**U.S. Department of Labor**

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

BRB No. 22-0038 BLA

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| GRETA G. PRIVETT<br>(Widow of MERT E. PRIVETT, SR.) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| ITMANN COAL COMPANY | ) | DATE ISSUED: 02/22/2023 |
| Employer-Petitioner | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of Decision and Order Awarding Benefits on Modification in a Subsequent Claim of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits on Modification in a Subsequent Claim (Decision and Order on Modification) (2019-BLA-05811) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a request for modification of a survivor's claim filed on November 8, 2007.

In a Proposed Decision and Order – Denial of Benefits dated August 8, 2018, the district director found Claimant failed to establish the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.205. On October 22, 2018, Claimant timely requested modification of that denial. Director's Exhibit 22.

In her September 30, 2021 Decision and Order on Modification, the subject of the current appeal, ALJ Harris (the ALJ) found Claimant established 21.58 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, she found Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis,[2] 30 U.S.C. §921(c)(4) (2018). She further found: Employer did not rebut the presumption; Claimant established modification based on a mistake in a determination of fact, 20 C.F.R. §725.310; and granting modification would render justice under the Act.[3] Thus she awarded benefits.

[1] Claimant is the widow of the Miner, who died on October 16, 2005. Director's Exhibit 7. The Miner previously filed claims for benefits. In a Decision and Order Denying Benefits dated November 25, 2005, ALJ Richard A. Morgan denied the Miner's prior claim, filed on August 13, 2003, because he failed to establish pneumoconiosis. Director's Exhibit 28. Because the Miner did not successfully establish entitlement to benefits during his lifetime, Claimant is not entitled to derivative benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018).

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

[3] Notably, the ALJ held she was required to first determine whether granting modification would render justice under the Act prior to considering Claimant's modification petition on the merits. Decision and Order on Modification at 3-4. However,

On appeal, Employer argues the ALJ erred in concluding that granting Claimant's request for modification would render justice under the Act. On the merits of entitlement, it asserts that the ALJ erred in finding it did not rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's argument that the ALJ erred in finding that granting modification would render justice under the Act. Employer replies, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance

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there is no requirement that an ALJ conduct such a threshold analysis in requests for modifications, particularly in light of the fact that accuracy is a relevant factor in whether granting modification would render justice under the Act. *See Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 330 (4th Cir. 2012) (search for "justice under the Act" should be guided, first and foremost, by the need to ensure accurate benefit distribution); 65 Fed. Reg. 79,920, 79,975 (Dec. 20, 2000) (rejecting limits on modification because Congress's overriding concern in enacting the Act was to ensure that miners who are totally disabled due to pneumoconiosis arising out of coal mine employment receive compensation). While it might make sense to make a threshold determination in cases of obvious bad faith, it does not follow that a threshold determination is appropriate in cases such as this where there is no indication of an improper motive. In such a case, the ALJ must first consider the merits. *See O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (plain purpose of modification is to vest an adjudicator with "discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."). Given that the ALJ considered the merits of Claimant's petition, however, any error in finding she had the discretion to refuse to consider the petition is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 21.58 years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 32.

with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record on modification, an ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The ALJ may correct "any mistake . . . including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).

**Rebuttal of the Section 411(c)(4) Presumption**

Because Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[6] or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.

**Legal Pneumoconiosis**

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b),

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 19.

[6] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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." 20 C.F.R. §718.201(a)(1).

718.305(d)(2)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the medical opinions of Drs. Castle, Basheda, and Fino that the Miner did not have legal pneumoconiosis.[7] Decision and Order at 41-43. Drs. Castle and Basheda opined the Miner's severe airway obstruction and emphysema were related to his smoking, and not related to his coal mine dust exposure. Director's Exhibits 28 at 24, 47-48; Employer's Exbibit 4 at 14-15. Dr. Fino opined the Miner's disabling lung disease was related to his "progressive lung carcinoma," and unrelated to coal mine dust exposure. Employer's Exhibits 3 at 6; 6 at 4. The ALJ found their opinions not well-reasoned and unpersuasive. Decision and Order at 41-43.

Employer asserts the ALJ erred in weighing the medical opinions of Drs. Castle, Basheda, and Fino. Employer's Brief at 16-26. We disagree.

Initially, we reject Employer's argument that the ALJ applied the wrong standard when addressing the issue of rebuttal of legal pneumoconiosis. Employer's Brief at 21. Contrary to Employer's argument, the ALJ applied the correct standard by requiring Employer to affirmatively disprove the existence of legal pneumoconiosis by a preponderance of the evidence. 20 C.F.R. §§718.201(b)(2), (c), 718.305(d)(2)(i)(A); *see Minich*, 25 BLR at 1-155 n.8; Decision and Order on Modification at 32, 40. Moreover, as discussed below, she discredited Drs. Castle's, Basheda's, and Fino's opinions because she found they are not reasoned and failed to explain their own conclusions that any lung disease or impairment the Miner had was unrelated to coal mine dust exposure -- not because they failed to meet a heightened legal standard. Decision and Order on Modification at 41-43.

We also reject Employer's argument that the ALJ provided invalid reasons for finding the opinions of Drs. Castle, Basheda, and Fino not credible. Employer's Brief at 21, 25.

Dr. Castle excluded coal mine dust exposure as a cause of or contributing factor to the Miner's disabling respiratory impairment. Director's Exhibit 28 at 48-49. He stated

[7] The ALJ also reviewed the medical opinions of Drs. Mullins and Habre. Decision and Order at 41. She found Dr. Mullins did not address the issue of legal pneumoconiosis and assigned it no weight. *Id*.; Director's Exhibit 25. Further, she found Dr. Habre's opinion that the Miner had legal pneumoconiosis inadequately explained and conclusory and therefore assigned it no weight. Decision and Order at 41; Claimant's Exhibit 2. Employer does not challenge the ALJ's weighing of Drs. Mullins's and Habre's opinions; thus, we affirm her findings. *Skrack*, 6 BLR at 1-711; Decision and Order at 41.

the results of the Miner's pulmonary function and arterial blood gas studies exhibited a smoke-induced emphysema that led to the development of his bronchogenic carcinoma. In light of the Department of Labor's recognition that the effects of smoking and coal mine dust can be additive, the ALJ permissibly found Dr. Castle did not adequately explain why the Miner's history of coal mine dust exposure did not significantly contribute, along with cigarette smoking, to his obstructive lung disease.[8] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. 79,920, 79,939-79,941 (Dec. 20, 2000); Decision and Order on Modification at 41.

Next, Dr. Basheda explained the air trappings, reduced diffusing capacity, and bronchoreversibility as seen on the Miner's pulmonary function studies are "classic" indications that the Miner had smoke-induced "obstructive lung disease with asthmatic and emphysematous components." Employer's Exhibit 4 at 14-15. He excluded coal mine dust exposure as a cause of the Miner's asthma, emphysema, and chronic obstructive pulmonary disease (COPD) because the Miner's "arterial blood gas abnormalities developed long after leaving the coal mines." *Id*. at 15. The ALJ permissibly discredited Dr. Basheda's opinion because it is inconsistent with the regulations' recognition that pneumoconiosis is a latent and progressive disease that may first become detectable after exposure to coal mine dust ends. 20 C.F.R. §718.201(c); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); Decision and Order on Modification at 42; *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 408 (6th Cir. 2020).

Further, Dr. Fino found the Miner's worsening respiratory abnormality was "consistent with progressive lung cancer" and the doctor "lack[ed] sufficient medical records available for [his] review . . . to suggest any diagnoses other than progressive lung cancer" as the cause of the Miner's disability and death. Employer's Exhibits 3 at 6; 6 at 4. The ALJ stated the Miner's treatment records that Dr. Fino reviewed "are replete with notations and diagnoses of pulmonary diseases and impairments other than [the Miner's] lung cancer."[9] Decision and Order on Modification at 42. She further found Dr. Fino

[8] We reject Employer's argument that the ALJ erred in finding Dr. Castle's opinion not well-reasoned as it contradicts a finding in the Miner's prior claim. Employers' Brief at 21. An ALJ must conduct a de novo review of all the facts in order to determine whether there was a mistake in the judge's determination of fact in the prior decision. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 498 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).

[9] The ALJ noted the Miner's hospitalization and treatment records diagnosed several pulmonary impairments, including chronic obstructive pulmonary disease, bronchitis, and

neither discussed nor refuted these other conditions. *Id*. at 42. Thus, she permissibly found Dr. Fino's opinion unpersuasive. *See Looney*, 678 F.3d at 316-17; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); Decision and Order on Modification at 42; Employer's Exhibits 4 at 6; 6 at 5; Employer's Brief at 25.

We consider Employer's assertion that the opinions of Drs. Castle, Fino and Basheda are well-reasoned and well-documented as a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within her discretion in rejecting the opinions of Drs. Castle, Basheda, and Fino, we affirm her finding that Employer did not disprove the existence of legal pneumoconiosis. Decision and Order on Modification at 43. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(2)(i); Decision and Order on Modification at 43.

**Death Causation**

The ALJ found Employer did not rebut the Section 411(c)(4) presumption by establishing "no part of the Miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *see* Decision and Order on Modification at 44. Because Employer does not challenge this finding, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 44.

Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. See 30 U.S.C. §921(c)(4). Thus, we also affirm her finding that Claimant established a mistake in a determination of fact at 20 C.F.R. §725.310.

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interstitial fibrosis. Decision and Order on Modification at 43. She found "none of the physicians adequately explained the bases for their diagnoses and did not attribute these diseases to any particular etiology." *Id*. Thus she concluded these records do not aid Employer in disproving the existence of legal pneumoconiosis. *Id*.

[10] Because the ALJ's determination that Employer did not disprove the existence of legal pneumoconiosis precludes a finding that the Miner did not have pneumoconiosis, we need not address Employer's argument that the ALJ erred in finding it failed to disprove the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 11-14.

**Justice Under the Act**

Finally, Employer argues the ALJ erred in determining that granting modification renders justice under the Act because there was "no prejudice" to Employer as Claimant did not act in "bad faith." Employer's Brief at 5-6. Employer maintains the Miner's treatment records and Drs. Mullins's and Habre's reports "were available and could have been submitted to [the DOL] before it initially denied benefits." *Id*. at 6. Therefore, it asserts Claimant's "lack of diligence" prejudiced it because it had to respond to evidence that was available before the initial denial. *Id*. at 6. We disagree.

Before granting a request for modification, the ALJ must determine whether doing so will render justice under the Act. *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327- 28 (4th Cir. 2012). In making that determination, the ALJ must consider several factors, including the need for accuracy, the quality of the new evidence, the moving party's diligence and motive, and whether a favorable ruling would still be futile. *Sharpe v. Dir., OWCP* [*Sharpe I*], 495 F.3d 125, 132-33 (4th Cir. 2007). Because the ALJ has broad discretion in deciding whether modification is warranted, *Sharpe II,* 692 F.3d at 335, the party opposing modification bears the burden of establishing the ALJ abused her discretion. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

In *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), the Board held that while an ALJ has the authority to reopen a case based on any mistake in fact, "[her] exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw*, 33 BRBS at 72 (citing *Wash. Soc'y for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991)). Courts have recognized that, in considering whether to reopen a claim, an adjudicator must exercise the discretion granted under 20 C.F.R. §725.310 by assessing factors relevant to rendering justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 132-33 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547 (7th Cir. 2002); *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33, 1-38 (2008). As noted, these factors include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Sharpe*, 495 F.3d at 132-33; *Hilliard*, 292 F.3d at 547; *Stiltner*, 24 BLR at 1-38.

Citing the relevant factors, the ALJ found the interest in accuracy in this case outweighs the Claimant's motive. Decision and Order on Modification at 4. With respect to Claimant's motive, the ALJ considered Employer's assertion of "bad faith" but found Employer's "suspicions" alone are insufficient to establish bad faith.[11] *Id.*; Employer's

[11] We further reject Employer's assertion that collateral estoppel prohibits Claimant from relying on the evidence from the miner's claim to establish legal pneumoconiosis.

Brief to the ALJ at 3-5. Moreover, the ALJ stated that "even if Claimant is not entirely faultless here, there is a strong interest in an accurate adjudication of this case." Decision and Order on Modification at 4.

Although Employer alleges Claimant's "motive is suspect," it provides no evidence to support such an allegation. Employer's Brief at 11. Further, while Employer maintains it was prejudiced by Claimant's submission of evidence on modification that was available before the initial denial of her claim, the ALJ was authorized to consider wholly new evidence, cumulative evidence, or merely further reflect on the evidence initially submitted, in determining whether a mistake of fact was made. *See O'Keeffe,* 404 U.S. at 256. Even if new evidence had been introduced in the current claim that was available at the time of the prior hearing, "a modification request cannot be denied out of hand . . . on the basis that the evidence may have been available at an earlier stage in the proceeding." *Hilliard*, 292 F.3d at 546. Rather, the "modification procedure is flexible, potent, [and] easily invoked," *Stanley*, 194 F.3d at 497, and embodies a policy favoring accuracy of determination over finality. *Hilliard*, 292 F.3d at 541. Thus, "[o]nce a request for modification is filed, no matter the grounds stated, if any, the [ALJ] has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions." *Worrell*, 27 F.3d at 230. The ALJ properly weighed all of the evidence in this case and Employer has not demonstrated any improper motive by Claimant in seeking modification.

As the ALJ did not abuse her discretion, we affirm her determination that granting modification renders justice under the Act. *See O'Keeffe*, 404 U.S. at 255; *Worrell*, 27 F.3d at 230; *Branham*, 20 BLR at 1-34; Decision and Order on Modification at 4. Consequently, having affirmed the ALJ's determinations that Claimant invoked the

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Employer's Brief at 7, 21. With respect to the issue of pneumoconiosis, collateral estoppel does not bar relitigation of a factual issue where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than in the second, or where his or her adversary has a heavier burden in the second action than in the first. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988). Because the Section 411(c)(4) presumption of pneumoconiosis was not available to the Miner in his subsequent claim, he had the affirmative burden of proving the existence of the disease. In the survivor's claim, however, the availability and invocation of the Section 411(c)(4) presumption shifted the burden to Employer to affirmatively disprove the existence of pneumoconiosis. For these reasons, the doctrine of collateral estoppel is not applicable under the facts of this case.

Section 411(c)(4) presumption of death due to pneumoconiosis and established a basis for modification, we affirm the award of benefits.

Accordingly, the ALJ's Decision and Order Awarding Benefits on Modification in a Subsequent Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge