge gave less weight to the opinions of Drs. Castle and Fino because they failed to "adequately analyze" the qualifying blood gas study results during exercise from Dr. Forehand. Decision and Order at 11-12. The administrative law judge noted that Dr. Castle did not discuss the blood gas study results from Dr. Forehand, but merely relied on the non-qualifying results of the pulmonary function study he had administered. The administrative law judge also rejected employer's contention that Dr. Castle had not reviewed Dr. Forehand's blood gas study results because claimant had withheld the evidence. The administrative law judge noted that Dr. Castle stated in his report that he was aware that Dr. Forehand had previously administered a blood gas study. The administrative law judge also noted that, while Dr. Forehand's blood gas study results had been submitted and served on employer in April, 1999, employer had offered no explanation for its failure to have this evidence reviewed by its own expert prior to the close of the record in February, 2000, Decision and Order at 11 n. 6.

The administrative law judge further found that Dr. Fino's "dismissive treatment" of Dr. Forehand's qualifying blood gas study results during exercise was "unpersuasive," Decision and Order at 12. The administrative law judge found Dr. Fino's characterization

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[11] Claimant contends that the administrative law judge erred in excluding from the record evidence submitted by claimant regarding claimant's allegation that a technician, utilized by Dr. Castle in administering the pulmonary function study on which he relied in rendering his opinion, lacked an appropriate license. Contrary to claimant's contention, the administrative law judge considered claimant's allegation and did not abuse his discretion in excluding such evidence and/or in admitting into the record and considering Dr. Castle's examination report and pulmonary function study, but reasonably concluded that "[i]t is for the medical physicians who review the procedure and test results" to determine whether the tests are reliable. *See* March 28, 2000, Order Granting Motion To Exclude at 2.

that there had been a "slight decrease" in the blood gas study results obtained during exercise by Dr. Forehand indicated either a "failure to appreciate" that the results were sufficient to qualify as a finding of total disability under the regulations or "a cursory review" of the results, *id*. In addition, the administrative law judge found Dr. Fino's opinion less carefully reasoned than Dr. Forehand's opinion. Finally, the administrative law judge found that Dr. Forehand's opinion was entitled to additional weight as he was claimant's treating physician. Consequently, the administrative law judge found that the preponderance of the newly submitted blood gas study and medical opinion evidence established total disability and was not outweighed by the contrary probative evidence, *i.e.*, the newly submitted pulmonary function study from Dr. Castle.

Employer contends that the administrative law judge inconsistently and selectively analyzed the relevant evidence by failing to address the fact that Dr. Forehand did not consider claimant's non-qualifying pulmonary function study results in rendering his opinion and had found evidence of complicated pneumoconiosis, which is contrary to the administrative law judge's finding. Employer also contends that the administrative law judge did not explain why Dr. Forehand's qualifying results during exercise after nine minutes out weighed the non-qualifying results at rest, during exercise after five minutes, and after exercise. Moreover, employer contends that the fact that Dr. Forehand's blood gas study is unrebutted and the fact that Dr. Castle's opinion was not based on blood gas study results was due to claimant's refusal to undergo another blood gas study. In any event, employer contends that Dr. Castle's opinion is sufficiently documented, as there is no requirement that an opinion on disability rely on blood gas study results. Finally, employer contends that the administrative law judge acted as a medical expert by arbitrarily and capriciously discrediting Dr. Fino's opinion, whose opinion employer contends was adequately documented.

Although employer contends that the reason that Dr. Forehand's newly submitted blood gas study is unrebutted is due to claimant's refusal to undergo another blood gas study by Dr. Castle, employer does not allege, and a review of the record fails to indicate, that employer ever notified the administrative law judge that it had any problems obtaining evidence or at any time sought an order to compel claimant to undergo another blood gas study. As the administrative law judge noted, employer merely contended in its April 28, 2000 brief, before the administrative law judge, that claimant had withheld the newly submitted blood gas study administered by Dr. Forehand from employer. The administrative

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[12] The former 20 C.F.R. §718.402 (2000), provides that a "miner who unreasonably refuses... to submit to... a test requested by... a coal mine operator... shall not be found eligible for benefits." 20 C.F.R. §718.402 (2000). The language of the former Section §718.402 (2000) now appears, in substantially the same form, at revised 20 C.F.R. §725.414(a)(3)(i)(B), which is applicable to claims filed after January 19, 2001, *see* 20 C.F.R. §725.2(c). Thus, the standard set forth in the former Section §718.402 (2000) is, apparently, still applicable to the instant case that was pending on January 19, 2001.

law judge properly noted, however, that Dr. Forehand's blood gas study results had been submitted and served on employer in April, 1999, *see* Director's Exhibit 70, and that, in any event, Dr. Fino did review Dr. Forehand's blood gas study results in his report submitted by employer, *see* Employer's Exhibit 9. Consequently, employer waived its right to respond to the proffered evidence and/or to have claimant undergo another blood gas study, and any right to Board review of the issue, by failing to object, before the administrative law judge, to the proffered evidence or to seek an order to compel claimant to undergo another blood gas study, *see Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Morris v. Freeman United Coal Mining Co.*, 8 BLR 1-505 (1986); *see also Gladden v. Eastern Associated Coal Corp.*, 7 BLR 1-577, 1-579 (1984); *Pendleton v. U.S. Steel Corp.*, 6 BLR 1-815 (1984). Thus, employer's contention is rejected.

Contrary to employer's other contention, because pulmonary function studies and blood gas studies measure different types of impairments, a medical opinion of no respiratory or pulmonary impairment based only on a pulmonary function study, such as Dr. Castle's, does not necessarily rule out the existence of a respiratory or pulmonary impairment and non-qualifying pulmonary function study results cannot be seen as being a direct offset or "contrary" to qualifying blood gas study results, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984); *see also Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Moreover, Dr. Forehand found that claimant suffers from a totally disabling respiratory impairment based on the exercise results of the blood gas studies he administered, not his finding that claimant suffered from complicated pneumoconiosis, *see* Director's Exhibits 12, 70; Claimant's Exhibit 1. Because the interpretation of medical data is for the medical experts, *see Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984), the administrative law judge permissibly relied on Dr. Forehand's opinion that the exercise results of the blood gas studies he administered established that claimant suffers from a totally disabling respiratory impairment and, therefore, gave less weight to Dr. Castle's opinion as it was based on an incomplete picture of claimant's health condition, *see Fagg v. Amax Coal Co.*, 2 BLR 1-77 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Because the administrative law judge found Dr. Forehand's opinion to be corroborated and substantiated by his newly submitted blood gas study evidence, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1983); *Fields*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), the administrative law judge reasonably found Dr. Forehand's opinion entitled to additional weight on the basis that he was claimant's treating physician, *see Tussey*, *supra*; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). In addition, it is for the administrative law judge, as the trier-of-fact, to determine whether the medical opinion evidence is documented and reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields*, *supra*; *Lucostic*, *supra*, and to assess the evidence of record and determine whether a party has met its burden of proof,

see Maddaleni v. The Pittsburg & Midway Coal Mining Co., 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Thus, because the administrative law judge weighed all of the relevant newly submitted evidence, like and unlike, *see Budash*, *supra*; *Fields*, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*, and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when his findings are rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that total respiratory disability was established by a preponderance of the evidence pursuant to Section 718.204(b)(2), formerly 20 C.F.R. §718.204(c), as rational and supported by substantial evidence.

Next, the administrative law judge considered all of the relevant medical opinion evidence on the merits and found total disability due to pneumoconiosis established, *see* 20 C.F.R. §718.204(c), formerly 20 C.F.R. §718.204(b)(2000). Because the administrative law judge found that Drs. Castle and Fino erroneously concluded that claimant was not totally disabled, *see Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986), he correctly found that Dr. Forehand was the only physician to consider the cause of claimant's total respiratory disability, attributing claimant's impairment to his coal mine employment, *i.e.*, pneumoconiosis as more broadly defined by the Act and regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201. Because the administrative law judge, within his discretion, found Dr. Forehand's opinion to be well-reasoned, *see Clark*, *supra*; *Fields*, *supra*; *Lucostic*, *supra*, we affirm the administrative law judge's finding that total disability due to pneumoconiosis was established in accordance with the standard at Section 718.204(c)(1), *see* 20 C.F.R. §718.204(c)(1), formerly 20 C.F.R. §718.204(b), as rational and supported by substantial evidence, *see Anderson*, *supra*; *Worley*, *supra*.

Finally, the administrative law judge found that although no mistake in a determination of fact had been established, because the newly submitted evidence was sufficient to establish total respiratory disability, a change in conditions was established. Ultimately, because the administrative law judge found no evidence of record sufficient to establish the exact date of onset of claimant's total disability, the administrative law judge found claimant entitled to benefits as of the month he filed his motion for modification, *i.e.*, April 1, 1998, in accordance with the holding in *Eifler v. Director, OWCP*, 926 F.2d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991). In *Eifler*, *supra*, the United States Court of Appeals for the Seventh Circuit held that a change in condition, *i.e.*, a worsening of a claimant's pneumoconiosis to the point where it is totally disabling, entitles claimant to benefits from the date of the change, whereas the correction of a mistake in fact, *i.e.*, "showing that he had totally disabling black lung disease at the time of the original hearing," entitles claimant to benefits from the date of the total disability.

Subsequent to the issuance of the administrative law judge's Decision and Order, 20 C.F.R. §725.503, regulating the date from which benefits are payable, was revised to provide

specific guidelines for determining the onset date for benefits awarded based on a modification petition, *see* 20 C.F.R. §725.503. This revision is applicable to the instant claim that was pending on January 19, 2001, *see* 20 C.F.R. §725.2(c). Thus, if a claim is awarded on modification based on a mistake in fact in a miner's claim, benefits are payable "beginning with the month on onset of total disability due to pneumoconiosis arising out of coal mine employment," but "[w]here the evidence does not establish the month of onset, benefits shall be payable... beginning with the month during which the claim was filed," *see* 20 C.F.R. §725.503(a)-(b), (d)(1). If a claim is awarded on modification based on a change in conditions, benefits are payable "beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge," but "[w]here the evidence does not establish the month of onset, benefits shall be payable... from the month in which the claimant requested modification," *see* 20 C.F.R. §725.503(d)(2).

Because the administrative law judge found that no mistake in a determination of fact was established, employer contends that the administrative law judge erred in finding a change in conditions established without comparing Dr. Forehand's newly submitted opinion in 1998 with his previously submitted opinion in 1995 to determine whether Dr. Forehand's opinion actually establishes that the claimant's condition had changed or deteriorated since the prior denial. Employer also contends that because Dr. Forehand stated in his 1998 opinion, submitted on modification, that claimant's respiratory impairment was "still present," that claimant's disability had been indicated by blood gas study results during exercise "on two occasions over two years apart," and because claimant's 1998 blood gas study results during exercise, while qualifying, actually were improved over claimant's prior 1995 blood gas study results during exercise, Dr. Forehand's 1998 opinion was the same as his previous 1995 opinion and did not establish any "change" in claimant's condition.

The administrative law judge found no specific factual error committed by Judge Neusner in determining that the evidence of record, as it previously existed before him, did not establish total disability. However, the administrative law judge also has the authority on modification to consider "whether the ultimate fact (*i.e.*, no total respiratory disability) was wrongly decided," *see Worrell*, *supra*. In finding no mistake in a determination of fact established, the administrative law judge did not consider whether the evidence of record, including the newly submitted evidence, established that claimant has been totally disabled all along and, therefore, should not have been denied benefits previously. Thus, while, as employer contends, Dr. Forehand's opinion regarding disability in 1998 may have been the same as his previous opinion in 1995, the administrative law judge did not consider or address Dr. Forehand's opinions in the context of whether the ultimate fact was wrongly decided by the prior administrative law judge, Judge Neusner.

Consequently, the administrative law judge's findings, that no mistake in a determination of fact was established, but that a change in conditions was established, are

vacated and the case is remanded for the administrative law judge to reconsider whether the evidence of record establishes that "the ultimate fact (*i.e.*, no total respiratory disability) was wrongly decided," *see Worrell*, *supra*. Because the administrative law judge's finding on remand, as to whether a mistake in a determination in fact was demonstrated in accordance with the standard enunciated in *Worrell* or, instead, whether modification is based upon a change in conditions, is determinative of the date from which benefits are payable, *see* 20 C.F.R. §725.310 (2000); 20 C.F.R. §725.503, the administrative law judge's determination of the date from which benefits are payable is also vacated and the case is remanded for the administrative law judge to determine the onset date in accordance with Sections 725.310 (2000) and 725.503.

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

SO ORDERED.

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[13] In reconsidering whether a mistake in a determination in fact was demonstrated in accordance with the standard enunciated in *Worrell*, *supra*, on remand, the administrative law judge should also reconsider his determination that no specific factual error was committed by Judge Neusner in determining that the evidence of record as it previously existed before him, did not establish total disability. Dr. Forehand's 1995 qualifying blood gas study results drawn during exercise, Director's Exhibits 11, 13, were rebutted in the original record by Dr. Sargent's non-qualifying blood gas study exercise results, *see* Director's Exhibit 32. However, Dr. Sargent's blood gas study exercise results were drawn after exercise, *see* Director's Exhibit 38 at 10. The relevant quality standards under 20 C.F.R. §718.105(b)(2000), *see also* 20 C.F.R. §725.2(c), state that "if an exercise blood-gas test is administered, blood shall be drawn during exercise." On modification, Dr. Forehand criticized Dr. Sargent's blood gas study exercise results due to the fact that they were from a blood sample drawn after exercise as opposed to during exercise, *see* Director's Exhibit 70; Claimant's Exhibit 1. Thus, while the quality standards set forth in Section 718.105 (2000) for blood gas studies are not mandatory, the administrative law judge should, as claimant contends, consider and use them as guidelines, *see Orek v. Director, OWCP*, 10 BLR 1-51 (1987)(Levin, J., concurring), in reconsidering whether a mistake in a determination of fact was committed by Judge Neusner regarding Dr. Sargent's blood gas study exercise results. In addition, the administrative law judge should consider the fact that, while Dr. Fino found on modification that Dr. Forehand's qualifying blood gas study results did not make "clinical sense," in part, because Dr. Sargent's blood gas studies yielded "higher values at rest," *see* Employer's Exhibit 9, the qualifying blood gas study results from Dr. Forehand were drawn during exercise, not at rest, *see* Director's Exhibits 11, 13, 70; Claimant's Exhibit 1.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge