U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0525 BLA

CHARLES D. COLE (o/b/o DOUGLAS M. COLE) Claimant-Respondent v. WAMPLER BROTHERS COAL COMPANY c/o UNITED COAL COMPANY, LLC and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/22/2023 DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

Michael A. Pusateri and Brian D. Straw (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Jennifer Stocker (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Denying Request for Modification (2011-BLA-05319) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves Employer's request for modification of a miner's subsequent claim filed on November 18, 2002.[1]

In a Decision and Order on Remand dated June 10, 2009, ALJ Janice K. Bullard found the Miner entitled to benefits. Director's Exhibit 56. On May 18, 2010, the Benefits Review Board affirmed the award of benefits. *Cole v. Wampler Bros. Coal Co.*, BRB No. 09-0698 BLA (May 18, 2010) (unpub.). Employer timely filed a request for modification on July 22, 2010. Director's Exhibit 67.

On January 3, 2018, ALJ Larry A. Temin issued a Decision and Order Denying Employer's Request for Modification and Affirming Award of Benefits. In response to

[1] This is the Miner's third claim for benefits. On August 26, 1991, the district director denied the Miner's prior claim, filed on March 19, 1991, because he did not establish any element of entitlement. Director's Exhibit 2 at 10-11. The Miner took no further action until filing the current claim. Director's Exhibit 4. He died on January 14, 2014, while his claim was pending before the Office of Administrative Law Judges. Director's Exhibit 79 at 6. Charles Cole is pursuing the miner's claim on his father's estate's behalf as Claimant. *Id*. at 1-2, 10-11. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant was therefore required to establish at least one element of entitlement to obtain review of the meris of this current claim. *White*, 23 BLR at 1-3.

Employer's appeal, the Board vacated ALJ Temin's decision and remanded the case for reassignment to a new ALJ consistent with the United States Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). *Cole v. Wampler Bros. Coal Co.*, BRB No. 18-0171 BLA (Jan. 30, 2019) (unpub.). On March 19, 2021, the case was reassigned to ALJ Golden (the ALJ).[2] March 19, 2021 Order of Reassignment.

In a Decision and Order Denying Request for Modification, the subject of the current appeal, the ALJ found Claimant established the Miner had 13.41 years of coal mine employment and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established the existence of legal pneumoconiosis and a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b), (c). He thus found Claimant entitled to benefits and therefore that Employer failed to establish a change in conditions or mistake in a determination of fact. Consequently, the ALJ denied Employer's request for modification. 20 C.F.R. §725.310.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It also argues the removal provisions applicable to

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[2] The case was originally reassigned to ALJ Peter B. Silvain; however, it was subsequently reassigned to ALJ Jason A. Golden (the ALJ) because of ALJ Silvain's unavailability. March 19, 2021 Order of Reassignment.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

Department of Labor (DOL) ALJs violate the separation of powers doctrine and render his appointment unconstitutional. Further, it argues the ALJ erred in finding it employed the Miner for at least one year and thus is the responsible operator. In addition, it contends the ALJ's refusal to allow it to obtain discovery from the DOL regarding the scientific bases for the preamble to the 2001 regulatory revisions, while relying on the preamble to assess the evidence in this case, deprived it of due process. On the merits of entitlement, Employer asserts the ALJ erred in finding Claimant established the Miner had legal pneumoconiosis.

Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject Employer's Appointments Clause challenges, contentions of due process violations, and argument that the ALJ erred in relying on the preamble to assess the evidence in this case. Employer replied to Claimant's and the Director's response briefs, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause/Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia*.[6] Employer's Brief at 42-44. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting DOL ALJs on December 21, 2017, but maintains the ratification

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1 at 112; 2 at 90; 13 at 6-7.

[6] *Lucia* involved an Appointments Clause challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

was insufficient to cure the constitutional defect in the ALJ's prior appointment.[7] *Id*. In addition, it challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 42-43. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional.[8] Employer's Brief at 42-43. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023), and *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Request for Modification

In considering whether to grant modification of the prior award in the Miner's subsequent claim, the ALJ was required to determine whether the award contained a mistake in a determination of fact or whether the evidence submitted on modification, along with the evidence previously submitted in this subsequent claim, is sufficient to establish a change in conditions, i.e., a change in an applicable condition of entitlement. 20 C.F.R. §§725.309(c), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). In reviewing the record on modification, the ALJ 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 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993). Thus, the ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence

[7] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Golden.

[8] Employer also states it "preserves its objections to both the ALJ's appointment and removal protections . . . [as] the latter issue is now pending before the Supreme Court." Employer's Brief at 43.

initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Employer's Discovery Request

While the case was pending before the ALJ, Employer sought discovery from the DOL related to its deliberative process underlying the preamble to the 2001 revised regulations. In response, the Director moved for a Protective Order barring the requested discovery. Employer opposed the Director's request. The ALJ granted the Director's motion, finding Employer's discovery request would not lead to relevant information regarding the DOL's deliberative process or the science underlying the revised regulations that was not already set forth in the preamble or to evidence relevant to adjudication of the present claim. November 25, 2020 Order Granting Director's Motion for Protection Order at 2.

Employer argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting the opinions of its physicians as being inconsistent with the science the DOL relied on in the preamble. Employer's Brief at 18-21; Employer's Reply Brief at 19-21. For the reasons set forth in *Johnson*, BLR , BRB No. 22-0022 BLA, slip op. at 8-9, we reject Employer's arguments.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner" for at least one year.[9] 20 C.F.R. §§725.494(c), 725.495(a)(1). The Director bears the burden of proving the responsible operator is a potentially liable operator. 20 C.F.R. §725.495(b). Once designated, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another operator financially

[9] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The ALJ found Claimant worked for Employer for more than 125 days. Decision and Order at 12. He also found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 12. Further, he found Employer failed to demonstrate that a more recent operator employed the Miner for at least one year.[10] Decision and Order at 12. He thus found Employer is the responsible operator. *Id*.

Employer does not challenge the ALJ's calculation that the Miner worked 146.78 days for it in 1981 and 21.7 days for it in 1982.[11] Nor does Employer allege it fails to otherwise satisfy the regulatory criteria for a potentially liable operator. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12. Rather, Employer only argues the ALJ erred in finding the Miner worked at least one year for it based on Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedural Manual* and the United States Court of Appeals for the Sixth Circuit's holding in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-02 (6th Cir. 2019), that one year of coal mine employment is established if the miner worked for 125 days for an operator during a calendar year. Employer's Brief at 15-18. It asserts the ALJ's reliance on *Shepherd* is misplaced as the relevant discussion cited is dicta. *Id*. at 15. We disagree.

Contrary to Employer's assertion, the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) in *Shepherd* is not dicta. The Sixth Circuit held a miner is entitled to credit for a full year of coal mine employment if he establishes 125 working days in a

[10] The ALJ's findings that the Miner had "only 63.1" working days of coal mine employment in 1982 and "21.7 of those days were working" for Employer are unchallenged; thus, we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12. In addition, as the ALJ's finding that the Miner's testimony that he worked for Four Sons Coal Company for about three months in 1984 is insufficient to establish 125 working days of coal mine employment is unchallenged, we affirm it. *Id*.

[11] The ALJ noted the Miner's yearly earnings with Employer were $14,207.82 in 1981 and $2,205.00 in 1982. Decision and Order at 11. He also noted the daily average earnings as reported by Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual* were $96.80 in 1981 and $101.59 in 1982. *Id*. Dividing $14,207.82 by $96.80 and $2,205.00 by $101.59, the ALJ found the Miner worked 146.78 days for Employer in 1981 and 21.7 days for it in 1982. *Id*.

calendar year, "regardless of how long the miner actually was employed by the mining company in any one calendar year or partial periods totaling one year." 915 F.3d at 401-02. Thus, a miner need not have a full 365-day employment relationship with an employer in order to establish a year of coal mine employment. *Id*. The Sixth Circuit in *Shepherd* expressly instructed the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)," including Section 725.101(a)(32)(i) which states 125 working days comprises a year of coal mine employment for all purposes under the Act. *Id*. at 407.

Having affirmed the ALJ's determinations that Sixth Circuit law applies, and as the Miner worked over 125 days for Employer in 1981 and he did not work at least 125 days with any more recent operator, we reject Employer's contention of error and affirm the ALJ's finding that Employer is the responsible operator.

Entitlement to Benefits – 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 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 an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis[12]

Employer argues the ALJ erred in finding Claimant established the Miner had legal pneumoconiosis.[13] To establish legal pneumoconiosis, Claimant must demonstrate the Miner had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The Sixth Circuit holds that a miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine

[12] The ALJ found the evidence did not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a); Decision and Order at 18.

[13] "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). The definition includes "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).

employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the medical opinions of Drs. Baker, Rosenberg, and Jarboe. Decision and Order at 22-38. Dr. Baker opined the Miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis related to coal mine dust exposure and cigarette smoking, while Drs. Rosenberg and Jarboe opined he did not have legal pneumoconiosis but did have COPD, chronic bronchitis, and bronchial asthma unrelated to coal mine dust exposure. Director's Exhibits 10 at 11; 12 at 12-14; 79 at 112-13; Employer's Exhibits 4 at 11-13; 5 at 11-16; 13 at 7-10; 14 at 6-11. The ALJ found Dr. Baker's opinion well-reasoned and documented, and Drs. Rosenberg's and Jarboe's opinions "insufficiently" documented or reasoned and thus unpersuasive. Decision and Order at 27, 32, 38. He thus concluded the medical opinions establish the existence of legal pneumoconiosis. *Id*. at 38.

We initially reject Employer's assertion that the ALJ erred in relying on the preamble to the revised 2001 regulations as a basis for weighing the opinions of Drs. Baker, Rosenberg, and Jarboe and that he improperly treated it as a binding rule that created an "impermissible" burden of proof.[14] Employer's Brief at 29-36; Employer's Reply at 3-7.

Federal circuit courts have consistently held that an ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Harman Mining Co. v. Director, OWCP*

[14] Employer asserts the ALJ improperly relied on training materials developed and provided to DOL ALJs that prejudiced these proceedings and encouraged an incorrect analysis. Employer's Brief at 31-32. Employer has not shown the ALJ saw or relied on the training materials. Director's Response Brief at 10-12. Consequently, to the extent Employer argues the ALJ was biased because of the training materials, it has not laid the necessary foundation for consideration of its allegation. Therefore, Employer's claim of bias is rejected. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992) (charge of bias against an ALJ is not substantiated by a mere allegation but must be established by concrete evidence of prejudice against a party's interest); *see also Orange v. Island Creek Coal Co*., 786 F.2d 724 (6th Cir. 1986) (adverse rulings in a proceeding are not by themselves sufficient to show bias on the part of the ALJ).

[*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). Additionally, contrary to Employer's contention, the preamble is not a legislative ruling requiring notice and comment. *Adams*, 694 F.3d at 801-02; Employer's Brief at 34-36; Employer's Reply at 13-15.

Here, the ALJ permissibly evaluated the opinions of Drs. Baker, Rosenberg, and Jarboe in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *See Sterling*, 762 F.3d at 491; *Adams*, 694 F.3d at 801-02; Decision and Order at 26-38. Moreover, his references to the preamble did not, as Employer suggests, result in substituting his own opinion for that of the physicians; rather, as discussed below, he properly evaluated whether the physicians credibly explained their opinions that the Miner did not have legal pneumoconiosis. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Employer's Brief at 22-29.

We next reject Employer's argument that the ALJ provided invalid reasons for finding Dr. Rosenberg's and Jarboe's opinions not credible. Employer's Brief at 20-26.

Drs. Rosenberg and Jarboe both eliminated coal mine dust exposure as a contributing cause of the Miner's severe obstructive impairment because his pulmonary function study showed a markedly reduced FEV_1/FVC ratio, which they opined is consistent with cigarette smoking and not coal mine dust exposure. Employer's Exhibits 4 at 11-12; 14 at 6-7, 9-11. The ALJ permissibly discredited their opinions because they are based on premises inconsistent with studies the DOL cited in the preamble that coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV_1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Sterling*, 762 F.3d at 491; Decision and Order at 28-29, 33.

Further, Dr. Rosenberg concluded the Miner had diffuse emphysema, and that "diffuse emphysematous destruction of lung tissue" is consistent with cigarette smoking and "not characteristic of coal mine dust exposure." Employer's Exhibits 4 at 11; 14 at 6-7. The ALJ acted within his discretion in finding Dr. Rosenberg's opinion inadequately explained given the DOL's recognition in the preamble that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See Adams*, 694 F.3d at 801-02; 65 Fed. Reg. at 79,943; Decision and Order at 33-34.

Dr. Rosenberg further excluded coal mine dust exposure as a causative factor of the Miner's COPD based on latency. Hearing Tr. at 79. He explained "the data does not support that decades after you leave the coal mines, you're going to develop bronchitis and decreased impairment from a legal perspective." *Id*. Further, he stated "chronic

bronchospastic disease, after cessation of coal mine dust exposure, does not represent a form of legal [coal workers' pneumoconiosis]." Employer's Exhibit 4 at 12. The ALJ permissibly discredited Dr. Rosenberg's reasoning as inconsistent with the regulations' recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Young*, 947 F.3d at 407; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012); *Beeler*, 521 F.3d at 726; 20 C.F.R. §718.201(c); Decision and Order at 38.

Moreover, the ALJ permissibly found Dr. Rosenberg's reasoning unpersuasive because he did not explain why, even if smoking was the primary contributing cause of the Miner's obstructive impairment, coal mine dust exposure did not also contribute to his impairment. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185; Decision and Order at 33.

In addition, Dr. Jarboe eliminated coal mine dust exposure as a contributing cause of the Miner's chronic bronchitis because his pulmonary function studies demonstrated partial reversibility of his obstructive impairment in response to bronchodilators consistent with asthma. Director's Exhibit 12 at 12-14; Employer's Exhibits 5 at 12-14; 13 at 7-10. The ALJ permissibly found Dr. Jarboe's opinion unpersuasive because, even if asthma were a cause of the Miner's impairment, the doctor did not adequately explain why his coal mine dust exposure neither caused nor substantially aggravated his asthma.[15] *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 29-30.

We further reject Employer's argument that the ALJ erred in crediting Dr. Baker's opinion. Employer's Brief at 37-41. Dr. Baker examined the Miner on January 8, 2003, and June 20, 2012, and recorded his coal mine employment and cigarette smoking histories.[16] Director's Exhibits 10 at 8-9; 79 at 109-10. He opined the Miner's coal mine

[15] Because the ALJ provided valid reasons for discrediting Drs. Rosenberg's and Jarboe's opinions, we need not address Employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 20-26.

[16] We reject Employer's argument that the ALJ erred in crediting Dr. Baker's opinion because it is based on an "understated" smoking history. Employer's Brief at 37. The ALJ found the Miner "smoked approximately 1 to 1.5 packs per day from age 18 (1961) until he stopped smoking in late 2013" based on his deposition testimony and the reports of Drs. Baker, Rosenberg, and Jarboe. Decision and Order at 21. He thus concluded "the Miner had a significant 52 to 78-pack year smoking history." *Id*. As Dr.

dust exposure and smoking contributed to his COPD and chronic bronchitis because both exposures can have a synergistic effect on one's lungs. Director's Exhibits 10 at 11; 79 at 112-113. Further, he found the Miner's cigarette smoking was the primary cause of his condition based on his symptoms of cough and shortness of breath, but considered coal mine dust exposure to be a contributing factor because it caused persistent inflammation that aggravated his chronic bronchitis. Employer's Exhibit 21 at 37, 47-51.

The ALJ found Dr. Baker's opinion consistent with the scientific evidence the DOL found credible in the preamble to the revised regulations establishing that the risks of smoking and coal mine dust exposure can be additive. *See* 65 Fed. Reg. at 79,939-40. Given his consideration of the Miner's symptoms and employment histories, the ALJ permissibly found Dr. Baker's opinion reasoned and documented.[17] *See Sterling*, 762 F.3d at 491; *Adams*, 694 F.3d at 801-02; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 27. Employer's argument amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; Employer's Brief at 36-41. As it is supported by substantial evidence, we affirm the ALJ's finding that the medical opinion evidence establishes that the Miner had legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 39.

Total Disability

As Employer does not challenge the ALJ's finding that Claimant established the Miner had a totally disabling respiratory or pulmonary impairment, it is affirmed. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2); Decision and Order at 6.

Baker reported the Miner smoked one pack per day since age eighteen for "a 60 to 75-pack year smoking history," the ALJ permissibly found Dr. Baker "considered a cigarette smoking history similar to [his] finding." *Id*.

[17] We also reject Employer's argument that the ALJ erred in crediting Dr. Baker's opinion because the doctor relied on an inaccurate coal mine employment history. Employer's Brief at 37. The ALJ found the Miner had 13.41 years of coal mine employment. Decision and Order at 11. He correctly noted that while Dr. Baker recorded an eighteen-year coal mine employment history in his report, the doctor also stated his opinion would not change if the Miner had worked for thirteen years instead. *Id*. at 25; Employer's Exhibit 21 at 28. Thus, he permissibly found "Dr. Baker did not rely on an overstated occupational history." Decision and Order at 25.

Disability Causation

Further, Employer does not challenge the ALJ's finding that Claimant established the Miner was totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c)(1); Decision and Order at 41. Thus, we affirm this finding. *See Skrack*, 6 BLR at 1-711.

As Employer raises no additional arguments, we affirm the ALJ's finding that Employer failed to establish a change in conditions or mistake in determination of fact. 20 C.F.R. §725.310; Decision and Order at 41. Further, we affirm his finding that granting Employer's request for modification would not render justice under the Act.

Accordingly, the ALJ's Decision and Order Denying Request for Modification is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge