**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0447 BLA

| | | |
|---|---|---|
| ROGER M. FRIDY | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PEABODY COAL COMPANY, c/o HERITAGE COAL COMPANY | ) | DATE ISSUED: 09/29/2015 |
| | ) | |
| and | ) | |
| | ) | |
| PEABODY INVESTMENTS, INCORPORATED, c/o OLD REPUBLIC INSURANCE COMPANY | ) | |
| | ) | |
| 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 Granting Claimant's Petition for Modification of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Thomas E. Springer, III (Springer Law Firm, PLLC), Madisonville, Kentucky, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Granting Claimant's Petition for Modification (2010-BLA-05782) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed his claim on April 16, 2004.[1] Administrative Law Judge Jeffrey Tureck denied benefits on November 21, 2007, finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Claimant filed a request for modification on January 3, 2008, which was denied by the district director. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a hearing and was ultimately assigned to Judge Sellers (the administrative law judge).

On August 29, 2014, the administrative law judge issued his Decision and Order, which is the subject of this appeal. The administrative law judge credited claimant with thirty-one years of coal mine employment, as stipulated by the parties. Based on his consideration of all the evidence of record, the administrative law judge found that claimant established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c). The administrative law judge therefore granted claimant's request for modification pursuant to 20 C.F.R. §725.310, and awarded benefits commencing on April 2004.

On appeal, in its petition for review and supporting brief, employer argues that the administrative law judge impermissibly relied on the preamble to the revised 2001 regulations in considering the weight to accord to the medical opinions of Drs. Repsher and Majmudar. Regarding the issue of the existence of legal pneumoconiosis, employer specifically asserts that the administrative law judge improperly relied on the preamble as a basis for crediting Dr. Majmudar's opinion, without consideration as to whether it was reasoned and documented. Employer further challenges the administrative law judge's findings on the issues of clinical pneumoconiosis, total disability and disability causation, and his determination regarding the date for commencement of benefits. Claimant responds, urging affirmance of the award of benefits. In its reply brief, employer asserts that the administrative law judge erred in crediting the most recent positive x-ray evidence over the negative CT scan evidence, and failed to rationally weigh all the relevant evidence together, prior to finding that claimant established the existence of clinical pneumoconiosis. The Director, Office of Workers' Compensation Programs, has declined to file a response brief, unless specifically requested to do so by the Board.

[1] The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim, based on its filing date. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(a).

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).

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 in a miner's claim, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, the 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[3] that defeated an award 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). With respect to a mistake in a determination of fact, claimant need not allege any specific error made by the administrative law judge in order to establish a basis for modification. Rather, the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). The administrative law judge is authorized "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); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2; Hearing Transcript at 17.

[3] In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by pneumoconiosis. 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).

## I. Existence of Clinical Pneumoconiosis

The administrative law judge found that claimant established the existence of clinical pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.202(a)(1), and the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Specifically, the administrative law judge considered four readings of three x-rays dated April 7, 2010, November 9, 2010 and December 15, 2011, submitted by the parties in conjunction with the request for modification. Decision and Order at 5-6. The April 7, 2010 x-ray was read as positive for pneumoconiosis by Dr. Majmudar, and as positive for "possible" pneumoconiosis by Dr. Meyer, dually qualified as a Board-certified radiologist and B reader. Director's Exhibit 105; Employer's Exhibit 4. The November 9, 2010 x-ray was read as negative by Dr. Repsher, a B reader. Employer's Exhibit 2. Dr. Alexander, a dually-qualified radiologist, read the December 15, 2011 x-ray as positive for clinical pneumoconiosis. Claimant's Exhibit 1. The administrative law judge gave greatest weight to Dr. Alexander's positive reading because it is "the most recent film" and "does not express any equivocation and is uncontradicted." Decision and Order at 17. Thus, the administrative law judge found that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that all of the CT scan evidence submitted on modification was negative for clinical pneumoconiosis: Dr. Repsher read a November 9, 2010 CT scan as negative for pneumoconiosis, and Dr. Fino read an April 6, 2005 CT scan as negative for pneumoconiosis.[4] Decision and Order at 17-18. With regard to the medical opinion evidence, the administrative law judge assigned "paramount weight" to Dr. Majmudar's diagnosis of clinical pneumoconiosis because it was consistent with "the present weight of the x-ray evidence." *Id.* at 21. In contrast, the administrative law judge assigned "no weight" to Dr. Fino's opinion, as he "appears to deliberately avoid committing to a conclusion [as to] whether the [c]laimant has simple clinical pneumoconiosis." *Id*. at. 19. The administrative law judge also rejected Dr. Repsher's opinion, that claimant does not suffer from clinical pneumoconiosis, because he was not persuaded by Dr. Repsher's rationale.[5] *Id*. at 20.

[4] The record also contains CT scans from claimant's treatment records, dated November 24, 2004 and May 31, 2005, which were read by Dr. Eberly. Director's Exhibit 105 at 86-87. The administrative law judge found that they make no "specific findings regarding the presence or absence of pneumoconiosis." Decision and Order at 18.

[5] In considering the evidence submitted before Judge Tureck in the underlying claim, the administrative law judge credited Dr. Alexander's positive reading of the

In its reply brief, employer argues that the administrative law judge did not properly weigh all of the contrary evidence, prior to finding that claimant satisfied his burden to prove the existence of clinical pneumoconiosis. Employer contends that the administrative law judge gave claimant an erroneous presumption that his pneumoconiosis was progressive, erred in giving greatest weight to the more recent evidence, and did not rationally explain why the positive x-ray evidence was more credible than the negative CT scan evidence. Contrary to employer's arguments, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recognized that "[r]ecent evidence is particularly important in black lung cases . . . because of the progressive nature of pneumoconiosis." *See Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1167, 21 BLR 2-73, 2-82 (6th Cir. 1997); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993) ("Pneumoconiosis is a progressive and degenerative disease."). Moreover, the administrative law judge rationally relied on Dr. Alexander's uncontradicted positive reading of the most recent x-ray dated December 15, 2011, over the two negative CT scans of record dated April 6, 2005 and November 9, 2010, because "[t]here are no contemporaneous or more recent . . . CT scan interpretations to dispute [Dr. Alexander's] finding[.]" *Id*. at 21; *see Crace*, 109 F.3d at 1167, 21 BLR at 2-82; *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). Therefore, we affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a), as he properly weighed together all of the relevant evidence, in accordance with *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-218 (6th Cir. 2012).

## II. Existence of Legal Pneumoconiosis

In considering the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge also addressed whether claimant has legal pneumoconiosis. The administrative law judge observed that the newly submitted evidence on modification and the previously submitted evidence show that claimant has a moderate obstructive respiratory impairment. He credited Dr. Majmudar's opinion, that claimant's obstructive impairment is significantly related to coal dust exposure, as reasoned and consistent with the preamble to the revised 2001 regulations. Decision and Order at 21; *see* Director's Exhibit 105 at 6-15, 21-45. The administrative law judge rejected the contrary opinion of Dr. Repsher, that claimant does not have legal pneumoconiosis, because he found that Dr.

---

December 15, 2011 x-ray over the negative x-rays considered by Judge Tureck. Decision and Order at 17. The administrative law judge also rejected medical opinions considered by Judge Tureck that did not diagnose clinical pneumoconiosis, based on his finding that the new x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis. *Id*. at 19-20.

Repsher expressed views that were inconsistent with the preamble and failed to persuasively explain why claimant's obstructive respiratory impairment was not significantly related to, or substantially aggravated by, coal dust exposure. Decision and Order at 22-24; Employer's Exhibits 2, 3. Regarding the prior medical reports before Judge Tureck, the administrative law judge considered the diagnoses of legal pneumoconiosis by Drs. Westerfield and Simpao to be credible and corroborated by the opinion of Dr. Majmudar on modification. Decision and Order at 24-25. Further, the administrative law judge rejected the earlier opinions by Drs. Fino and Repsher, that claimant did not have legal pneumoconiosis, because he found that they did not sufficiently explain the bases for their conclusions. *Id*. at 25.

Initially, we reject employer's argument that the administrative law judge erred in consulting the preamble when evaluating the credibility of the medical opinion evidence. Contrary to employer's contention, multiple United States Courts of Appeals, and the Board, have held that an administrative law judge, as part of the deliberative process, may rely on the preamble as a guide in assessing the credibility of the medical evidence. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91, 25 BLR 2-633, 2-644-45 (6th Cir. 2014); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *see also Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 25 BLR 2-581 (9th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Furthermore, the administrative law judge did not, as employer suggests, utilize the preamble as a legal rule, or as a presumption that all obstructive lung disease is pneumoconiosis, but merely consulted it as a statement of credible medical research findings accepted by the Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *see also Looney*, 678 F.3d at 314-15, 25 BLR at 2-129-32. Moreover, the preamble does not, as employer suggests, constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *Id*. We therefore reject employer's assertions that the administrative law judge's use of the preamble violated the Act and the Administrative Procedure Act (APA).[6]

[6] The Administrative Procedure Act, 5 U.S.C. §500 *et seq*., as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented." 5 U.S.C. §557(c)(3)(A).

With respect to the administrative law judge's specific credibility findings,[7] we reject employer's contention that the administrative law judge "use[d] the preamble to fill the void" in Dr. Majmudar's reasoning and improperly "substitute[d] the preamble for an explanation in [the] medical opinion." Employer's Brief in Support of Petition for Review at 14-15. The administrative law judge noted specifically that Dr. Majmudar based his diagnosis of legal pneumoconiosis on claimant's "clinical symptoms, exposure histories, and the pulmonary function study results," which showed a moderate obstructive respiratory impairment.[8] Decision and Order at 21, *citing* Employer's Exhibit 6 at 10-11. The administrative law judge also discussed the reasoning underlying Dr. Majmudar's opinion, as follows:

> When prompted to explain what role the Claimant's coal dust exposure played in his chronic pulmonary disease, Dr. Majmudar asserted that because the Claimant endured "over thirty years" of dust exposure and because the Claimant had "no significant history of smoking," he concluded that the Claimant had no other significant exposure to a substance causative of pneumoconiosis. He opined that the Claimant's exposure to cigarette smoke was not significant enough to cause his respiratory impairment and added that besides coal dust, no other potential causes of obstructive pulmonary disease were relevant to the Claimant's case.

Decision and Order at 21-22, *quoting* Claimant's Exhibit 4. We see no error in the administrative law judge's findings that Dr. Majmudar's diagnosis of legal pneumoconiosis is reasoned and "persuasive" and "consistent with the regulations and the preamble to the regulations," which state that "coal dust exposure can cause clinically significant obstructive impairment even in miners who do not smoke." Decision and Order at 22; 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069, 25 BLR 2-431, 2-

[7] As employer does not raise any specific allegation of error with regard to the weight accorded the opinions of Drs. Fino, Westerfield and Simpao, the administrative law judge's credibility findings with regard to these physicians are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] Dr. Majmudar also indicated that claimant suffers from legal pneumoconiosis "because of the significant reduction in his lung capacity" and because he "has moderate obstructive airway impairment with FEV1 only 59% of his predicted volume." Director's Exhibit 105 at 8. Moreover, he reported that arterial blood gas testing showed mild hypoxemia. Employer's Exhibit 6 at 18-19.

446-47 (6th Cir. 2013); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Furthermore, there is no merit to employer's argument that the administrative law judge mischaracterized Dr. Repsher's opinion and did not give it proper weight. The administrative law judge noted correctly that Dr. Repsher "invalidated the pulmonary function studies he obtained, thus leaving him without the usual objective data necessary to identify and measure any obstructive impairment." Decision and Order at 22; Employer's Exhibits 2, 3 at 7, 17. Dr. Repsher opined that claimant had "possible" chronic obstructive pulmonary disease (COPD) due to smoking and the aging process. Decision and Order at 23; Employer's Exhibit 2. As a basis for excluding coal dust exposure as a significant contributing factor in claimant's COPD, Dr. Repsher cited medical studies and statistics pertaining to the expected loss of FEV1 in smokers and non-smoking miners. Decision and Order at 24; Employer's Exhibit 2. Contrary to employer's assertion, the administrative law judge rationally found that Dr. Repsher based his opinion on "abstract principles," as opposed to claimant's specific condition. Decision and Order at 23; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Moreover, to the extent that "Dr. Repsher suggests that absent a *high degree* of clinical pneumoconiosis or the presence of asthma, coal dust exposure is unlikely to cause any significant impairment," the administrative law judge rationally found that Dr. Respher expressed views that are inconsistent with the findings of the National Institute for Occupational Safety and Health (NIOSH), adopted by the DOL in the preamble, that "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is present." Decision and Order at 23, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). The administrative law judge also rationally found that, to the extent that Dr. Repsher believes that coal dust exposure does not cause clinically significant obstructive lung disease, and is less damaging than the aging process, his opinion is inconsistent with the position of the DOL that "coal dust exposure can cause reductions in FEV1 that are independent of age." Decision and Order at 23-24, *quoting* 65 Fed. Reg. 79,920, 79,940-41 (Dec. 20, 2000); *see Ogle*, 737 F.3d at 1069, 25 BLR at 2-446-47; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11.

Consequently we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4). We further affirm his overall finding that claimant satisfied his burden of proving that he suffers from legal

pneumoconiosis, based on a consideration of all the relevant evidence at 20 C.F.R. §718.202(a). *Hensley*, 700 F.3d at 881, 25 BLR at 2-218.

## III. Total Disability

Employer next argues that the administrative law judge mischaracterized the exertional requirements of claimant's usual coal mine work as "moderately strenuous" and, thus, erred in determining the weight to accord the conflicting medical opinions as to whether claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer's Brief in Support of Petition for Review at 21. Employer maintains that claimant's usual coal mine work as a hydraulic shovel operator did not require him to lift heavy items on a regular basis and that his job "primarily involved sitting and working the levers with occasional moderate labor." *Id.*, *citing* Director's Exhibit 81-32. Employer's assertions of error are rejected as they are without merit.

In determining whether a miner is totally disabled, the administrative law judge must compare the exertional requirements of the miner's usual coal mine work with the doctor's description of the pulmonary impairment and physical limitations. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir 1996); *see also Manning Coal Corp. v. Wright*, 257 F.Appx. 836, 842 (6th Cir. 2007) (explaining that the administrative law judge may make a finding of total disability based on a medical opinion that "provide[s] a *medical assessment of physical abilities or exertional limitations* which lead to that conclusion.") (emphasis added).

In this case, the administrative law judge found that claimant's usual coal mine work "as an operator of a hydraulic excavator did not involve what could be described as very heavy or even heavy labor." Decision and Order at 26. He also specifically noted claimant's testimony that operating the pedal and levers of the excavator was similar to operating a bulldozer and did not require a lot of pulling or pushing of the pedals and levers. *Id.* However, the administrative law judge further observed claimant's description that "physically, the 'worst part about' his job was 'getting up on the machine' because it was tall and required 'a lot of climbing.'" *Id.*, *quoting* Hearing Transcript at 31. The administrative law judge also noted claimant's testimony that "approximately three times per shift, he was required to dismount the excavator to 'go down in the engine room, check [the] engines and then get out on the ground and check [his] bucket, see that everything is intact, and make sure [he] didn't have any grease lines blown.'" Decision and Order at 26, *quoting* Hearing Transcript at 31-32. The administrative law judge concluded that claimant's ancillary duties were "moderately strenuous." Decision and Order at 26-27.

Contrary to employer's characterization of claimant's job duties, we see no error in the administrative law judge's rational interpretation of claimant's testimony or his finding that claimant's work required more than just sitting in a machine and operating levers and was not light or sedentary work, as suggested by employer. Decision and Order at 26-27, 29; *see Grundy Mining Co. v. Flynn*, 353 F.3d 467, 484 23 BLR 2-44, 2-50 (6th Cir. 2003); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. When rendering findings on the issue of total disability, an administrative law judge may make "reasonable inferences from the evidence before him." *See Wright*, 257 F.Appx. at 842, *citing Flynn*, 353 F.3d at 484 23 BLR at 2-50. Thus we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant's usual coal mine employment required moderately strenuous labor.

Taking into consideration claimant's work requirements, the administrative law judge weighed the medical opinions and credited the disability findings of Drs. Simpao, Westerfield and Majmudar, over the contrary opinions of Drs. Fino and Repsher that claimant is not totally disabled.[9] According to employer, however, the administrative law judge erred in relying on the opinions of Drs. Westerfield and Majmudar to find that claimant is totally disabled because neither physician had "specific knowledge of the miner's usual coal mine job" or "the specific requirements of that job." Employer's Brief in Support of Petition for Review at 23. We disagree.

Dr. Westerfield testified that claimant would be able to do his job as a heavy equipment operator if he "mostly" had to just sit and operate a machine. Director's Exhibit 35 at 15, 18. Dr. Westerfield indicated that climbing in and out of the machine would be difficult, depending on how frequently claimant had to do this. *Id*. at 25-26. Moreover, he stated that claimant would be unable to perform certain tasks involved with maintenance of the equipment, such as checking the "greasing," inspecting "different pieces or aspects of the mechanical function of the bulldozer to make sure they were in good operating condition," looking under the machine, checking the track on the machine, and inspecting other aspects of the operational portions of the machine. *Id*. at 26. Dr. Westerfield concluded that claimant's ability to perform the maintenance of the

[9] There is no merit to employer's argument that the administrative law judge "relied on nose-counting" to resolve the conflict in the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Employer's Brief in Support of Petition for Review at 26. The administrative law judge properly conducted both a qualitative and quantitative analysis of the medical opinions and properly based his conclusions on the preponderance of the credible evidence. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

machine depended on how frequently he performed these tasks, indicating that he could occasionally perform them, but not if he "has to be up and down all the time." *Id*. at 32-33.

Contrary to employer's assertion, the administrative law judge properly considered the physical limitations identified by Dr. Westerfield, in conjunction with the physical requirements of claimant's usual coal mine job, and permissibly concluded:

> Weighing Dr. Westerfield's opinion, I interpret it to mean that he believed that the Claimant retained the respiratory or pulmonary capacity to "occasionally" mount and dismount the equipment and operate the equipment's levers, but did not retain the capacity to check and maintain the equipment during his shift. *Because the Claimant's testimony makes clear that he was required to perform these ancillary duties as well as just mount, dismount, and operate the machine's levers, I consider Dr. Westerfield's opinion generally supportive of a finding of total disability.*

Decision and Order at 29 (emphasis added); *see Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11. Because the administrative law judge has discretion to draw inferences from the evidence, and his conclusion was rational, it is affirmed. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Furthermore, we see no error in the administrative law judge's finding that Dr. Majmudar's opinion is reasoned and supportive of a finding of total disability. The administrative law judge noted correctly that Dr. Majmudar diagnosed a moderate obstructive respiratory impairment, based on the pulmonary function testing, and mild hypoxemia, based on the arterial blood gas testing. Decision and Order at 29; Director's Exhibit 105. Although the pulmonary function tests obtained by Dr. Majmudar were non-qualifying, he opined that claimant's moderate obstructive impairment "would limit the speed and distance that [claimant] could walk, in addition to limiting his ability to reach and pull weight . . . [and] that 'any heavy equipment operating or climbing stairs, pulling, lifting, carrying on [*sic*] stuff' would 'make [the claimant] out of breath and limit him . . . .'" Decision and Order at 29, *quoting* Employer's Exhibit 6 at 29. Taking into consideration the physical limitations identified by Dr. Majmudar, the administrative law judge permissibly concluded that claimant's "FEV1 decrement [as described by Dr. Majmudar] would inhibit the exertion required of his job operating heavy machinery." *Id*. at 29; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer also argues that the administrative law judge misinterpreted Dr. Simpao's opinion as supporting a finding of total disability. We disagree. The administrative law judge specifically rejected employer's assertion that Dr. Simpao did

not find claimant to be totally disabled in his report dated April 29, 2004. Decision and Order at 28 n.14. The record reflects that, when asked if claimant has "the respiratory capacity to perform regular coal mining duties[,]" Dr. Simpao underlined "NO" and indicated that this was due to a moderate pulmonary or respiratory impairment. Director's Exhibit 11; *see* Decision and Order at 28. To the extent that Dr. Simpao understood that claimant's usual coal mine work involved moderately strenuous labor, consistent with the administrative law judge's finding, we affirm the administrative law judge's reliance on Dr. Simpao's opinion as supporting a finding of total disability. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 28.

Additionally, we reject employer's argument that the administrative law judge erred in giving greater weight to Dr. Majmudar's opinion, that claimant is totally disabled, over Dr. Fino's contrary opinion. The administrative law judge fully summarized Dr. Majmudar's deposition testimony, including his discussion of claimant's limitations with respect to heavy equipment operation and the specific individual tasks that claimant would be limited from performing. Decision and Order at 8-11, 29-31; *see* Employer's Exhibit 6. The administrative law judge also fully summarized Dr. Fino's discussion of the tasks that claimant would be able to perform on a daily basis, including the tasks that Dr. Fino believed encompassed claimant's last coal mine employment.[10] Decision and Order at 14-15, 30. Based on his comparison of this evidence, the administrative law judge acted within his discretion, as fact-finder, in concluding that Dr. Fino did not have an "entirely accurate" understanding of claimant's work as a heavy equipment operator, while Dr. Majmudar "evinced a more comprehensive knowledge of the requirements of [claimant's] usual coal mine employment," which was "corroborated by other evidence of record."[11] *Id*. at 31; *see Adams*, 694 F.3d at 801-02, 25 BLR at 2-

[10] The administrative law judge found that Dr. Fino incorrectly described claimant's work operating heavy machinery with levers as "'primarily a sitting job' since obviously the [c]laimant was more than just sitting on the machine when he was operating it to move coal and overburden." Decision and Order at 30, *quoting* Employer's Exhibit 7. The administrative law judge also noted that, "[u]nlike a desk job," claimant was required to "constantly [use] his arms and legs to operate" the machine. Decision and Order at 30.

[11] Our dissenting colleague argues that the administrative law judge improperly credited Dr. Majmudar's opinion, based on a misstatement of Dr. Majmudar's understanding of the requirements of claimant's usual coal mine employment. Our colleague accurately notes that, while the administrative law judge characterized Dr. Majmudar's knowledge of the requirements as "comprehensive," Dr. Majmudar testified that he was generally unaware of claimant's duties. Decision and Order at 31; *see* Employer's Exhibit 6 at 17-18. Nevertheless, as the administrative law judge recognized, Dr. Majumudar testified to the specific physical limitations imposed by claimant's

210-11; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Furthermore, the administrative law judge rationally found that Dr. Majmudar's opinion is corroborated by the opinions of Drs. Westerfield and Simpao. *Id*. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability based on the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv).

Lastly, contrary to employer's argument, the administrative law judge properly weighed "all the evidence of total disability together, both like and unlike," and rationally concluded that claimant established total disability at 20 C.F.R. §718.204(b)(2), notwithstanding the non-qualifying pulmonary function tests and arterial blood gas studies. Specifically, we affirm the administrative law judge's finding that "the weight of the objective data and medical-opinion evidence supports a finding of a moderate obstructive impairment" and "this level of impairment was sufficient to preclude [claimant] from performing the entirety of his previous coal mine work."[12] Decision and Order at 31; *Cornett*, 227 F.3d at 577, 22 BLR at 2-123.

---

respiratory impairment, and claimant testified to the specific exertional requirements of his job, with the two categories overlapping significantly. Decision and Order at 26, 29; Claimant's Exhibit 4; Employer's Exhibit 6 at 18, 29; Hearing Transcript at 26, 31-32. Thus, while the administrative law judge's wording could have been more precise on this issue, it was entirely within his discretion to compare the specific exertional requirements of the job, as established by claimant's testimony, with the limitations established by Dr. Majmudar in determining that claimant is totally disabled. *See, e.g., Cornett v. Benham Coal Co.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000) (noting that even a mild respiratory impairment may preclude the performance of the miner's usual duties depending on the exertional requirements of the miner's usual coal mine employment); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir 1996) (comparing physician's assessment with exertional requirements of usual coal mine employment); *Manning Coal Corp. v. Wright*, 257 F.Appx. 836, 842 (6th Cir. 2007) ("[t]o infer disability, the [administrative law judge] must first determine the nature of the claimant's usual coal mine work and then compare evidence of the exertional requirements of the work with medical opinions as to the claimant's work capability.") (citation omitted).

[12] In so doing, the administrative law judge acted within his discretion in giving no weight to Dr. Repsher's opinion on the issue of total disability, as Dr. Repsher indicated that the pulmonary function test he obtained was invalid, and the administrative law judge determined that his opinion was not sufficiently documented. *Cornett*, 227 F.3d at 578, 22 BLR at 2-123; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 30.

## IV. Total Disability Due to Pneumoconiosis

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge permissibly rejected the opinions of Drs. Fino and Repsher, that claimant's respiratory disability was unrelated to coal dust exposure, because neither physician diagnosed clinical or legal pneumoconiosis, contrary to the administrative law judge's findings that claimant suffers from both diseases. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); *Ogle*, 737 F.3d at 1074, 25 BLR at 2-452; Decision and Order at 31. Furthermore, the administrative law judge permissibly credited Dr. Majmudar's opinion that clinical and legal pneumoconiosis contributed to claimant's disabling respiratory impairment because it was "well-reasoned and well-documented[.]" Decision and Order at 32; *see Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Ogle*, 737 F.3d at 1072-74, 25 BLR at 2-451-52; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Consequently, because substantial evidence supports the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis, we affirm the award of benefits in this claim.

## V. Commencement of Benefits

Whether modification is granted based on a mistake in a determination of fact or a change in conditions affects the date from which benefits commence. If modification is based on a change in conditions, claimant is entitled to benefits as of the month of onset of total disability due to pneumoconiosis, or if that date is not ascertainable, as of the date he requested modification. 20 C.F.R. §725.503(d)(2). If modification is based on the correction of a mistake in a determination of fact, claimant is entitled to benefits from the date he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Eifler v. Peabody Coal Co.*, 926 F.3d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The administrative law judge found "the record does not establish when [claimant] first became disabled" and summarily concluded that benefits are payable as of April 2004, the month in which claimant filed his claim. Decision and Order at 33. In the portion of his Decision and Order entitled "Conclusion," the administrative law judge discussed the fact that he had broad discretion to correct mistakes of fact, and stated that "the submission of new, probative evidence altered the preponderant weight of the evidence that compelled Judge Tureck's denial, thereby warranting modification of that denial in the paramount interest of accuracy." *Id.*

Employer contends that the administrative law judge erred in finding that claimant is entitled to benefits commencing in April 2004, the month in which he filed his claim.

Employer asserts that while the administrative law judge "did not explain whether he relied on a finding of a mistake of fact or a change in condition, . . . his analysis of the x-ray evidence establishes, clearly, that he found a change in [claimant's] condition since the prior denial of benefits, relying on the most recent evidence, coupled with his belief that pneumoconiosis is a progressive disease." Employer's Brief in Support of Petition for Review at 27. Thus, employer maintains that benefits should be awarded based on the date of the request for modification and not the month in which claimant filed his claim. Employer's assertion of error has merit, in part.

Although the administrative law judge's statements in his "Conclusion" suggest that he granted modification based on a mistake of fact, his determination regarding the date for commencement is not sufficiently explained in accordance with the APA, and must be vacated. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). On remand, the administrative law judge must specifically identify the basis for granting modification pursuant to 20 C.F.R. §725.310, and then determine the date for the commencement of benefits in accordance with 20 C.F.R. §725.503(d).

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

SO ORDERED.

_____

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

_____

JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

While I concur with my colleagues' decision in all other respects, I respectfully dissent from the majority's decision to affirm the administrative law judge's award of benefits. I would vacate the award of benefits and remand the case for further consideration. Specifically, I would vacate the administrative law judge's finding that claimant established total disability through medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Substantial evidence does not support the administrative law judge's finding that "Dr. Majmudar's discussion of the Claimant's exertional requirements [is] persuasive, as it evinced a more comprehensive knowledge of the requirements of the claimant's usual coal mine employment." Decision and Order at 30-31.

Dr. Majmudar testified that he did not "know, exactly what [claimant] does in the heavy equipment[,]" but that he assumed "the heavy equipment requires a heavy – heavy workload." Employer's Exhibit 6 at 17-18. This is contrary to the administrative law

judge's finding that claimant's usual coal mine "work as an operator of a hydraulic excavator did not involve what could be described as very heavy or even heavy labor" and that his ancillary duties were "moderately strenuous." Decision and Order at 26-27. Although Dr. Majmudar provided testimony addressing physical activities that claimant would be "limited" from performing, he did not have an accurate understanding of the nature of claimant's usual coal mine employment as a heavy equipment operator or the specific details of that job. Employer's Exhibit 6 at 28-29. Therefore, on remand, I would instruct the administrative law judge to reconsider whether the medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), taking into consideration the credibility of the physicians' explanations, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

_____

RYAN GILLIGAN
Administrative Appeals Judge