U.S. Department of Labor

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

BRB Nos. 20-0559 BLA
and 20-0565 BLA

ELIZA BENTLEY (Widow of LARRY F. BENTLEY) Claimant-Respondent v. PROSPECT COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 4/29/2022 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification and the Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Awarding Benefits on Modification (2019-BLA-05877) and his Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act (2019-BLA-05240) rendered on claims filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a second modification request of an initial miner's claim filed on November 29, 2005, and Claimant's survivor's claim filed on July 19, 2006.[2]

In his March 21, 2011 Decision and Order – Denial of Black Lung Disability Claim & Denial of Survivor Claim, ALJ Richard T. Stansell-Gamm credited the Miner with 11.32 years of coal mine employment and thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Further finding Clamant did not establish the Miner had complicated pneumoconiosis, ALJ Stansell-Gamm found Claimant could not invoke the irrebuttable presumption that the Miner's total disability and death were due to

[1] We refer to the ALJ's decision in the miner's claim as "Decision and Order," and his decision in the survivor's claim as "SC Decision and Order."

[2] Claimant is the widow of the Miner, who died on June 1, 2006, while his claim was pending before the district director. Director's Exhibit 25. She is pursuing his claim as well as her own survivor's claim. Director's Exhibit 36.

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

pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2018). Considering entitlement under 20 C.F.R. Part 718, he found the Miner had clinical pneumoconiosis and was totally disabled, but that Claimant did not establish the Miner's disability or death were due to pneumoconiosis and thus denied benefits in both claims. 20 C.F.R. §§718.202(a), 718.204(c), 718.205(b).

On March 1, 2012, Claimant requested modification, alleging a mistake in a determination of fact; she did not submit additional medical evidence. Director's Exhibit 126. On February 21, 2017, ALJ Monica C. Markley found no mistake of fact in ALJ Stansell-Gamm's findings in either the miner's or survivor's claim. Accordingly, she denied modification. Director's Exhibit 143.

On February 9, 2018, Claimant requested modification of ALJ Markley's denial and again alleged a mistake in fact; she did not submit additional evidence. Director's Exhibit 144. In his August 26, 2020 Decisions and Orders that are the subject of this appeal, ALJ Steven D. Bell (the ALJ) found Claimant established two mistakes of fact in ALJ Markley's prior denial as he found the Miner had 16.47 years of coal mine employment and complicated pneumoconiosis. Thus, the ALJ determined Claimant invoked the Section 411(c)(3) irrebuttable presumption and established the Miner's entitlement to benefits. In the alternative, the ALJ also found Claimant invoked the Section 411(c)(4) presumption and Employer did not rebut it. Further finding that granting modification renders justice under the Act, the ALJ awarded benefits in the miner's claim and concluded Claimant is derivatively entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4] Decision and Order at 36; SC Decision and Order at 4.

On appeal, Employer argues the ALJ lacked authority to preside over the case because he has not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2, and that the removal provisions applicable to the ALJ render his appointment unconstitutional.[5] On the merits, Employer contends Claimant's

[4] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall

second request for modification is untimely; it also asserts the ALJ erred in finding a mistake in a determination of fact regarding the length of the Miner's coal mine employment and in finding the Miner had complicated pneumoconiosis. Employer's Brief at 31-34. Employer further contends the ALJ erred in finding the Miner was totally disabled, that Claimant invoked the rebuttable presumption at Section 411(c)(4), and that Employer did not rebut the presumption.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Benefits Review Board to reject Employer's challenge to the constitutionality of the ALJ's appointment as well as its assertions of legal error concerning the ALJ's length of coal mine employment calculation. Employer separately replied to Claimant's and the Director's responses.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Appointments Clause

Employer argues the ALJ, as an "inferior officer," was not properly appointed and the Secretary's ratification of his appointment on December 21, 2017,[7] as well as the

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> be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 35.

[7] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the

August 31, 2018 Executive Order providing new procedures for ALJs' appointments, was an inadequate remedy.[8] Employer's Brief at 21-25; Employer's Reply to Director at 1-4. Employer thus urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).

We agree with the Director's position that Employer has forfeited these arguments. Director's Brief at 5-6. Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted).

Although *Lucia* was decided over one year before the ALJ's hearing in this matter, Employer did not raise any challenge to his authority to decide the case while the matter was before him; instead, it raises this argument for the first time on appeal.[9] Had Employer timely raised its Appointments Clause challenge to the ALJ, he could have considered the issue and, if appropriate, provided the relief Employer is requesting. Having failed to do so, Employer forfeited its argument. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (employer forfeited its Appointments Clause challenge by failing to raise it to the ALJ); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019).

Furthermore, Employer has not identified any basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Kiyuna*, 53 BRBS at 11 (Appointments Clause argument is an "as-applied" challenge that the ALJ can address and thus can be waived or forfeited); *see also* 20 C.F.R. §802.301(a) (Board cannot engage in "unrestricted

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> Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Bell.

[8] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to DOL ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[9] The ALJ issued a notice of hearing on July 10, 2019; he held the hearing on December 3, 2019.

review of a case" but must limit its review to "the findings of fact and conclusions of law on which the decision or order appealed from was based."). We therefore see no reason to entertain its forfeited arguments. *See Zdanok*, 370 U.S. at 535; *Davis*, 937 F.3d at 591-92; *Powell*, 53 BRBS at 15; *Kiyuna*, 53 BRBS at 11.

Removal Provisions

Employer also asserts the removal protections afforded ALJs in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 26-29; Employer's Reply to the Director at 4-6. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 26-19; Employer's Reply to the Director at 4-6.

The removal argument is subject to similar issue preservation requirements, however, and Employer likewise forfeited it by not raising it before the ALJ. *See, e.g., Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments concerning §7521 removal provisions are subject to issue exhaustion, and because petitioners "did not raise the dual for-cause removal provision before the agency" the court was "powerless to excuse the forfeiture"). Regardless, Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1136 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an

"independent agency led by a single Director and vested with significant executive power."[10] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1136.

Claimant's Second Modification Request

The sole basis on which an ALJ may grant modification in a deceased miner's claim or a survivor's claim is that a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). An ALJ has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). The party opposing modification, therefore, bears the burden of establishing

[10] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

the ALJ 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.

Timeliness

Employer asserts Claimant's second request for modification is untimely because it was not filed within one year of ALJ Stansell-Gamm's 2011 Decision and Order. Employer's Brief at 31-32. Employer contends that while 20 C.F.R. §725.310 allows for modification within one year of the denial of a claim, it does so only with regard to the "first final or formal rejection [of a claim]," and it does not allow for modification of a decision on modification. *Id*. at 32.

The plain language of 20 C.F.R. §725.310 allows for the filing of a modification request, based on a change in conditions or a mistake in a determination of fact, at any time before one year after the denial of a claim. 20 C.F.R. §725.310(a). Moreover, a second petition for modification may be filed within one year of the denial of an initial petition for modification. *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 498-500 (4th Cir. 1999); *see also Garcia v. Director, OWCP*, 12 BLR 1-24, 1-26 (1988). As Claimant filed her second request for modification on February 9, 2018, less than one year after ALJ Markley issued her February 21, 2017 decision denying Claimant's initial modification request, the ALJ correctly found Claimant timely filed her second request. Decision and Order at 36.

Miner's Claim - Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act, a claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any of them precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner's totally disabling respiratory or pulmonary impairment was due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, 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. In determining whether a claimant has invoked the irrebuttable presumption, the ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. 30 U.S.C. §923(b); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-ray, computed tomography scan, and medical opinion evidence does not establish complicated pneumoconiosis and the biopsy report does not address the presence or absence of the disease; however, he determined the autopsy evidence establishes the Miner had massive lesions in his lung. Decision and Order at 15-23. Weighing all the evidence together, the ALJ determined "the autopsy evidence is the most persuasive evidence of complicated pneumoconiosis" and therefore concluded Claimant invoked the irrebuttable presumption. *Id*. at 23. Employer challenges the ALJ's weighing of the autopsy evidence, his rejection of Dr. Jarboe's opinion, and his overall conclusion the Miner had complicated pneumoconiosis. Employer's Brief at 46-48; Employer's Reply to Claimant at 10.

Autopsy Evidence

The United States Court of Appeals for the Sixth Circuit has held that autopsy evidence can establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) if it shows massive lesions or, alternatively, if a physician opines there are lesions on autopsy that, if seen on an x-ray, would appear as greater than one centimeter in diameter. *Gray*, 176 F.3d at 390. A diagnosis of progressive massive fibrosis is equivalent to a diagnosis of "massive lesions" resulting from pneumoconiosis under 20 C.F.R. §718.304(b). *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) ("Complicated pneumoconiosis . . . involves progressive massive fibrosis as a complex reaction to dust and other factors . . . ."); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365 n.4 (4th Cir. 2006) (autopsy report diagnosing "[c]oal worker type pneumoconiosis, complicated type, with progressive massive fibrosis" sufficient to invoke the presumption pursuant to 20 C.F.R. §718.304(b)).

The ALJ considered the autopsy reports of four Board-certified pathologists. He credited the opinions of Drs. Dennis and Perper that the Miner had progressive massive fibrosis over the contrary opinions of Drs. Oesterling and Crouch.[11] Decision and Order at

[11] The ALJ found Dr. Naeye's autopsy report exceeded the evidentiary limitations and did not consider it. Decision and Order at 5; Director's Exhibit 110 at 12-13. We

18-21; Director's Exhibits 97 at 18, 31; 110 at 323, 332, 470.

Employer argues the ALJ did not equally scrutinize the autopsy opinions, failed to give a valid reason for discounting the opinions of Drs. Oesterling and Crouch, and improperly shifted the burden of proof. Employer's Brief at 45-48. We disagree.

Dr. Dennis performed the Miner's autopsy, which included a gross examination of the lungs and a microscopic review of twenty tissue slides. He diagnosed, among other conditions, a malignant tumor with necrosis, moderate to severe progressive massive fibrosis "with dense fibrosis," "macular development greater than 2 cms in diameter," and "[s]ilica particle deposition . . . in all clusters of black granular pigment and anthracotic pigment." Director's Exhibit 110 at 470.

Dr. Perper reviewed Dr. Dennis's autopsy report and the microscopic slides. Director's Exhibit 97 at 3-4. He identified metastatic pulmonary cancer and micronodular and macronodular coal workers' pneumoconiosis with a "macronodule exceeding 1.0 cm and therefore consistent with complicated coal workers[']s pneumoconiosis (Progressive Massive Fibrosis)."[12] *Id.* at 18, 31. He noted, "The pathological examination is recognized to be the golden standard for diagnosing coal workers' pneumoconiosis . . . ." *Id.* at 31. Addressing his identification of a macrodule of pneumoconiosis measuring "1.3 cm x 0.4 cm," Dr. Perper stated, "In the past pathologists [have] arbitrarily chose[n] a 2 cm or larger anthraco-fibrotic or anthraco-fibro-hyaline mass in order to diagnose complicated coal workers' pneumoconiosis . . . ." *Id.* at 32. He disagreed with that diagnostic method as medical studies show the method is "arbitrary" and that "an actual pathological lesion" measuring one centimeter or larger is sufficient to diagnose the disease under "current criteria." *Id*. He further explained "a pathological lesion" measuring one centimeter is "equivalent to a radiological lesion of the same size." *Id*.

Dr. Oesterling also reviewed the autopsy slides and Dr. Dennis's autopsy report. He diagnosed "minimal macular" and "primarily pleural based" coal workers' pneumoconiosis. Director's Exhibit 110 at 332. Dr. Oesterling opined the Miner did not

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affirm this finding as it is unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[12] Dr. Perper specified slide J revealed a "thick band of fibro-anthracosis" that contained "multiple birefringent silica and silicate crystals." Director's Exhibit 97 at 17. He characterized this "band" as both a "solid area[] of pneumoconiosis" and a "macronodule," further noting it "measures 1.3 cm x 0.4 cm and is surrounded by clusters of carcinoma cells." *Id*. at 17-18, 32.

have complicated pneumoconiosis and disagreed with Dr. Dennis's diagnosis of progressive massive fibrosis, stating:

> The condition, as it is defined by the original classification system and by all current authors, is a process in which micronodules begin to coalesce into larger aggregates of fibrosis, micronodules and at times showing necrosis, but the masses should attain a 2 cm. dimension. Obviously, these macules do not in any way approach that dimension since the greatest of the dimensions is on the pleural surface and it extends for no more than several m[ilimeters] into the subpleural tissues. This is not progressive massive fibrosis. Thus I can in no way accept Dr. Dennis' impression that this gentleman did have this entity.

Id.

Dr. Crouch also reviewed the autopsy slides. She diagnosed, among other things, adenocarcinoma and "mild simple coal workers' pneumoconiosis." Director's Exhibit 110 at 323. She further commented:

> The lungs show histological changes consistent with mild simple coal workers' pneumoconiosis characterized by [coal dust] macules and focal emphysema [together with the coal dust]. No coal dust micronodules, coal dust nodules, silicotic nodules, or larger lesions consistent with complicated pneumoconiosis are observed.

Id. at 323; *see also* Director's Exhibit 111 at 77. At her subsequent deposition, Dr. Crouch testified she "did not see anything at all in [her review of the autopsy slides] that had the appearance of progressive massive fibrosis. Director's Exhibit 111 at 79. When asked to explain the difference between her findings and those of Dr. Dennis, Dr. Crouch stated the Miner's cancer "complicates this case" because:

> lung cancer makes its own scar tissue, and as it overruns the lung, it traps dust that's already there into that scar, so it's a common mistake for people that are maybe not quite so familiar with looking at it to infer that this is a preexisting scar or that there's fibrosis of some other cause when it's really scarring related to the tumor or sometimes secondary to the treatment of the tumor. So I didn't see anything at all in here that had the appearance of progressive massive fibrosis, and I don't know why that diagnosis was made. I can only speculate that the prosector was impressed by the large amount of coal dust present, but just simply having lots of coal dust doesn't make disease.

Id. at 78-79.

The ALJ considered the conflict in the autopsy opinions regarding the diagnostic criteria for identifying pathological complicated pneumoconiosis or progressive massive fibrosis. Contrary to Employer's contention, the ALJ permissibly found Dr. Oesterling's opinion unpersuasive because he required the masses or nodules to measure at least two centimeters in diameter – a standard that is not set forth in the regulations.[13] *See Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 986 (11th Cir. 2007); *see also* 65 Fed. Reg. 79,920, 79,936 (Dec. 20, 2000) (declining to adopt diagnostic criteria requiring a lesion of 2.0 [centimeters] for a diagnosis of complicated pneumoconiosis because "the record does not substantiate the existence of a consensus among physicians for making diagnoses using these criteria"). In contrast, the ALJ permissibly found Dr. Dennis's opinion supports a finding of complicated pneumoconiosis because he reported the Miner had *massive lesions* with macular development greater than 1.5 to 2.0 centimeters in diameter with dense fibrosis and silica particle depositions with anthracotic pigment. Decision and Order at 18; Director's Exhibit 110 at 470. Moreover, the ALJ rationally found Dr. Perper's opinion supports a finding of complicated pneumoconiosis by virtue of his specific equivalency determination. Dr. Perper identified "a fibroanthracotic area of pneumoconiosis exceeding one centimeter in diameter" and explained a pathological lesion of this size is "sufficient to qualify for a nodule of complicated pneumoconiosis and [is] equivalent with a radiological lesion of the same size." Decision and Order at 19; Director's Exhibit 97 at 32.

We also see no error in the ALJ's rejection of Dr. Crouch's opinion. The ALJ observed correctly that "unlike Dr. Perper," Dr. Crouch "did not provide her interpretation of each slide or provide measurements for the nodules she did observe." Decision and

[13] Employer asserts the Sixth Circuit has adopted diagnostic criteria requiring a pathologic lesion of at least two centimeters in order to support a finding of massive lesions *or* a finding that a lesion would appear as greater than one centimeter in diameter if viewed on x-ray. Employer's Brief at 46 (citing *Gray*, 176 F.3d at 390). Contrary to Employer's characterization, the Sixth Circuit in *Gray* did not set forth any specific diagnostic criteria other than what is described by the regulation for establishing complicated pneumoconiosis at 20 C.F.R §718.304(b). *Id.* at 388. The court merely stated, under the facts of that case, that the ALJ permissibly credited a physician's opinion that an autopsy lesion of 1.5 centimeters was not a massive lesion and would not appear as a greater than one-centimeter opacity on x-ray. *Id.* In this case, the ALJ's finding of complicated pneumoconiosis is consistent with *Gray* because Dr. Perper specifically made the equivalency determination set forth in the regulations and described by the court as one of the two available methods for establishing complicated pneumoconiosis at 20 C.F.R. §718.304(b).

Order at 20; Director's Exhibit 110 at 323-24. Thus, the ALJ permissibly questioned whether Dr. Crouch in fact saw any opacities comparable in size to the ones identified by Drs. Dennis and Perper. We therefore affirm the ALJ's finding that Dr. Crouch's opinion is not adequately explained. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002) (determination as to whether a physician's report is sufficiently reasoned and documented is a credibility matter for the ALJ to decide).

Because it is supported by substantial evidence, we affirm the ALJ's conclusion that the autopsy evidence supports a finding that the Miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Decision and Order at 19; *see Usery*, 428 U.S. at 7; *Gray*, 176 F.3d at 390; *Napier*, 301 F.3d at 712-14; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Medical Opinions and Evidence as a Whole

The ALJ considered medical opinions from Drs. Forehand, Rosenberg, Jarboe, and Naeye, each of whom opined the Miner did not have complicated pneumoconiosis. Director's Exhibits 11 at 18; 110 at 12, 46, 319; 111 at 19-21. Thus, the ALJ found Claimant could not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c). Weighing the evidence as a whole, the ALJ concluded the contrary medical opinions do not undermine the probative value of the positive autopsy evidence.

Employer generally asserts the ALJ failed to accord the negative medical opinions sufficient weight. However, the ALJ rationally gave Dr. Forehand's opinion "less probative weight" because he relied upon his 2005 examination of the Miner and "did not have the benefit of reviewing Miner's autopsy reports." Decision and Order at 21; *see Napier*, 301 F.3d at 712-14; Director's Exhibit 11 at 18. The ALJ also acted within his discretion in rejecting Dr. Rosenberg's opinion, as he found the physician's conclusion that the Miner's massive lesions "probably were related to widespread metastatic disease" to be speculative. Decision and Order at 21 (quoting Director's Exhibit 113 at 2); *see Napier*, 301 F.3d at 712-14. We also affirm as unchallenged the ALJ's finding that Dr. Rosenberg failed to adequately explain why a diagnosis of lung cancer necessarily excluded a concurrent diagnosis of progressive massive fibrosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 21; Director's Exhibits 110 at 275-78, 325-26; 113 at 2.

The ALJ found Dr. Jarboe's opinion not well-reasoned because it was based on Dr. Oesterling's autopsy report, which the ALJ found merited no weight, and Dr. Naeye's inadmissible autopsy report. Decision and Order at 22; Director's Exhibit 111 at 19, 30-33. In alleging the ALJ erred in discounting Dr. Jarboe's opinion, Employer merely reiterates its contentions that the autopsy opinions of Drs. Dennis and Perper are not credible, which we have rejected. Employer's Brief at 48.

Because Employer raises no further challenges to the ALJ's determination the medical opinions do not outweigh the autopsy evidence, we affirm the ALJ's conclusion that Claimant established complicated pneumoconiosis. 20 C.F.R. §718.304. We also affirm the ALJ's unchallenged finding that the Miner's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b);[14] *see Skrack*, 6 BLR at 1-711; Decision and Order at 24. Consequently, we affirm the ALJ's finding that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and thereby established a basis for granting modification. 20 C.F.R. §§718.304, 725.310.

Justice under the Act

Finally, Employer argues the ALJ erred in determining that reopening the claims renders justice under the Act because Claimant's multiple modification requests "abuse[] the modification remedy" and her "pursuit of modification in this case reflects little more than ALJ shopping." Employer's Brief at 32-34. Employer's arguments lack merit.

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

Citing the relevant factors, the ALJ found the interest in accuracy outweighs the interest in finality. Decision and Order at 35-36. He determined Claimant acted diligently in requesting modification and her request was not futile or moot because she established the Miner's entitlement to benefits. *Id*. With respect to Claimant's motive, we reject Employer's suggestion that she was "ALJ shopping." Employer's Brief at 34. The ALJ

[14] Employer concedes the Miner had at least ten years of coal mine employment sufficient to invoke the presumption of disease causation at 20 C.F.R. §718.203(b). It also did not offer any evidence to rebut that presumption. Decision and Order at 24; *see* 20 C.F.R. §718.203(b); Employer's Post Hearing Brief at 15.

permissibly concluded Claimant acted in "good faith" as "Employer has not offered any evidence that Claimant's motivation in requesting modification is anything other than to obtain benefits to [which the] Miner was entitled." Decision and Order at 36; *see Worrell*, 27 F.3d at 230.

As the ALJ did not abuse his discretion, we affirm his determination that granting modification renders justice under the Act. *See O'Keeffe*, 404 U.S. at 255; *Worrell*, 27 F.3d at 230; *Branham*, 20 BLR at 1-34; Decision and Order at 36. Consequently, having affirmed the ALJ's determination that Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis and established a basis for modification, we affirm the award of benefits in the miner's claim.[15]

Survivor's Claim

The ALJ determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(*l*); SC Decision and Order at 3-4.

[15] In light of our disposition of this appeal, we need not reach Employer's challenges to the ALJ's findings regarding the Miner's length of coal mine employment and invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim award, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the ALJ's Decision and Order Awarding Benefits on Modification and Decision and Order Awarding Continuing Benefits under the Automatic Entitlement Provision of the Black Lung Benefits Act are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge