

U.S. Department of Labor

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



BRB No. 15-0242 BLA

THEODORE M. LATUSEK, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 05/13/2016
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits - On Remand and Order Denying Motion to Vacate of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Sue Anne Howard, Wheeling, West Virginia, for claimant.

William S. Mattingly and Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits - On Remand and Order Denying Motion to Vacate (2010-BLA-5809) of Administrative Law Judge Thomas M. Burke, rendered on claimant's request for modification of the denial of his claim filed on July 5, 1994, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time in consideration of claimant's modification request, and it has a lengthy procedural history, as set forth in *Latussek v. Consolidation Coal*, BRB No. 12-0449 BLA, slip op. at 2-4 (Aug. 5, 2013) (unpub.). Claimant has established the existence of clinical pneumoconiosis, based on the biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2), and that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Id.* at 2. Claimant has also established that he is totally disabled by a diffuse form of interstitial pulmonary fibrosis (IPF), pursuant to 20 C.F.R. §718.204(b)(2). *Id.* The relevant issue on modification was whether claimant established disability causation pursuant to 20 C.F.R. §718.204(c). As the physicians agree in this case that claimant is totally disabled by his IPF, proving the requisite causal relationship between claimant's coal dust exposure and his IPF establishes the existence of legal pneumoconiosis<sup>1</sup> and total disability due to pneumoconiosis<sup>2</sup> under the Act and regulations. 20 C.F.R. §§718.201(a)(2), 718.202(a), 718.204(c).

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<sup>1</sup> Legal pneumoconiosis is defined as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2). A disease arising out of coal mine employment “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(a)(2), (b).

<sup>2</sup> Pursuant to 20 C.F.R. §718.204(c), a miner is considered totally disabled due to pneumoconiosis if pneumoconiosis:

is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a “substantially contributing cause” of the miner's disability if it:

(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

In *Latusek v. Consolidation Coal*, BRB No. 12-0449 BLA, the Board previously rejected evidentiary challenges raised by employer with respect to the processing of the case by the district director. *Latusek*, BRB No. 12-0449 BLA, slip op. at 5-7. The Board also rejected employer's argument that, because the United States Court of Appeals for the Fourth Circuit<sup>3</sup> reversed an earlier award of benefits by Administrative Law Judge Daniel L. Leland, *see Consolidation Coal Co. v. Latusek*, 89 F. App'x 373 (4th Cir. 2004) (unpub.),<sup>4</sup> claimant is forever precluded from establishing his entitlement to benefits, and

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(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

<sup>4</sup> In *Consolidation Coal Co. v. Latusek*, 89 F. App'x 373 (4th Cir. 2004) (unpub.), the Fourth Circuit concluded that claimant was unable to establish that his disabling interstitial pulmonary fibrosis (IPF) was due to coal dust exposure, based on the record before it. *Latusek*, 89 F. App'x at 376-378. The court held that Administrative Law Judge Daniel L. Leland erred in discrediting the opinions of Drs. Kleinerman, Renn, Morgan, and Fino on the ground that they did not provide a definitive etiology for claimant's disabling IPF, when they specifically ruled out coal dust exposure as a causative factor for his condition. *Id.* at 377. The court also held that Judge Leland did not properly consider the qualifications of the physicians relevant to the diagnosis and treatment of pneumoconiosis. *Id.* Furthermore, the Fourth Circuit concluded that Judge Leland erred in crediting the opinions of Drs. Jennings and Rose as to the etiology of claimant's respiratory condition, to the extent that they based their diagnoses on the following medical articles, which the court considered to be flawed: *Diffuse Interstitial Fibrosis In Nonasbestos Pneumoconiosis – A Pathological Study* by Dr. Honma; *Idiopathic Pulmonary Fibrosis* by Dr. Iwai; and *Mineralogical Microanalysis of Idiopathic Pulmonary Fibrosis* by Dr. Monso. *Id.* The court stated, "no reasonable mind could have interpreted the evidence and credited the [medical opinions] as [Judge Leland] did," and it reversed the award of benefits. *Id.* at 378.

his modification request must be denied.<sup>5</sup> *Latusek*, BRB No. 12-0449 BLA, slip op. at 7-9.

In addition, the Board rejected several arguments raised by employer relevant to the manner in which Administrative Law Judge Thomas M. Burke (the administrative law judge) resolved the conflict in the medical evidence. Specifically, the Board rejected employer's argument that the administrative law judge failed to properly consider the reliability of the medical studies underlying the opinions of claimant's experts, Drs. Rose, Parker, and Dauber, who concluded that claimant is totally disabled by IPF, significantly related to his history of coal dust exposure. *Latusek*, BRB No. 12-0449 BLA, slip op. at 14. The Board also held that the administrative law judge properly considered the criticisms raised by employer's experts with regard to the medical studies cited by claimant's experts, and also properly considered the relevant qualifications of the physicians in rendering his credibility determinations. *Id.* at 15-17. The Board further affirmed the administrative law judge's decision to assign controlling weight to the opinions of Drs. Rose and Dauber, based on their respective qualifications in the diagnosis and treatment of IPF *and* diseases related to occupational exposure to coal mine dust. *Id.* at 16-17.

Notwithstanding, the Board agreed with employer that the administrative law judge erred in failing to address the weight he accorded to all of the relevant pathology evidence, which also formed the bases for the physicians' opinions regarding the etiology of claimant's IPF. *Latusek*, BRB No. 12-0449 BLA, slip op. at 18-19. The Board therefore vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c). *Id.* at 18. Additionally, the Board held that the administrative law judge erred by failing to address whether modification would render justice under the Act. *Id.* The Board therefore vacated the administrative law judge's finding that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000)<sup>6</sup>

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<sup>5</sup> The Board held that claimant was not precluded from establishing modification, based on application of the law of the case, as the administrative law judge on modification was not presented with the same record that was before the Fourth Circuit. *Latusek v. Consolidation Coal*, BRB No. 12-0449 BLA, slip op. at 7-8 (Aug. 5, 2013) (unpub.). The Board also rejected employer's contention that claimant did not properly allege a "theory" to support his modification request, as modification may be based on any mistake in fact, including the ultimate fact of entitlement, pursuant to 20 C.F.R. §725.310. *Id.* at 14, *citing Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

<sup>6</sup> The Department of Labor revised the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. The 2001 revised regulations included

and the award of benefits, and remanded this case to the administrative law judge for further consideration. *Id.* Employer subsequently filed a motion for reconsideration and rehearing en banc, which was denied by the Board. *Latusek v. Consolidation Coal*, BRB No. 12-0449 BLA (Mar. 11, 2014) (unpub. Order).

In his February 10, 2015 Decision and Order Awarding Benefits - On Remand, which is the subject of this appeal, the administrative law judge weighed the pathology evidence and found that it was consistent with a finding that claimant's disabling IPF was caused by pneumoconiosis. The administrative law judge thus found that claimant established a mistake in a determination of fact under 20 C.F.R. §725.310. The administrative law judge further found that granting claimant's request for modification would render justice under the Act and, therefore, he awarded benefits. Employer subsequently filed a motion to vacate the award of benefits, asserting that the administrative law judge did not have jurisdiction to render his decision. The administrative law judge issued an Order Denying Motion to Vacate on March 31, 2015.

In the current appeal, employer argues that the administrative law judge did not have jurisdiction on remand to render a decision on claimant's modification request. Employer also argues that the administrative law judge failed to follow the Board's remand instructions and failed to properly explain the weight accorded the pathology evidence. Employer maintains that the administrative law judge's issuance of an award of benefits on modification violates the doctrine of the law of the case, and that his finding of a mistake in a determination of fact is not rational. In addition, employer asserts that the administrative law judge erred in finding that granting claimant's request for modification would render justice under the Act. Employer requests that the case be reassigned to a new administrative law judge. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board. Employer has filed a reply brief, reiterating its arguments on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30

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limitations on evidence submitted in conjunction with modification requests. The 2001 revised regulations are not applicable to this claim, based on its filing date. Similarly, the amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim, based on its filing date. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(a).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

## I. JURISDICTION

Employer argues that the administrative law judge did not have jurisdiction of the case on remand to issue an award of benefits, and erred in denying its motion to vacate his Decision and Order Awarding Benefits on Remand. The record reflects that, following the Board’s decision, Associate Chief Judge William Colwell, Office of Administrative Law Judges (OALJ), Washington D.C., issued a June 12, 2014 Memorandum to Judge Richard A. Morgan, in his capacity as Acting District Chief Judge of the OALJ in Pittsburgh, Pennsylvania, transferring the case for assignment. Judge Morgan issued an Order Setting Deadline for Filing of Briefs on Remand on August 28, 2014. Following the Decision and Order Awarding Benefits - On Remand, issued on February 10, 2015, employer filed its motion to vacate the decision, asserting that the “re-assignment” to the administrative law judge was “done without notice and without any stated jurisdiction.” Motion to Vacate Decision and Order Awarding Benefits at 2. Employer maintains in this appeal that Judge Morgan obtained jurisdiction of this case when he issued his scheduling order. Employer asserts that once Judge Morgan gained jurisdiction, the case could not be transferred to another administrative law judge without good cause and without notice to the parties pursuant to 20 C.F.R. §725.454(e).<sup>7</sup> Because these requirements were not satisfied, employer contends that the administrative law judge lacked jurisdiction to issue his February 10, 2015 Decision and Order and, therefore, erred in denying its motion to vacate. We disagree.

The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), requires that the adjudication officer “who presides at the reception of evidence shall make the recommended decision or initial decision unless he becomes unavailable to the agency.” 5 U.S.C. §554(d). Interpreting this provision, the Board held in *Strantz v. Director, OWCP*, 3 BLR 1-431, 1-432-33 (1981), that the “APA restriction on substituting adjudication officers is applicable to cases on remand; that is, the same administrative law judge who heard the case the first time should hear the case on remand unless he is unavailable.” *Strantz*, 3 BLR at 1-432-33, *citing Pigrenet v. Boland Marine & Manufacturing Co.*, 631 F.2d 1190, 12 BRBS 10 (5th Cir. 1980). The Board explained that the purpose of this provision is to provide a procedural guaranty that the adjudication officer who conducted the hearing, and received the

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<sup>7</sup> The regulation at 20 C.F.R. §725.454(e) states that “[t]he Chief Administrative Law Judge may for good cause shown transfer a case from one administrative law judge to another.”

evidence, would render the decision, and not some other adjudication officer. *Stranz*, 3 BLR at 1-432-33. Furthermore, the Board noted in *Stranz* that reassignment is improper when there is no indication in the record that the original administrative law judge was unavailable to reconsider the case following the initial remand. *Id.*

It is not clear from the record before us, why the case was not initially returned to the administrative law judge.<sup>8</sup> However, applying the principles set forth in *Stranz* to the facts of this case, once the Board remanded the case for further consideration, the adjudication officer who should have been vested with jurisdiction over the matter for further consideration was the administrative law judge, not Judge Morgan. *Stranz*, 3 BLR at 1-432-33. Although employer desires a new administrative law judge to consider claimant's modification request, employer has not demonstrated prejudicial error in the return of the case to the adjudication officer who conducted the hearing, received the evidence on modification, and also specifically considered employer's arguments, as set forth in its remand brief. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."). Thus, we reject employer's assertion that the administrative law judge lacked jurisdiction to decide the case on remand.

## II. MODIFICATION

### A. Mistake in a Determination of Fact

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, an administrative law judge is obligated to

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<sup>8</sup> According to employer, the case was "assigned" to Judge Morgan because the administrative law judge had temporarily retired from the Office of Administrative Law Judges and was unavailable to decide the case. Even assuming that employer is correct, and the administrative law judge was temporarily unavailable, this would not automatically vest Judge Morgan with jurisdiction of this case during that interim period. Rather, in accordance with the Board's holding in *Strantz v. Director, OWCP*, 3 BLR 1-431, 1-432-33 (1981), the parties should have been notified of the unavailability of the administrative law judge to decide the case on remand, and then been given the opportunity to object to the transfer of the case to Judge Morgan. We consider the proper return of the case to the administrative law judge for a decision on remand to be consistent with the procedural guarantees discussed in *Strantz*.

perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated an award in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). A mistake in a determination of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence of record. *See O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Employer raises arguments in this appeal that were rejected by the Board in the prior appeal: 1) modification is precluded under the doctrine of the law of the case; 2) the administrative law judge erred in finding a mistake in a determination of fact, based on his rationale that claimant submitted “unavailable evidence” or that there has been a “change in medical knowledge” since the prior denials; 3) the opinions of Drs. Rose, Dauber and Parker were not entitled to weight, based on the medical articles they relied upon to support their opinions; 3) the administrative law judge abdicated his duties as “gatekeeper” under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); and 4) the administrative law judge should have assigned controlling weight to the opinions of employer’s physicians, Drs. Renn, Rosenberg, Tuteur, Repsher, Kleinerman, Morgan, Fino, and Spagnolo. *See Latusek*, BRB No. 12-0449 BLA, slip op. at 9-18. As employer has not shown that the Board’s holdings were clearly erroneous, resulted in a manifest injustice, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board’s prior determinations. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting).

Employer’s only new argument in this appeal is that the administrative law judge failed to follow the Board’s remand instructions when considering the pathology evidence. We disagree.

The Board remanded the case with the instruction that the administrative law judge explain the weight accorded the pathology findings of Drs. Naeye and Crouch, in relation to the other evidence of record, relevant to whether claimant proved that his disabling IPF was caused by coal dust exposure. *Latusek*, BRB No. 12-0449 BLA, slip op. at 17-19. In accordance with that instruction, the administrative law judge noted that Drs. Naeye and Crouch each reviewed pathology slides obtained from claimant’s explanted left lung, which was removed after claimant underwent a single left lung transplant on July 3, 2006, at the University of Pittsburgh Medical Center (UPMC). Decision and Order on Remand at 2-3; *see* Employer’s Exhibits 1, 14, 15. In his July 19, 2007 pathology report, Dr. Naeye stated that the slides showed “no black pigment and no



very tiny birefringent crystals of toxic silica [that] are associated with the fibrosis.” Employer’s Exhibit 14. He opined that “the near absence of fibrosis in nearby lymph nodes is categorical confirmation that the fibrosis is not occupational-silicotic in origin.” *Id.* He explained that “when silica or other environmental fibrogenic agents damage lung tissue they eventually drain into nearby lymph nodes where they produce fibrosis.” *Id.*

In an August 21, 2009 report, Dr. Crouch reviewed the pathology slides of the explanted left lung, and slides from a 1992 biopsy of claimant’s right lung. Employer’s Exhibit 15. She described that both “lungs show evidence of a severe diffuse fibrosing lung disorder,” which was “first recognized in 1992 and eventually progressed to end-stage pulmonary fibrosis as is evident from the explant in 2006.” *Id.* She indicated that “the histologic findings in the 1992 biopsy are generally consistent with usual interstitial pneumonia [] and the clinical diagnosis of idiopathic pulmonary fibrosis.” *Id.* She opined that there were “a few coal dust macules, but no larger dust related lesions, and there is also no concordance between the distribution of dust and the distribution or severity of the observed fibrosis.” *Id.* She diagnosed chronic organizing interstitial pneumonia and coal dust deposition with a small number of coal macules consistent with mild simple coal workers’ pneumoconiosis. *Id.*

The administrative law judge concluded that the pathology findings of Drs. Naeye and Crouch did not undermine the diagnoses of IPF due to coal dust exposure, made by Drs. Dauber and Rose, the physicians whom the administrative law judge initially credited in this case.<sup>9</sup> Decision and Order on Remand at 2. Contrary to employer’s

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<sup>9</sup> The administrative law judge noted that both Dr. Dauber and Dr. Rose opined that their “findings of interstitial fibrosis caused by coal dust exposure were supported by the presence of coal workers’ pneumoconiosis in the lung tissue.” Decision and Order on Remand at 2. The administrative law judge summarized their reasoning as follows:

Dr. Dauber explained that his review of the [July 3, 2006 lung transplant] records as well as the pathology of the lung tissue showed multiple hilar lymph nodes with focally calcified anthracosilicotic nodules, meaning that the regional lymph nodes were anthracotic due to the fact that the coal particles will transport through the lymphatics, then through the local lymph nodes and stay there. He reasoned that the pathology showed that [cl]aimant had a lot of dust in the lung at the time that usual interstitial pneumonia [(UIP)] was developing. Dr. Rose offered the opinion that the transplant pathology was consistent with findings from the 1992 biopsy pathology in that it showed interstitial lung disease in a UIP pattern progressing to end stage fibrotic lung disease with findings of airway-centered injury that were consistent with an inhalation exposure, which she

argument, the administrative law judge permissibly determined that “Dr. Naeye’s report on the pathology of the explanted lung tissue finding no pneumoconiosis and not even black pigment, is contrary to the preponderance of pathology evidence,” and to Dr. Naeye’s prior biopsy report pertaining to claimant’s 1992 open lung biopsy of the right lung.<sup>10</sup> Decision and Order on Remand at 3; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

The administrative law judge observed correctly that the UPMC pathology report from the explanted left lung states that there are “multiple hilar lymph nodes with focally *calcified anthracosilicotic nodules*.” Decision and Order on Remand at 3, quoting Employer’s Exhibit 1 (emphasis added). As noted by the administrative law judge, Drs. Waldron and Honma reviewed the slides obtained from the June 12, 1992 biopsy at the request of Dr. Jennings, during his treatment of claimant. Decision and Order on Remand at 3. Dr. Waldron specifically “found dust macules consistent with coal worker’s pneumoconiosis, which contained *abundant polarizable silicates*.”<sup>11</sup> *Id.* at 3 (emphasis added). In a report dated November 14, 1994, Dr. Honma stated that there were “extensive areas of advanced diffuse interstitial fibrosis and also a small quantity of silicate material mixed with carbonaceous dust.”<sup>12</sup> Director’s Exhibit 45. The

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determined, with a reasonable degree of probability, was [c]laimant’s coal dust exposure.

*Id.*

<sup>10</sup> Furthermore, in his February 7, 1995 pathology report examining tissue from the 1992 right lung biopsy, Dr. Naeye also diagnosed simple coal worker’s pneumoconiosis “characterized by [the] presence of several anthracotic micrododules, and observed black pigment, albeit a small amount, and birefringement crystals of all sizes.” Director’s Exhibit 25.

<sup>11</sup> Dr. Waldron’s findings are outlined by Dr. Jennings in his October 28, 1993 report. Claimant’s Exhibit 3.

<sup>12</sup> Dr. Honma stated, “Lung tissue obtained showed extensive areas of advanced diffuse interstitial fibrosis, which was particularly accentuated in the peripheral lung parenchyma and resulted in conspicuous honeycombing of the lungs. . . . It is noticeable that the tissue involved by honeycombing, also shows evidence of the dust deposition.” Claimant’s Exhibit 1. He advised Dr. Jennings that “diffuse interstitial fibrosis or UIP seen in your patient, represents a dust-related disorder.” *Id.*

administrative law judge also noted that Dr. Kleinerman reviewed the same biopsy evidence as Dr. Naeye and “reported observing in some slides a minimal number of macules of simple coal worker’s pneumoconiosis, and within the lesions of pneumoconiosis he observed particles with anisotropic properties characteristic of crystalline silicates and free crystalline silica.” Decision and Order on Remand at 3; *see* Director’s Exhibit 25.

Given the preponderance of the evidence that contradicts Dr. Naeye’s pathology findings outlined by the administrative law judge, we see no error in the administrative law judge’s conclusion that Dr. Naeye’s reports did not change the administrative law judge’s determination that claimant’s IPF was caused by coal dust exposure. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. In addition, the administrative law judge observed correctly that the opinions of employer’s experts were inconsistent with each other as “Dr. Naeye did not diagnose pneumoconiosis and did not find even black pigment[,] whereas Dr. Crouch did find coal dust deposition with a small number of coal dust macules consistent with mild simple coal workers’ pneumoconiosis.” Decision and Order on Remand at 3; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Although employer contends that the administrative law judge failed to properly explain the weight he gave Dr. Crouch’s opinion, that claimant’s mild simple coal workers’ pneumoconiosis did not contribute to his IPF, we are satisfied that the administrative law judge considered all the relevant evidence in this case, as required by the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Specifically we affirm the administrative law judge’s crediting of the opinions of Drs. Dauber, Rose, and Parker “who opined that the pathology evidence is consistent with [c]laimant’s interstitial fibrosis being caused by coal dust exposure.”<sup>13</sup> Decision and Order on Remand at 4. We therefore affirm, as supported by substantial evidence, the administrative law judge’s conclusion that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

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<sup>13</sup> Employer correctly asserts that the administrative law judge erred in relying on Dr. Jennings’s opinion, contrary to the Board’s holding that Dr. Jennings’s medical opinion could not be credited. *See Latusek*, BRB No. 12-0449 BLA, slip op. at 14 n.12; Employer’s Brief in Support of Petition for Review at 24. However, the administrative law judge’s error is harmless, as his finding that claimant established disability causation is supported by the opinions of Drs. Rose and Dauber, whom he permissibly credited. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

## B. Justice Under the Act

The modification of a claim does not automatically flow from a finding that a mistake was made on an earlier determination, and should be made only where doing so will render justice under the Act. See *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (holding that the purpose of modification is to “render justice”); *Westmoreland Coal Co. v. Sharpe (Sharpe II)*, 692 F.3d 317, 327-28, 25 BLR 2-157, 2-173-174 (4th Cir. 2012), *cert. denied*, 133 S.Ct. 2852 (2013); *Sharpe v. Director, OWCP (Sharpe I)*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 547, 22 BLR 2-429, 2-453 (7th Cir. 2002). In this case, the administrative law judge observed that modification should only be denied “if the moving party has engaged in such contemptible conduct or conduct that renders its opponents so defenseless, that it could be said correcting the decision would not render justice under the Act.” Decision and Order on Remand at 4, *citing Hilliard*, 292 F.3d at 533, 22 BLR at 2-429. The administrative law judge stated:

Here, the evidence, including that developed as a result of the examination of the transplant lung tissue, demonstrates that [c]laimant’s total pulmonary disability relates to his coal dust exposure. Further, as testified by Dr. Parker, who worked for National Institute for Occupational Safety and Health (NIOSH) as Chief/Acting Chief of the clinical investigation branch and the coal workers’ surveillance and B reader certification programs, which he ran from 1991 to 1998, it is becoming more slowly accepted that coal miners may develop interstitial fibrosis in the absence of or with minimal evidence of, traditional coal macules or silicotic nodules.

Decision and Order on Remand at 4. The administrative law judge concluded that granting claimant’s modification request would render justice under the Act “because new evidence[,] along with further reflection on the evidence previously submitted[,] shows that the denial of entitlement was wrongly decided.” *Id.*

Employer contends that the administrative law judge erred in applying the standard set forth by the United States Court of Appeals for the Seventh Circuit in *Hilliard*, as this case arises with the jurisdiction of the Fourth Circuit. Employer asserts that the case should be remanded because the administrative law judge failed to properly address whether granting modification would render justice under the Act, based on the factors set forth in *Sharpe II*. Employer’s arguments are without merit.

The Fourth Circuit held in *Sharpe I*, and in *Sharpe II*, that an administrative law judge has sound discretion to grant modification under 20 C.F.R. §725.310, based on a consideration of factors that may be relevant to the rendering of justice under the Act,

which include the need for accuracy, the quality of the new evidence, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Sharpe II*, 692 F. 3d at 327-28, 25 BLR at 2-173-174; *Sharpe I*, 495 F.3d at 131-133, 24 BLR at 2-67-68. Although the administrative law judge did not cite to *Sharpe II*, we are satisfied that the administrative law judge properly considered the relevant factors, namely the need for accuracy in this case and the quality of the new evidence submitted by claimant in seeking modification, which the administrative law judge thoroughly analyzed.<sup>14</sup> *Sharpe II*, 692 F. 3d at 327-28, 25 BLR at 2-173-174; *Sharpe I*, 495 F.3d at 131-133, 24 BLR at 2-67-68. Employer’s general assertion that granting modification would not render justice under the Act because claimant’s modification request is “an improper collateral attack on the Fourth Circuit’s controlling judgment,” is without merit, as discussed *supra*. Employer’s Brief in Support of Petition for Review at 28-29. Because we discern no error or abuse of discretion in the administrative law judge’s determination that granting modification would render justice under the Act, that finding is affirmed. *See Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68, 72 (1999), *citing Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991). We therefore affirm the administrative law judge’s conclusion that claimant is entitled to modification pursuant to 20 C.F.R. §725.310, and we affirm the award of benefits.

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<sup>14</sup> Moreover, contrary to employer’s contention, the standard set forth by the Fourth Circuit in *Westmoreland Coal Co. v. Sharpe (Sharpe II)*, 692 F. 3d 317, 327-28, 25 BLR 2-157, 2-173-174 (4th Cir. 2012), *cert. denied*, 133 S.Ct. 2852 (2013), is not inconsistent with the standard set forth by the United States Court of Appeals for the Seventh Circuit in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 547, 22 BLR 2-429, 2-453 (7th Cir. 2002), as the Fourth Circuit in *Sharpe II* repeatedly cited to *Hilliard* as support for its holding.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits - On Remand and Order Denying Motion to Vacate in a Subsequent Claim are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge