**U.S. Department of Labor**

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

BRB No. 19-0006 BLA

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| DANNY SLONE<br>(o/b/o the Estate of RAYMOND SLONE)<br><br>Claimant-Respondent<br><br>v.<br><br>ISLAND CREEK KENTUCKY MINING COMPANY, self-insured through ISLAND CREEK COAL COMPANY, c/o HEALTHSMART CCS<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | DATE ISSUED: 11/25/2019<br><br><br><br><br><br>DECISION and ORDER |

Appeal of the Decision and Order Granting Claimant's Request for Modification and Awarding Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Claimant's[1] Request for Modification and Awarding Benefits (2017-BLA-05325) of Administrative Law Judge Steven D. Bell rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's second request for modification of a subsequent claim filed on October 20, 2005.[2]

After the miner filed this subsequent claim, Administrative Law Judge Robert B. Rae issued a Decision and Order - Denying Benefits on September 2, 2009, because the new evidence did not establish any element of entitlement and, thus, did not establish a change in an applicable condition of entitlement.[3] *See* 20 C.F.R. §725.309; Director's Exhibit 69.

The miner requested modification on January 15, 2010, and submitted new medical evidence in support of his request. Director's Exhibit 72. Following the miner's death on May 5, 2010, a hearing was requested and the case was transferred to the Office of

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[1] Claimant is the son of the miner, who died on May 5, 2010. Director's Exhibit 101. He is pursuing the claim on behalf of the miner's estate. Director's Exhibit 101-5.

[2] The miner filed two prior claims. Director's Exhibits 1, 2. The district director denied his most recent prior claim, filed on June 23, 1994, by reason of abandonment. Director's Exhibit 2.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the miner's 1994 claim was denied by reason of abandonment, the miner was considered to have failed to establish any element of entitlement. 20 C.F.R. §725.409(c). Consequently, to obtain review of the merits of his claim, the miner had to establish one element of entitlement.

Administrative Law Judges. Director's Exhibits 91, 101. Administrative Law Judge Larry S. Merck found claimant established total disability, a change in applicable condition of entitlement, and invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012); Director's Exhibit 123. He further found, however, employer rebutted the presumption by establishing pneumoconiosis played no role in the miner's respiratory impairment and denied benefits. 20 C.F.R. §718.305(d)(1)(ii); Director's Exhibit 123.

Claimant initially appealed the decision, but then filed a request for modification on the miner's behalf on August 12, 2015. The Board therefore dismissed the appeal and remanded the case to the district director for modification proceedings. *Slone v. Island Creek Kentucky Mining*, BRB No. 15-0452 BLA (Jan. 29, 2016) (Order) (unpub.); Director's Exhibits 124-126, 133.

Receiving no new evidence, the district director transferred the case to the Office of Administrative Law Judges. The case was subsequently assigned to Administrative Law Judge Steven D. Bell (hereinafter, the administrative law judge), who found employer failed to rebut the Section 411(c)(4) presumption. Director's Exhibits 136, 139. Consequently, he found claimant was entitled to modification. He further determined granting modification would render justice under the Act and awarded benefits commencing August 2015, the month claimant filed the second request for modification.[5]

On appeal, employer argues the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in determining that granting modification renders justice under the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has responded and takes no position on the merits of employer's arguments, but urges the Board to remand the case for a proper determination of the onset date for benefits. In a reply brief, employer reiterates its contentions and urges

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[4] Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[5] The administrative law judge considered the evidence from the miner's prior claims filed in 1981 and 1994 and permissibly found it merited less weight due to its age. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); Decision and Order at 6.

the Board not to disturb the commencement date as neither claimant nor the Director raised the issue in a cross-appeal.[6]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision and order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions since the denial of benefits or a mistake in a determination of fact.[8] 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected, including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

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[6] Although employer argues "[the administrative law judge's] findings and reasoning are insufficient to support the finding of total disability," it does not allege any specific error in the administrative law judge's consideration of this issue or the conclusions he reached. Employer's Brief in Support of Petition for Review at 15. Consequently, we affirm, as unchallenged, the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment; a totally disabling respiratory impairment; invocation of the Section 411(c)(4) presumption; and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 11.

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

[8] Because the miner was no longer living when Administrative Law Judge Larry S. Merck denied the 2005 subsequent claim on July 17, 2015, claimant could not establish modification based on a change in the miner's condition since that denial. 20 C.F.R. §725.310(a); Director's Exhibit 123.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither clinical nor legal pneumoconiosis[9] or "no part of his respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found employer did not rebut by either method.

We affirm the administrative law judge's finding employer failed to disprove the existence of clinical pneumoconiosis as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16. Employer's failure to disprove clinical pneumoconiosis precludes finding the miner did not have pneumoconiosis on rebuttal. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention the administrative law judge erred in finding it failed to disprove the existence of legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

To disprove legal pneumoconiosis, employer must establish the miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Minich*, 25 BLR at 1-155 n.8. The administrative law judge considered the opinions of Drs. Jarboe, Tomashefski, Caffrey, Repsher, and Spagnolo.[10] Decision and Order at 17-19. Dr. Jarboe diagnosed a disabling obstructive impairment due to cigarette smoking, asthma, and chronic congestive heart failure. Director's Exhibits 58-37, 58-64, 113-5, 117-4. Dr. Tomashefski reviewed autopsy slides and diagnosed mild to moderate centrilobular

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[9] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[10] The administrative law judge also considered the opinions of Drs. Mettu, Baker, and Habre and correctly noted that because they each diagnosed legal pneumoconiosis, their opinions cannot assist employer in rebutting the presumption. Decision and Order at 19.

emphysema due to smoking. Director's Exhibits 112-4, 117-52. Dr. Caffrey reviewed autopsy slides and opined the amount of coal dust seen in the lung tissue would not cause any discernible amount of pulmonary disability. Director's Exhibit 101-28. Drs. Repsher and Spagnolo both opined the miner's impairment was due solely to his chronic heart failure and was not related to his coal dust exposure. Director's Exhibits 23, 58-80, 114-5, 118-4. The administrative law judge found their opinions unpersuasive and insufficiently reasoned to support employer's burden of proof. Decision and Order at 19.

We reject employer's contention the administrative law judge erred in discrediting the opinions of Drs. Jarboe and Tomashefski.[11] Employer's Brief in Support of Petition for Review at 16-19. Dr. Jarboe eliminated coal mine dust exposure as a source of the miner's obstructive pulmonary disease, in part, because he found a reduction in the miner's FEV1/FVC ratio to be incompatible with obstruction due to coal mine dust exposure.[12] The administrative law judge permissibly discredited this aspect of Dr. Jarboe's opinion because his reasoning conflicts with the Department of Labor's recognition that coal mine dust exposure can cause clinically significant obstructive disease as measured by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 17-18.

Dr. Tomashefski[13] opined that based on his review of the autopsy slides, the most probable cause of the miner's centrilobular emphysema is tobacco smoke exposure, which he noted is "the most important cause of centrilobular emphysema in the general population." Director's Exhibit 112-5. He explained the miner's emphysema was not

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[11] Employer mentions the opinions of Drs. Caffrey, Repsher, and Spagnolo in its brief but raises no specific challenges to the administrative law judge's discrediting of their opinions on the issue of legal pneumoconiosis. Consequently, those findings are affirmed. *See Sarf,* 10 BLR at 1-120-21; *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack*, 6 BLR at 1-711; Decision and Order at 17, 19.

[12] Dr. Jarboe provided reports dated May 15, 2006 and June 9, 2011, and testified on February 15, 2007 and April 3, 2014. Director's Exhibits 58-37, 58-64, 113-5, 117-4. He attributed the miner's pulmonary abnormality to smoking and not coal mine dust exposure, in part, because the miner had a preserved forced vital capacity (FVC) with a disproportionately reduced FEV1. Director's Exhibit 113-10. Dr. Jarboe reasoned, "[a] disproportionate reduction of FEV1 compared to FVC is the hallmark of the functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation." *Id.*

[13] Dr. Tomashefski provided a pathology report on September 7, 2012, and deposition testimony on April 24, 2014. Director's Exhibits 112-4, 117-52.

caused by coal mine dust because "you should see emphysematous lesions right around the area of coal dust deposits, including extending out from the coal macules." Director's Exhibit 117-61-62. The administrative law judge permissibly found Dr. Tomashefski's opinion did not preclude the possibility that coal mine dust aggravated or contributed to the miner's obstructive impairment and therefore was insufficient to support employer's burden. *See Tenn. Consol. Coal Co. v. Crisp,* 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 19.

As the administrative law judge permissibly discredited the medical opinions supportive of a determination the miner did not have legal pneumoconiosis, we affirm his finding employer failed to rebut the Section 411(c)(4) presumption by establishing the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer established rebuttal by proving "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 20-21. The administrative law judge rationally found the same reasons that undercut the opinions of Drs. Jarboe and Tomashefski on the issue of legal pneumoconiosis also undercut their opinions that the miner's disabling respiratory impairment is not caused by the disease. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 40.

Employer raises no causation argument not previously addressed with regard to the administrative law judge's finding of legal pneumoconiosis. We therefore affirm the administrative law judge's determination employer failed to rebut disability causation. *See* 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the administrative law judge's finding employer failed to rebut the Section 411(c)(4) presumption.

**Justice under the Act**

Employer argues the administrative law judge erred in finding that granting modification renders justice under the Act because claimant requested modification for the purpose of filing new evidence, which was never submitted. Employer's Brief in Support of Petition for Review at 10-12. Employer further alleges the administrative law judge should have given greater weight to the factors of motive, diligence, and futility than to accuracy. Employer's Brief in Support of Petition for Review at 12-13. We disagree.

Assessing a request for modification is committed to the broad discretion of the administrative law judge. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The party opposing modification, therefore, bears the burden of establishing the

administrative law judge committed an abuse of discretion. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). Employer has not met its burden in this case.

Regarding the scope of claimant's modification request, there are no formal requirements for filing a request for modification under 20 C.F.R. §725.310. Indeed, "the standard for what constitutes a modification request is very low." *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 953 (6th Cir. 1999). Such a request need only be "any written notice by or on behalf of the claimant within one year evidencing an intention to make a [request for modification]. . . ." *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545, 547 (5th Cir. 1974); *see also Stanley*, 194 F.3d at 497 ("Almost any sort of correspondence from the claimant can constitute a request for modification of a denial, as long as it is timely and expresses dissatisfaction with a purportedly erroneous denial."). In addition, the party seeking modification need not specify the precise basis for modification or submit new evidence. *See O'Keeffe*, 404 U.S. at 256 (An 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."); *Worrell*, 27 F.3d at 230. Therefore, the administrative law judge acted within his discretion in treating the filing from claimant's counsel as a request for modification based on a mistake in a determination of fact, addressing the merits of the request and considering whether granting such modification renders justice under the Act.[14] 20 C.F.R. §725.310; *see O'Keeffe,* 404 U.S. at 256.

We further reject employer's assertion the administrative law judge erred in failing to make a "threshold" determination of whether granting modification would render justice under the Act before considering whether the prior denial contained a mistake in a determination of fact. Employer's Brief in Support of Petition for Review at 12-13, *citing Sharpe v. Director, OWCP (Sharpe I)*, 495 F.3d 125, 128, 24 BLR 2-56, 2-68 (4th Cir. 2007) and *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317 (4th Cir. 2012), *cert. denied*, 570 U.S. 917 (2013). This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has not adopted *Sharpe*. Moreover, while *Sharpe I* held that an administrative law judge must consider the question before ultimately granting modification, nothing in *Sharpe I* requires a threshold determination. While an administrative law judge might exercise his discretion to make a threshold justice under the Act determination, for example, in cases of obvious bad faith, it does not follow that a threshold determination is required in cases where there is no indication of an improper motive. In such a case, the administrative law judge ordinarily should first consider the merits. If there is no basis to grant modification, there is no reason

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[14] At the hearing, claimant's counsel specifically alleged a mistake in a determination of fact. Hearing Transcript at 8-9.

to determine whether relief would render justice under the Act. *See O'Keeffe*, 404 U.S. at 255.

The administrative law judge also properly applied the factors relevant to determining whether granting modification renders justice under the Act.[15] Decision and Order at 21-23. Contrary to employer's argument, he permissibly determined that because the evidence established the miner's entitlement to benefits, "the need for accuracy weighs in favor of granting [c]laimant's request for modification." *Id*. at 22; *see Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547 (7th Cir. 2002). He also reasonably found claimant demonstrated adequate diligence by requesting modification within the one-year time limit established in the regulations. 20 C.F.R. §725.310(a); *Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-20, 25 (1996); Decision and Order at 22. With respect to claimant's motive, the administrative law judge permissibly concluded "[e]mployer has offered no evidence that [c]laimant's motivation to request modification is anything other than to obtain benefits to which he is entitled." Decision and Order at 23; *see Worrell*, 27 F.3d at 230; *see also Sharpe II*, 692 F.3d at 330; *Hilliard*, 292 F.3d at 541.

Because employer has not established an abuse of discretion, we affirm the administrative law judge's determination that granting modification renders justice under the Act. *See Worrell*, 27 F.3d at 230; *Branham*, 20 BLR at 1-34; Decision and Order at 23. Consequently, we further affirm the award of benefits.

**Commencement Date for Benefits**

Because the administrative law judge granted modification based on the correction of a mistake in a determination of fact, the miner was entitled to benefits from the month he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the month he filed his claim, unless credited evidence establishes he was not disabled

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[15] In summarizing the procedural history of this case, the administrative law judge correctly noted claimant submitted no new evidence with the most recent request for modification. Decision and Order at 5. When determining whether granting modification would render justice under the Act, however, he indicated that the quality of the new evidence is a relevant factor and stated, "I find the newly-submitted evidence persuasive in establishing [c]laimant's disability is due to pneumoconiosis." *Id*. at 22. Although employer asserts this finding is erroneous, the error is harmless in light of the administrative law judge's appropriate consideration of the factors that are actually applicable in this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief in Support of Petition for Review at 8-9.

at any subsequent time. 20 C.F.R. §725.503(b), (d)(1); *see Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

The administrative law judge found the record does not establish when the miner first became disabled and determined benefits should commence from August 2015, the month and year in which claimant filed the request for modification at issue in this case. Decision and Order at 23-24.

The Director argues the commencement date of August 2015 is "demonstrably incorrect" as the miner is entitled to benefits only up to the month before his death on May 5, 2010, which therefore is April 2010. Director's Brief in Support of Petition for Review at 3, *citing* 20 C.F.R. §725.203(b)(1).

Employer contends the failure by either claimant or the Director to raise this issue in a cross-appeal, instead of a response brief, precludes the Board from addressing it. Citing *Hansen v. Director, OWCP*, 984 F.2d 364, 367 (10th Cir. 1993),[16] employer maintains changing the onset date would enlarge claimant's rights and, therefore, a cross-appeal was required. Reply Brief at 1-4. We disagree.

The Sixth Circuit held in *Consolidation Coal Co. v. Maynes*, 739 F.3d 323 (6th Cir. 2014), "[t]he Board . . . has general discretion to consider issues not raised by the parties where doing so is 'necessary to reach the correct result.'" *Maynes*, 739 F.3d at 328, *quoting Milliken*, 200 F.3d at 955. Thus, the Court "affirm[ed] the Board's ruling on the appropriate commencement date for . . . benefits" even though the Director raised the issue in a response brief, not a cross-appeal. *Id.*

In this case, the commencement date of August 2015 is incorrect on its face as it post-dates the miner's death and if the date is not changed, no benefits can be paid despite claimant's success on the merits. 20 C.F.R. §725.203(b). Although the Board has authority to modify the commencement date, 20 C.F.R. §725.503(b), (d)(1); *see Maynes*, 739 F.3d at 328, doing so is not appropriate under these circumstances. The administrative law judge found "there is no valid evidence that [the miner] was not disabled at any time after Dr. Baker examined him in 2009," which does not address whether there is valid evidence establishing the miner was not disabled at a point in time between the filing date of the claim in October 2005 and Dr. Baker's examination in December 2009. Decision and

[16] The court in *Hansen* explained, "the rules governing cross appeals to the Board closely track the rules governing civil cross appeals," which provide "a party may not attack a decision with a view toward enlarging his or her own rights or lessening the rights of an adversary absent a cross appeal." *Hansen v. Director, OWCP*, 984 F.2d 364, 367 (10th Cir. 1993), *citing Dalle-Tezze v. Director, OWCP*, 814 F.2d 129 (3d Cir. 1987).

Order at 23; 20 C.F.R. §725.503(d)(1); Director's Exhibit 72. Resolving this issue requires weighing the evidence, which the Board is not empowered to do. *See Rowe*, 710 F.2d at 255. We therefore vacate the administrative law judge's determination that benefits commence as of August 2015 and remand the case for him to reconsider the commencement date in accordance with 20 C.F.R. §§725.203(b)(1), 725.503(d).

Accordingly, the administrative law judge's Decision and Order Granting Claimant's Request for Modification and Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge