U.S. Department of Labor

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

BRB Nos. 20-0096 BLA
and 20-0097 BLA

VERDA LEE COX (o/b/o and Widow of HENRY COX) Claimant-Respondent v. W & C COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/25/2021 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Laura Metcoff Klaus and Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer/Carrier.

Jeffery S. Goldberg (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jason A. Golden's Decision and Order Awarding Benefits (2018-BLA-06069, 2018-BLA-06111) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves the third request for modification of a subsequent claim, and the first request for modification of a survivor's claim.

The Miner filed his subsequent claim on May 10, 2004. In an October 5, 2011 Decision and Order Denying Benefits On Remand,[1] Administrative Law Judge Ralph A. Romano denied the claim because the Miner failed to establish pneumoconiosis. 20 C.F.R. §718.202(a); Director's Exhibit 68. The Miner requested modification of that denial[2] but died while it was pending. Director's Exhibits 69, 74, 79. Claimant, the Miner's widow, is now pursing the claim on his behalf. *Id*. The district director denied the request for modification of the subsequent claim on September 21, 2012. Director's Exhibit 81. Claimant filed a second request for modification. Director's Exhibit 86. Separately, Claimant filed a survivor's claim on August 31, 2012, which was consolidated with the modification proceeding in the Miner's subsequent claim. Director's Exhibit 100. In a Decision and Order dated May 10, 2017, Administrative Law Judge Richard M. Clark

[1] Administrative Law Judge Romano had initially awarded benefits in the subsequent claim in a March 11, 2008 Decision and Order. Director's Exhibit 56. Upon Employer's appeal, however, the Board vacated the award of benefits because Judge Romano erred in weighing the evidence on the issues of pneumoconiosis and total disability causation. 20 C.F.R. §§718.202(a), 718.204(c); *H.C.* [*Cox*] *v. W & C Coal Co.*, BRB No. 08-0482 BLA (Apr. 29, 2009) (unpub.). We incorporate the procedural background of the subsequent claim and the prior claims as set forth in the Board's decision. *Id*.

[2] Although the Miner initially appealed Judge Romano's denial of benefits to the Benefits Review Board, he subsequently requested modification. Director's Exhibits 69, 74. Thus the Board dismissed the appeal and remanded the case to the district director to process the Miner's modification request. *H.C.* [*Cox*] *v. W & C Coal Co.*, BRB No. 12-0071 BLA (Apr. 26, 2012) (Order) (unpub.).

denied the second request for modification because Claimant failed to establish a change in conditions or a mistake in a determination of fact and denied the survivor's claim because Claimant failed to establish the Miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.205, 725.310; Director's Exhibit 143.

Claimant then filed a third request for modification of the Miner's subsequent claim and a first request for modification of her survivor's claim on August 29, 2017. Director's Exhibits 145, 148. Because Claimant submitted no new evidence, the district director transferred the claims to the Office of Administrative Law Judges (OALJ), which assigned them to Administrative Law Judge Jason A. Golden (the administrative law judge). Director's Exhibit 148.

In his Decision and Order Awarding Benefits that is the subject of the current appeal, the administrative law judge credited the Miner with 14.75 years of coal mine employment and found he had legal pneumoconiosis in the form of obstructive lung disease significantly related to, or substantially aggravated by, coal mine dust exposure.[3] 20 C.F.R. §718.202(a). He also found the Miner was totally disabled due to legal pneumoconiosis.[4] 20 C.F.R. §718.204(b), (c). Thus he found Claimant established modification based on a mistake in a determination of fact. 20 C.F.R. §725.310. He further found granting modification would render justice under the Act and awarded benefits in the Miner's claim. In addition, he found Claimant automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act based on the award in the Miner's claim.[5] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[6] It also argues that the removal

[3] The administrative law judge also found the Miner had clinical pneumoconiosis. 20 C.F.R. §718.202(a).

[4] The rebuttable presumption at Section 411(c)(4) of the Act is inapplicable because the Miner filed his subsequent claim prior to January 1, 2005. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Director's Exhibit 3; Decision and Order at 5, 8.

[5] Section 422(*l*) provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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

provisions applicable to administrative law judges violate the separation of powers doctrine and render his appointment unconstitutional. On the merits of entitlement, Employer contends the administrative law judge erred in finding Claimant established legal pneumoconiosis and disability causation, and in finding that granting modification would render justice under the Act.[7] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting the administrative law judge had the authority to decide the case. The Director also urges affirmance of the administrative law judge's finding that granting modification renders justice under the Act. Employer filed reply briefs, reiterating its arguments.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to

> [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.

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established total disability. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 34-35.

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

Lucia v. SEC, 585 U.S. , 138 S.Ct. 2044 (2018).[9] Employer's Brief at 14-15, 20. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[10] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[11] *Id*. at 15-18; Employer's Reply Brief to the Director's Response at 1-4.

The Director argues the administrative law judge had the authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Brief at 5-6. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 6 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency

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[9] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) administrative law judge. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges 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)).

[10] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

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

Secretary's December 21, 2017 Letter to Administrative Law Judge Golden.

[11] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to DOL administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co.*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Moreover, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Golden and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Golden. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Golden "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts," and generally speculates that he did not make a "genuine, let alone thoughtful, consideration" when he ratified Judge Golden's appointment. Employer's Brief at 18. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the administrative law judge's appointment.[12] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals were valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper).

[12] While Employer notes the Secretary's ratification letter was signed "with an autopen," Employer's Brief at 17-18, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F.Supp.2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

We further reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, supports its Appointments Clause argument because incumbent administrative law judges remain in the competitive service. Employer's Brief at 20; Employer's Reply Brief to the Director's Response at 9-11. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of Judge Golden's appointment, which we have held constituted a valid exercise of his authority, bringing the administrative law judge's appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded to the OALJ for a new hearing before a different administrative law judge.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges. Employer's Brief at 18-20; Employer's Reply Brief to the Director's Response at 4-9. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 19-20; Employer's Reply Brief to the Director's Response at 6-7. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S.Ct. 2183 (June 29, 2020). Employer's Brief at 18-20; Employer's Reply to the Director's Response at 4-9.

In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Finally, in *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an

"independent agency led by a single Director and vested with significant executive power."[13] 140 S. Ct. at 2201.

Although Employer generally summarizes these cases, it has not explained how or why these legal authorities should apply to administrative law judges or otherwise undermine the administrative law judge's ability to hear and decide this case. Employer simply assumes, without explaining, that because limitations on removal are unconstitutional for certain executive branch officials performing executive functions, the same must be true for administrative law judges.[14] A reviewing court, however, should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider argument that the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional either facially or as applied.

Modification

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *Wojtowicz v. Duquesne Light Co.*,

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[13] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S.Ct. 2183, 2191, 2200 (June 29, 2020).

[14] In other cases not addressed by Employer, the Supreme Court has distinguished between officials performing executive functions and those performing purely adjudicatory functions. In *Wiener v. United States*, 357 U.S. 349 (1958), for example, the Court upheld limitations on removal for members of the War Claims Commission which "receive[d] and adjudicate[d] according to law" personal injury and property damage claims arising from World War II. Similarly, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court upheld removal limitations for members of the Federal Trade Commission whose duties were "neither political nor executive, but predominantly quasi judicial and quasi legislative." *See Seila Law v. CFPB*, 591 U.S. , 140 S.Ct. 2183, 2199 (June 29, 2020) (comparing permissible removal protections for "multimember bodies" performing "quasi-judicial" or "quasi-legislative" functions with the President's "unrestrictable power ... to remove purely executive officers").

12 BLR 1-162, 1-164 (1989). An administrative law judge has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Miner's Claim - Entitlement under 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. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of them 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

To establish legal pneumoconiosis, Claimant must prove the Miner had a chronic lung disease or an impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). The United States Court of Appeals for 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 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 administrative law judge considered the opinions of Drs. Perper, Baker, Rosenberg, and Caffrey.[15] Decision and Order at 17-31. Dr. Perper diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease

[15] The administrative law judge also considered the opinions of Drs. Wicker and Jarboe that the Miner's chronic obstructive pulmonary disease (COPD) was due to smoking and unrelated to coal mine dust exposure and the opinion of Dr. Potter that the Miner's COPD was due to coal mine dust exposure. Director's Exhibits 14, 17, 55a. He found their opinions not well-reasoned or documented. Decision and Order at 17-18, 21, 29. Employer does not challenge the administrative law judge's discrediting of the opinions of Drs. Wicker and Potter. Thus we affirm these credibility findings. *See Skrack*, 6 BLR at 1-711.

(COPD)/emphysema related to cigarette smoking and coal mine dust exposure. Claimant's Exhibit 1. Dr. Baker similarly diagnosed legal pneumoconiosis in the form of COPD related to cigarette smoking and coal mine dust exposure. Director's Exhibit 51 at 145-151. Drs. Rosenberg and Caffrey excluded legal pneumoconiosis and opined the Miner had emphysema and COPD related solely to smoking. Employer's Exhibits 1, 2. The administrative law judge credited the opinions of Drs. Perper and Baker as well-reasoned and consistent with the record and the preamble to the 2001 regulatory revisions. Decision and Order at 18-20, 29-34. He discredited the opinions of Drs. Rosenberg and Caffrey as inadequately reasoned and inconsistent with the preamble. *Id*. at 32. He therefore found the medical opinion evidence established legal pneumoconiosis. 20 C.F.R. §718.202(a)(4).

As an initial matter, we affirm as unchallenged by Employer the administrative law judge's crediting of Dr. Baker's opinion as reasoned and documented, and sufficient to establish legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18-20, 33-34.

Employer argues the administrative law judge erred in relying on the preamble to weigh the contrary medical opinions of Drs. Rosenberg and Caffrey. Employer's Brief at 20-30. We disagree. As part of the deliberative process, an administrative law judge may permissibly evaluate expert opinions in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *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 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008).

We further reject Employer's assertion that the administrative law judge erred in finding the opinions of Drs. Rosenberg and Caffrey inconsistent with the preamble. Employer's Brief at 20-30.

Dr. Rosenberg excluded legal pneumoconiosis, in part, because the Miner's pulmonary function studies showed a markedly reduced FEV_1/FVC ratio, which he opined is consistent with cigarette smoking and not coal mine dust exposure. Employer's Exhibit 2 at 7. The administrative law judge permissibly discredited Dr. Rosenberg's opinion as conflicting with the DOL's position 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 22-24. Although Dr. Rosenberg acknowledged coal mine dust exposure "can have this effect [of reducing the FEV1/FVC ratio]," he stated it is "unlikely"

to do so. Employer's Exhibit 2 at 5. The administrative law judge permissibly found that explanation unpersuasive as it is based on generalities and lacked an explanation as to why the Miner could not be an "exception to [Dr. Rosenberg's] generalization."[16] *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 23.

Dr. Caffrey eliminated a diagnosis of legal pneumoconiosis, in part, because the number of lesions of clinical pneumoconiosis were minimal and inadequate to cause the Miner's moderate to severe COPD/emphysema.[17] Director's Exhibit 110-12; Employer's Exhibit 1 at 3. The administrative law judge also noted Dr. Caffrey acknowledged there was coal mine dust in the Miner's lungs and coal mine dust can cause emphysema in a susceptible individual. *Id*. He permissibly found Dr. Caffrey's exclusion of legal pneumoconiosis inadequately reasoned because the doctor did not explain how the coal mine dust seen in the Miner's lungs did not contribute to his emphysema, and because a finding of legal pneumoconiosis is not dependent on a miner having clinical pneumoconiosis. *See Groves*, 277 F.3d at 836; *Crisp*, 866 F.2d at 185; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); 65 Fed. Reg. at 79,943; Decision and Order at 30-31.

As Employer raises no additional argument, we affirm the administrative law judge's finding that Claimant established legal pneumoconiosis based on Dr. Baker's opinion.[18] 20 C.F.R. §718.204(a)(4); *see Groves*, 761 F.3d at 597-98; Decision and Order at 18-20, 33-34.

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[16] Because the administrative law judge provided valid reasons for discrediting Dr. Rosenberg's opinion, we need not address Employer's remaining arguments regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 20-30.

[17] Dr. Caffrey reviewed fifteen autopsy slides and provided an opinion and a supplemental opinion. Director's Exhibit 110; Employer's Exhibit 1. He acknowledged emphysema can be due to coal mine dust in a susceptible individual, but noted smoking is the number one cause of emphysema. Director's Exhibit 110-12; Employer's Exhibit 1 at 4. He stated "the lesions of simple coal workers' pneumoconiosis were not sufficient enough to have caused [the Miner] to have legal pneumoconiosis." Employer's Exhibit 1 at 3.

[18] Employer also challenges the administrative law judge's decision to credit Dr. Perper's diagnosis of legal pneumoconiosis. Employer's Brief at 21-30; Employer's Reply

Disability Causation

Employer does not challenge the administrative law judge'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 35-36. Thus we affirm this finding. *See Skrack*, 6 BLR at 1-711.

Justice Under the Act

Finally, Employer argues the administrative law judge erred in finding that granting modification renders justice under the Act because Claimant's lack of diligence in filing evidence in multiple modification requests suggests an improper motive.[19] Employer asserts the administrative law judge should have given greater weight to the factors of motive and diligence, rather than to accuracy. Employer's Brief at 30-32; Employer's Reply Brief to the Director's Response at 16-17. We disagree.

Assessing a request for modification is committed to the broad discretion of the administrative law judge. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The party opposing modification, therefore, bears the burden of establishing the administrative law judge committed an abuse of discretion. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). Employer has not met its burden in this case.

The administrative law judge properly applied the factors relevant to determining whether granting modification renders justice under the Act. Decision and Order at 37-38. Contrary to Employer's argument, he permissibly determined that because the evidence established the Miner's entitlement to benefits, "the need for accuracy weighs in favor of granting Claimant's request for modification." *Id*. at 37, *citing Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 546 (7th Cir. 2002). He also reasonably found Claimant demonstrated adequate diligence by requesting modification within the one-year time limit established in the regulations. 20 C.F.R. §725.310(a); *Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-20, 25 (1996); Decision and Order at 38. With respect

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Brief to the Director's Response at 11-16. As we have affirmed the administrative law judge's finding that Claimant established legal pneumoconiosis based on Dr. Baker's opinion, and there is no credible contrary evidence, we need not address Employer's arguments with respect to Dr. Perper. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[19] Employer inaccurately refers to a fourth request for modification. Employer's Brief at 30; Employer's Reply Brief to the Director's Response at 16. This is Claimant's third request for modification on the Miner's behalf. Decision and Order at 3.

to Claimant's motive, we reject Employer's suggestion that Claimant was seeking "a more sympathetic judge." Employer's Brief at 30. The administrative law judge permissibly concluded "Employer has not offered any evidence that Claimant's motivation in requesting modification is anything other than to obtain benefits to which she is entitled." *See Worrell*, 27 F.3d at 230; Decision and Order at 38.

Finally, we reject Employer's argument that the administrative law judge was required to first evaluate whether granting modification would render justice under the Act before considering whether the prior denial contained a mistake in a determination of fact. Employer's Brief at 32. There is no requirement that an administrative law judge conduct such threshold analysis in requests for modifications, particularly in light of the fact that accuracy is a relevant factor in whether granting modification would render justice under the Act. *See Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 330 (4th Cir. 2012) (the search for "justice under the Act" should be guided, first and foremost, by the need to ensure accurate benefit distribution); 65 Fed. Reg. at 79975 (Dec. 20, 2000) (rejecting limits on modification because Congress's overriding concern in enacting the Act was to ensure that miners who are totally disabled due to pneumoconiosis arising out of coal mine employment receive compensation).

As the administrative law judge did not abuse his discretion, we affirm his determination that granting modification renders justice under the Act. *See O'Keeffe*, 404 U.S. at 255; *Worrell*, 27 F.3d at 230; *Branham*, 20 BLR at 1-34; Decision and Order at 37-38. Consequently, having affirmed the administrative law judge's determination that Claimant established the requisite elements of entitlement, we affirm the award of benefits in the Miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the Miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the administrative law

judge's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge