BRB No. 08-0563 BLA

M.A.S. (Widow of W.A.S.) Claimant-Petitioner v. WESTMORELAND COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/17/2009 DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr., Wilkes-Barre, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

BEFORE: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order (2001-BLA-00398 and 2001-BLA-00399) of Administrative Law Judge Robert D. Kaplan denying benefits with respect to a miner's claim and a survivor's 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 alleges that the administrative law judge erred in granting employer's request for modification of an award of benefits in the miner's claim and in denying benefits in both the miner's claim and the survivor's claim. Claimant also contends that the administrative law judge erred in denying her requests to submit additional evidence. Employer has responded and urges affirmance of the administrative

law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), initially submitted a letter in which he indicated that he would not file response brief in this appeal. The Director subsequently submitted a letter in which he disputed employer's assertion that his decision not to file a response brief represented a tacit endorsement of the administrative law judge's finding that granting modification of the award of benefits in the miner's claim renders justice under the Act.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed.[1] 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. Procedural History

A. Adjudication Before the Office of Administrative Law Judges and the Benefits Review Board

The miner filed an application for benefits on March 2, 1989. Director's Exhibit 1. Administrative Law Judge Giles J. McCarthy issued a Decision and Order denying benefits, finding that although the record supported the parties' stipulation to the existence of simple pneumoconiosis, the miner failed to establish that he was totally disabled. Director's Exhibit 46. The miner appealed to the Board, which affirmed Judge McCarthy's finding that the miner did not prove that he was totally disabled, but vacated his determination that the x-ray evidence was insufficient to establish the existence of complicated pneumoconiosis. Accordingly, the Board vacated the denial of benefits and remanded the case for reconsideration. [*W.A.S.*] *v. Westmoreland Coal Co.*, BRB No. 91-1566 BLA (Mar. 29, 1993) (unpub.); Director's Exhibit 55. Due to Judge McCarthy's unavailability, the case was reassigned to Administrative Law Judge Julius A. Johnson, who issued a Decision and Order awarding benefits in which he determined that the miner established the existence of complicated pneumoconiosis and was, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Director's Exhibit 56. Employer appealed to the Board, which affirmed the award of benefits. [*W.A.S.*] *v. Westmoreland Coal Co.*, BRB No. 93-2511 BLA (Sept. 28, 1994) (unpub.); Director's Exhibit 65. The miner died on April 18, 2000. Director's Exhibit 67. On April 26, 2000, claimant, the miner's surviving spouse, filed an application for survivor's benefits. Director's Exhibit 66.

[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

The district director made an initial finding of entitlement in the survivor's claim. Director's Exhibit 69. Employer contested the district director's finding and on June 15, 2000, submitted a request for modification of the award of benefits in the miner's claim, asserting that Judge Johnson made a mistake in a determination of fact in concluding that the miner had complicated pneumoconiosis. Director's Exhibit 73. After conducting an informal conference regarding employer's request for modification in the miner's claim and claimant's request for benefits in the survivor's claim, the district director issued a Memorandum of Conference, in which he denied employer's request for modification and awarded benefits in the survivor's claim. Director's Exhibit 81. Employer requested a hearing and the case was assigned to Administrative Law Judge Robert D. Kaplan (the administrative law judge). Director's Exhibits 82, 84. At the hearing, the administrative law judge granted employer's request to keep the record open for the submission of Dr. Fino's post-hearing deposition. *See* Administrative Law Judge's Order dated December 20, 2001. After Dr. Fino's deposition was taken and the transcript was made available to the parties, claimant asked the administrative law judge to give her the opportunity to develop and submit rebuttal evidence, including an amended death certificate on which pneumoconiosis had been identified as a contributing cause of death. The administrative law judge denied claimant's request. *Id*.

Subsequent to the hearing, the administrative law judge issued a Decision and Order denying modification in the miner's claim, after concluding that employer failed to establish that Judge Johnson's finding of complicated pneumoconiosis contained a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[2] With respect to the survivor's claim, the administrative law judge determined that the evidence of record was sufficient to establish the existence of complicated pneumoconiosis and therefore, that claimant invoked the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304. Accordingly, the administrative law judge awarded benefits in the survivor's claim. Employer appealed to the Board, which held that the administrative law judge had not applied the proper standard in determining that employer failed to establish a mistake of fact in the award of benefits in the miner's claim. The Board also held that the administrative law judge had not properly weighed the x-ray, CT scan and medical opinion evidence relevant to Section 718.304. The Board vacated the administrative law judge's denial of employer's request for modification and the award of benefits in the survivor's claim and remanded the case to the administrative

[2] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726. The amendments to the regulation pertaining to requests for modification, set forth in 20 C.F.R. §725.310, do not apply to claims filed before January 19, 2001. 20 C.F.R. §725.2.

law judge for further consideration. [*M.A.S.*] *v. Westmoreland Coal Co.*, BRB No. 02-0810 BLA (Aug. 22, 2003) (unpub.).

On remand, the administrative law judge determined that Judge Johnson had made a mistake in a determination of fact in finding that the evidence of record was sufficient to establish the existence of complicated pneumoconiosis in the miner's claim. The administrative law judge then considered entitlement in the miner's claim and found that the evidence was insufficient to establish that the miner was totally disabled. Accordingly, the administrative law judge modified the prior award and denied benefits in the miner's claim. With respect to the survivor's claim, the administrative law judge determined that claimant was not entitled to benefits, as the evidence did not support a finding of complicated pneumoconiosis or death due to pneumoconiosis. Upon consideration of claimant's appeal, the Board affirmed the administrative law judge's Decision and Order. [*M.A.S.*] *v. Westmoreland Coal Co.*, BRB No. 04-0723 BLA (June 13, 2005) (unpub.). Claimant appealed to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises.

B. The Decision of the United States Court of Appeals for the Fourth Circuit

In a published decision, the court held that the administrative law judge abused his discretion in granting employer's request for modification because he assessed only the factual accuracy of the prior decision and did not consider other factors relevant to a determination of whether modification would render justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-68 (4th Cir. 2007). The court emphasized that "modification of a black lung award or denial does not automatically flow from a mistake in an earlier determination of fact" and that "the requesting party's motive may be an appropriate consideration in adjudicating a modification request." *Sharpe*, 495 F.3d at 132-133, 24 BLR at 2-61-62. With respect to the latter principle, the court quoted with approval the statement of the United States Court of Appeals for the Seventh Circuit in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002), that "if the party's purpose in filing a modification [request] is to thwart a claimant's good faith claim or an employer's good faith defense, the remedial purpose of the statute is no longer served." *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69, *quoting Hilliard*, 292 F.3d at 546, 22 BLR at 2-452. The court further indicated that, intertwined with the determination of the moving party's motive are considerations of the moving party's diligence, and the ultimate futility of a request for modification, i.e., a resolution favorable to the moving party would have no impact upon the substantive disposition of the prior claim. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69. Lastly, the court stated that "finality interests may sometimes be relevant to a proper modification request ruling." *Sharpe*, 495 F.3d at 133 n.5, 24 BLR at 2-69 n.15.

To provide guidance for the administrative law judge's consideration of the case on remand, the court identified the following questions as pertinent to the "justice under the Act" inquiry in this case:

> Why did [employer] wait to seek modification under [20 C.F.R.] §725.310(a) until June 2000, two months after [the miner's] death and nearly seven years after the [Benefits Review Board] had affirmed his living miner's award (a decision that [employer] never appealed)?
>
> Should [employer's] motive in seeking modification be deemed suspect?
>
> Was the Modification Request part and parcel of [employer's] defense to [claimant's] claim for survivor's benefits, which had been filed less than two months earlier?
>
> Is the Modification Request futile or moot, in that no overpayments made to [the miner] could be recovered?
>
> Is the Modification Request akin to a request for an advisory opinion, in that a favorable resolution thereof will have no impact on the living miner's claim?

Sharpe, 495 F.3d at 133, 24 BLR at 2-69-70. The court also stated that the administrative law judge's finding of a mistake in a determination of fact in Judge Johnson's decision required further explanation. The court indicated that the administrative law judge's weighing of the x-ray evidence may have been premised upon improper head counting and that the administrative law judge did not provide an adequate explanation of his decision to credit Dr. Fino's opinion in his 2004 Decision and Order. *Sharpe*, 495 F.3d at 134 n.16, 24 BLR at 2-70 n.16. The court remanded the case, therefore, for reconsideration of employer's request for modification. *Sharpe*, 495 F.3d at 134, 24 BLR at 2-71.

C. The Administrative Law Judge's Decision and Order on Remand

After receiving the case on remand from the Fourth Circuit, the administrative law judge held an additional hearing and allowed the parties to submit post-hearing briefs. Attached to claimant's brief were documents purporting to establish that employer did not exercise reasonable diligence in pursuing its request for modification in this case. In the Decision and Order that is the subject of this appeal, the administrative law judge sustained employer's objection to the admission of these documents, finding that claimant violated the twenty-day rule set forth in 20 C.F.R. §725.456 and did not establish good cause for their admission. 2008 Decision and Order at 3.

Regarding employer's request for modification, the administrative law judge addressed the factors identified by the Fourth Circuit and determined that they did not bar consideration of whether the award of benefits in the miner's claim contained a mistake in a determination of fact. 2008 Decision and Order at 7-10. After reviewing the newly submitted evidence, the administrative law judge concluded that employer demonstrated that Judge Johnson's finding of complicated pneumoconiosis pursuant to Section 718.304 was in error. *Id*. at 13-16. The administrative law judge also found that the evidence was insufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). *Id*. at 17. In considering the survivor's claim, the administrative law judge determined that the evidence of record did not support a finding of complicated pneumoconiosis under 20 C.F.R. §718.304 or death due to pneumoconiosis under 20 C.F.R. §718.205(c). *Id*. at 18. Accordingly, the administrative law judge denied benefits in both claims. *Id*.

II. Issues on Appeal

A. Whether Modification Would Render Justice Under the Act

Claimant contends that the administrative law judge erred in finding that granting employer's request for modification would render justice under the Act. In support of this assertion, claimant alleges that employer exhibited a lack of diligence in filing its request for modification seven years after the award of benefits in the miner's claim. Claimant maintains that the 1990 CT scan and the 1992 and 1993 x-rays which employer offered to support its petition for modification could have been obtained prior to the miner's death on April 18, 2000. Claimant further argues that because employer's motive was to "create a smokescreen" to thwart her survivor's claim, employer's request for modification was inimical to the interest of justice. Claimant's Brief at 19. Claimant also contends that the administrative law judge's determination that employer's request for modification would not be futile was incorrect, as there is no method by which employer can recover an overpayment of benefits to the miner.

In response, employer acknowledges that its purpose in requesting modification of the miner's claim was to preclude application of the irrebuttable presumption in the survivor's claim. Employer asserts that its purpose is honorable because the irrebuttable presumption should not be applied when new evidence shows that the miner did not have complicated pneumoconiosis. Employer also acknowledges both that it cannot recover benefits paid in the miner's claim and that it was not diligent in pursuing modification, but employer asserts both considerations are irrelevant to the determination of whether it is in the interest of justice to grant modification in this case.

We agree with claimant that in setting forth his findings on the issue of whether modifying the award of benefits in the miner's claim would render justice under the Act,

the administrative law judge did not address the diligence, motive and futility factors in the manner directed by the Fourth Circuit in *Sharpe*. It is clear from the court's questions that it is the court's position that modification should be granted only when to do so would render justice in the claim to be reopened. With respect to employer's diligence, the administrative law judge determined that because employer had paid benefits it need not have paid and could not now recoup, it had prejudiced its own interests more than claimant's by waiting seven years to seek modification. 2008 Decision and Order at 8-9. The administrative law judge further found, with respect to employer's motive, that correcting an erroneous award of benefits trumped concerns about employer's reasons for requesting modification. *Id*. at 9. The administrative law judge stated "[w]here a party's action is not prohibited by law[,] it should not be precluded simply because the party is motivated by self-interest." *Id*. Regarding the issue of futility, the administrative law judge determined that employer's interest in preventing the application of offensive non-mutual collateral estoppel barred a finding that the request for modification was futile, stating "an employer's objective to thwart a survivor's claim (or a potential survivor's claim) is sufficient basis for finding that modification of a miner's claim is not a futile act, regardless of whether the employer could recoup the payment of benefits it made to the miner." *Id*. at 10.

A review of the record reveals that the administrative law judge erred in his analysis of the factors relevant to a determination of whether modification of the miner's claim would render justice under the Act. Claimant filed her application for survivor's benefits on April 26, 2000. Director's Exhibit 66. On May 5, 2000, the claims examiner issued a Notice of Initial Finding stating that claimant was entitled to benefits. Director's Exhibit 68. In the letter accompanying the Notice of Initial Finding, the claims examiner stated: "Since the miner was found diagnosed with COMPLICATED PNEUMOCONIOSIS, there is an IRREBUTTABLE PRESUMPTION that the miner's death was due to pneumoconiosis per 20 C.F.R. §718.304." Director's Exhibit 70 (emphasis in original). Employer first responded by submitting a controversion of the survivor's claim on May 25, 2000. Director's Exhibit 71. Employer's next action was to file a request for modification on June 15, 2000. Director's Exhibit 73. In its request for modification, employer alleged that Judge Johnson "made a mistake of fact in concluding that [the miner] had complicated coal workers' pneumoconiosis." Director's Exhibit 73. Employer's initial submissions in support of its request for modification consisted of evidence addressed by Judge Johnson.[3] Director's Exhibits 74, 75.

The timing of employer's request for modification, and the nature of the supporting evidence it initially proffered, establish that employer's motive in seeking to

[3] Employer first proffered evidence post-dating the material considered by Judge Johnson after the Informal Conference on the survivor's claim. Director's Exhibit 79.

set aside the award of benefits in the miner's claim was to evade application of the irrebuttable presumption of death due to pneumoconiosis in the survivor's claim. Thus, employer was attempting to circumvent the law, which, in this case, prohibited employer from defending against the survivor's claim by showing that the miner did not have complicated pneumoconiosis. Granting modification when the moving party's motive is to circumvent the law does not render justice under the Act. *See Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 780, 17 BRBS 154, 159 (11th Cir. 1985) (Section 22 petition for modification cannot be used to circumvent requirement that request for Section 8(f) relief be raised at earliest opportunity or waived); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 266, 31 BRBS 119, 128 (4th Cir. 1997). Employer's request for modification of the miner's claim in order to evade application of the doctrine of collateral estoppel in the survivor's claim constituted an attempt "to thwart . . . claimant's good faith claim," a motive explicitly condemned by the Fourth Circuit in *Sharpe* as contravening the remedial purpose of the statute. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69, *quoting Hilliard*, 292 F.3d at 546, 22 BLR at 2-452.

In addition, the timing of employer's request for modification, filed seven years after the Board's affirmance of the award of benefits in the miner's claim, invokes the interest in finality that the Fourth Circuit held is "relevant to a proper modification request ruling," particularly when there is nothing remarkably different about the new evidence that employer submitted.[4] *Sharpe*, 495 F3d at 133 n.15, 24 BLR at 2-69 n.15. Regarding whether employer's request for modification was futile, employer has conceded that it is not attempting to recoup any overpayment from the miner's estate, and such recovery is precluded, as the miner had no estate when he died and the time for filing a claim had elapsed as of the date of filing of the request for modification. *See Sharpe*, 495 F.3d at 130, 24 BLR at 2-67. In short, it is undisputed that employer could not recoup any payment made pursuant to the award of benefits in the miner's claim, the decision which employer sought to modify.

The administrative law judge's analysis of this evidence was fundamentally flawed because he determined that it was in the interest of justice to grant modification of the decision in the miner's claim in order to preclude claimant's reliance on collateral estoppel in the survivor's claim, a separate claim, when employer proffered evidence that the miner had not suffered from complicated pneumoconiosis. That is contrary to the premise of the Fourth Circuit's questions in *Sharpe*, indicating that a determination of whether modification is in the interest of justice is limited to consideration of the claim to be reopened. Although the *Sharpe* court indicated that modification should be denied if

[4] This evidence consisted of x-ray readings, CT scan readings, the medical opinions of Drs. Fino and Castle, and various treatment records. Director's Exhibits 40-42; Employer's Exhibits 1-4, 8.

the factors discussed *supra* show that modification would not render justice, the court also discussed another factor relevant to a determination of whether modification would render justice, i.e., accuracy. Accordingly, we will discuss the administrative law judge's determination that Judge Johnson erred in finding complicated pneumoconiosis established in the miner's claim.

With respect to whether the prior judgment contained a mistake in a determination of fact, employer urges the Board to affirm the administrative law judge's determination that Judge Johnson erred in finding that the miner established the existence of complicated pneumoconiosis pursuant to Section 718.304, although no particularly reliable evidence, i.e., autopsy evidence, was presented. In his most recent Decision and Order, the administrative law judge reiterated his prior finding that Judge Johnson relied upon a mischaracterization to discredit the opinion in which Dr. Fino indicated that the miner did not have complicated pneumoconiosis. 2008 Decision and Order at 15; *see* 2004 Decision and Order at 6. The administrative law judge's determination is neither rational nor supported by substantial evidence.

Dr. Fino examined the miner on August 8, 1990. Based upon the results of this examination and a review of the miner's medical records, including chest x-rays obtained by other physicians, Dr. Fino diagnosed simple pneumoconiosis. Director's Exhibit 40. At a deposition obtained on December 28, 1990, Dr. Fino stated that the lesions observed on the miner's x-rays were not consistent with complicated pneumoconiosis because they were not solid, well-defined lesions of at least one centimeter located in the lower portion of the upper zone or upper portion of the middle zone of the miner's lungs. Director's Exhibit 44 at 24. Dr. Fino stated that the lesions he saw were "ill-defined without good borders," which he opined, is "a classic finding of an old tuberculosis infection." *Id*. at 25. Dr. Fino also discussed the possibility that the lesions were caused by histoplasmosis, which is a fungal infection that he described as "not uncommon" in the region where the miner lived. *Id*. at 25-26.

In his 1993 Decision and Order on Remand Awarding Benefits, Judge Johnson found that Dr. Fino's opinion was outweighed by the x-ray readings and opinions of the physicians who diagnosed complicated pneumoconiosis. 1993 Decision and Order at 6. The Board affirmed this finding. [*W.A.S.*], BRB No. 93-2511 BLA, slip op. at 3; Director's Exhibit 65. In his 2008 Decision and Order, the administrative law judge reiterated his prior determination that Judge Johnson erred in discrediting Dr. Fino's opinion, stating:

> I noted that ALJ Johnson had discredited Dr. Fino based on the ALJ's erroneous finding that Dr. Fino's conclusion was that the miner had only lesions shown on x-rays that were caused by tuberculosis or histoplasmosis. I pointed out that[,] in fact[,] the physician had found that the miner had simple pneumoconiosis, but not tuberculosis or histoplasmosis. The 2004

> ALJ Decision went on to state, "this mischaracterization of Dr. Fino's medical opinion undermines [ALJ] Johnson's decision to give greater weight to the medical opinions [i.e., the four Category "A" and "B" x-ray interpretations] which concluded that the miner had complicated pneumoconiosis." In addition, the 2004 ALJ Decision noted that while Dr. Fino felt, at bottom, that the miner did not have tuberculosis, the physician also stated that his chest x-rays showed opacities in the apices of the lungs that are "classic" signs of tuberculosis. Based on the last point, the 2004 ALJ Decision stated that "Dr. Fino's testimony calls into question [ALJ] Johnson's determination to give less weight to the physicians who diagnosed tuberculosis based on [the ALJ's] rationale that there was "absolutely no clinical or historical support for the disease." I now find that these conclusions in the 2004 ALJ Decision are well-founded.

2008 Decision and Order at 15 (internal citations omitted). The administrative law judge's determination that Judge Johnson misinterpreted Dr. Fino's 1990 opinion is not supported by substantial evidence. Contrary to the administrative law judge's finding, Judge Johnson acknowledged that Dr. Fino had interpreted three x-rays as showing simple pneumoconiosis at a profusion of 1/0. 1993 Decision and Order at 3. Judge Johnson stated that the issue was not whether simple pneumoconiosis was established, but "whether the disease had developed in its complicated form by 1989." *Id*. at 9. Moreover, in his December 12, 1990 deposition testimony, Dr. Fino did not rule out tuberculosis or histoplasmosis, as the administrative law judge indicated, but rather identified these conditions as the source of the lesions observed on the miner's x-rays. Director's Exhibit 44 at 25-26.

The administrative law judge's finding that Judge Johnson mischaracterized Dr. Fino's opinion also appears to be based upon a misunderstanding of Judge Johnson's reference to the lack of "clinical" evidence of tuberculosis. The administrative law judge determined that the record, in fact, contained "clinical" evidence of tuberculosis, as Dr. Fino stated that the miner's x-rays showed "classic" signs of tuberculosis. 2008 Decision and Order at 15; Director's Exhibit 44 at 25. It is clear from the context of Judge Johnson's 1993 Decision and Order, however, that he was using the word "clinical," in a manner consistent with its definition as "having to do with medical study or practice based on actual treatment and observations of patients." 1993 Decision and Order at 6; *Webster's New World Dictionary* 274 (2d ed. 1968). Thus, Judge Johnson communicated accurately that the record before him did not contain evidence indicating that the miner was either treated for, or observed to have symptoms of, tuberculosis or histoplasmosis.

In sum, the administrative law judge has provided no reason for us to disturb our prior determination that Judge Johnson did not err in considering Dr. Fino's opinion. We stated:

> We reject employer's argument that the administrative law judge erred in according less weight to Dr. Fino's x-ray interpretations. The administrative law judge gave less weight to Dr. Fino's opinion regarding the film quality of the x-rays dated April 3, 1989 and July 27, 1989 because it differed from all of the other readers of record. He also gave less weight to Dr. Fino's diagnosis of no complicated pneumoconiosis based on his finding that the opacities were not in the lower portion of the upper zone or the upper portion of the middle zone, because Dr. Fino did not identify the source for such definition and the administrative law judge found that no such restriction as to specific zones is found under 20 C.F.R. Part 718. The administrative law judge also found that the record does not support Dr. Fino's diagnosis of tuberculosis.

[*W.A.S.*], BRB No. 93-2511 BLA, slip op. at 3 n.4 (citations omitted).

With respect to the remainder of the findings in Judge Johnson's 1993 Decision and Order, employer has not identified any ground justifying altering our affirmance of Judge Johnson's determination that the evidence of record was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Judge Johnson acted within his discretion in crediting the opinions of the physicians who diagnosed the presence of large opacities over the contrary opinions of record, as it was "more reasonable and logical to characterize the lesions as pneumoconiosis – in view of the admitted presence of some degree of the disease in [the miner's] lungs – than to speculate about alternative disease processes for which there is absolutely no clinical or historical support." 1993 Decision and Order at 6; [*W.A.S.*], BRB No. 93-2511 BLA, slip op. at 3; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Moreover, the evidence post-dating that considered by Judge Johnson does not establish error in his determination that the miner had complicated pneumoconiosis. The evidence submitted on modification, consisting of x-rays, CT scans, medical records and medical opinions spanning the period from 1990 to the miner's death in 2000, is of the same sort as the evidence that was available during the miner's life. Under these circumstances, it is proper to grant survivor's benefits based on finding made during the miner's life. As the United States Court of Appeals for the Seventh Circuit held in *Villain*: "[T]here is no point in readjudicating the question whether a given miner had pneumoconiosis unless it is possible to adduce highly reliable evidence – which as a practical matter means autopsy results. Otherwise the *possibility* that the initial decision was incorrect is no reason to disturb it." *Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 334, 22 BLR 2-581, 2-587 (7th Cir. 2002) (emphasis supplied), *citing Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) ("Simple justice"

is achieved when a complex body of law developed over time is evenhandedly applied). As the Fourth Circuit observed in *Sharpe*, the administrative law judge simply weighed the evidence differently from Judge Johnson; he had no reliable evidence to support his finding of a mistake in fact. 495 F.3d at 130 n.10, 24 BLR at 2-62 n.10. Based upon these facts, employer cannot demonstrate that it is in the interest of justice to overturn the award of benefits in the miner's claim. *See Villain*, 312 F.3d at 334, 22 BLR at 2-587.

We reverse the administrative law judge's decision to grant modification because the administrative law judge abused his discretion in holding that modification of the decision awarding benefits in the miner's claim was in the interest of justice: the administrative law judge "committed a clear error of judgment on the conclusion [he] reached upon a weighing of the relevant factors." *Sharpe*, 495 F.3d at 130, 24 BLR at 2-67, *quoting Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999). To serve what he perceived to be in the interest of justice in the survivor's claim, the administrative law judge reopened the miner's claim after the miner had died. The administrative law judge's decision conflicts with the Fourth Circuit's guidance in *Sharpe*, requiring the administrative law judge to consider only factors relevant to a determination of whether reopening the claim would render justice in the claim to be reopened, not another claim. The administrative law judge also erred in finding that the new evidence proved that the miner had not suffered from complicated pneumoconiosis. His decision was based on more of the same evidence considered by Judge Johnson, and on a flawed analysis of Judge Johnson's decision. Under these circumstances, it is not in the interest of justice to disturb Judge Johnson's decision. *See Villain*, 312 F.3d at 334, 22 BLR at 2-587. Accordingly, we reverse the administrative law judge's decision to grant modification of the miner's claim and we vacate his decision denying benefits in the miner's claim.

B. Application of Offensive Non-Mutual Collateral Estoppel

Having reinstated the award of benefits in the miner's claim, we must address employer's allegation that offensive non-mutual collateral estoppel does not preclude it from relitigating the issue of the existence of complicated pneumoconiosis in the survivor's claim. Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Ramsay v. INS*, 14 F.3d 206 (4th Cir. 1994); *see Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308 (4th Cir. 1987). Collateral estoppel is "offensive" when the plaintiff seeks to foreclose the defendant from litigating an issue that the defendant did not litigate successfully in the prior adjudication. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 n.4, 23 BLR 2-393, 396 n.4 (4th Cir. 2006). The doctrine is "non-mutual" when the party seeking to rely on the prior disposition of an issue was not a party in the earlier proceeding. *Id.* In cases involving the potential

application of offensive non-mutual collateral estoppel, the party seeking to invoke the doctrine must establish that:

(1) The issue sought to be precluded is identical to one previously litigated;

(2) the issue was actually determined in the prior proceeding;

(3) the issue was a critical and necessary part of the judgment in the prior proceeding;

(4) the prior judgment is final and valid; and

(5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum.

Collins, 468 F.3d at 217, 23 BLR at 2-396; *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992). Even if these elements are present, however, the United States Supreme Court had held that offensive non-mutual collateral estoppel may not be invoked when to do so would be unfair under the circumstances of the case before the adjudicating authority. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979). In *Collins*, the Fourth Circuit held that a widow can rely on the doctrine of offensive collateral estoppel in a survivor's claim unless fairness to employer precludes its application. The court stated that a determination of fairness requires consideration of four non-exclusive factors:

(1) Whether the survivor could easily have joined in the earlier proceeding;

(2) Whether the employer had an incentive in the prior action to have defended the action fully and vigorously;

(3) Whether employer ever obtained a ruling in which the element of entitlement at issue was decided against the miner; and

(4) Whether procedural opportunities are available to the employer in the present proceeding that were unavailable to it in the prior proceeding.

Collins, 468 F.3d at 221, 23 BLR at 2-400, *citing In re: Microsoft Corp Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004).

In a footnote to his decision, the administrative law judge rejected the Director's argument that the doctrine of collateral estoppel is applicable to the case at bar. 2008 Decision and Order at 11 n.15. The administrative law judge acknowledged that the Fourth Circuit had held in *Collins* that the claimant in a survivor's claim could invoke the

doctrine with respect to the finding of simple pneumoconiosis in the miner's claim. *Id*. The administrative law judge determined that *Collins* was distinguishable from the present case, stating:

> [*Collins*] emphasized that even when the presence of simple pneumoconiosis has been established by collateral estoppel, "a widow cannot succeed in her claim for survivor's benefits without further establishing that the pneumoconiosis hastened her husband's death. *See* 20 C.F.R. §718.205(c)(2) & (5)." [*Collins*], 468 F.3d 213, 223. Of course, this reasoning could not apply where, as here, complicated pneumoconiosis has been established in a miner's claim. In such a circumstance, if [*Collins*] were applicable, non[-]mutual offensive collateral estoppel would serve to automatically establish that pneumoconiosis was a substantial cause of the miner's death by operation of the irrebuttable presumption in §718.304. So the victory in the miner's claim would automatically result in a victory in the survivor's claim. This entails an entirely different process than that contemplated by the [c]ourt in [*Collins*].

Id.

In its response brief, employer maintains that the last two elements necessary for application of the doctrine of offensive non-mutual collateral estoppel cannot be established in this case and that, in any event, it would be unfair to apply in a survivor's claim a finding of complicated pneumoconiosis from the miner's claim because it would result in automatic entitlement. Employer also argues that offensive non-mutual collateral estoppel is not available in this case, as employer's request for modification prevented the judgment in the miner's claim from becoming final. Employer further maintains that it did not have a full and fair opportunity to litigate the issue of complicated pneumoconiosis in the prior proceeding, based on its assertion in its request for modification that Judge Johnson erred in finding that the miner had complicated pneumoconiosis.

Upon reviewing the administrative law judge's finding and employer's arguments on appeal, we hold, as a matter of law, that offensive non-mutual collateral estoppel precludes employer from relitigating, in the survivor's claim, the issue of the existence of complicated pneumoconiosis. Thus, we also hold that claimant is entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304. As an initial matter, we note that, contrary to employer's contention, the regulations make clear that filing a request for modification does not prevent a Decision and Order from becoming final. Pursuant to 20 C.F.R. §725.479(a): "A decision and order shall become

effective when filed in the office of the district director, and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing." 20 C.F.R. §725.479(a) (internal citations omitted). Under Section 725.479, therefore, filing a request for modification is not identified as a procedure that affects the finality of a Decision and Order. Indeed, 20 C.F.R. §725.480 provides: "A party who is dissatisfied with a decision and order *which has become final* in accordance with [Section] 725.479 may request a modification of the decision and order if the conditions set forth in [Section] 725.310 are met." 20 C.F.R. §725.480 (emphasis supplied). Thus, pursuant to Section 725.480, modification requests do not alter the finality of a Decision and Order, but rather pertain to Decision and Orders that have become final. The Board's Decision and Order affirming Judge Johnson's award of benefits in the miner's claim became final on November 23, 2004. *See* 20 C.F.R. §802.406. Since employer did not appeal that decision, it cannot now be heard to question the validity of Judge Johnson's decision.

Similarly devoid of merit is employer's contention that it was denied a fair hearing before Judge Johnson. Employer states: "By asserting that there has been a mistake in a determination of fact, and presenting new evidence, [employer] has not been provided a full and fair opportunity to litigate the issue in the previous forum." Employer's Response Brief at 20-21. Our reaction to employer's argument is best expressed in the words of Justice Scalia in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S.Ct. 1278, 1288, 29 BRBS 87, 95 (1995): "That is not a form of reasoning we are familiar with." The existence of new evidence is irrelevant to the issue of whether employer was provided a full and fair opportunity to present the evidence it had at that time. Employer has failed to show that any of the five elements necessary to apply collateral estoppel is lacking and employer has not attempted to show that any of the four factors relevant to fairness to employer exists in this case to preclude application of collateral estoppel.

Lastly, we also reject employer's argument that applying offensive non-mutual collateral estoppel to the finding of complicated pneumoconiosis in the miner's claim would be unfair in this case involving a survivor's claim, as claimant would be entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304. Although the administrative law judge's finding on this issue is consistent with employer's contention, *see* 2008 Decision and Order at 11 n.15, we hereby reverse the administrative law judge's finding, as it is contrary to law. Both the administrative law judge and employer appear to rely upon the notion that it is inherently unfair to give preclusive effect to the finding of complicated pneumoconiosis in the miner's claim because it will result in an automatic award of benefits in the survivor's claim. The invalidity of this position is demonstrated by the case law relevant to the application of the irrebuttable presumption in survivor's claims.

The United States Supreme Court has held that the irrebuttable presumption of death due to pneumoconiosis set forth in Section 411(c)(3) of the Act, reflects the intent of Congress to provide compensation to survivors of miners who had complicated pneumoconiosis, regardless of whether complicated pneumoconiosis actually resulted in death. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976). The circuit courts and the Board have recognized that the irrebuttable presumption of death due to pneumoconiosis applies to Part C claims, such as the present one, which were filed after the effective date of the 1981 amendments to the Act. *Pittsburg & Midway Coal Mining Co*. [*Cornelius*], 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *USX Corp. v. Director, OWCP* [*Lambert*], 19 F.3d 1431, 18 BLR 2-210 (4th Cir. 1994); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988). Thus, it is well-settled that the irrebuttable presumption of death due to pneumoconiosis applies to establish a survivor's entitlement to benefits, absent any separate proof that the miner's death was related to pneumoconiosis, whether simple or complicated. Employer cannot credibly argue, therefore, that it was surprised by the possibility that claimant would be found entitled to benefits via invocation of the irrebuttable presumption of death due to pneumoconiosis. *Collins*, 468 F.3d at 221, 23 BLR at 2-400. Hence, the doctrine of offensive non-mutual collateral estoppel applies in this case to the finding of complicated pneumoconiosis in the miner's claim. Because the irrebuttable presumption of death due to pneumoconiosis, set forth in Section 718.304, is invoked in the survivor's claim, claimant's entitlement to benefits in the survivor's claim is established.[5]

[5] In light of our disposition of this case, we decline to address claimant's allegations regarding the administrative law judge's evidentiary rulings, as error, if any, in the administrative law judge's dispositions is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order granting employer's request for modification, and denying benefits in both the miner's claim and the survivor's claim, is reversed and this case is remanded to the district director for reinstatement of the award of benefits in the miner's claim and for entry of an award of benefits in the survivor's claim.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' holdings reversing the administrative law judge's Decision and Order granting employer's request for modification and denying benefits in both the miner's claim and the survivor's claim. As the Fourth Circuit recognized in *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007), the decision whether to grant or deny a request for modification is committed to the discretion of the administrative law judge. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69. In particular, the administrative law judge, as fact-finder, is charged with rendering a finding as to whether granting a request for modification would render justice under the Act. *Id.*; *see also Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976); *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27 (1996) (McGranery, J., dissenting); *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999). In this case, the Fourth Circuit identified factors that the administrative law judge was to consider in making a finding on this issue, including employer's motive and diligence and whether

the request for modification was futile. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69-70. The administrative law judge addressed each of these factors at length in his Decision and Order and made findings that are rational and supported by substantial evidence.

With respect to the issues of motive and diligence, the administrative law judge properly noted that under the relevant case law, the courts and the Board have indicated that granting an employer's request for modification does not render justice under the Act when the employer waited to defend a claim until after a finding of entitlement was made, or used modification to correct tactical errors made by its counsel. *See* [*Hilliard*], 292 F.3d at 547, 22 BLR at 2- 452; *McCord*, 532 F.2d at 1379; *Branham*, 20 BLR at 1-34; *Kinlaw*, 33 BRBS at 73; 2008 Decision and Order at 5-7. The administrative law judge rationally determined that these circumstances, which the Fourth Circuit referenced in *Sharpe*, were not present in this case, as employer fully participated in the litigation of the miner's claim, and its request for modification was supported by new medical evidence, which was not available at the time that the miner's claim was litigated.[6] *Sharpe*, 495 F.3d at 132-133, 24 BLR at 2-62-63; 2008 Decision and Order at 7. Moreover, the administrative law judge was not required to find that employer did not exercise reasonable diligence by failing to regularly assess the miner's pulmonary condition. Claimant has not identified any provision in the Act or the regulations that places such a duty upon an employer who has been found liable for the payment of benefits. Indeed, the Board has held that an employer does not have an absolute right to compel a miner to submit to a physical examination, or to comply with other requests for medical evidence, in conjunction with a petition for modification. *See Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37 (2000) (Decision and Order on Reconsideration *En Banc*); *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999).

Regarding the issue of futility, the administrative law judge found that when viewed solely from the perspective suggested by claimant in the present appeal and by the Fourth Circuit in *Sharpe*, employer's request for modification was indeed futile because employer could not recoup any overpayment from the miner's estate, which was devoid of assets. *See Sharpe*, 495 F.3d at 133, 24 BLR at 2-62; 2008 Decision and Order at 8, 10. The administrative law judge rationally determined, however, that employer had a legitimate interest in challenging the finding of complicated pneumoconiosis in the

[6] The objective evidence considered by Judge Johnson in his 1993 Decision and Order on Remand Awarding Benefits, spanned from September 25, 1974 through August 8, 1990. Director's Exhibit 56. The evidence submitted in support of employer's request for modification included records from Mercy Hospital dating from September 24, 1990 through April 17, 2000. Director's Exhibit 79. Employer also submitted readings of x-rays dated April 30, 1992 through April 18, 2000. Employer's Exhibits 1-4, 8.

miner's claim, as claimant could rely upon the principle of non-mutual collateral estoppel to invoke the irrebuttable presumption of death due to pneumoconiosis in the survivor's claim resulting in an "automatic award of benefits on the survivor's claim." 2008 Decision and Order at 9-10. Therefore, I would hold that, based upon this finding, the administrative law judge permissibly determined that employer's request for modification was not futile.

Because the administrative law judge considered each of the factors identified by the Fourth Circuit and rendered findings that are rational and supported by substantial evidence, I would affirm his determination that granting modification would render justice under the Act as being within a reasonable exercise of his discretion. Furthermore, I would affirm the administrative law judge's finding that employer established a mistake in a determination of fact in Judge Johnson's award of benefits in the miner's claim and the administrative law judge's denial of benefits in the miner's claim. Moreover, the administrative law judge's findings that modification would "render justice under the Act" pursuant to 20 C.F.R. §§725.310 (2000) and 718.205(c) are rational, supported by substantial evidence, and within a reasonable exercise of his discretion as fact-finder. Indeed, the Board previously affirmed what were essentially the same findings in the administrative law judge's 2004 Decision and Order granting employer's request for modification and denying benefits in the miner's claim and the survivor's claim.[7] [*M.A.S.*] *v. Westmoreland Coal Co.*, BRB No. 04-0723 BLA (June 13, 2005) (unpub.).

Lastly, I would also reject claimant's allegations of error regarding the administrative law judge's admission of Dr. Fino's post-hearing deposition and his exclusion of the materials attached to claimant's remand brief. With respect to the admission of Dr. Fino's deposition, claimant raised this same issue in her appeal of the administrative law judge's 2004 Decision and Order and the Board held that the administrative law judge's action represented a reasonable exercise of the discretion accorded to him in resolving procedural issues. [*M.A.S.*], BRB No. 04-0723 BLA, slip op. at 6 n.5. The Board's prior disposition of this issue now constitutes the law of the case. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting). Regarding the documents that claimant attached to her remand brief, the administrative law judge rationally determined that claimant did not establish good cause for her failure to comply with the twenty-day rule set forth in 20 C.F.R. §725.456(b)(2). *See Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984);

[7] In his 2008 Decision and Order, the administrative law judge addressed the concerns expressed by the Fourth Circuit regarding his weighing of the x-ray evidence and the opinion of Dr. Fino. 2008 Decision and Order at 14, 16.

2008 Decision and Order at 3. The administrative law judge's finding that the evidence claimant sought to admit was irrelevant to the case before him was also within his discretion. *See Clark*, 12 BLR at 1-153; 2008 Decision and Order at 3.

Accordingly, I would affirm the administrative law judge's Decision and Order granting employer's request for modification, and denying benefits in both the miner's claim and the survivor's claim.

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ROY P. SMITH
Administrative Appeals Judge