U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0225 BLA

LINDA S. AKERS (Widow of DANIEL AKERS) Claimant-Respondent v. TBK COAL COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/11/2016 DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits in a Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Wes Addington, Appalachian Citizens' Law Center, Inc., Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenburg Traurig, LLP), Washington, D.C., for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order - Award of Benefits in a Survivor's Claim (2011-BLA-5751) of Administrative Law Judge Larry S. Merck, rendered on a request for modification of the denial of a survivor's claim, filed on December 15, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).[1] The administrative law judge credited the miner with sixteen years of underground coal mine employment, as stipulated by the parties and supported by the record, and determined that employer conceded that the miner had a totally disabling respiratory impairment at the time of his death.[2] Thus, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. §725.310, and awarded benefits.

On appeal, employer contends that the administrative law judge was required to determine, as a threshold issue, whether granting modification would render justice under the Act, and asserts that a change in law is not a proper ground for granting claimant's request for modification. Employer further argues that the doctrine of collateral estoppel requires that claimant be bound by the finding previously made in the miner's claim that

[1] Claimant is the widow of the miner, who died on May 26, 2008. Director's Exhibit 8. The miner filed two claims during his lifetime, which were both denied. The miner's most recent claim, filed on March 4, 2002, was denied on the ground that, although he established total respiratory disability, the miner failed to establish the existence of pneumoconiosis.

[2] The administrative law judge additionally found that employer was collaterally estopped from relitigating the issue of total disability in this survivor's claim, as the issue was finally decided in the miner's claim. Decision and Order at 8. Contrary to the administrative law judge's finding, however, the doctrine of collateral estoppel is not applicable in this case, as the finding of total disability was not necessary to the judgment denying benefits in the miner's claim. *See Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 25 BLR 2-521 (6th Cir. 2014); *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, (1999)(en banc). Because employer conceded the issue of total respiratory disability, however, the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3] Relevant to this survivor's claim, Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if the miner had a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4)(2012).

the existence of pneumoconiosis was not established. Finally, employer argues that the administrative law judge erroneously relied on the preamble to the revised regulations in discrediting the medical opinions of Drs. Rosenberg and Jarboe on rebuttal. Claimant responds, urging affirmance of the award of benefits, to which employer replies in support of its position. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments that the administrative law judge erred in considering claimant's modification petition, that claimant is collaterally estopped from establishing the existence of pneumoconiosis, and that the administrative law judge improperly relied on the preamble in weighing the medical opinion evidence.

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.[4] 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).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made, *see* 20 C.F.R. §725.310; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The intended purpose of allowing modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Any mistake in fact may be corrected by the fact-finder, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994); *Betty B Coal Co. v. Director, OWCP* [*Stanley*],194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70 (2008).

EMPLOYER'S PROCEDURAL ARGUMENTS

Initially, we reject employer's argument that Section 411(c)(4) does not apply to a request for modification of the denial of a survivor's claim. In *Mullins v. ANR Coal Co., LLC*, 25 BLR 1-49 (2012), the Board addressed and rejected a substantially similar argument. Because claimant filed her claim after January 1, 2005, and timely requested modification such that the claim was pending after March 23, 2010, the administrative law judge appropriately applied Section 411(c)(4) in this survivor's claim.

[4] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Employer next argues that, since the existence of pneumoconiosis was not established in the finally denied miner's claim, which claimant pursued on behalf of the miner, the doctrine of collateral estoppel should have been applied to preclude consideration of the issue of pneumoconiosis in the survivor's claim. We disagree. As the Director points out, the doctrine does not bar relitigation of factual issues 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, 23 BLR 2-394, 2-401 (4th Cir. 2006). Since the presumption of pneumoconiosis was not available to the miner in his lifetime claim, the miner had the affirmative burden of proving the existence of pneumoconiosis, whereas the burden shifted to employer to affirmatively disprove the existence of pneumoconiosis in the survivor's claim. Thus, the doctrine of collateral estoppel is not applicable under the facts of this case.

JUSTICE UNDER THE ACT

Employer contends that this case must be remanded, as the administrative law judge did not specifically address whether granting claimant's request for modification of the denial of her survivor's claim would render justice under the Act. Employer avers that the administrative law judge erred in reopening this case, without first considering the factors, set forth in *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007), which are pertinent to modification. In particular, employer relies on the factors of "the requesting party's diligence and motive," arguing that claimant filed repetitive modification requests and failed to submit medical evidence in her claim. Employer's Brief at 16-17; *see Sharpe*, 495 F.3d at 132-133, 24 BLR at 2-70.

At the outset, we note that the United States Court of Appeals for the Sixth Circuit, which exercises jurisdiction over this case, has not adopted the *Sharpe* factors in deciding whether modification renders justice under the Act. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc)(the law of the United States Court of Appeals for the Circuit in which the miner most recently performed coal mine employment is applied); Director's Response at 2-3. Moreover, employer did not argue to the administrative law judge that a consideration of such factors was required in this case and that they would preclude modification. Employer, therefore, cannot raise the argument for the first time here. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1981)(an issue that was not raised at the hearing level cannot be considered on appeal).[5]

[5] In *York v. Director, OWCP*, No. 92-3351, 989 F.2d 501 (6th Cir. Mar. 15, 1993) (unpub.), the unpublished Sixth Circuit case relied upon by our dissenting colleague, the panel remanded for a finding of whether modification renders justice under the Act where the Director, Office of Workers' Compensation Programs (the Director) sought to

But even if employer had so argued – and the Sixth Circuit eventually agreed with it – it would make no difference under the facts of this case.

In arguing that the *Sharpe* factors control, employer has not, and cannot, show that claimant's motive for seeking modification was improper. As the Director notes, the paramount concern in granting modification is whether the entitlement determination is accurate. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547, 22 BLR 2-429, 2-453 (7th Cir. 2002)(administrative law judge has the discretion to weigh various factors under the "justice under the Act" standard, keeping in mind "the basic determination of Congress that accuracy of determination is to be given weight in all determinations under the Act"). Here, the administrative law judge determined that the district director's decision denying benefits was not accurate. Claimant's motive in filing for modification, therefore, was simply to establish as much. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-996 (claimant need merely allege that the "ultimate fact" of entitlement was wrongly decided to initiate modification proceedings).

Nor has the employer substantiated its new allegations that claimant was somehow less than diligent in pursuing her claim because she has made two modification requests, but did not submit evidence to support her initial claim. The Director, who is charged with administering the Act, notes that claimant has, in fact, filed only a single modification request. Director's Response at 3 n.5. And while it may be technically true that claimant did not personally submit medical evidence in the initial survivor's claim proceedings, the district director obtained and placed into the record supporting

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terminate benefits. Notably, the panel did so only at the Director's urging, who stressed claimant's argument to the administrative law judge that such a finding was necessary:

> [w]here, as here, a party has specifically argued to the ALJ that modification would not render justice under the Act, and has presented testimony in support of that argument, we believe that it is incumbent upon the ALJ to address the issue and make specific findings regarding his exercise of discretion. . . . [S]ince claimant provided specific arguments in support of her position in a post-hearing brief to the ALJ, the ALJ should be required to explain why modification would render justice under the Act.

Slip op. at 6, *quoting* Director's Brief. While the panel found the requirement to determine whether modification renders justice "implicitly required" by authority, *id.*, it did not indicate whether it would require remand in a case like this in which the party did not first raise the issue in front of the administrative law judge. Nor did it include any discussion of the factors considered in *Sharpe*, which was decided fourteen years later. Our dissenting colleague's reliance on *York* as authority for the proposition that the employer cannot waive an argument it did not raise in front of an administrative law judge is, therefore, misplaced.

documentation on her behalf. *See* 20 C.F.R. §725.405(c) ("In the case of a survivor's claim filed by or on behalf of a miner, the district director shall obtain whatever medical evidence is necessary and available for the development and evaluation of the claim."). Such practice is routine in survivor's claims. *Id.* None of the *Sharpe* factors of futility, improper motive, or lack of diligence suggesting bad faith, therefore, are remotely implicated by this case. *See Sharpe*, 495 F.3d at 129, 24 BLR at 2-60. In the absence of any evidence that claimant, as the moving party, engaged in any conduct that evinces contempt for the adjudicative process, and given the employer's failure to allege any such conduct below, we hold that the finding that modification serves justice is inherent in the administrative law judge's decision to modify the prior denial to an award. We therefore reject employer's argument that this claim should be remanded so that the administrative law judge can apply the *Sharpe* factors to determine whether granting benefits on modification renders justice under the Act.[6]

REBUTTAL OF THE SECTION 411(C)(4) PRESUMPTION

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4),[7] the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[8] or by proving that 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)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d

[6] Our dissenting colleague has not indicated any disagreement with the administrative law judge's decision to award benefits pursuant to Section 411(c)(4) and failed to identify any disputed facts relevant to employer's newly-raised arguments that the administrative law judge needs to reconcile on remand. Thus, even if employer had not waived the issue, and there was some authority requiring consideration of the specific *Sharpe* factors in this case, judicial economy would still strongly dictate against a remand for what would amount to a simple ministerial action by the administrative law judge.

[7] The administrative law judge found sixteen years of underground coal mine employment established, and employer conceded the issue of total disability. As employer does not otherwise challenge invocation of the presumption at Section 411(c)(4), it is affirmed. Decision and Order at 2 n.5, 4, 8-9; Employer's Brief at 14-16; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[8] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *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). "Legal pneumoconiosis" is defined as any chronic lung disease or impairment and its sequelae that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2), (b).

129, 138-43 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *see also Minich v. Keystone Coal Mining Corp*., 25 BRB 1-149 (2015)(Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer maintains that the administrative law judge improperly relied on precedent and the preamble, rather than the record, in discounting the medical opinions of Drs. Rosenberg and Jarboe. Employer asserts that these opinions are uncontradicted in the record and are buttressed by more recent literature showing that smoking-related chronic obstructive pulmonary disease (COPD) is far more common than coal dust-related COPD, and that the effects of smoking are greater than the studies relied on by the Department of Labor (DOL) in its 2000 rulemaking preamble. Thus, employer argues, the administrative law judge effectively transformed the rebuttable presumption into an irrebuttable presumption, and deprived employer of a fair and impartial hearing. Employer's Brief at 20-28; Employer's Reply Brief at 3.

We reject employer's argument that, in evaluating the credibility of the medical opinion evidence, the administrative law judge erred in relying on the studies cited by the DOL in the preamble. *See A&E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Rather, the administrative law judge permissibly consulted the preamble as a statement of medical science studies found credible by DOL when it revised the definition of legal pneumoconiosis to include obstructive impairments arising out of coal mine employment, and permissibly evaluated the medical opinions of record in light of those studies. *Adams*, 694 F.3d at 801, 25 BLR at 2-210. Therefore, the administrative law judge's references to the preamble did not convert the rebuttable presumption of Section 411(c)(4) into an irrebuttable presumption, as employer maintains, or deny employer a fair adjudication. Further, employer fails to identify how the more recent studies cited by Drs. Rosenberg and Jarboe are more reliable than the studies found credible by DOL in promulgating its regulations.[9] *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-265 (4th Cir. 2013)(Traxler, C.J., dissenting). A party may dispute the science credited by the DOL in the preamble, as archaized or invalid, only by laying the appropriate foundation. *See Cochran*, 718 F.3d at 323, 25 BLR at 2-265; *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Absent the type and quality of medical evidence that would invalidate the scientific studies found credible by DOL in

[9] Employer urges generally that: "no court has held that the preamble is per se more credible than more recent literature or studies." Employer's Reply Brief at 3.

the preamble, a physician's opinion that is inconsistent with the preamble may be discredited. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-492, 25 BLR 2-633, 2-645 (6th Cir. 2014).

In the present case, the administrative law judge addressed the various additional studies referenced, and nonetheless rejected the conclusions posited by Drs. Rosenberg[10] and Jarboe.[11] *See* Decision and Order at 12, 14. The administrative law judge noted that both physicians concluded that the miner's COPD was not coal dust-induced, in part, because the miner's reduced FEV_1/FVC ratio was not symmetrical and his pulmonary function improved after bronchodilation. Noting that the preamble recognizes that coal miners have an increased risk of developing COPD, with associated decrements in FEV_1 and the FEV_1/FVC ratio, the administrative law judge acted within his discretion in finding that the opinions of Drs. Rosenberg and Jarboe were unpersuasive. Decision and Order at 13-14, *see* 65 Fed. Reg. 79,920, 79,939, 79,943 (Dec. 20, 2000). Further, the administrative law judge found that both physicians failed to adequately explain why partial responsiveness to bronchodilation necessarily eliminated a finding of legal pneumoconiosis, or why coal dust exposure did not exacerbate the miner's smoking-related impairment, particularly in light of his "significant" length of underground coal mine employment. Decision and Order at 13-15; *see Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 487 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Thus, the administrative law judge permissibly found that the opinions of Drs. Rosenberg and Jarboe were not well-reasoned and were entitled to little weight. Decision and Order at 16; *see Clark v.*

[10] Dr. Rosenberg provided a consultative medical report and additional medical evidence review, and diagnosed airways disease, restriction with obstruction and bronchodilator response, and cardiopulmonary problems related to whole body disorders, all unrelated to coal mine dust exposure. He attributed the miner's death to exacerbation of his pulmonary problems related to obesity-hypertension and smoking-related chronic obstructive pulmonary disease (COPD), and opined that coal mine dust did not hasten or accelerate the miner's death. Dr. Rosenberg testified that the miner's bronchodilator response and reduced FEV_1/FVC ratio demonstrates a pattern of impairment that is inconsistent with coal dust exposure or legal pneumoconiosis. Decision and Order at 11-13; Employer's Exhibits 3, 6.

[11] Dr. Jarboe reviewed medical evidence and diagnosed asthma. He assessed a moderately severe restrictive and obstructive ventilatory impairment, caused by a combination of very heavy smoking and morbid obesity. Dr. Jarboe opined that coal mine dust is not capable of inducing reversible airway obstruction, and that asthma does not occur from the inhalation of coal mine dust. Dr. Jarboe attributed the miner's disproportionate reduction in FEV_1 values to smoking and/or asthma, but not to coal dust inhalation. He concluded that coal mine dust did not cause, aggravate, or contribute to the miner's disabling pulmonary impairment or his death. Decision and Order at 14-15; Employer's Exhibits 4 at 13-15, 5, 8.

Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989)(en banc); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121-22 (6th Cir. 2000).

It is the province of the administrative law judge to evaluate conflicting medical evidence, draw appropriate inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(en banc). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to rebut the presumed fact of legal pneumoconiosis.[12] Decision and Order at 16.

Lastly, the administrative law judge permissibly found that because Drs. Rosenberg and Jarboe failed to provide well-reasoned opinions on the issue of legal pneumoconiosis, their opinions on the cause of the miner's death were entitled to little weight.[13] Decision and Order at 16-17; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013). We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption of death due to pneumoconiosis, and that claimant is entitled to survivor's benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2)(i), (ii).

[12] As employer failed to rebut the presumed fact of legal pneumoconiosis at 20 C.F.R. §718.305(d)(2)(i)(A), the administrative law judge declined to address whether employer disproved the existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(2)(i)(B). Decision and Order at 16.

[13] The record also contains the miner's death certificate, which lists the cause of death as "cardio respiratory arrest" due to, or as a consequence of, "C.O.P.D." Director's Exhibit 8. No other significant contributing factors are recorded. Both Drs. Rosenberg and Jarboe opined that COPD was a cause of the miner's death, but failed to persuade the administrative law judge that the miner's COPD did not constitute legal pneumoconiosis.

Accordingly, the Decision and Order - Award of Benefits in a Survivor's Claim is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

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JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's determination that the administrative law judge's failure to make a finding regarding whether granting modification in this case would render justice under the Act does not necessitate remanding this case. I agree with employer that the administrative law judge should have made an explicit finding regarding whether modification would render justice in this case.

Section 22 of the Longshore Act, as incorporated by 30 U.S.C. §932(a), provides in relevant part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . and . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. §922. Section 22 "is a broad reopening provision that is available to employers and employees alike." *King v. Jericol Mining, Inc*., 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001).

Modification of a claim should not be granted automatically upon finding that a mistake was made in an earlier determination, but only when the administrative law judge concludes that doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (recognizing that the purpose of modification is to "render justice"). In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's 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 Washington Soc'y for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991).

Those courts that have addressed the issue, have recognized that an adjudicator, in considering whether to reopen a claim, must exercise the discretion granted under 20 C.F.R. §725.310 by assessing any factors relevant to the rendering of justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*] , 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33 (2008). These relevant factors include, but are not limited to, the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Id*.

Notably, neither the Board, nor any circuit court, has held that an administrative law judge need not address whether granting modification would render justice under the Act. Indeed, in an unpublished decision, the United States Court of Appeals for the Sixth Circuit addressed a situation analogous to the one presented here. In an appeal to the Board, a claimant asserted that the administrative law judge, in granting employer's request for modification, failed to make a finding as to whether modification would render justice under the Act. The Board held that, because the administrative law judge found that claimant was not entitled to benefits, the administrative law judge "implicitly" found that modification would render justice under the Act. *York v. Director, OWCP*, BRB No. 89-2196 BLA (Feb. 20, 1992) (unpub.). The Sixth Circuit rejected the Board's approach, explaining that "there is no reason to think that there should be an automatic reopening [of a case] simply because the [fact finder] found a mistake in a determination of fact." *York v. Director, OWCP*, No. 92-3351, slip op. at 5 (6th Cir. Mar. 15, 1993) (unpub.). Because an "articulated finding" is required,[14] the Sixth Circuit held that the

[14] Because an administrative law judge must make an "articulated finding" regarding whether reopening a case will render justice under the Act, it is not incumbent upon the parties to raise the issue. Hence, the issue cannot be waived by a party's failure to do so. Moreover, while the parties may present arguments to the administrative law

Board's "implicit [finding] that modification would render justice under the Act . . . [was] inadequate." *York*, slip op. at 6. The Sixth Circuit, therefore, vacated the Board's decision, and ordered the case remanded for an explicit finding by the administrative law judge as to whether granting modification would render justice under the Act. Thus, the Sixth Circuit, in an unpublished case, has recognized that an administrative law judge is required to render an explicit finding as to whether granting modification will render justice under the Act.[15]

It is clear that the determination as to whether granting modification will render justice under the Act lies with the administrative law judge, not the Board.[16] Although the Board will review the administrative law judge's findings in this regard under an abuse of discretion standard, *see Kinlaw*, 33 BRBS at 73, in order to do so, the administrative law judge must first render such a finding. Here, the administrative law judge failed to do so. Because the administrative law judge failed to make a specific finding regarding whether modification would render justice under the Act, the proper course is to remand the case to the administrative law judge, not undertake our own independent assessment of the factors we find relevant to the issue. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (recognizing that "[w]hen the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case . . . ."); *see also Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14

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judge regarding the factors that they consider relevant to the determination, the administrative law judge's consideration of the issue is not limited to those factors. The courts have recognized that an administrative law judge, in determining whether reopening a case will render justice under the Act, is in a "unique position" to assess the motivations of the party, the merits of the motion, and "institutional concerns." *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547, 22 BLR 2-429, 2-453 (7th Cir. 2002). The courts have, therefore, been hesitant to "unnecessarily cabin [an] ALJ's ability to address the complexities of a motion to reopen." *Id.*

[15] I recognize that unpublished decisions are not considered binding precedent in the United States Court of Appeals for the Sixth Circuit. *See* Fed. R. App. P. 32.1; Local Rule 28(f); *Bell v. Johnson*, 308 F.3d 594, 611 (6th Cir. 2002). However, I agree with the reasoning of the Sixth Circuit in *York*, and base my holding on a review of both existing circuit court and Board case law.

[16] Although the majority agrees with the Director that the decision of the United States Court of Appeals for the Fourth Circuit in *Sharpe* is not controlling in this case, neither the majority, nor the Director, has explained why the Sixth Circuit would not follow existing Board and circuit court law. Moreover, neither the Board, nor the majority, has provided any support for the view that an administrative law judge need not render a finding regarding whether granting modification would render justice under the Act.

BLR 2-1 (6th Cir. 1990). Consequently, I would remand the case to the administrative law judge to consider whether granting modification of the prior denial of benefits would render justice under the Act.

I concur in all other respects with the majority's decision.

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RYAN GILLIGAN
Administrative Appeals Judge