BRB No. 10-0681 BLA

TRULA M. EDWARDS (Widow of BILLY J. EDWARDS)	)	
Claimant-Respondent	)	
v.	)	
GRACE COAL CORPORATION	)	DATE ISSUED: 08/26/2011
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Modification and Benefits (2008-BLA-05951) of Administrative Law Judge Pamela Lakes Wood, rendered on a survivor's claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The relevant procedural history of the case

is as follows. Claimant[1] filed a survivor's claim on August 6, 2001,[2] which was denied by the district director on June 13, 2002. Director's Exhibits 3, 23. Claimant filed a second claim on January 13, 2003, which was treated as a request for modification. Director's Exhibit 29. In a Decision and Order Granting Motion for Modification dated October 28, 2004, Administrative Law Judge Molly W. Neal determined that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and awarded benefits. *Id*.

Employer appealed, and the Board affirmed, as unchallenged, Judge Neal's decision to credit the miner with 17.297 years of coal mine employment, and her acceptance of employer's stipulation to the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b).[3] *Edwards v. Grace Coal Corp.*, BRB No. 05-0197 BLA, slip op. at 2-3 n.2 (Sept. 30, 2005) (unpub.). The Board ultimately vacated Judge Neal's finding that the miner's death was hastened by pneumoconiosis at 20 C.F.R. §718.205(c), and directed her on remand to explain the weight accorded the opinions of Drs. Robinette and Naeye. *Id*. at 5; *see Edwards v. Grace Coal Corp.* BRB No. 05-0197 BLA (Mar. 29, 2006) (Order on Motion for Recon.) (unpub.).

On remand, the case was reassigned to Administrative Law Judge Stuart A. Levin because Judge Neal was no longer with the Office of Administrative Law Judges. In a Decision and Order dated April 11, 2007, Judge Levin denied benefits for lack of a reasoned and documented opinion finding that the miner's death was hastened by pneumoconiosis. Director's Exhibit 71. On April 4, 2008, claimant filed a request for modification, which was denied by the district director on July 8, 2008. Director's

[1] Claimant is the widow of the miner, Billy J. Edwards, who died on March 28, 2001. The miner filed two claims during his lifetime, both of which were denied. Director's Exhibits 1, 2.

[2] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Those amendments do not apply to this case, based on the filing date of the claim.

[3] The Board rejected employer's assertion that the administrative law judge failed to properly apply the requirements for modification at 20 C.F.R. §725.310, noting that it was unnecessary for Judge Neal to consider whether the evidence was sufficient to establish a basis for modification of the district director's denial of the survivor's claim, as such an analysis is subsumed into a decision issued on the merits. *Edwards v. Grace Coal Corp.*, BRB No. 05-0197 BLA, slip op. at 3 (Sept. 30, 2005) (unpub.).

Exhibits 72, 76. Claimant requested a hearing, which was held on June 23, 2009, by Administrative Law Judge Pamela Lakes Wood (the administrative law judge).

In a Decision and Order issued on August 2, 2010, which is the subject of this appeal, the administrative law judge credited the miner with 17.297 years of coal mine employment, and noted that the parties had stipulated to the existence of clinical pneumoconiosis,[4] but disputed whether the miner suffered from legal pneumoconiosis[5] and whether his death was due to pneumoconiosis. The administrative law judge determined that the evidence established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). She concluded that clinical and legal pneumoconiosis substantially contributed to, or hastened, the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge found that claimant demonstrated a mistake in a determination of fact at 20 C.F.R. §725.310 and awarded benefits.

On appeal, employer asserts that the administrative law judge erred in admitting the reports of Dr. Green, contained at Claimant's Exhibits 1 and 2, as they exceed the evidentiary limitations at 20 C.F.R. §§725.310 and 725.414. Furthermore, employer asserts that Dr. Green's opinion must be excluded because he referenced evidence that is not in the record. With respect to the merits of the survivor's claim, employer contends that the administrative law judge erred in failing to address whether granting claimant's modification request was in the interest of justice. Employer argues that the administrative law judge should have given *res judicata* effect to Judge Levin's denial of benefits, which had confirmed the validity of the original denial, and that claimant's belated development of evidence should not be permitted to thwart employer's good faith defense. Additionally, employer contends that the administrative law judge erred in

[4] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

[5] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

weighing the conflicting medical opinions and in rendering her credibility determinations, as to the issues of the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and death causation at 20 C.F.R. §718.205(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director) responds, urging the Board to reject employer's argument that Dr. Green's reports exceed the evidentiary limitations.

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.[6] 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).

I. EVIDENTIARY LIMITATIONS

Employer argues on appeal that the administrative law judge erred in admitting both Dr. Green's report dated May 7, 2009, based on his review of the miner's autopsy slides and medical record, and the supplemental report of Dr. Green dated July 15, 2009. Claimant's Exhibits 1, 2. Employer maintains that Dr. Green's opinion exceeds the evidentiary limitations set forth at 20 C.F.R. §§725.414 and 725.310, as it constitutes both an autopsy and a medical report. Employer argues that claimant is not entitled to submit two autopsy reports and, further, that the portion of Dr. Green's opinion that satisfies the definition of a medical report must be excluded as is "inextricably based on the inadmissible autopsy review." Employer's Brief in Support of Petition for Review at 3. We reject employer's arguments as without merit.

The regulations at 20 C.F.R. §§725.414 and 725.310(b) establish combined evidentiary limitations. *See* 20 C.F.R. §§725.2(c), 725.414, 725.310(b); *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007). Pursuant to 20 C.F.R. §725.414(a), each party may submit, in support of his affirmative case, no more than two chest x-ray interpretations, two pulmonary function studies, two arterial blood gas studies, one report of autopsy, no more than one report of each biopsy, and no more than two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). The regulation at 20 C.F.R. §725.310(b) further provides that, in a modification proceeding, each party shall be entitled to submit one additional x-ray interpretation, pulmonary function study, blood gas study, and medical report as affirmative case evidence, "along with such rebuttal evidence and

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

additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414." 20 C.F.R. §725.310(b). If a party did not submit the full complement of evidence allowed by 20 C.F.R. §725.414, in support of its affirmative case in the underlying claim, that party would be permitted on modification to submit any additional evidence allowed under 20 C.F.R. §725.414, as well as the additional medical evidence allowed by 20 C.F.R. §725.310(b). *Rose*, 23 BLR at 1-227. Additionally, the regulations provide that if any evidence exceeding the limitations is offered by a party, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

In support of her survivor's claim, claimant submitted the March 23, 2001 autopsy report of Dr. Segen, and the April 16, 2002 medical report from Dr. Robinette. Director's Exhibits 7, 72. Claimant also submitted a copy of a report of examination by Dr. Robinette on May 9, 1989, which was previously submitted in the miner's claim. Director's Exhibit 50. In conjunction with her modification request, claimant submitted a copy of the April 22, 2002 report by Dr. Robinette, attached to which was a January 23, 2008 cover letter from Dr. Robinette, stating:

> [The miner's] family has requested an additional summary be submitted from my office concerning his respiratory illness and diagnosis. [O]n [April 16], 2002, a five page summary was submitted on behalf of [the miner] which clearly described the pathophysiology of underlying pneumoconiosis, emphysema and [COPD]. Within that body of evidence[,] I summarized both the autopsy information as well as his clinical information. If you have some new evidence[,] I will be glad to review those records[.] [B]ut obviously there is little that can be added to the pathology report other than the summary as submitted in 2002.

Id. Additionally, claimant submitted a medical report from Dr. Green dated May 7, 2009, based on his review of the miner's autopsy slides and medical records, and a supplemental report from Dr. Green dated July 15, 2009. Claimant's Exhibits 1, 2.

Prior to the hearing, claimant's counsel specifically designated, as affirmative evidence, the March 23, 2001 autopsy report of Dr. Segen, the April 16, 2002 medical report of Dr. Robinette, and the May 7, 2009 medical report of Dr. Green. *See* Claimant's Black Lung Evidence Summary. The record reveals that employer submitted an affirmative autopsy report by Dr. Naeye dated January 1, 2004. Director's Exhibit 50. Thereafter, employer designated, as affirmative evidence, the April 21, 1999 report of Dr. Castle, the April 20, 2009 report of Dr. Tuteur, and the supplemental report of Dr. Tuteur dated June 12, 2009. *See* Employer's Black Lung Evidence Summary.

Employer correctly asserts in this appeal that Dr. Green's opinion constitutes both a medical report and an autopsy report, because he performed an autopsy slide review

and prepared a written opinion of the miner's pulmonary condition, based on his review of the medical record. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*); Employer's Brief in Support of Petition for Review at 19. As such, Dr. Green's opinion must comply with the evidentiary limitations pertaining to both autopsy evidence and medical reports. *See* 20 C.F.R. §725.414(a)(2)(i).

However, contrary to employer's assertion, although claimant submitted an affirmative autopsy report by Dr. Segen, she was not precluded from also submitting Dr. Green's autopsy slide review. The regulations provide that a party may submit both an affirmative autopsy report and, where the opposing party has also submitted affirmative autopsy evidence, a rebuttal autopsy report. *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii); *Keener*, 23 BLR at 1-240. We agree with the Director that "Dr. Segen's report is admissible as [c]laimant's one affirmative case autopsy report" and that "Dr. Green's review of the autopsy slides is admissible as autopsy rebuttal evidence contradicting Dr. Naeye's interpretation of the tissue slides." Director's Brief at 4; *see* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii); *Keener*, 23 BLR at 1-240. Thus, we reject employer's assertions that Dr. Green's opinion constitutes an inadmissible autopsy report, as it complies with the evidentiary limitations.[7]

We also conclude that Dr. Green's opinion complies with the evidentiary limitations on medical reports. Claimant has submitted three affirmative medical reports in this case. The first two affirmative medical reports were prepared by Dr. Robinette, on May 9, 1989 and April 16, 2002, and are admissible pursuant to 20 C.F.R. §725.414(a)(2)(i). The third affirmative medical report, prepared by Dr. Green on May 7, 2009, and his supplemental opinion of July 15, 2009, were submitted by claimant on modification and are admissible pursuant to 20 C.F.R. §725.310(b). *See Rose*, 23 BLR at 1-227.

Finally, we reject employer's contention that Dr. Green's opinion was inadmissible because he cited to evidence that was not of record, namely "medical records from Buchanan General Hospital, Abingdon Radiology Services, Ltd., Johnston Memorial Hospital and Stone Mountain Heath Services," along with a report from Dr. Feit. Employer's Brief in Support of Petition for Review at 23. We note, however, that employer had different legal counsel while the case was pending before the administrative law judge. Prior to the hearing, in a letter dated June 4, 2009, employer's counsel advised the administrative law judge that Dr. Green's report listed medical records and a report by Dr. Feit, which was provided to him for review, but was not a part

[7] Because Dr. Green's autopsy slide review was properly admitted into the record, we reject employer's assertion that Dr. Green's opinion must be excluded in its entirety. Employer's Brief in Support of Petition for Review at 21.

of the evidentiary record. At the hearing held on June 23, 2009, claimant's counsel provided employer with a copy of the evidence referenced by Dr. Green. Following a discussion between the parties and the administrative law judge, which was off the record, it was agreed that the evidence in question was part of the record in the miner's claim, but was not submitted in the survivor's claim. *Id*. at 11-12. The administrative law judge specifically ruled that there was good cause for the admission of the evidence from the miner's claim, cited by Dr. Green, and also gave employer the opportunity, post-hearing, to obtain a report from its own medical expert, based on the same evidence that was provided to, and reviewed by, Dr. Green in his May 7, 2009 report. *Id.* Thereafter, employer submitted Dr. Tuteur's June 30, 2009 report, based on his review of "the newly available evidence," which specifically references the report of Dr. Feit. Employer's Exhibit 5. Because employer was given the opportunity to have its own medical expert review the same documentary evidence presented to Dr. Green for review, we see no prejudice to employer by the administrative law judge's ruling.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984).

We further reject employer's contention that the administrative law judge erred in refusing to exclude Dr. Green's opinion because he had "ex parte" communications with the miner's son about the physical condition of the miner at the time of death. Employer's Brief in Support of Petition for Review at 24. The administrative law judge acknowledged that Dr. Green referenced information obtained from the miner's son "either from an unspecified conversation or letter" concerning the circumstances surrounding the miner's death, but concluded that there was no prejudice to employer, as "Dr. Tuteur was provided with a copy of Dr. Green's report, which summarized the information provided [by the miner's son], and Dr. Tuteur was able to respond to Dr. Green's report." 2010 Decision and Order at 15-16; *see generally Dempsey v. Sewell*

[8] Employer suggests that the January 23, 2008 cover letter from Dr. Robinette, attaching a copy of his April 16, 2002 report, also constitutes an additional medical report that must be taken into consideration in determining whether claimant's evidence exceeds the evidentiary limitations. Employer's Brief in Support of Petition for Review at 19. We disagree. The regulation at 20 C.F.R. §725.414(a)(1) defines a medical report as a "written assessment of the miner's respiratory or pulmonary condition" that is "prepared by a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1). Because Dr. Robinette's January 23, 2008 letter does not contain a review of any additional medical records or provide further assessment of the miner's condition, it is not a medical report for purposes of the evidentiary limitations. *See Id.*; *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006).

Coal Corp., 23 BLR 1-47 (2004) (*en banc*) (an administrative law judge is given broad discretion in resolving procedural matters). Thus, we reject employer's challenge to the admissibility of Dr. Green's opinion.

II. MODIFICATION/MERITS OF CLAIM

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

Pursuant to 20 C.F.R. §725.310(a), a party may, at any time before one year after the denial of a claim, file a request for modification of the denial of benefits on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. The sole basis available 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.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge has the authority to consider all the evidence for any mistake in a determination of fact, including the ultimate fact of entitlement. 20 C.F.R. §725.310; *see Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

In this case, the physicians are in agreement that the miner had clinical pneumoconiosis and COPD, and that COPD contributed to his death. Thus, the sole issue is the etiology of the miner's COPD. The administrative law judge determined that claimant established a mistake in a determination of fact because the evidence before Judge Levin focused on whether clinical pneumoconiosis hastened death and did not address the broader issue of whether the miner's death was hastened by legal pneumoconiosis, in the form of COPD due, in part, to coal dust exposure. The administrative law judge found that the evidence submitted on modification addressed

this broader issue and she credited Dr. Green's opinion, that the miner's death was due to both clinical and legal pneumoconiosis.[9] She, therefore, awarded benefits.

A. LEGAL PNEUMOCONIOSIS

Employer asserts that the administrative law judge erred in weighing the conflicting evidence, as to the etiology of the miner's COPD. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Robinette, Castle, Naeye, Tuteur and Green. Dr. Robinette was the miner's treating physician and prepared his most recent report on April 16, 2002, subsequent to the miner's death. Director's Exhibits 9, 38. Dr. Robinette indicated that the miner was treated for clinical pneumoconiosis and COPD and opined that the miner's pneumoconiosis significantly contributed to his death. *Id*.

Dr. Castle examined the miner on April 21, 1999, and also reviewed certain medical records predating the miner's death. Employer's Exhibit 1. He opined that the miner had no evidence of coal workers' pneumoconiosis. *Id*. He concluded that the miner suffered from COPD, primarily chronic bronchitis, due to tobacco smoke and unrelated to coal dust exposure. *Id*.

In a report dated January 1, 2004, Dr. Naeye reviewed the miner's death certificate, a copy of the autopsy report, and seventeen pathology slides. Director's Exhibit 50. He found minimal evidence of simple coal workers' pneumoconiosis, with adjacent focal emphysema, and opined that the lesions were too small to have contributed to any lung dysfunction. Employer's Exhibit 1. He also found severe centrilobular emphysema and severe chronic bronchitis. Dr. Naeye stated, "I do not have a smoking history on this man but the severe centrilobular emphysema and severe chronic bronchitis in his lungs is a very rare finding, if it ever occurs in bituminous coal miners who have never smoked cigarettes." *Id*. He opined that coal dust exposure played no role in the miner's death due to a myocardial infarction and lung cancer. *Id*.

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[9] Contrary to employer's argument, the administrative law judge was not precluded, based on principles of *res judicata*, from considering whether a mistake in a determination of fact occurred pursuant to 20 C.F.R. §725.310. *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). The intended purpose of modification, based on a mistake in a determination of fact, is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971); *Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

Dr. Tuteur reviewed medical records and prepared a report dated April 20, 2009. Employer's Exhibit 2. He opined that, at the time of the miner's death, the miner suffered from heart disease, metastatic carcinoma of the lung, mild simple pneumoconiosis and severe COPD, characterized by emphysema and chronic bronchitis. *Id*. Dr. Tuteur opined that the miner's simple clinical pneumoconiosis played no role in his death. *Id*. Dr. Tuteur cited to a medical study that found a twenty percent incidence of COPD in life-long smokers and approximately a one percent prevalence of COPD in non-smoking miners and concluded that the miner's COPD was "uniquely caused by the inhalation of tobacco smoke, not coal mine dust." *Id*.

In his report, dated May 7, 2009, Dr. Greene stated that he reviewed the autopsy report, fourteen pathology slides and certain medical records. Claimant's Exhibit 1. He opined that the miner's lungs showed clinical coal workers' pneumoconiosis, severe emphysema and vascular changes consistent with cor pulmonale. *Id*. He further noted that he reviewed the miner's death certificate, the autopsy report and other medical records. *Id*. He opined that the miner suffered from clinical coal workers' pneumoconiosis, severe end-stage COPD, in the form of emphysema and chronic bronchitis, and invasive carcinoma of the lung. *Id*. Dr. Green explained that the miner died a "cardiac" death due to severe ischemic heart disease and right-sided congestive heart failure due to cor pulmonale. *Id*. He opined that COPD was a major contributor to the miner's death and respiratory impairment during his lifetime. *Id*. Dr. Green indicated that pulmonary function tests showed a restrictive impairment, primarily caused by coal dust exposure, and a severe obstructive impairment, consistent with both smoking and coal dust exposure. He opined that clinical pneumoconiosis and COPD due to smoking and coal dust exposure caused cor pulmonale which contributed to the miner's death by further reducing the oxygen supply to the heart. *Id*.

In a supplemental report dated June 12, 2009, Dr. Tuteur reviewed Dr. Green's opinion and agreed that the miner had cor pulmonale caused by his COPD, which contributed to his death.[10] *Id*. However, he disputed that the miner's COPD was in any way related to coal dust exposure. *Id*. In a supplemental report dated July 15, 2009, Dr. Green criticized Dr. Tuteur's reliance on a medical study showing that no more than three percent of non-smoking miners develop COPD to support his conclusion in this case that there was no contribution from coal dust exposure to the miner's COPD. Dr. Green reiterated that the miner's COPD was due in part to coal dust exposure, explaining that

[10] Dr. Tuteur criticized a May 7, 2009 article in the American Journal of Respiratory and Critical Care Medicine, authored by Dr. Green, stating that it "clearly over estimates [sic] the influence of the inhalation of coal mine dust on the development of panlobular and centrilobular emphysema." Employer's Exhibit 4.

coal dust exposure can contribute to all forms of emphysema, not just focal emphysema, as suggested by Dr. Tuteur. *Id*.

In weighing the conflicting opinions at 20 C.F.R. §718.202(a)(4), the administrative law judge gave no probative weight to Dr. Robinette's opinion, as he did not address the etiology of the miner's COPD/emphysema. 2010 Decision and Order at 9. She also found that Dr. Naeye's opinion, attributing the miner's respiratory condition solely to smoking, was "based on generalities" and entitled to little weight as Dr. Naeye "admitted that he had no information on the length of the [m]iner's coal mine dust exposure or on his smoking histories." *Id.* She also assigned less weight to Dr. Castle's opinion, that the miner's COPD was due solely to smoking, because Dr. Castle's report predated the miner's death and, therefore, he did not have the opportunity to review "the [m]iner's final treatment records and the autopsy report." *Id*. at 10.

In weighing the conflicting opinions of Drs. Green and Tuteur, the administrative law judge first noted that she was "unable to say that either one possesses superior credentials." 2010 Decision and Order at 10. She noted that the physicians applied different criteria for assessing whether coal dust exposure contributed to the miner's COPD. *Id*. The administrative law judge concluded that Dr. Tuteur applied the wrong standard, while she found Dr. Green's opinion to be reasoned and documented and sufficient to satisfy claimant's burden to establish that the miner's "COPD was significantly related to his coal mine dust exposure." *Id*. Thus, she found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*.

Employer argues that the administrative law judge did not give valid reasons for crediting Dr. Green's opinion and discounting the medical opinions of Drs. Naeye, Castle and Tuteur. Employer's Brief in Support of Petition for Review at 28. We disagree. The administrative law judge found that Dr. Naeye's opinion, that the miner's centrilobular emphysema was due entirely to smoking, was based on "generalities," as he had no information regarding the length and extent of the miner's smoking history. 2010 Decision and Order at 9. She further found that "while Dr. Naeye believed cigarette smoking was likely the dominant cause of the [m]iner's COPD, he did not address whether coal mine dust exposure made a clinically significant contribution to the [m]iner's pulmonary impairment, and he apparently lacked sufficient information to do so." *Id*. Because an administrative law judge may properly assign less weight to a physician who provides a generalized opinion, rather than focusing on the specifics of the miner's condition, we affirm her decision to accord Dr. Naeye's opinion less weight. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); 2010 Decision and Order at 9; Director's Exhibit 50. She also reasonably assigned less weight to Dr. Castle's opinion because he "did not have the benefit" of the miner's final treatment record or a copy of the autopsy report, in rendering

his opinion as to the existence of legal pneumoconiosis. *See Clark*, 12 BLR at 1-151; 2010 Decision and Order at 10; *see* Employer's Exhibit 1.

With respect to Dr. Tuteur, the administrative law judge correctly noted that, to support his opinion that the miner's COPD was due entirely to smoking, Dr.Tuteur cited a study by Lapp and Morgan for the proposition that approximately twenty percent of lifelong smokers develop COPD, while no more than three percent of non-smoking coal miners develop COPD. 2010 Decision and Order at 10; Employer's Exhibit 2. Dr. Tuteur surmised, therefore, that it was statistically unlikely that the miner's COPD was due to coal dust exposure and that it was medically reasonable to assume that the miner's COPD was "uniquely caused" by smoking. Employer's Exhibit 2.

The administrative law judge rejected Dr. Tuteur's opinion, noting Dr. Greene's criticism that Dr. Tuteur's statistics compare only smoking non-coal miners to non-smoking miners and do not address the occurrence of COPD in *smoking* coal miners, consistent with the facts of this case. 2010 Decision and Order at 11, citing Claimant's Exhibit 2. She found that, because Dr. Tuteur's "statistics do not include *smoking* coal miners, they may understate the existence of COPD in coal miners because they do not provide for a dual origin theory,"[11] as suggested by Dr. Green. *Id* (emphasis added in original), citing Claimant's Exhibit 2. The administrative law judge found that Dr. Tuteur did not address the salient issue, which is whether the contribution of the miner's coal mine dust exposure to his respiratory disease was "clinically significant." 2010 Decision and Order at 11. The administrative law judge found more persuasive Dr. Green's opinion, that the miner's emphysema was caused by both smoking and coal dust exposure, and she gave less weight to Dr. Tuteur's contrary opinion. *Id*.

Because the administrative law judge has broad discretion to assess the credibility of the medical experts, we affirm her decision to give Dr. Tuteur's opinion less weight, as Dr. Tuteur failed to adequately explain why the miner's seventeen-year history of coal dust exposure was not a contributing or aggravating factor in his COPD, and also did not hasten his death. 2010 Decision and Order at 11, *citing* 20 C.F.R. §718.201; s*ee Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). We also affirm the administrative law judge's finding that Dr. Green's opinion was "cogently explained" and reasoned and documented with regard to the issues of the existence of legal pneumoconiosis and death causation. *See Clark*, 12 BLR at 1-151; 2010 Decision and Order at 11, 15. Thus, we affirm the administrative law judge's reliance on Dr. Green's opinion to find that the miner's death was due to legal

[11] The "dual origin theory" refers to the combined effects of smoking and coal dust exposure on COPD as discussed by Dr. Green. Claimant's Exhibit 2.

pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and her conclusion that claimant demonstrated a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.[12]

B. JUSTICE UNDER THE ACT

Employer, however, correctly contends in this appeal that the administrative law judge erred in awarding benefits, without considering whether a grant of modification would render justice under the Act.[13] The modification of a claim does not automatically flow from a finding that a mistake was made on an earlier determination, and should be made only where doing so will render justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007); *see Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (recognizing that the purpose of modification under the Longshore Act, also applicable to the Black Lung Benefits Act, is to "render justice."). Because the administrative law judge did not undertake the analysis required by *Sharpe*, we vacate the award of benefits and remand the case for consideration of whether granting claimant's modification request will render justice under the Act.

[12] Although employer states that "it bears noting that [Dr. Green] has referenced fourteen autopsy slides" while "Dr. Naeye referenced seventeen autopsy slides[,]" employer does explain why this is significant. Employer's Brief in Petition for Review at 24; *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[13] Employer argues that claimant had ample opportunity to develop evidence in this case, including the opinion of Dr. Green, and that consideration of her modification request is not in the interest of justice. Employer's Brief in Support of Petition for Review at 18.

Accordingly, the administrative law judge's Decision and Order Granting Modification and Benefits 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.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge