BRB No. 13-0011 BLA

BILLY MILES ROSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 10/31/2013
	)	
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 Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5772) of Administrative Law Judge John P. Sellers, III rendered on a second request for modification of a 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 pertinent procedural history of this case is as follows: Claimant filed his claim on July 6, 2001. Director's Exhibit 2. On January 12, 2006, Administrative Law Judge Edward Terhune Miller issued a Decision and Order denying benefits, based on claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 31. Claimant filed a request for modification on April 25, 2006. Director's Exhibits 36, 37. On February 25, 2008, Administrative Law Judge Ralph A. Romano issued a Decision and Order denying benefits, based on claimant's failure to establish the existence of pneumoconiosis and, thus, a change in conditions. Director's Exhibits 37, 62. Claimant filed a second request for modification on February 17, 2009. Director's Exhibit 63.

On September 28, 2012, Judge Sellers (the administrative law judge) issued a Decision and Order, which is the subject of this appeal. The administrative law judge accepted the parties' stipulation that claimant worked in qualifying coal mine employment for twenty-five years and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), contained in the Patient Protection and Affordable Care Act, was not applicable to this case because the instant claim was filed before January 1, 2005. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010). However, the administrative law judge determined that justice would be served under the Act by reopening the record to consider the evidence newly submitted in support of modification in conjunction with the previously submitted evidence. Although the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), he found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge found that claimant established modification based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Further, after noting that employer conceded the issue of total respiratory disability at the formal hearing held on May 11, 2011, the administrative law judge found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination that reopening the record under Section 725.310 rendered justice under the Act. Employer also challenges the administrative law judge's finding that the evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a) and, thus, a mistake in a determination of fact pursuant to Section 725.310. Further, employer challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis pursuant to Section 718.204(c). Claimant responds, urging affirmance

of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, the administrative law judge may grant modification of an award or denial of benefits, based upon either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, the administrative law judge is vested 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, 256 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Initially, we will address employer's contention that the administrative law judge erred in finding that claimant established a mistake in a determination of fact pursuant to Section 725.310. Employer asserts that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis[3] at Section 718.202(a)(4). We disagree.

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[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[3] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

In evaluating the evidence of record relevant to the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Baker, Jarboe, Repsher, and Fino. Dr. Baker opined that claimant has legal pneumoconiosis,[4] Director's Exhibit 8; Claimant's Exhibit 2, while Drs. Jarboe, Repsher, and Fino opined that claimant does not have legal pneumoconiosis,[5] Director's Exhibits 28, 52; Employer's Exhibits 1, 6. The administrative law judge acknowledged the expertise of Dr. Baker and found that Dr. Baker's opinion was persuasive because it was well-documented, well-reasoned, and consistent with the scientific views endorsed by the Department of Labor (the Department) in the preamble to the 2001 amended regulations. By contrast, while the administrative law judge acknowledged the expertise of Drs. Jarboe, Repsher, and Fino as Board-certified pulmonologists, he found that their opinions were not persuasive because they were not reasoned and relied on positions that were inconsistent with the scientific views endorsed by the Department in the preamble to the 2001 amended regulations. Thus, based on Dr. Baker's opinion, the administrative law judge found that claimant established the existence of legal pneumoconiosis.

Employer asserts that Dr. Baker's opinion is insufficient to establish the existence of legal pneumoconiosis because it is speculative. Employer argues that the administrative law judge improperly applied a presumption of legal pneumoconiosis. Employer maintains that "[the administrative law judge] cites to the fact that Dr. Baker is not required to apportion relative contribution between cigarette smoking and coal dust exposure as a reason to credit [Dr. Baker's] opinion that coal dust exposure and cigarette smoking in fact both caused [claimant's] respiratory impairment." Employer's Brief at

[4] In reports dated October 3, 2001 and March 27, 2009, Dr. Baker diagnosed chronic obstructive pulmonary disease (COPD) and chronic bronchitis related to coal dust exposure and cigarette smoking. Director's Exhibit 8; Claimant's Exhibit 2.

[5] In reports dated July 17, 2003 and February 28, 2010, as well as a deposition dated July 14, 2004, Dr. Jarboe opined that claimant's airways obstruction resulted from a combination of cigarette smoking and bronchial asthma, and not coal dust exposure. Director's Exhibit 28 (Dr. Jarboe's Depo. at 20-21); Employer's Exhibit 1. In a report dated August 21, 2006 and a deposition dated September 6, 2007, Dr. Repsher opined that claimant does not have a respiratory disease or condition caused by coal dust exposure. Director's Exhibits 52, 56 (Dr. Repsher's Depo. at 15-17). Further, in a report dated January 27, 2011, Dr. Repsher suggested that claimant's respiratory impairment is related to hereditary and lifestyle factors, such as cigarette smoking and bronchial asthma. Director's Exhibit 52; Employer's Exhibit 6. Lastly, in a report dated October 14, 2003, Dr. Fino diagnosed obstructive pulmonary disease related to cigarette smoking. Director's Exhibit 23. During a deposition dated July 14, 2004, Dr. Fino opined that claimant does not have any disease or impairment related to coal dust exposure. Director's Exhibit 23 (Dr. Fino's Depo. at 14-15).

10. Employer also argues that the administrative law judge did not address Dr. Baker's failure to specify what objective tests his diagnosis of pneumoconiosis was based upon and to determine whether Dr. Baker's reliance on an abnormal chest x-ray prejudiced his opinion. We disagree.

The administrative law judge permissibly accorded dispositive weight to Dr. Baker's opinion because it was well-reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge noted that "[Dr. Baker] opined that the [c]laimant's coal dust exposure[,] combined with his smoking history[,] had been additive in producing his impairment and that his opinion would not change even if it was assumed that the [c]laimant did not have clinical pneumoconiosis." Decision and Order at 39. The administrative law judge also stated, "I do not find discrediting the fact that Dr. Baker postulated that it was not 'intellectually' possible to apportion the relative contribution of coal dust exposure and cigarette smoking to the [c]laimant's impairment." *Id*. Further, in finding that Dr. Baker's reasoning was entirely consistent with the Department's position regarding the incidence of non-smoking coal miners and smoking coal miners developing airways obstruction and chronic bronchitis, the administrative law judge stated:

> Based upon this language, it is clear that [the Department] has adopted the view, which is shared by Dr. Baker, that even in miners who do not smoke, coal dust can cause both a moderate and severe degree of obstruction, and that the incidence of such obstruction is 'roughly equal' or 'equal' to the incidence among non-mining smokers. Further, [the Department] has taken the view, also shared by Dr. Baker, that the risk of obstructive lung disease is additive when coal dust exposure and cigarette smoking are combined in a miner who smokes.

Id. at 40.

Because the administrative law judge reasonably found that Dr. Baker's opinion was well-reasoned, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *Fuller*, 6 BLR at 1-1294, we reject employer's assertion that Dr. Baker's opinion is insufficient to establish the existence of legal pneumoconiosis. Furthermore, because Dr. Baker unequivocally opined that claimant's chronic lung disease was related to coal dust exposure, Director's Exhibit 8; Claimant's Exhibit 2, we reject employer's assertion that the administrative law judge improperly applied a presumption of legal pneumoconiosis. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Employer also asserts that the administrative law judge erred in failing to provide valid reasons for discrediting the opinions of Drs. Jarboe, Repsher, and Fino. We disagree. The preamble to the 2001 regulations sets forth how the Department has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An administrative law judge may, within his discretion, evaluate medical expert opinions in conjunction with the Department's discussion of sound medical science in the preamble to these regulations. *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012). In this case, the administrative law judge permissibly discredited the opinions of Drs. Jarboe and Repsher because they were inconsistent with the Department's position that the regulations provide that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is due to coal dust exposure.[6] *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000); 20 C.F.R. §718.204(b)(2)(i)(C); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 311-12, 25 BLR at 2-125. In addition, the administrative law judge permissibly discredited the opinions of Drs. Repsher and Fino because they were inconsistent with the Department's position that coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms.[7] *See* 65 Fed. Reg. 79,940-43 (Dec. 20, 2000); *J.O.* [*Obush*] *v. Helen*

[6] The administrative law judge stated that "it is clear that primary to Dr. Jarboe's opinion that the [c]laimant did not have legal pneumoconiosis was his view that coal dust causes a symmetric reduction in a miner's FEV1 and FVC, so that the ratio is preserved, whereas cigarette smoking causes disproportionate reduction of the FEV1, causing the ratio to be reduced." Decision and Order at 42. Although the administrative law judge noted several reasons why "it is not clear to [him] how Dr. Jarboe's conclusion necessarily follows from [Dr. Jarboe's] premise," he ultimately stated that, "[o]f equal if not greater importance, Dr. Jarboe's position that coal dust does not cause a reduced FEV1/FVC ratio is contrary to legislative fact." *Id*. With regard to Dr. Repsher's opinion, the administrative law judge stated, "I note that he relies upon the same principle underlying Dr. Jarboe's opinion, which is that coal dust causes a symmetrical or parallel reduction in the FEV1 and FVC, and a disproportionate reduction of FEV1 compared to the FVC is a sufficient basis to exclude coal dust as a cause of impairment." *Id*. at 44.

[7] In considering Dr. Repsher's opinion, the administrative law judge noted that "Dr. Repsher also opined that[,] even assuming that coal dust contributed to the [c]laimant's [COPD], such contribution would necessarily be minimal compared to the effects of smoking and aging." Decision and Order at 44. Then the administrative law judge stated, "I find such a position to be in stark contrast to the official [Department of Labor (the Department)] position, which is that even in miners who do not smoke, coal dust can cause both a moderate and severe degree of obstruction, and that the incidence of such obstruction is 'roughly equal' or 'equal' to the incidence among non-mining

Mining Co., 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011). The administrative law judge also permissibly discredited Dr. Fino's opinion because it was inconsistent with the Department's position that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis.[8] *See* 65 Fed. Reg. 79,971 (Dec. 20, 2000); 20 C.F.R. §718.201(a)(2); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 311-12, 25 BLR at 2-125. Further, the administrative law judge permissibly discredited Dr. Repsher's opinion because "Dr. Repsher does not provide any convincing reason for ruling out the [c]laimant's 25 years of coal dust exposure at the mine face as a cause of his impairment, or otherwise relegating such exposure to insignificance as a contributory or aggravating factor." Decision and Order at 45; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Moreover, the administrative law judge permissibly discredited Dr. Jarboe's opinion because Dr. Jarboe did not adequately explain why partial reversibility in the results of a portion of claimant's pulmonary function studies necessarily eliminated a diagnosis of legal pneumoconiosis.[9] *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23

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smokers." *Id*. The administrative law judge further stated, "[b]ased upon this language, it is clear that [the Department] has adopted a view directly at odds with Dr. Repsher's view that coal dust only causes obstruction at a level that is statistically less significant than obstruction due to smoking and even the normal aging process." *Id*. at 44-45. Regarding Dr. Fino's opinion, the administrative law judge stated, "I find his statements that coal dust only causes a loss of FEV1 of 3 ccs per year to be inconsistent, if not contrary, to the official [Department] position previously noted that coal dust can cause clinically significant obstructive lung disease, both moderate and severe, and does so at an incidence equal to that of smokers." *Id*. at 45.

[8] The administrative law judge noted that "Dr. Fino's statement that he considers the degree of obstruction due to coal dust to be 'directly proportional to the chest x-ray' indicates that he required x-ray evidence of clinical pneumoconiosis to diagnose legal pneumoconiosis." Decision and Order at 46.

[9] Employer asserts that the administrative law judge erred in discrediting Dr. Jarboe's opinion that claimant's airway disease was compatible with asthma, and not pneumoconiosis. Employer maintains that the administrative law judge impermissibly substituted his expertise for that of Dr. Jarboe. Further, employer avers that the administrative law judge improperly applied an inconsistent degree of scrutiny to Dr. Jarboe's opinion as compared to Dr. Baker's contrary opinion with regard to the reversibility of claimant's airway disease. We disagree. In finding that Dr. Baker's opinion was well-documented, the administrative law judge stated that, "[a]lthough Dr.

BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155. Thus, we reject employer's assertion that the administrative law judge erred in failing to provide valid reasons for discrediting the opinions of Drs. Jarboe, Repsher, and Fino.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4).[10] Furthermore, we affirm the administrative law judge's finding that claimant thus established a mistake in a determination of fact at Section 725.310.

Next, we address employer's contention that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at Section 718.204(c). Specifically, employer asserts that the administrative law judge erred in failing to consider disability causation as a separate element of entitlement. We disagree.

The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge

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Baker did not perform pulmonary function studies after the use of bronchodilators, I do not find this significantly discrediting as he testified that even if the [c]laimant demonstrated a degree of reversibility above 15%, this would not rule out a diagnosis of coal workers' pneumoconiosis." Decision and Order at 39. With regard to Dr. Jarboe's opinion, the administrative law judge noted the doctor's deposition testimony that a fixed airway obstruction can develop in a person with asthma that has not been treated for a sufficient length of time. The administrative law judge stated, "[w]eighing these statements, I note that Dr. Jarboe has drawn several inferences from the lack of information he reviewed, namely that the [c]laimant's asthma, if he has it, has not been aggressively treated, and that he has had non-optimally treated asthma for a sufficient length of time to cause remodeling of the airways even though the state of medical literature is unable to predict how long it takes for such remodeling to occur." *Id*. at 41-42. Because the administrative law judge reasonably found that Dr. Jarboe's theory regarding the reversibility of claimant's asthma was less persuasive than Dr. Baker's opinion that coal dust exposure contributed to claimant's fixed impairment, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), we reject employer's assertion that the administrative law judge erred in discrediting Dr. Jarboe's opinion, that claimant's airway disease was compatible with asthma.

[10] A finding that pneumoconiosis arose out of coal mine employment is subsumed in a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201.

independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Here, in considering whether the evidence established total disability due to pneumoconiosis, the administrative law judge considered the opinions of Drs. Baker, Jarboe, Repsher, and Fino.[11] The administrative law judge noted that Dr. Baker found that claimant is totally disabled and that coal dust exposure significantly contributed to, and substantially aggravated, his condition. Further, the administrative law judge noted that Drs. Jarboe, Repsher, and Fino found that there is no causal or contributory relationship between claimant's respiratory condition and his coal dust exposure. The administrative law judge then stated:

> For the reasons previously discussed, I have found their opinions [Drs. Jarboe, Repsher, and Fino] unpersuasive on the issue of legal pneumoconiosis. For essentially the same reasons, I do not find their opinions persuasive on the issue of the cause of the [c]laimant's total disability. Instead, I credit the opinion of Dr. Baker and find his opinion sufficient to sustain the [c]laimant's burden of total disability due to pneumoconiosis.

Decision and Order at 47.

As discussed *supra*, in considering whether claimant established the existence of legal pneumoconiosis, the administrative law judge permissibly discredited the opinions of Drs. Jarboe and Repsher because they were inconsistent with the Department's position that the regulations provide that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is due to coal dust exposure. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000); 20 C.F.R. §718.204(b)(2)(i)(C); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 311-12, 25 BLR at 2-125. The administrative law judge also permissibly discredited the opinions of Drs. Repsher and Fino because they were inconsistent with the Department's position that coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms. *See* 65 Fed. Reg. 79,940-43 (Dec. 20, 2000); *J.O.* [*Obush*], 24 BLR at 1-125-26. Additionally, the administrative law judge permissibly discredited Dr. Fino's opinion because it was inconsistent with the Department's position that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79,971 (Dec. 20, 2000); 20

[11] Dr. Baker opined that coal dust exposure significantly contributed to, and substantially aggravated, claimant's pulmonary impairment. Director's Exhibit 8; Claimant's Exhibit 2. Conversely, Drs. Jarboe, Repsher, and Fino opined that claimant's disabling pulmonary impairment was not caused by coal dust exposure. Director's Exhibits 28, 52; Employer's Exhibits 1, 6.

C.F.R. §718.201(a)(2); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 311-12, 25 BLR at 2-125. Moreover, the administrative law judge permissibly discredited Dr. Repsher's opinion because "Dr. Repsher does not provide any convincing reason for ruling out the [c]laimant's 25 years of coal dust exposure at the mine face as a cause of his impairment, or otherwise relegating such exposure to insignificance as a contributory or aggravating factor." Decision and Order at 45; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Lastly, the administrative law judge permissibly discredited Dr. Jarboe's opinion because Dr. Jarboe did not adequately explain why partial reversibility in the results of a portion of claimant's pulmonary function studies necessarily eliminated a diagnosis of legal pneumoconiosis. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Swiger*, 98 F. App'x at 237; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Thus, we reject employer's assertion that the administrative law judge erred in failing to consider disability causation as a separate element of entitlement.[12]

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at Section 718.204(c).

Finally, employer contends that the administrative law judge erred in determining that granting modification would render justice under the Act. Specifically, employer asserts that claimant's request for modification constitutes a "back door route to retrying the case," as it seeks "another bite at the apple" and "to correct litigation mistakes in prior proceedings." Employer's Brief at 7. We disagree.

Modification of a claim should not be granted automatically upon finding that a mistake was made in an earlier determination, but only when the administrative law judge concludes that doing so will render justice under the Act. *See* 20 C.F.R. §725.310(a); *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (recognizing that the purpose of modification is to "render justice"). The administrative law judge has broad discretion in determining whether to grant modification. *O'Keeffe*, 404 U.S. at 256; *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547, 22 BLR 2-429, 2-453 (7th Cir. 2002). In determining whether modification will render justice under the Act, the administrative law judge should consider all relevant factors, including the preference, under the Act, for accuracy; the interest in finality; any delay in seeking modification; the diligence and motive of the requesting party; the quality of the new

[12] Employer asserts that the administrative law judge improperly shifted the burden of proof to employer to rule out a diagnosis of legal pneumoconiosis. Contrary to employer's assertion, the administrative law judge found that claimant satisfied his burden to establish the existence of legal pneumoconiosis and total disability due to pneumoconiosis. Decision and Order at 46-47. Thus, we reject employer's assertion.

evidence; and mootness. *See Hilliard*, 292 F.3d at 546-47, 22 BLR at 2-452-54; *Westmoreland Coal Co. v. Sharpe*, 692 F. 3d 317, 25 BLR 2-157 (4th Cir. 2012), *cert. denied*, 570 U.S. (2013).

In this case, the administrative law judge stated, "I am not persuaded by the [e]mployer's argument that the [c]laimant's request for modification is ill-motivated in that it seeks 'another bite of the apple' and represents merely a desire for the undersigned 'to re-weigh the evidence in the hopes that the [c]ourt will come to a different conclusion than that reached by Judges Miller and Romano.' Emp. P. Hg. Bf. at 3-4." Decision and Order at 29. The administrative law judge further stated:

> This is only the [c]laimant's second request for modification, a number that I do not find to be abusive of the process. He has presented evidence of sufficient quality to demonstrate that the modification request was in earnest and not just a procedural ploy to keep the claim viable and deny to the [e]mployer its legitimate rights of repose. Nor do I find that the purpose of this modification is to cure litigation mistakes as was the case in [*Wilson v. Peabody Coal Co.*, BRB No. 09-0770 BLA (Aug. 11, 2010)(unpub.)]. Taking all these factors into consideration, I find that the modification request does render justice under the Act and justifies reopening the record to analyze both the old and new evidence for either a change in condition or a mistake of fact.

Id.

Employer offers nothing in the record to support its allegation that claimant has an improper motive. Because we discern no error or abuse of discretion in the administrative law judge's determination that granting modification would render justice under the Act, it is affirmed. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge