BRB Nos. 95-1812 BLA
and 97-1702 BLA

EDGAR HANCOCK	)	
	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Harold B. Culley, Jr. (Culley & Wissore), Raleigh, Illinois, for claimant.

Michael J. Pollack (Arter and Hadden), Washington, D.C., for employer.

Helen H. Cox (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits (86-BLA-1371) and the Decision and Order Denying Petition for Modification (96-BLA-0726) of Administrative Law Judge Pamela Lakes Wood on a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has submitted a Motion to Remand. Employer has submitted briefs in reply to claimant and the Director. This case has previously been before the Board.

The procedural history of this case is as follows: Claimant first applied for black lung benefits on June 27, 1973 with the Social Security Administration (SSA). Director's Exhibit (DX) 26. The claim was denied on September 27, 1973 because claimant was still working. DX 32. In 1978, claimant was notified that he could have his claim reviewed by either SSA or the Department of Labor (DOL) pursuant to Section 435 of the Black Lung Benefits Reform Act of 1977, 30 U.S.C. §945. Claimant has submitted affidavits asserting that he returned the election card and asked for DOL review. DX 26; Claimant's Exhibit(s) (CX) 1-3. DOL has no record of receiving the election card from claimant. DX 47. No further action was taken on this claim.

On July 1, 1981 claimant filed the instant, duplicate claim. DX 1. After a hearing on the claim, Administrative Law Judge Glenn Robert Lawrence issued a Decision and Order - Awarding Benefits on March 15, 1988.[1] Judge Lawrence determined that claimant waived his right to have his Part B (Social Security) claim reviewed under Section 435 of the Black Lung Benefits Reform Act of 1977 because the evidence does not establish that claimant responded to the notification of his right to review. He found, therefore, that liability for benefits awarded did not transfer from employer to the Black Lung Disability Trust Fund. On the merits of the claim, Judge Lawrence determined that, as claimant had over 15 years of coal mine employment and filed his claim before January 1, 1982, he was entitled to the

[1] Before the Decision and Order was issued, the miner died on December 5, 1987. Director's Exhibit (DX) 57.

rebuttable presumption that he was totally disabled due to pneumoconiosis under 20 C.F.R. §718.305. Judge Lawrence further found the presumption had not been rebutted. Accordingly, benefits were awarded.

On October 16, 1992 the Board affirmed in part Judge Lawrence's decision and remanded the case for further findings. *Hancock v. Peabody Coal Co.,* BRB No. 88-1278 BLA (Oct. 16, 1992) (unpub.). The Board affirmed, as supported by substantial evidence, the denial of transfer of liability. The Board also affirmed Judge Lawrence's finding that the opinions of Drs. Tuteur and Seten established a totally disabling respiratory impairment under 20 C.F.R. §718.204 (c) and that therefore the presumption at Section 718.305 was applicable. The Board then affirmed, as supported by substantial evidence, Judge Lawrence's finding that the presumption was not rebutted. However, as Judge Lawrence failed to determine whether the conditions of claimant's work as a surface miner were substantially similar to the conditions in underground mining, as required under Section 718.305, the Board remanded the case for this finding to be made. Additionally, because this claim is a duplicate claim, the Board held that the administrative law judge must determine whether claimant established a material change in conditions pursuant to *Sahara Coal Co. v. Director, OWCP [McNew],* 946 F.2d 554, 15 BLA 2-227 (7th Cir. 1991). Claimant's subsequent motion for reconsideration was granted in part by Order dated April 14, 1993, which amended the Board's decision to reflect the fact that claimant filed a timely response brief. Claimant's motion was otherwise denied. Employer's motion for reconsideration was summarily denied by Order dated May 11, 1994.

On remand, Administrative Law Judge Pamela Lakes Wood[2] (the administrative law judge) found that the conditions existing at the surface mines at which claimant worked were substantially similar to conditions found at an underground coal mine and thus the rebuttable presumption at Section 718.305 was properly applied. The administrative law judge also found that claimant established a material change in conditions pursuant to *McNew* because claimant's disease progressed to the point of becoming totally disabling, even though it was not totally

[2] The parties were notified that Judge Lawrence was no longer with the Office of Administrative Law Judges and were given 30 days to object to a transfer of the case. No objections were received. Decision and Order on Remand Granting Benefits (D&O) at 4.

disabling when his prior claim was adjudicated.[3] The administrative law judge found that the issues of the transfer of liability and whether the presumption at Section 718.305 was rebutted, raised by employer, were not before her as the Board had affirmed Judge Lawrence's findings on those issues.

Following the issuance of the administrative law judge's decision, employer first appealed to the Board and subsequently filed a request for modification. In light of the modification request, the Board dismissed employer's appeal and remanded the case, by Order dated October 27, 1995.

[3] Inasmuch as this finding is not challenged on appeal, we affirm it. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

On modification, the administrative law judge noted that employer submitted the miner's death certificate, the report of a biopsy performed before the miner's death, and medical reports from Drs. Crouch, Kleinerman and Branscomb, along with their curricula vitae, in support of employer's contention that the administrative law judge made a mistake in a determination of fact in her decision and order. She also noted that claimant submitted the medical report and curriculum vitae of Dr. Houser. The administrative law judge reviewed the findings on the previously submitted evidence made by Judge Lawrence and considered the newly submitted evidence. She concluded that, contrary to employer's contention, the evidence of record does not rebut the presumption of the existence of pneumoconiosis. She also rejected employer's argument that the evidence of record is insufficient to establish the comparability of conditions between claimant's surface mining and underground coal mining and reaffirmed her finding that the conditions were substantially similar. The administrative law judge declined to address the transfer of liability issue because employer had submitted no new evidence related to this issue, and because she found that employer was alleging a mistake of law, rather than of fact. She concluded, therefore, that employer had not established a basis for modification based on a mistake of fact.[4]

On appeal,[5] employer argues that the administrative law judge lacked a sufficient basis in the record to make a finding regarding the comparability of the surface mines in which claimant worked with the conditions of underground coal mines, and thus the administrative law judge erred in finding the presumption at Section 718.305 invoked. Employer also argues that even if the presumption is invoked, the administrative law judge erred in finding that it was not rebutted. Finally, employer argues that the transfer of liability issue must be revisited. The Director, in a Motion to Remand, argues that the determination of whether the miner

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[4] The administrative law judge noted that, as the miner has been deceased since 1987, there can be no change in conditions, nor has employer alleged a change in conditions. Decision and Order Denying Petition for Modification (D&O II) at 5.

[5]By Order dated September 22, 1997 the Board acknowledged receipt of claimant's appeal and assigned it BRB No. 97-1702 BLA. In addition, the Board reinstated employer's appeal of the administrative law judge's Decision and Order on Remand Granting Benefits in BRB No. 95-1812 BLA. *See Hancock v. Peabody Coal Co.*, BRB Nos. 95-1812 BLA and 97-1702 BLA (Sept. 22, 1997)(unpublished Order).

returned his election card, and thus whether liability transfers, is a factual determination and should have been considered by the administrative law judge on modification.

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

Initially, we reject employer's argument that the administrative law judge's comparability finding may not be affirmed. The administrative law judge relied on claimant's testimony at the hearing and at his deposition to find that the coal mine dust conditions at the surface or strip mines where claimant was employed were comparable to the conditions at an underground coal mine. Decision and Order on Remand Granting Benefits (D&O) at 5-6; Transcript (TR) at 10-16; Employer's Exhibit (EX) 1 at 23-27, 65-66. She found that claimant's testimony was corroborated by the work history records and by the opinion of Dr. Tuteur. DXs 34, 39. Since the administrative law judge's finding is rational and based on substantial evidence in the record, we affirm it. *See Blakley v. Amax Coal Co.,* 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Director v. Midland Coal Co.,* 855 F.2d 509 (7th Cir.1988).

Regarding the issue of transfer of liability, employer and the Director correctly argue that the administrative law judge erred in declining to address it on modification. The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this claim arises, has held that previously decided claims may be reopened within one year on the grounds of either a change in conditions or a mistake in determination of fact. *See Eifler v. Director, OWCP,* 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991). The Seventh Circuit has further held that even a mixed question of law and fact is treated as a factual question for the purpose of reopening a claim on modification. *See Amax Coal Co. v. Franklin,* 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992). As the Director argues, whether liability transfers from employer to the Black Lung Disability Trust Fund depends on the administrative law judge's determination as to whether the miner returned his election card. Therefore, we grant the Director's Motion to Remand in order that the administrative law judge may address the arguments raised by employer and make this factual determination.

Finally, employer argues that the administrative law judge erred in finding that

the presumption at Section 718.305 is not rebutted. Employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a), and misconstrued the evidence when she failed to find that the evidence of record establishes the absence of clinical and legal pneumoconiosis. For the reasons set forth below, employer's arguments have merit.

First, employer correctly argues that the administrative law judge erred in failing to provide an adequate rationale for her agreement with the opinions of Drs. Cody, Sanjabi and Houser, that claimant's disabling chronic lung disease was related to his coal mine employment, rather than with the opinion of Dr. Tuteur, that claimant's pulmonary disease was related to his cigarette smoking. Employer argues that Drs. Sanjabi and Cody did not include a rationale to support their conclusions and Dr. Houser appears to have overlooked the biopsy evidence when he reported on his review of the record. As the administrative law judge has not adequately considered the relevant evidence, she must do so on remand. APA; *Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162 (1989).

Employer also correctly argues that the administrative law judge erred in stating that only the opinions of Drs. Branscomb and Tuteur supported the absence of legal pneumoconiosis and that "the remaining physicians did not address the contribution of coal mine dust to the Miner's COPD." Decision and Order Denying Petition for Modification (D&O II) at 7. Employer correctly asserts that Dr. Kleinerman's opinion also supports a finding of the absence of legal pneumoconiosis. DX 57. Furthermore, employer argues that the administrative law judge erred in finding that the biopsy evidence does not undermine her finding of legal pneumoconiosis because it showed a deposition of coal mine dust in the miner's lungs. Employer correctly states that Dr. Gabrawy, who performed the lobectomy, did not mention coal mine dust, DX 57; Dr. Crouch, who reviewed the slides, found "evidence of dust exposure" but no coal dust maculas, coal dust nodules, or silicotic nodules, DX 57; and Dr. Kleinerman, who also reviewed the slides, stated that the miner's lung cancer was not related to coal mine dust exposure, DX 57. On remand, the administrative law judge must discuss and weigh all of the relevant evidence in determining whether rebuttal is established at Section 718.305. APA, *supra.*

We reject, however, employer's argument that the administrative law judge misinterpreted the opinions of Drs. Sanjabi and Houser. Contrary to employer's

contention, the administrative law judge properly found that Dr. Sanjabi diagnosed COPD related to the miner's coal mine employment, DX 9, and she properly found that Dr. Houser concluded in his report that the miner's COPD was related to his coal dust exposure, CX 1.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge