U.S. Department of Labor

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

BRB No. 15-0366 BLA

RONNIE A. STREET	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION/SUN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 05/23/2016
	)	
	)	
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 Granting Modification of Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin and Victoria S. Herman (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Barry H. Joyner (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Modification of Benefits (2012-BLA-05416) of Administrative Law Judge Paul R. Almanza, rendered on a subsequent claim filed on May 19, 2005,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In a previous Decision and Order on Remand issued on April 15, 2009, Administrative Law Judge Richard T. Stansell-Gamm determined that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, found that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Considering the claim on the merits, Judge Stansell-Gamm found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a), but failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In addition, Judge Stansell-Gamm found that claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. Accordingly, benefits were denied.

Claimant filed a timely request for modification on January 11, 2010. Director's Exhibit 69. In a Proposed Decision and Order issued on October 25, 2010, the district director determined that claimant demonstrated a change in conditions pursuant to 20 C.F.R. §725.310, because the new evidence established that claimant has complicated pneumoconiosis, and that claimant is thus entitled to the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304. Director's Exhibit 89. The district director determined that claimant was entitled to benefits, commencing January 2010, the month in which claimant filed his modification request. *Id*. Employer did not contest the decision and began paying benefits. Director's Exhibit 94.

[1] Claimant filed a prior claim for benefits on December 3, 2001, which was denied by the district director because claimant did not establish total disability. Director's Exhibit 1. Claimant took no action with regard to the denial until filing his subsequent claim on May 19, 2005. In a Decision and Order issued on September 14, 2006, Administrative Law Judge Richard Stansell-Gamm awarded benefits. Director's Exhibit 49. In consideration of employer's appeal, the Board vacated Judge Stansell-Gamm's finding that claimant established complicated pneumoconiosis, because he did not provide valid reasons for the weight accorded the x-ray and medical opinion evidence. *R.A.S.* [*Street*] *v. Dominion Coal*, BRB No. 08-0100 BLA (Nov. 5, 2008) (unpub.); Director's Exhibit 66. On remand, in a Decision and Order dated April 15, 2009, Judge Stansell-Gamm denied benefits. Director's Exhibit 68.

Thereafter, claimant filed a second request for modification on February 25, 2011, arguing that modification should be granted on the grounds of a mistake in a determination of fact in Judge Stansell-Gamm's denial of benefits, and not a change in conditions. Director's Exhibit 91. Accordingly, claimant maintained that he was entitled to benefits as of the month in which he filed his subsequent claim, as opposed to the month in which he filed his modification request. *Id.* The district director, however, denied the second request for modification on December 7, 2011. Director's Exhibit 98. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a hearing and was assigned to Judge Almanza (the administrative law judge).

On June 11, 2015, the administrative law judge issued his Decision and Order on Modification, which is the subject of this appeal. The administrative law judge found that medical evidence pre-dating Judge Stansell-Gamm's April 15, 2009 denial of benefits was sufficient to establish that claimant suffered from complicated pneumoconiosis at that time. Therefore, the administrative law judge concluded that claimant established a mistake in a determination of fact in pursuant to 20 C.F.R §725.310. The administrative law judge further found that granting modification would render justice under the Act, and awarded benefits, commencing May 2005, the month in which he found that claimant filed his subsequent claim.

On appeal, employer asserts that the administrative law judge erred in finding that claimant established a mistake in a determination of fact with regard to the prior denial of benefits. Employer also asserts that the administrative law judge erred in finding that granting modification would render justice under the Act. Additionally, employer contends that the administrative law judge erred in his determination as to the date for commencement of benefits. Claimant responds, urging affirmance of the administrative law judge's finding of a mistake in a determination of fact and his finding that benefits commence as of May 2005. The Director, Office of Workers' Compensation Programs (the Director), responds, also urging affirmance of the administrative law judge's finding that benefits commence as of May 2005. The Director does not take a position as to whether the administrative law judge properly found a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Employer has replied to each of the briefs filed by claimant and the Director, 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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30

[2] The record indicates that claimant's last coal mine employment was in Virginia. Director's Exhibits 4, 6, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

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 in a miner's claim, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, the administrative law judge is obligated to 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[3] 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). The administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). The administrative law judge 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).

I. Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *see E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240,

[3] In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

243, 22 BLR 2-554, 2-561 (4th Cir. 1999). In determining whether a miner is entitled to the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

In considering whether claimant established a mistake in a determination of fact, the administrative law judge fully set forth Judge Stansell-Gamm's findings on the issue of complicated pneumoconiosis. Pursuant to 20 C.F.R. §718.304(a), the administrative law judge noted that the x-ray evidence before Judge Stansell-Gamm included nine interpretations of four x-rays dated August 16, 2005, December 20, 2005, January 27, 2006, and February 15, 2006. Decision and Order on Modification at 4-7; Director's Exhibits 14, 16, 17, 45, 46, 47, 51. Dr. Rasmussen, a B reader, read the August 16, 2005 x-ray as positive for complicated pneumoconiosis, Category A. Director's Exhibit 14. Dr. Scott, dually qualified as a Board-certified radiologist and B reader, read this x-ray as showing "[n]o large opacities consistent with pneumoconiosis." Director's Exhibit 16. Dr. Alexander, also a dually-qualified radiologist, read this x-ray as revealing a "Category A [two centimeter] large opacity consistent with pneumoconiosis in the right upper zone indicating complicated [pneumoconiosis]." Director's Exhibit 17. Dr. Humphreys, a Board-certified radiologist, read an x-ray dated December 20, 2005, and identified a two and one-half centimeter "conglomerate mass [in the] right upper lobe" suspicious of "coal workers' pneumoconiosis with progressive massive fibrosis."[4] Director's Exhibit 47. Dr. DePonte, a dually-qualified radiologist, read the January 27, 2006 x-ray as positive for complicated pneumoconiosis, Category A, whereas Dr. Scott read the same x-ray as revealing no large opacities consistent with pneumoconiosis. Director's Exhibits 46, 51. However, Dr. Scott did identify a "[four centimeter] mass or focal infiltrate [in the] peripheral [right upper lung], probably granulomatous, cannot rule out cancer." Director's Exhibit 51. Dr. Rasmussen read the February 15, 2006 x-ray as positive for complicated pneumoconiosis, Category A, whereas Dr. Scatarige, a dually-qualified radiologist, read the same x-ray as revealing no large pulmonary opacities consistent with pneumoconiosis. Director's Exhibits 45, 51. Dr. Scatarige indicated, however, that there was a three and one-half centimeter "mass or focal infiltrate, right upper lung," which could be due to tuberculosis or cancer. Director's Exhibit 51. Dr. Scatarige recommended a CT scan to verify the etiology of the mass. *Id.*

[4] Dr. Humphreys also conducted an anteroposterior view of the same x-ray, and identified a "conglomerate mass right upper lobe," suggestive of "coal workers' pneumoconiosis with progressive massive fibrosis." Director's Exhibit 47.

The administrative law judge observed that, in his 2009 Decision and Order on Remand, Judge Stansell-Gamm made the following findings: that the August 16, 2005 and January 27, 2006 x-rays were in equipoise, based on the equal number of positive and negative readings by the dually qualified radiologists; that the December 20, 2005 x-ray was inconclusive for complicated pneumoconiosis because Dr. Humphreys did not use the ILO classification system; and that the February 15, 2006 x-ray was negative for complicated pneumoconiosis, based on the superior radiological qualifications of Dr. Scatarige in comparison to Dr. Rasmussen. Decision and Order on Modification at 6. The administrative law judge concluded that there was no mistake in a determination of fact with regard to Judge Stansell-Gamm's finding that the aforementioned x-ray evidence was insufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a). *Id*. The administrative law judge also concluded that there was no mistake in a determination of fact by Judge Stansell-Gamm in finding that the medical opinions of Drs. Rasmussen and McSharry, diagnosing complicated pneumoconiosis, were based on "inaccurate documentation" and were thus insufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(c).[5] *Id*.

However, the administrative law judge noted that, in support of his request for modification, claimant "submitted additional medical evidence, including CT-scans produced in the course of [claimant's] treatment[,] that predate the 2009 denial." Decision and Order on Modification at 7. The administrative law judge summarized the relevant CT scan evidence as follows:

> Claimant has submitted treatment records from Dr. Joseph Smiddy, from March 22, 2006 to August 2, 2011. . . . Dr. Gert Van Der Westhuizen, [Board-certified radiologist (BCR)], interpreted a CT scan administered on August 21, 2006, to show "innumerable bilateral pulmonary nodules." She also identified an "elongated mass like soft tissue density in the right upper lobe measuring approximately 3.5 x 3.3 x 2.1 [centimeters]. This could represent massive pulmonary fibrosis in a patient known to have coal workers pneumoconiosis. A malignant lesion cannot be excluded with certainty." . . . Dr. Thomas Lepsch, BCR, interpreted a CT scan administered on January 5, 2009, to show "numerous heterogeneously distributed small nodules in both lungs typical of pneumoconiosis. There is a confluent soft tissue attenuation irregularly shaped mass in the upper right lung, typical of progressive massive fibrosis. This has enlarged modestly

[5] The administrative law judge noted that "[n]o biopsy evidence was submitted, and thus there was no evidence of complicated pneumoconiosis under [20 C.F.R.] §718.304(b)." Decision and Order on Modification at 6.

since the study of August 21, 2006. No other change is apparent elsewhere in the lungs."

Id. at 7-8, *quoting* Director's Exhibit 106 at 14, 25-27.

The administrative law judge found that the August 21, 2006 and January 5, 2009 CT scans are "particularly probative," insofar as they "show that [claimant] suffered from complicated pneumoconiosis prior to the 2009 denial."[6] Decision and Order on Modification at 7. Furthermore, the administrative law judge concluded that the medical evidence developed subsequent to the April 2009 denial also supports the conclusion that claimant "did in fact suffer from complicated pneumoconiosis when his claim was denied."[7] *Id*. at 8. Weighing the CT scan evidence "against all other admitted evidence,"

[6] The administrative law judge concluded that the x-rays contained in the same treatment records "are inconclusive regarding the presence of complicated pneumoconiosis[.]" Decision and Order on Modification at 7.

[7] The administrative law judge explained this finding as follows:

> Dr. Deponte, [dually-qualified as a B reader and Board-certified radiologist (B/BCR)] interpreted a March 16, 2010 x-ray to show category "B" large opacities consistent with complicated pneumoconiosis. Dr. Navani, B/BCR, recorded the same interpretation of that x-ray. Dr. Smiddy interpreted a July 13, 2009 CT scan, a January 13, 2010 CT scan, and a January 25, 2010 CT scan to each show large opacities of the lungs consistent with complicated pneumoconiosis. Although at first blush Dr. Wheeler's interpretation of a May 27, 2010 x-ray weighs against my crediting the pre-2009 Decision and Order CT scan interpretations, Dr. Wheeler's own words indicate his belief that a CT scan would provide a better evaluation: "Check clinically and get CT scan for better evaluation." Dr. Wheeler included similar language in his reading of Claimant's March 16, 2010 x-ray: "get CT scan since this is one view of potentially serious lung disease." As Dr. Wheeler's reports undercut his opinion by stating his view that a CT scan would provide a better evaluation, I give Dr. Wheeler's interpretation less weight vis-à-vis opinions based on CT scans. Thus, given the progressive nature of the disease, this post-denial evidence supports Dr. Smiddy's reading of the August 2006 and January 2009 CT scans and shows that [claimant] did in fact suffer from complicated pneumoconiosis when his claim was denied (and that [Administrative Law Judge] Stansell-Gamm therefore made a mistake of fact).

the administrative law judge found that claimant established that he suffered from complicated pneumoconiosis under 20 C.F.R. §718.304. *Id*. at 8, *citing Melnick*, 16 BLR at 1-33-34. The administrative law judge, therefore, concluded that "[Judge] Stansell-Gamm (through no fault of his own) was mistaken in denying benefits in 2009." *Id*. at 7.

Employer asserts that the administrative law judge "erred by finding that the CT scans would establish complicated pneumoconiosis under the criteria of Section 718.304(c) to support an onset dated back to May 2005," the month in which claimant filed his subsequent claim, and demonstrate that there was a mistake in fact in Judge Stansell-Gamm's denial of benefits. Employer's Brief in Support of Petition for Review at 7. Employer specifically argues that the physicians who read the August 21, 2006 and January 5, 2009 CT scans, Drs. Van Der Westhuizen and Lepsch, were equivocal as to whether those scans revealed the existence of complicated pneumoconiosis. Employer's assertions of error are without merit. The administrative law judge acknowledged that Dr. Van Der Westhuizen's interpretation of the August 21, 2006 CT scan "did not rule out a malignant lesion," but found that Dr. Lepsch's interpretation of the subsequent January 5, 2009 CT scan "did implicitly rule out that diagnosis . . . by not mentioning that the mass could be a lesion, by stating that the mass had only enlarged 'modestly' in the intervening two and a half years, and by remarking that no other changes were apparent in the lungs." Decision and Order on Modification at 8, *quoting* Director's Exhibit 106 at 14, 25-27. The administrative law judge did not err in considering the two CT scans together when determining whether they established the existence of complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

Moreover, we reject employer's argument that the administrative law judge erred by not finding Dr. Lepsch's interpretation of the January 5, 2009 CT scan to be equivocal. Dr. Lepsch described an "irregularly shaped mass in the upper right lung, typical of progressive massive fibrosis." Director's Exhibit 106 at 25-27. Contrary to employer's contention, Dr. Lepsch's use of the phrase "typical of" does not necessarily reflect equivocation. *Id*.; *see Perry v. Mynu Coals, Inc*., 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006) (holding that the refusal to express a diagnosis in categorical terms is candor, not equivocation); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999) (explaining that the meaning of an ambiguous word or phrase and the weight to give the testimony of an uncertain witness are questions for the trier-of-fact). The administrative law judge acted within his discretion in determining the weight to accord Dr. Lepsch's interpretation. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Milburn*

Decision and Order on Modification at 8, *quoting* Director's Exhibits 73, 82, 86 at 3-6, 106 at 4-12.

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).

Employer next argues that the administrative law judge erred in finding complicated pneumoconiosis established in the absence of a specific equivalency determination by Drs. Van Der Westhuizen and Lepsch. We disagree. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge must perform an equivalency determination to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61. In *Scarbro*, the court specifically observed that "'[b]ecause prong (A) sets out an entirely objective scientific standard' - i.e., an opacity on an x-ray greater than one centimeter - x-ray evidence provides the benchmark for determining what, under prong (B), is a 'massive lesion' and what, under prong (C), is an equivalent diagnostic result reached by other means." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100, *quoting Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61. In *Blankenship*, the Fourth Circuit remanded the case for the administrative law judge to "find whether [a] 1.3-centimeter lesion would, if x-rayed prior to removal of that portion of [the miner's] lung, have showed as a one-centimeter opacity" on x-ray. *Blankenship*, 177 F.3d at 244, 22 BLR at 2-562.

In this case, the administrative law judge concluded that the CT scan evidence established complicated pneumoconiosis under 20 C.F.R. §718.304(c) because "the interpreting physicians identified a mass that would reasonably be expected to yield a large opacity greater than [one centimeter] in diameter." Decision and Order on Modification at 8. The record reflects that the mass identified on the CT scans was located in claimant's right upper lung, Director's Exhibit 106 at 14, 25-27, consistent with the x-ray evidence reviewed by Judge Stansell-Gamm, wherein each of the radiologists who interpreted claimant's x-rays identified a mass greater than one centimeter in diameter in claimant's right upper lung. Director's Exhibits 14, 16, 17, 45, 46, 47, 51. Specifically, Dr. Alexander identified a two centimeter mass on the August 16, 2005 x-ray, Dr. Scott identified a four centimeter mass on the January 27, 2006 x-ray, and Dr. Scartarige identified a 3.5 centimeter mass on the February 15, 2006 x-ray. Director's Exhibits 17, 51. As the administrative law judge credited the CT scan evidence as establishing that the right upper lung mass is not cancer, but a mass of complicated pneumoconiosis, we hold that the administrative law judge's equivalency finding satisfies the standard set forth in *Scarbro* and *Blankenship*. *See Scarbro*, 220 F.3d at 256, 22 BLR 2-93, 2-101 (explaining that "all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray"); *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding, based on his consideration of all of the relevant evidence, that claimant had complicated pneumoconiosis at the time of the 2009 denial by Judge Stansell-Gamm, and that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Moreover, as it is unchallenged on appeal, we also affirm the administrative law judge's finding that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Modification at 9.

II. 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. Rather, modification 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, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007). The Fourth Circuit has explained that, in addition to futility, the factors relevant to this inquiry include the requesting party's diligence and motive, and the result of weighing the preference for accuracy against the interest in finality in decision making. *Sharpe II*, 692 F. 3d at 327-28, 25 BLR at 2-173-174 (explaining that a request for modification is futile when it is meritorious but no relief is available); *Sharpe I*, 495 F.3d at 128, 24 BLR at 2-68; *see Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 541, 22 BLR 2-429, 2-444 (7th Cir. 2002).

We reject employer's contention that the administrative law judge failed to explain why granting modification would render justice under the Act. Citing *Sharpe I*, 495 F.3d at 128, 24 BLR at 2-68, the administrative law judge rationally found that granting modification would not be futile because "this mistake of fact will require [e]mployer to pay [c]laimant the benefits to which he is entitled, and doing so will thereby render 'justice under the [Act].'" Decision and Order on Modification at 9; *Sharpe II*, 692 F. 3d at 327-28, 25 BLR at 2-173-174. In addition, the administrative law judge specifically rejected employer's argument, raised at the January 2, 2012 hearing, that claimant acted with improper motive when filing the second request for modification on February 25, 2011, and that the second request for modification should be dismissed. Decision and Order on Modification at 3; *see* Hearing Transcript at 10-12. 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, it 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).

III. Date for the Commencement of Benefits

Employer argues that the administrative law judge erred in awarding benefits as of May 2005, the month in which the subsequent claim was filed. We disagree. In a miner's claim, benefits are payable beginning with the month of onset of disability due to pneumoconiosis. 20 C.F.R. §725.503; *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-69 (1990). If a claim is awarded pursuant to a request for modification based on a mistake in a determination of fact, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, or the month of onset of complicated pneumoconiosis. *See* 20 C.F.R. §725.503(d)(1); *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). However, if the evidence does not establish the month of onset, benefits are payable from the month in which the claim was filed. *See* 20 C.F.R. §725.503(b), (d)(1).

In this case, the administrative law judge awarded benefits based on his finding that claimant demonstrated a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge considered the relevant evidence, and specifically found that the record did not establish the onset date of claimant's complicated pneumoconiosis. Decision and Order on Modification at 10. Therefore, contrary to employer's assertion, the administrative law judge correctly awarded benefits beginning in the month in which the subsequent claim was filed. *See Williams*, 13 BLR at 1-28. Therefore, we affirm his finding that benefits commence as of May 2005.

Accordingly, the administrative law judge's Decision and Order Granting Modification of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge