BRB No. 09-0191 BLA

D.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WAMPLER BROTHERS COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 10/26/2009
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
	)	
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 on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C. for employer/carrier.

Michelle S. Gerdano (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-0008) of Administrative Law Judge Janice K. Bullard denying its request for modification 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).[1] This case involves a duplicate claim filed on August 13, 1993.[2] In the initial decision, Administrative Law Judge Daniel L. Leland credited claimant with ten years and eight months of coal mine employment,[3] and found that the new medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 54. Consequently, Judge Leland considered claimant's 1993 claim on the merits. After finding that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b), Judge Leland found that the evidence established total disability pursuant to 20 C.F.R. §718.204(c) (2000) and

[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 (2009). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[2] Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on March 15, 1973. Director's Exhibit 1. The SSA denied the claim on October 5, 1973 and October 25, 1978. *Id.* The Department of Labor then reviewed the claim. In a Decision and Order on Remand dated March 23, 1990, Administrative Law Judge Donald W. Mosser found that claimant was not entitled to invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). *Id.* Judge Mosser also found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, Judge Mosser denied benefits. *Id.* Judge Mosser denied claimant's motion for reconsideration on July 3, 1990. *Id.* There is no evidence that claimant took any further action in regard to his 1973 claim.

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[4] *Id.* Accordingly, Judge Leland awarded benefits.

Pursuant to employer's appeal, the Board affirmed Judge Leland's finding of a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). [*D.S.*] *v. Wampler Bros. Coal Co.*, BRB No. 96-0757 BLA (Feb. 13, 1997) (unpub.). The Board, however, remanded the case for Judge Leland to address whether all of the evidence of record supported a finding of pneumoconiosis. *Id.* The Board also vacated Judge Leland's findings pursuant to 20 C.F.R. §718.204(c), (b) (2000), and remanded the case for further consideration. *Id.*

On remand, Judge Leland found that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R, §718.202(a)(4). Director's Exhibit 67. Judge Leland also found that the evidence established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b) (2000). *Id.* Accordingly, Judge Leland awarded benefits. *Id.*

Pursuant to employer's appeal, the Board affirmed Judge Leland's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). [*D.S.*] *v. Wampler Bros. Coal Co.*, BRB No. 97-1295 BLA (May 27, 1998) (unpub.). The Board also affirmed Judge Leland's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* The Board, however, vacated Judge Leland's disability causation finding pursuant to 20 C.F.R. §718.204(b) (2000), and remanded the case for further consideration. *Id.*

On remand for the second time, Judge Leland found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Director's Exhibit 76. Accordingly, Judge Leland awarded benefits. *Id.*

Pursuant to employer's appeal, the Board affirmed Judge Leland's finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Stewart v. Wampler Bros. Coal Co.*, 22 BLR 1-80 (2000) (*en banc*) (Hall, C.J., and Nelson, J., concurring and dissenting). The Board,

[4] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

therefore, affirmed Judge Leland's award of benefits.[5] *Id.* Employer filed an appeal with the United States Court of Appeals for the Sixth Circuit. In a decision dated May 5, 2003, the Sixth Circuit affirmed Judge Leland's award of benefits. *Wampler Bros. Coal Co. v. Stewart*, No. 01-3745 (6th Cir. May 5, 2003).

Employer timely requested modification on March 30, 2004. Director's Exhibit 114; *see* 20 C.F.R. §725.310 (2000).[6] After the case was forwarded to the Office of Administrative Law Judges, employer moved to dismiss claimant's duplicate claim based on claimant's alleged failure to cooperate with employer's discovery requests. In the alternative, employer requested that claimant be ordered to attend a scheduled pulmonary examination. Claimant responded to employer's motion, requesting that employer's request for modification be "dismissed based upon *res judicata*." Claimant's Motion to Dismiss at 2. On January 31, 2006, Administrative Law Judge Janice K. Bullard (the administrative law judge) scheduled the claim for a hearing on May 11, 2006. However, on February 17, 2006, the administrative law judge issued an Order, wherein she canceled the hearing and dismissed employer's request for modification.[7]

Pursuant to employer's appeal, the Board held that the administrative law judge erred in dismissing employer's request for modification.[8] [*D.S.*] v. *Wampler Bros. Coal*

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[5] The Board denied employer's motion for reconsideration. [*D.S.*] *v. Wampler Bros. Coal Co.*, BRB No. 99-0246 BLA (May 10, 2001) (Order on Recon.) (*en banc*) (unpub.).

[6] Although Section 725.310 has been revised, those revisions apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2(c).

[7] Administrative Law Judge Janice K. Bullard (the administrative law judge) denied employer's motion for reconsideration on April 4, 2006.

[8] The Board explained that:

> First, although the administrative law judge found that employer failed to submit any evidence to support modification of the award based on a change in conditions, the administrative law judge's summary judgment ruling was premature since she did not wait until expiration of the time permitted under 20 C.F.R. §725.456 for employer to submit evidence to support its modification request. The administrative law judge's ruling also ignores that employer sought to obtain evidence by compelling an examination of claimant. Rather than ruling on employer's motion to compel, the administrative law judge simply denied employer's modification request without addressing the merits of that motion. Thus,

Co., BRB No. 06-0550 BLA (Apr. 30, 2007) (unpub.). The Board also held that the administrative law judge "erred by not performing a *de novo* review of the record, including both the prior evidence and the new evidence on modification, to determine whether there was a mistake in fact with regard to the award of benefits." *Id.* at 8. The Board, therefore, remanded the case to the administrative law judge, with instructions to reschedule the hearing requested by employer and to "consider whether employer is entitled to modification based either on a change in conditions or a mistake in fact, based on her *de novo* review of the record under 20 C.F.R. §725.310 (2000)." *Id.*

On remand, employer moved to compel claimant to submit to a physical examination. By Order dated March 24, 2008, the administrative law judge found that employer failed to demonstrate that its request to have claimant submit to a physical examination was reasonable. The administrative law judge, therefore, denied employer's motion. The administrative law judge denied employer's motion for reconsideration on April 18, 2008. The administrative law judge conducted a hearing on May 1, 2008.

In a Decision and Order on Remand dated November 4, 2008, the administrative law judge found that employer could not establish a change in conditions. Further, the administrative law judge conducted a *de novo* review of the record, including both the original evidence and the new evidence submitted by employer on modification, and found that there was not a mistake in a determination of fact. Accordingly, the administrative law judge denied employer's request for modification. 20 C.F.R. §725.310 (2000).

On appeal, employer contends that the administrative law judge erred in failing to find that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Employer also argues that the administrative law judge erred in denying its request to compel claimant to undergo a medical examination. Claimant responds in support of the administrative law judge's denial of employer's request for modification. The Director, Office of Workers' Compensation Programs, has filed a limited response, noting his disagreement with employer's assertion that it has an absolute right to have claimant undergo a medical examination on modification. In separate reply briefs, employer reiterates its previous contentions.

> the administrative law judge's ruling effectively thwarted employer's attempt at discovery without any explanation as to why employer was not entitled to have claimant examined.

[*D.S.*] v. *Wampler Bros. Coal Co.*, BRB No. 06-0550 BLA (Apr. 30, 2007) (unpub.), slip op. at 7 (footnotes omitted).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Modification

While employer may establish a basis for modification of the award of benefits by establishing either a change in conditions since the issuance of the previous decision or a mistake in a determination of fact in the previous decision,[9] 20 C.F.R. §725.310(a) (2000); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993), the burden of proof to establish a basis for modifying the award of benefits rests with employer. Claimant does *not* have the burden to reestablish his entitlement to benefits. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997). Employer, as the proponent of an order terminating an award of benefits, bears the burden of disproving at least one element of entitlement. *Id.*; *see also Branham v. BethEnergy Mines*, 20 BLR 1-27 (1996). An administrative law judge has the authority to reconsider all the evidence for any mistake of fact or change in conditions, *Worrell*, 27 F.3d at 230, 18 BLR at 2-296, but the exercise of that authority is discretionary. *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 456, 22 BLR 2-46, 2-69 (6th Cir. 1999).

Employer initially argues that the administrative law judge, in considering whether there was a mistake in a determination of fact, failed to follow the Board's directive to conduct a *de novo* review of the record. Contrary to employer's contention, the administrative law judge considered all of the evidence *de novo* and addressed whether employer satisfied its burden of disproving any element of entitlement. Decision and Order on Remand at 9-18.

The Existence of Pneumoconiosis

[9] The administrative law judge found that a change in conditions was not established. Decision and Order on Remand at 9. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer argues that the administrative law judge erred in finding that there was not a mistake of fact in the previous determination that claimant suffers from pneumoconiosis. In considering whether the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[10] the administrative law judge accorded the greatest weight to Dr. Sundaram's opinion, that claimant suffers from pneumoconiosis, based in part upon the doctor's status as claimant's treating physician.[11] Decision and Order on Remand at 13. The administrative law judge further found that Dr. Sundaram was well-qualified and "adequately explained his rationale for diagnosing [c]laimant with a pulmonary impairment related to coal dust exposure." *Id.* The administrative law judge found that the newly submitted medical opinions of Drs. Rosenberg and Tuteur did not "refute the finding of the presence of pneumoconiosis."[12] *Id.* at 12. The administrative law judge, therefore, found that there was no mistake of fact and thus, no basis for modifying the prior determination that the medical opinion

[10] The administrative law judge found no mistake of fact in regard to Judge Leland's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). Decision and Order on Remand at 9-10.

[11] During a July 18, 1995 deposition, Dr. Sundaram diagnosed coal workers' pneumoconiosis. Director's Exhibit 46 at 8. Dr. Sundaram opined that claimant suffers from both obstructive lung disease and restrictive lung disease. *Id.* at 22. Dr. Sundaram opined that claimant's coal dust exposure was a substantial causative factor of his pulmonary condition. *Id.* Dr. Sundaram explained that he considered the fact that claimant was a non-smoker in making this determination. *Id.* Dr. Sundaram also specifically opined that claimant's coal dust exposure was a contributing cause of his chronic bronchitis. *Id.* at 23.

[12] Dr. Rosenberg reviewed the medical evidence. In a report dated March 25, 2008, Dr. Rosenberg opined that claimant does not suffer from clinical or legal pneumoconiosis. Employer's Exhibit 11. Dr. Rosenberg opined that claimant's cough and sputum production "probably relates to esophageal reflux or a degree of hyperactive airways." *Id.*

Dr. Tuteur also reviewed the medical evidence. In a report dated April 2, 2008, Dr. Tuteur opined that claimant does not suffer from clinical or legal pneumoconiosis. Employer's Exhibit 12. Dr. Tuteur noted that claimant's clinical notes reported gastritis and gastroesophageal reflux disease. *Id.* Dr. Tuteur explained that this condition "can account for pulmonary symptoms such as breathlessness, exercise intolerance, cough and wheezing." *Id.* Dr. Tuteur further noted that, if this condition had been present for many decades prior to the recording of these symptoms, it could explain claimant's reported symptoms. *Id.*

evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in automatically crediting Dr. Sundaram's opinion simply because he was claimant's treating physician. Employer's Brief at 11. Employer's contention lacks merit. In an earlier decision, the Board rejected employer's argument that Judge Leland erred in according greater weight to Dr. Sundaram's opinion based upon his status as claimant's treating physician. In its 2000 Decision and Order on Remand, the Board held that:

> Employer contends that the administrative law judge erred by mechanically according greater weight to Dr. Sundaram's opinion as claimant's treating physician. As the Board held previously, however, regarding the administrative law judge's findings under Section 718.202(a)(4), the administrative law judge's reliance on Dr. Sundaram's opinion as claimant's treating physician was reasonable. The record indicates that Dr. Sundaram, who is board-certified in internal medicine, has been treating claimant for shortness of breath since June, 1994, and sees claimant every two to three months, Claimant's Exhibit 4 at 7. Dr. Sundaram explained how his diagnosis was based on his examination of claimant, claimant's coal mine employment history, symptoms, chest x-ray, non-smoking history and objective study results. Under these circumstances, the administrative law judge permissibly accorded greater weight to Dr. Sundaram's opinion as claimant's treating physician.

Stewart, 22 BLR at 1-91 (case citations omitted).

The Sixth Circuit similarly rejected employer's previous argument that Judge Leland erroneously applied an automatic presumption that a treating physician's opinion is entitled to greater weight, holding that:

> [Employer] fails to show that an automatic presumption was applied in this case. [Judge Leland] cited several reasons for finding the treating physician's opinion persuasive and well-reasoned. [Employer's] disagreement with the proposition that a physician who sees a patient on a regular basis may have more insight into the patient's condition than a physician who only examines the patient once is not persuasive, given this court's holding to the contrary.

Stewart, No. 01-3745, slip op. at 4.

In considering employer's modification request, the administrative law judge found no mistake of fact in regard to Judge Leland's finding that Dr. Sundaram's opinion

was entitled to greater weight based upon his status as claimant's treating physician. The administrative law judge explained that:

> I accord substantial weight to Dr. Sundaram's opinion. The doctor is Board[-]certified in the treatment of pulmonary conditions, and he adequately explained his rationale for diagnosing Claimant with a pulmonary impairment related to coal dust exposure. His opinion is entitled to additional weight because of his status as treating physician. Dr. Sundaram's opinion also is shared by three other physicians who examined Claimant years earlier, and diagnosed him with pneumoconiosis. His opinion is consistent with treatment records that reflect that the Claimant was treated for pneumoconiosis after his treatment by Dr. Sundaram ended. As recently as 2007, Claimant's treating physician diagnosed pneumoconiosis and prescribed pulmonary medication.

Decision and Order on Remand at 13. Because the administrative law judge's credibility determination is based on substantial evidence, we hold that the administrative law judge permissibly accorded greater weight to Dr. Sundaram's opinion based, in part, upon his status as claimant's treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

We also reject employer's contention that the administrative law judge erred in finding that Dr. Sundaram's opinion was sufficiently reasoned. The Board previously addressed this issue, holding that "Dr. Sundaram explained how his diagnosis [of pneumoconiosis] was based on his examination of claimant, claimant's coal mine employment, history, symptoms, chest x-ray, non-smoking history, and objective test results." [*D.S.*], BRB No. 97-1295 BLA, slip op. at 5. In considering employer's request for modification, the administrative law judge acted within her discretion in finding that Dr. Sundaram "adequately explained his rationale for diagnosing [c]laimant with a pulmonary impairment related to coal dust exposure." Decision and Order on Remand at 13. We, therefore, affirm the administrative law judge's finding, that Dr. Sundaram's opinion was sufficiently reasoned, as within her discretion. [13] *See Director, OWCP v.*

[13] Employer contends that the administrative law judge erred in finding that the newly submitted treatment notes support Dr. Sundaram's opinion. Employer's contention lacks merit. The administrative law judge merely noted that Dr. Sundaram's diagnosis of pneumoconiosis was consistent with treatment records indicating that claimant was treated for pneumoconiosis after his treatment by Dr. Sundaram ended. Decision and Order on Remand at 13. The administrative law judge accurately noted that Dr. Gish's treatment notes from August 8, 2007 reflect a diagnosis of "chronic obstructive lung disease[,] most likely pneumoconiosis." *Id.* at 5; Employer's Exhibit at 3.

Rowe, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

Employer contends that the administrative law judge erred in according less weight to the opinions of Drs. Rosenberg and Tuteur. We disagree. Although Drs. Rosenberg and Tuteur opined that claimant's pulmonary symptoms could be attributable to gastroesophageal reflux disease, the administrative law judge permissibly questioned their opinions because neither physician explained how he was able to rule out coal dust exposure as a cause, or contributing factor, of claimant's lung disease.[14] *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order on Remand at 11-12; Employer's Exhibits 11, 12.

In light of the above, we hold that the administrative law judge properly exercised her discretion in finding that there was not a mistake in a determination of fact in the previous finding that the medical opinion evidence established the existence of pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(4), 725.310 (2000); *Milliken*, 200 F.3d at 956, 22 BLR at 2-69. The administrative law judge's finding is, therefore, affirmed.

Total Disability

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[14] Although employer argues that an administrative law judge, in the initial adjudication of a claim, cannot reject an opinion for not ruling out coal dust exposure as a factor in causing a claimant's lung disease, employer fails to account for the fact that, in this modification proceeding, employer bears the burden of disproving the existence of pneumoconiosis. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997). By finding that Drs. Rosenberg and Tuteur failed to explain why coal dust exposure could not have contributed to claimant's pulmonary condition, the administrative law judge effectively found that the opinions of Drs. Rosenberg and Tuteur did not satisfy employer's burden to demonstrate that the prior finding of pneumoconiosis was mistaken.

Because the administrative law judge provided a proper basis for according less weight to the opinions of Drs. Rosenberg and Tuteur, *i.e.*, that they did not adequately explain why claimant's coal dust exposure did not contribute to his pulmonary condition, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We, therefore, need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Rosenberg and Tuteur.

Employer argues that the administrative law judge erred in finding that there was not a mistake in the previous determination that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In considering whether the medical opinion evidence established total disability,[15] the administrative law judge accorded the greatest weight to Dr. Sundaram's opinion, that claimant suffers from a totally disabling pulmonary impairment, based upon the doctor's status as claimant's treating physician.[16] Decision and Order on Remand at 16. The administrative law judge found that Dr. Sundaram's opinion was well-reasoned, noting that Dr. Sundaram explained that claimant's "symptoms and history and continued need for increases in medication supported his opinion that [c]laimant has a pulmonary impairment that would prevent him from performing his underground mine duties." *Id.* The administrative law judge noted further that Dr. Sundaram documented his familiarity with claimant's duties as an underground coal miner. *Id.* The administrative law judge accorded less weight to the opinions of Drs. Rosenberg and Tuteur, that claimant was not disabled from a respiratory standpoint, because he found that they were not well-reasoned and, therefore, provided "little probative value on the issue of whether [c]laimant established that he is totally disabled." *Id.* at 16.

Employer contends that that the administrative law judge did not consider that Dr. Sundaram lacked an adequate understanding of the exertional requirements of claimant's usual coal mine employment. In an earlier decision, the Board rejected employer's argument that Judge Leland did not compare Dr. Sundaram's opinion with the exertional requirements of claimant's usual coal mine employment, stating that:

> [E]mployer contends that the administrative law judge failed to compare Dr. Sundaram's opinion with the exertional requirements of claimant's usual coal mine employment in finding total respiratory disability established. This contention lacks merit. The administrative law judge complied with the Board's instruction to consider Dr. Sundaram's opinion in light of the exertional requirements of claimant's usual coal mine

[15] The administrative law judge found no mistake in regard to Judge Leland's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order on Remand at 14-15.

[16] Dr. Sundaram indicated that claimant was "short of breath . . . with limited activity and . . . cannot bend, crawl, stoop, or work at unprotected heights." Director's Exhibit 46 at 10. Dr. Sundaram noted that claimant was short of breath even at rest and experienced dizziness when he was asked to take a deep breath in and out. *Id.* at 11, 21. Dr. Sundaram opined that claimant was totally and permanently disabled from performing the normal work of an underground coal miner. *Id.* at 22.

> employment listed at Director's Exhibit 7. The administrative law judge reasonably concluded that, as claimant's job running a loader required standing, crawling, and lifting for a substantial portion of his work day, the work described was hard manual labor. Dr. Sundaram opined that claimant's respiratory impairment rendered him unable to "bend, crawl, [or] stoop," or to perform the "hard manual labor of a miner," on a six to eight hour basis. By comparing Dr. Sundaram's opinion with the exertional requirements of running a loader, the administrative law judge rationally inferred total respiratory disability. Therefore, we reject employer's contention, and we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4) as supported by substantial evidence.

[*D.S.*], BRB No. 97-22 BLR at 1-91 (case citations and footnote omitted).

In considering employer's modification request, the administrative law judge found that Dr. Sundaram adequately documented his familiarity with claimant's job duties and explained why claimant's pulmonary impairment would preclude him from performing those duties. Decision and Order on Remand at 16. Because it is supported by substantial evidence, the administrative law judge's finding that Dr. Sundaram's opinion supports a finding of total disability is affirmed. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). We also affirm the administrative law judge's finding that Dr. Sundaram's opinion regarding the extent of claimant's pulmonary disability was entitled to greater weight based upon his status as claimant's treating physician. *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

Employer contends that the administrative law judge erred in her consideration of the opinions of Drs. Rosenberg and Tuteur. Employer argues that the administrative law judge mischaracterized their opinions when she found that the physicians failed to identify the pulmonary function studies that they invalidated or provide reasons for finding them invalid. Employer's Brief at 20. The administrative law judge found that Dr. Rosenberg provided no basis for his conclusion that claimant did not provide adequate effort on pulmonary function studies conducted after 1990. Decision and Order on Remand at 15. The administrative law judge also found that Dr. Tuteur failed to adequately identify the pulmonary function studies that he found invalid or to provide a basis for his invalidations. *Id.* The administrative law judge's findings are supported by the record. While Dr. Rosenberg opined that claimant's pulmonary function studies were not performed with adequate effort after 1990, he did not provide an explanation for his conclusion. Employer's Exhibit 11. Although Dr. Tuteur opined that only two of claimant's eleven pulmonary function studies are "valid as an assessment of maximum function," he provided no explanation as to why the other nine studies were unacceptable.

See Employer's Exhibit 12. Consequently, we reject employer's contention that the administrative law judge mischaracterized the opinions of Drs. Rosenberg and Tuteur.

In light of the above, we hold that the administrative law judge did not abuse her discretion in finding that there was not a mistake in a determination of fact regarding the previous finding that the medical opinion evidence established total disability. *See* 20 C.F.R. §718.204(b)(2)(iv); *Milliken*, 200 F.3d at 956, 22 BLR at 2-69. The administrative law judge's finding is, therefore, affirmed.

Weighing all of the relevant evidence together, the administrative law judge found that there was no mistake in a determination of fact regarding the previous finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*). Decision and Order on Remand at 17. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Total Disability Due to Pneumoconiosis

The administrative law judge found that there was no mistake in a determination of fact as to the previous finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order on Remand at 18. This finding is similarly affirmed as unchallenged on appeal. *Skrack*, 6 BLR at 1-711. In light of the above, we affirm the administrative law judge's determination that employer did not satisfy its burden to demonstrate that the prior finding of entitlement was mistaken. *See* 20 C.F.R. §725.310 (2000); *Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Branham*, 20 BLR at 1-34.

Employer's Request to Compel Claimant to Undergo a Physical Examination

Employer argues that the administrative law judge erred in denying its motion to compel claimant to undergo a medical examination. The submission of evidence is this modification proceeding is governed by two provisions, 20 C.F.R. §725.310(b) (2000) and 20 C.F.R. §718.404(b) (2000). Section 725.310(b) (2000) provides that "[m]odification proceedings shall be conducted in accordance with the provisions of this part as appropriate." 20 C.F.R. §725.310(b) (2000). Section 718.404(b) provides that:

> An individual who has been finally adjudged to be totally disabled due to pneumoconiosis shall, if requested to do so upon reasonable notice, *where there is an issue pertaining to the validity of the original adjudication of disability*, present himself or herself for, and submit to, examinations or tests as provided in §718.101, and shall submit medical reports and other evidence necessary for the purpose of determining whether such individual

> continues to be under a disability. Benefits shall cease as of the month in which the miner is no longer determined to be eligible for benefits.

20 C.F.R. §718.404(b) (2000) (emphasis added).[17]

The Board has held that an employer's right to have a claimant undergo an examination pursuant to a request for modification is not absolute, and the determination of whether an employer is entitled to such an examination rests within the discretion of the administrative law judge. *Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37, 1-40-42 (2000) (*en banc*); *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173, 1-177-78 (1999) (*en banc*); *accord Cumberland River Coal Co. v. Caudill*, No. 05-3680 (6th Cir. Nov. 17, 2006) (unpub.).

Citing *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002), employer argues that the Board's requirement, that an employer must prove the need for a physical examination on modification, has been rejected by the United States Court of Appeals for the Seventh Circuit.[18] However, the Sixth Circuit,

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[17] 20 C.F.R. §718.404 (2000) is now found in substantially identical form at 20 C.F.R. §725.203(d). Section 725.203(d) provides that:

> Upon reasonable notice, an individual who has been finally adjudged entitled to benefits shall submit to any additional tests or examinations the Office deems appropriate, and shall submit medical reports and other relevant evidence the Office deems necessary, *if an issue arises pertaining to the validity of the original award.*

20 C.F.R. §725.203(d) (emphasis added).

[18] In *Hilliard*, the administrative law judge had refused to compel a widow who was receiving survivor's benefits to release her husband's autopsy results during a modification proceeding initiated by the employer. The Seventh Circuit held that:

> The regulations implementing the Act are not silent with respect to a miner's obligation to cooperate under these circumstances. Looking first to the regulation governing modification proceedings, 20 C.F.R. §725.310(b) (2001) provides that "[m]odification proceedings shall be conducted in accordance with the provisions of this part as appropriate...." Included within Part 725 is §725.414 which states in relevant part that "[i]f a miner unreasonably refuses . . . [t]o provide the Office or the designated responsible operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records . . . the miner's

within whose jurisdiction this case arises, has noted its disagreement with the Seventh Circuit's interpretation of the regulations in the *Hilliard* decision. In *Caudill*, the Sixth Circuit held that 20 C.F.R. §725.414, which the *Hilliard* court read to require a claimant to submit to a new medical examination and turn over medical records in modification proceedings, had to be read in light of 20 C.F.R. §725.401. The Sixth Circuit reasoned that:

> Section 725.401 provides that subpart E, which is where §725.414 is found, deals with the district director's adjudication of "claims." The term "claim" is defined in §725.101(a)(1) as "a written assertion of entitlement to benefits under section 415 . . . ." In light of that definition, a modification of an award is not an adjudication of a "claim;" rather, it is the *reconsideration* of such an adjudication. *See also* 20 C.F.R. §725.310(a) (stating that, at the request of any party, the district director may "*reconsider* the terms of an award or denial of benefits") (emphasis supplied). Therefore, we conclude that it is not appropriate to apply §725.414(a)(3)(i) to modification proceedings as the [*Hilliard*] court did.

Caudill, slip op. at 6.

The Sixth Circuit held that, because the §725.414 provision cited by the Seventh Circuit in *Hilliard* is not among those incorporated by Section 725.310(b), it does not apply to modification proceedings. The court held that the applicable provision, 20 C.F.R. §718.404(b) (2000), neither requires an administrative law judge to compel a miner to undergo a physical examination, nor prevents an administrative law judge from doing so; the matter is discretionary. *Caudill*, slip op. at 6.[19]

> claim may be denied by reason of abandonment." 20 C.F.R. §725.414(a)(3)(i) (2001). According to the regulations, therefore, the requirements of §725.414 apply to modification proceedings.

Old Ben Coal Co. v. Director, OWCP [*Hilliard*], 292 F.3d 533, 548, 22 BLR 2-429, 2-455 (7th Cir. 2002) (footnote omitted).

[19] We recognize that unpublished decisions are not considered binding precedent in the Sixth Circuit. *See* Fed. R. App. P. 32.1; Local Rule 28(f); *Bell v. Johnson*, 308 F.3d 594, 611 (6th Cir. 2002). However, we agree with the reasoning of the Sixth Circuit in *Caudill* and base our holding on a review of this administrative law judge's decision, wherein she properly followed existing Board law. *See Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37, 1-40-42 (2000) (*en banc*); *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173, 1-177-78 (1999) (*en banc*).

In this case, the administrative law judge noted that employer's modification request "was not accompanied by any evidence that suggests that [c]laimant's award was invalid." March 24, 2008 Order at 4. The administrative law judge also noted that employer "failed to offer evidence that demonstrates that its request to have [c]laimant examined [was] reasonable . . . ." *Id.* At the hearing, the administrative law judge reiterated her finding that employer provided no evidence demonstrating that its request to have claimant examined was reasonable under the circumstances. Hearing Transcript at 11-19. In this case, the administrative law judge's basis for rejecting employer's request for an examination, *i.e.*, that employer did not provide any evidence suggesting that the award of benefits was invalid, constituted a permissible exercise of her discretion. *See Stiltner*, 22 BLR at 1-40-42; *Selak*, 21 BLR at 1-177-78. We, therefore, hold that the administrative law judge properly rejected employer's request to have claimant examined pursuant to its request for modification.[20] 20 C.F.R. §718.404(b) (2000).

[20] Although employer's motion to compel claimant to undergo a medical examination was denied, employer was provided with an opportunity to obtain medical evidence in connection with its request for modification. Employer was able to question claimant during a deposition on May 13, 2004. Director's Exhibit 127. Claimant also signed a medical release, permitting employer access to his medical records. Drs. Rosenberg and Tuteur reviewed those records. Employer's Exhibits 11, 12.

Accordingly, the administrative law judge's Decision and Order on Remand denying employer's request for modification is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge