BRB No. 12-0575 BLA

OMA MILAM, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 09/20/2013
	)	
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 on Remand Awarding Benefits on Modification of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits on Modification (2009-BLA-5248) of Administrative Law Judge Richard A. Morgan rendered on a request for modification of the denial of a subsequent claim filed on February 13, 2004,[1] pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case is before the Board for the third time.

[1] Claimant filed his first claim for benefits on September 8, 1994. Director's Exhibit 1. The district director denied that claim on February 3, 1995, finding that the

In the initial decision on this subsequent claim, Administrative Law Judge Stephen L. Purcell found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and that claimant, thereby, established a change in an applicable condition of entitlement since the denial of his prior claim. *See* 20 C.F.R. §725.309(d); Director's Exhibit 46. On the merits of the claim, however, Judge Purcell found that the evidence did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), and denied benefits. Pursuant to claimant's appeal, the Board affirmed Judge Purcell's denial of benefits. *O.M.* [*Milam*] *v. Peabody Coal Co.*, BRB No. 07-0755 BLA (May 23, 2008)(unpub.). Claimant then timely requested modification. Director's Exhibit 53.

In his first Decision and Order on claimant's request for modification, Administrative Law Judge Richard A. Morgan (the administrative law judge) credited claimant with thirty-five years of coal mine employment. He found that, while the x-ray evidence and medical opinion evidence were insufficient to establish clinical pneumoconiosis, the medical opinion evidence was sufficient to establish legal pneumoconiosis,[2] in the form of chronic obstructive pulmonary disease (COPD) that was substantially aggravated by coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). Weighing all of the evidence relevant to the existence of pneumoconiosis together, the administrative law judge found that it established pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). The administrative law judge, therefore, found that claimant established a mistake in a determination of fact in the prior decision denying benefits, and granted modification pursuant to 20 C.F.R. §725.310. The administrative law judge further found, regarding the commencement date of benefits, that, because the month of onset of disability due to pneumoconiosis could not be determined, benefits should commence as of February 2004, the month that claimant filed his claim. Judge Morgan's 2010 Decision and Order.

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evidence did not establish any element of entitlement. *Id*. The record does not reflect that claimant took any further action on his 1994 claim.

[2] "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Pursuant to employer's appeal, the Board affirmed in part, and vacated in part, the administrative law judge's award of benefits and remanded the case for further consideration of the evidence. *Milam v. Peabody Coal Co.*, BRB No. 10-0554 BLA (May 24, 2011)(unpub.), *aff'd on recon.* BRB No. 10-0554 BLA (Sept. 27, 2011)(unpub. Order). The Board affirmed the administrative law judge's finding that the medical opinion evidence was sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4), and that the evidence as a whole established pneumoconiosis pursuant to Section 718.202(a). *Id*. at 4-6. However, the Board vacated the administrative law judge's finding that the evidence was sufficient to establish total respiratory disability and disability causation pursuant to Section 718.204(b)(2), (c), and remanded the case for the administrative law judge to reconsider the evidence thereunder. *Id.* at 8-10. Additionally, the Board instructed the administrative law judge that, in determining whether claimant established modification pursuant to 20 C.F.R. §725.310, he must determine whether granting modification would render justice under the Act. *Id*. at 10. Lastly, the Board held that the administrative law judge failed to adequately explain his finding on the commencement date of benefits. The Board, therefore, instructed the administrative law judge that, if reached, he must fully explain his finding regarding the commencement date of benefits.[3] *Id*.

On remand, the administrative law judge set forth his prior findings and the Board's remand instructions. The administrative law judge first noted that the Board affirmed his decision to credit the opinions of Drs. Agarwal and Baker and, therefore, affirmed his finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4),[4] as well as his finding that the weight of the evidence established pneumoconiosis pursuant to Section 718.202(a). The administrative law judge then considered the evidence relevant to total respiratory disability pursuant to Section 718.204(b). The administrative law judge found that while the pulmonary function study and blood gas study evidence did not establish total respiratory disability, the medical opinion evidence did. *See* 20 C.F.R. §718.204(b)(2)(i), (ii), and (iv). The administrative law judge found that total respiratory disability was established pursuant

[3] Specifically, the Board held that the administrative law judge "did not discuss the evidence or explain why it did not permit him to determine the month of onset." Board's 2011 Decision and Order at 10. Therefore, the Board instructed the administrative law judge to "again consider the date from which benefits are payable, and explain his finding." *Id*. at 10.

[4] 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, 718.203.

to Section 718.204(b) overall[5] and that total disability due to pneumoconiosis was established pursuant to Section 718.204(c). The administrative law judge also found that granting claimant's request for modification pursuant to Section 725.310 would render justice under the Act. Accordingly, the administrative law judge awarded benefits, commencing on March 1, 2004,[6] based on the 2004 opinion of Dr. Mullins.

On appeal, employer challenges the administrative law judge's finding that total respiratory disability and disability causation were established pursuant to Section 718.204(b)(2), (c). Employer also contends that the administrative law judge erred in finding the commencement date of benefits to be March 2004.[7] In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director,

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[5] Employer contends that the administrative law judge merely weighed the evidence relevant to each subsection of 20 C.F.R. §718.204(b) and failed to specifically weigh all of the relevant evidence together in determining whether total respiratory disability was established pursuant to Section 718.204(b) overall, as instructed by the Board. The Board, citing *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc), instructed the administrative law judge to determine whether the evidence as a whole established that claimant suffers from a totally disabling pulmonary or respiratory impairment. Board's 2011 Decision and Order. Employer is correct that the administrative law judge did not specifically state that, on weighing all of the evidence together, he found total respiratory disability established. The administrative law judge, however, considered the pulmonary function study, blood gas study and medical opinion evidence seriatim and concluded that total respiratory disability was established. Decision and Order on Remand at 4-7. We conclude, therefore, from a reading of the administrative law judge's Decision and Order in its totality, that the administrative law judge considered the evidence on total respiratory disability together and found that total respiratory disability was established pursuant to Section 718.204(b) overall. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); Decision and Order on Remand at 4-7.

[6] The administrative law judge initially found that benefits are payable as of March 1, 2004, based on the medical evidence of record. Decision and Order on Remand at 8. However, in his concluding paragraph, the administrative law judge stated that benefits commence as of April 1, 2004. *Id*. at 9. In light of the fact that March 1, 2004 is consistent with the administrative law judge's evaluation of the evidence, it is presumed that the April 1, 2004 date is a typographical error.

[7] The administrative law judge's finding that the grant of modification in this case would render justice under the Act is affirmed as unchallenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Office of Workers' Compensation Programs, has not filed a response to employer's appeal.

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.[8] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence of record. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). Moreover, the administrative law judge, on modification, must determine whether reopening the claim would render justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007); *see also D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33, 1-38 (2008).

[8] Because claimant's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 4.

20 C.F.R. §718.204(b)
Total Respiratory Disability

Considering the evidence relevant to total respiratory disability, the administrative law judge found that the pulmonary function study evidence was in equipoise and failed, therefore, to establish the existence or absence of total respiratory disability pursuant to Section 718.204(b)(2)(i). Regarding the blood gas study evidence, the administrative law judge found that it failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(ii), as the majority of the blood gas studies was non-qualifying.[9] Turning to the medical opinion evidence, the administrative law judge found, based on the better reasoned opinions, that total respiratory disability was established pursuant to Section 718.204(b)(2)(iv).[10] The administrative law judge concluded that total respiratory disability was established pursuant to Section 718.204(b) overall.

Employer contends, however, that the administrative law judge erred in finding the pulmonary function study evidence to be in "equipoise" on the issue of total respiratory disability. Instead, employer contends that the administrative law judge should have credited the non-qualifying pulmonary function study and found that the pulmonary function study evidence did not establish total respiratory disability pursuant to Section 718.204(b)(2)(i). We disagree.

In weighing the pulmonary function evidence, the administrative law judge found that, of the six pulmonary function studies, five resulted in qualifying pre-bronchodilator values, one resulted in a non-qualifying pre-bronchodilator value, and four resulted in

[9] Total respiratory disability cannot be established pursuant to 20 C.F.R. §718.204(b)(2)(iii), as the record does not contain evidence of cor pulmonale with right-sided congestive heart failure.

[10] The administrative law judge noted that Drs. Mullins, Zaldivar, Agarwal, Baker, and Crisalli opined that claimant does not retain the pulmonary capacity to return to his last coal mine employment, Director's Exhibits 12, 38, 41; Claimant's Exhibits 1, 2; Employer's Exhibit 4, while Drs. Rasmussen and Tuteur opined that claimant retains the pulmonary capacity to return to his last coal mine employment. Director's Exhibits 1, 42.

The administrative law judge rejected the opinion of Dr. Mullins as "unreasoned," and the opinion of Dr. Rasmussen, which was based on a 1994 evaluation, as too old in time to be helpful. Decision and Order on Remand at 6. Because these findings are unchallenged by the parties on appeal, they are affirmed. *Skrack*, 6 BLR at 1-711.

non-qualifying post-bronchodilator values.[11] Decision and Order on Remand at 4-5. The administrative law judge concluded that, in light of the "series" of qualifying values and "similar series" of non-qualifying values, the pulmonary function studies were in "equipoise" and did not, therefore, establish either the existence or absence of total respiratory disability pursuant to Section 718.204(b)(2)(i). *Id*.

Contrary to employer's contention, the administrative law judge's evaluation of the pulmonary function study evidence was in keeping with the Board's remand instructions to resolve the conflict in the pulmonary function study evidence and explain his reasoning. The administrative law judge properly concluded that the pulmonary function study evidence was in equipoise, as it resulted in a "similar series" of both qualifying and non-qualifying pulmonary function study values. *See* 20 C.F.R. §718.204(b)(2)(i).[12] Further, the administrative law judge was not required to accord greater weight to the post-bronchodilator non-qualifying values. *See* 20 C.F.R. §718.204(b)(1)(i); 45 Fed. Reg. 13,682 (1980); *Estep v. Director, OWCP*, 7 BLR 1-904 (1985). Consequently, because the administrative law judge discussed the pulmonary function study evidence, and explained his reasoning for finding it to be in equipoise, we affirm his finding that the pulmonary function study evidence failed to establish either the existence or absence of total respiratory disability pursuant to Section 718.204(b)(2)(i).[13]

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[11] The record contains six pulmonary function studies taken on March 9, 2004, July 21, 2004, December 21, 2005, May 20, 2008, November 7, 2008 and March 2, 2009. Director's Exhibits 14, 38; Claimant's Exhibits 1, 2; Employer's Exhibit 4. The pre-bronchodilator studies on March 9, 2004 and November 7, 2008 produced qualifying values; no bronchodilator was administered on these dates. Director's Exhibit 14; Claimant's Exhibit 2. The pre-bronchodilator studies conducted on July 21, 2004, May 20, 2008 and March 2, 2009 yielded qualifying values; however, post-bronchodilator studies conducted on the same dates were non-qualifying. Director's Exhibit 38; Claimant's Exhibit 1. Lastly, the pre-bronchodilator and post-bronchodilator studies administered on December 21, 2005 yielded non-qualifying values. Director's Exhibit 38.

[12] Further, contrary to employer's contention, the administrative law judge properly found that five of the six pre-bronchodilator studies yielded qualifying values, based on qualifying FEV_1/FVC ratios, as opposed to employer's unsupported allegation that only two of the studies were qualifying. 20 C.F.R. §718.204(b)(2)(i)(a); Decision and Order on Remand at 5.

[13] The Board also remanded the case for the administrative law judge to resolve the conflict in the blood gas study evidence and to explain the basis for his finding. On remand, the administrative law judge found that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii), as only one of the five blood gas

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv). Specifically, employer contends that the administrative law judge erred in engaging in an impermissible "nose-counting" of the medical opinion evidence to accord less weight to the opinion of Dr. Tuteur, that claimant is not totally disabled, and to accord greater weight to the opinions of the five pulmonologists who found him totally disabled.

Contrary to employer's argument, however, the administrative law judge permissibly accorded less weight to the opinion of Dr. Tuteur, in light of the great weight of the contrary opinions and based on his consideration of the comparable qualifications of all the physicians[14] and the bases for their opinions.[15] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 522, 21 BLR 2-323, 2-325 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order on Remand at 4, 7. Consequently, we reject employer's argument that the administrative law judge erred in according less weight to Dr. Tuteur's opinion because it was outnumbered by contrary medical opinions.

Employer next contends that the administrative law judge erred in finding that Dr. Zaldivar's opinion established total *respiratory* disability, when Dr. Zaldivar attributed claimant's total disability to non-occupational factors. Employer's Brief at 16-17; Director's Exhibit 38; Employer's Exhibit 5. Contrary to employer's argument, however, as the administrative law judge found, Dr. Zaldivar specifically opined that claimant has disabling non-occupationally related asthma and does not retain the pulmonary capacity to perform his usual coal mine employment.

The inquiry at Section 718.204(b)(2)(iv) is whether claimant has a total *respiratory* disability and the extent of that disability, and not whether that disability is related to coal mine employment. *See* 20 C.F.R. §718.204(b), (c). The fact that Dr.

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studies was qualifying. This finding is affirmed, as it is unchallenged by the parties on appeal. *See Skrack*, 6 BLR at 1-711.

[14] In his 2010 Decision and Order, the administrative law judge noted that Drs. Zaldivar, Agarwal, Baker, Crisalli and Tuteur were all Board-certified in Internal Medicine with subspecialties in pulmonary diseases.

[15] The opinions of Drs. Zaldivar, Agarwal, Baker, Crisalli and Tuteur were based on examinations, pulmonary function studies, blood gas studies, and histories. The opinion of Dr. Tuteur was based on a review of claimant's medical data.

Zaldivar opined that claimant's disabling asthma was unrelated to coal mine employment does not, therefore, preclude the administrative law judge from finding that Dr. Zaldivar's opinion supported a finding of total *respiratory* disability pursuant to Section 718.204(b)(2)(iv). *Gross v. Dominion Coal Corp*., 23 BLR 1-18, 1-18-19 (2003). Employer's argument concerning Dr. Zaldivar's opinion is, therefore, rejected.

Additionally, employer contends that the administrative law judge failed to consider whether the physicians were aware of the exertional requirements of claimant's usual coal mine employment when they found that claimant has a total respiratory disability. In his first decision, the administrative law judge specifically found that claimant's usual coal mine employment was as a "repairman" and "inspector for the fans and outside pumps" and that this "job involved a lot of walking and going up and down steps." Administrative Law Judge's 2010 Decision and Order. The physicians' opinions regarding the exertional requirements of claimant's usual coal mine employment are consistent with the administrative law judge's finding. *See* Employer's Exhibits 6, 13; Director's Exhibit 38. Consequently, considering the exertional requirements of claimant's usual coal mine employment and the physicians' assessment of claimant's ability to do that work, the administrative law judge reasonably found that the medical opinion evidence established that claimant could not perform his usual coal mine employment. *See Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). Employer's argument is, therefore, rejected.

Because the administrative law judge has considered the physicians' opinions, and the Board is required to defer to the administrative law judge's assessment of the physicians' credibility as long as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv).[16] *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

20 C.F.R. §718.204(c)
Disability Causation

In finding that disability causation was established, the administrative law judge credited the opinions of Drs. Agarwal and Baker over the opinions of Drs. Crisalli, Zaldivar and Tuteur. The administrative law judge found that both Drs. Agarwal and Baker "clearly" attributed claimant's total disability to his legal pneumoconiosis. In

[16] As employer does not otherwise challenge the administrative law judge's consideration of the medical opinion evidence, it is affirmed. *See Skrack*, 6 BLR at 1-711.

discrediting the opinions of Drs. Zaldivar, Crisalli and Tuteur, the administrative law judge found:

> [b]oth physicians [Drs. Zaldivar and Crisalli] had the preconceived notion that coal dust exposure would not worsen or aggravate the miner's asthma on a permanent basis, because it does not produce, cause or aggravate asthma. This is not in accord with the Department of Labor's discussion of the prevailing medical science in the preamble to the revised regulations. Moreover, neither considered the miner's obstructive lung disease to be due to coal mine dust exposure, as I had. Further, the Board affirmed my discrediting of Dr. Crisalli's opinion on the basis that he emphasized the lack of positive x-ray evidence as a factor for concluding that coal mine dust did not contribute to the miner's obstructive impairment; positive x-ray evidence is not so required. Dr. Tuteur admitted that inhalation of coal mine dust can cause obstruction, although infrequently and admitted asthma could impair clearance of coal dust from the lungs. He also admitted that the etiology of the obstructive defect "is likely to be multifactorial." (Director's Exhibit 42 at 3). Relying on statistics, in part, Dr. Tuteur opined that if the miner had COPD it would more likely have been caused by smoking. (Employer's Exhibit 7 at 11). Dr. Agarwal attributed the miner's disabling obstruction to smoking and coal mine dust exposure as did Dr. Baker. Thus, given the discrediting of the disability causation opinions of Drs. Zaldivar and Crisalli, Dr. Tuteur's admissions, and the clear disability causation opinions of Drs. Agarwal and Baker, I find total respiratory disability due to coal mine dust exposure has been established.

Decision and Order on Remand at 7.

Employer contends, however, that the administrative law judge erred in relying on the preamble to the 2001 regulations to discredit the opinions of Drs. Zaldivar and Crisalli. Additionally, employer contends that the administrative law judge substituted his opinion for that of the medical experts in weighing the medical evidence. We disagree.

Employer's argument is similar to the arguments it made in challenging the administrative law judge's findings pursuant to Section 718.202(a)(4). These arguments were, however, rejected by the Board in the prior appeal when it found that the administrative law judge properly applied the preamble in evaluating the bases of the physicians' conclusions.[17] *Milam*, BRB No. 10-0554 BLA, slip op. at 4, 5. Moreover,

[17] The preamble to the revised regulations sets forth how the Department of Labor (the Department) has chosen to resolve questions of scientific fact. *See Midland Coal*

contrary to employer's contention, the administrative law judge did not substitute his opinion for that of the medical experts. Rather, the administrative law judge reasonably found that, because Drs. Zaldivar and Crisalli did not find legal pneumoconiosis, contrary to his own finding, their opinions on disability causation were entitled to less weight. *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge properly considered the bases of the physicians' opinions on disability causation, and properly relied on the opinions of Drs. Agarwal and Baker for the same reasons he relied upon them pursuant to Section 718.202(a)(4). Consequently, we affirm the administrative law judge's finding that claimant's legal pneumoconiosis is a substantially contributing cause of his total disability pursuant to Section 718.204(c), as supported by substantial evidence. *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990); *Gross*, 23 BLR at 1-17, 1-18; Decision and Order on Remand at 6-7.

Commencement Date of Benefits

In addressing the commencement date for benefits, the administrative law judge found that the onset date of total disability due to pneumoconiosis "was established with Dr. Mullin's testing and opinion, in March 2004, taken together with Dr. Zaldivar's July 2004 testing and opinion." Decision and Order on Remand at 8. The administrative law judge, therefore, awarded benefits from March 1, 2004, concluding that "a change in condition [sic] has taken place since the previous denial … [and that] claimant has established a mistake in the ultimate issue of entitlement." *Id*. at 9.

Employer contends, however, that the administrative law judge erred in awarding benefits as of March 2004 based on the 2004 opinion of Dr. Mullins, because that opinion was considered and rejected by Judge Purcell, as unreasoned, in his 2007 decision, and Judge Purcell's finding was affirmed by the Board in 2008. Employer further contends that the administrative law judge did not grant modification based on a mistake in a previous determination of fact. Rather, he granted modification based on the change in conditions reflected in new evidence dated May 2008 and November 2008,[18] and

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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 the revised regulations. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012).

[18] Dr. Agarwal examined claimant on May 20, 2008. In addition to diagnosing legal pneumoconiosis, Dr. Agarwal found that claimant's severe pulmonary impairment

submitted in support of claimant's July 2008 modification request. Therefore, employer contends, citing 20 C.F.R. §725.503(d),[19] that benefits are payable no earlier than July 2008, the date that claimant filed his request for modification.

We agree with employer that the administrative law judge erred in finding that the commencement date of benefits in this case was March 2004. In the initial decision on this case, Judge Purcell rejected the opinion of Dr. Mullins as unreasoned and the Board affirmed that finding. In reviewing the case on modification, the administrative law judge found that Dr. Mullins's opinion was "unreasoned." Decision and Order on Remand at 6. The administrative law judge erred, therefore, in finding that the commencement date of benefits was March 2004, based on the opinion of Dr. Mullins. In light of the Board's May 2008 decision affirming the prior denial of benefits and the administrative law judge's finding that the May 2008 and November 2008 medical opinions establish that claimant is totally disabled due to pneumoconiosis, we agree with employer that benefits are payable no earlier than July 2008, the date that claimant filed his request for modification. 20 C.F.R. §725.503(d)(2); *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-1 (1989).

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would prevent him from performing his normal coal mine duties. Claimant's Exhibit 1. Dr. Baker examined claimant on November 7, 2008, finding that claimant had legal pneumoconiosis, *i.e.*, chronic obstructive pulmonary disease arising out of coal mine employment, that caused him to be unable, from a respiratory capacity, to perform his usual coal mine employment. Claimant's Exhibit 2.

[19] Section 725.503(d)(2) states, in pertinent part, that if modification is granted based on a change in conditions:

> Benefits are payable to a miner 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. Where the evidence does not establish the month of onset, benefits shall be payable to such miner from the month in which the claimant requested modification.

20 C.F.R. §725.503(d)(2).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits on Modification is affirmed, and is modified to reflect that the commencement date of benefits is July 1, 2008.

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