U.S. Department of Labor

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

BRB No. 19-0542 BLA

GARY W. MALCOMB	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	
	)	DATE ISSUED: 12/21/2020
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert and Crystal L. Moore (Shelton, Branham & Halbert PLLC), Lexington, Kentucky, for Employer.

Jeffrey S. Goldberg (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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits on Modification (2018-BLA-06149) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of a subsequent claim filed on April 24, 2014.[1]

In his July 28, 2017 Decision and Order Denying Benefits, Administrative Law Judge Richard A. Morgan found Claimant did not establish complicated pneumoconiosis. Director's Exhibit 35. Therefore Claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). He also did not establish a totally disabling respiratory or pulmonary impairment and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2); Director's Exhibit 35. Because Claimant failed to establish an essential element of entitlement, Judge Morgan denied benefits. Director's Exhibit 35.

Claimant requested modification of that denial on December 19, 2017, and submitted additional evidence. Director's Exhibit 36. In his August 27, 2019 Decision and Order that is the subject of this appeal, Judge Swank credited Claimant with at least twenty-seven years of coal mine employment and found he established complicated pneumoconiosis, thereby establishing a change in conditions, 20 C.F.R. §§718.304, 725.310, and invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act.[3] 30 U.S.C. §921(c)(3). Judge Swank further found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203. After determining granting modification would render justice under the Act, he awarded benefits.

On appeal, Employer argues Judge Morgan should have adjudicated Claimant's modification request, as he is the administrative law judge who denied Claimant's underlying subsequent claim. It also asserts Judge Swank (the administrative law judge)

[1] This is Claimant's fourth claim for benefits. The district director denied Claimant's most recent claim, filed on October 28, 2005, because he did not establish any element of entitlement. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

[3] Judge Swank also found Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

erred in finding Claimant established complicated pneumoconiosis, a change in conditions, and that granting modification would render justice under the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Benefits Review Board to reject Employer's argument that the case should have been assigned to Judge Morgan on modification. She also argues the administrative law judge did not err in finding that granting modification would render justice under the Act.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer's Request for Reassignment

Employer argues that the award of benefits should be vacated and the case be reassigned to Judge Morgan because he is the administrative law judge who adjudicated Claimant's underlying subsequent claim. Employer's Brief at 11-13. Having failed to raise the issue of reassignment before the administrative law judge, however, Employer has forfeited its right to raise this issue on appeal to the Board.[5] *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 479 (6th Cir. 2009); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986). Regardless, we agree with the Director that Employer fails to cite any convincing authority for its position that only the administrative law judge who initially decided a claim can adjudicate any subsequent requests for modification. Director's Brief at 3-4.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18; Director's Exhibit 7.

[5] As the Director, Office of Workers' Compensation Programs, noted, Employer "raised no objection when the [Office of Administrative Law Judges] notified parties that [the administrative law judge] was assigned to the case, when the case came before [the [administrative law judge] for a formal hearing, and when [Employer] filed its post-hearing brief." Director's Brief at 3.

Modification -- Change in Conditions

Employer argues the administrative law judge erred in evaluating whether Claimant established a change in conditions by proving he has complicated pneumoconiosis.[6] Employer's Brief at 7-11. Employer's arguments have no merit.

Because this case involves a request for modification, the administrative law judge was required to consider whether Claimant established a mistake in a determination of fact in the prior denial, or whether any additional evidence submitted on modification demonstrates a change in conditions since that prior denial. *See* 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993); *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995). 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 that defeated an award in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *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 evaluated whether Claimant established a change in conditions by establishing complicated pneumoconiosis. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the administrative law judge must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

[6] We reject Employer's argument that the administrative law judge did not specify if he was granting modification based on a change in conditions or a mistake in a determination of fact. Employer's Brief at 5-7. The administrative law judge specifically found modification established "because Claimant has developed a change in condition[s]." Decision and Order at 29.

The administrative law judge weighed x-rays, biopsy reports, medical opinions, CT scans, and treatment records relevant to the issue of complicated pneumoconiosis.

X-Rays

The administrative law judge first weighed thirteen interpretations of six x-rays taken on June 17, 2014, July 29, 2015, May 31, 2016, August 18, 2016, January 21, 2017, and December 5, 2017.[7] Decision and Order at 12-16; 20 C.F.R. §718.304(a). All the physicians who read these x-rays are dually-qualified B readers and Board-certified radiologists. *Id*. Because a greater number of dually-qualified radiologists read the June 17, 2014 x-ray as negative for complicated pneumoconiosis,[8] the administrative law judge found it negative for the disease. Decision and Order at 15. He found the interpretations of the July 29, 2015, May 31, 2016, August 18, 2016, January 21, 2017, and December 5, 2017 x-rays in equipoise because an equal number of dually-qualified radiologists read the respective x-rays as positive for complicated pneumoconiosis in comparison to radiologists who read it as negative for the disease.[9] *Id*. As the record contains one negative x-ray and the interpretations of five in equipoise, he found the x-rays did not establish complicated pneumoconiosis. Decision and Order at 15-16; 20 C.F.R. §718.304(a).

Biopsy

In weighing the biopsy evidence, the administrative law judge noted Dr. Hensley interpreted a September 10, 2014 biopsy sample of an upper lung apical mass and opined that "no malignancy was seen." Decision and Order at 16-17; *see* 20 C.F.R. §718.304(b); Director's Exhibit 25. Dr. Anselmo also viewed the biopsy sample and opined the mass is

[7] The parties submitted readings of the June 17, 2014, July 29, 2015, May 31, 2016, August 18, 2016, and January 21, 2017 x-rays before Judge Morgan in the underlying subsequent claim. Director's Exhibits 25, 35. They submitted readings of the December 5, 2017 x-ray in conjunction with Claimant's request for modification. Director's Exhibits 36, 38.

[8] Specifically, two dually-qualified radiologists, Drs. Willis and Shipley, read it as negative for the disease, and one dually-qualified radiologist, Dr. Alexander, read it as positive for Category A opacities. Decision and Order at 15; Director's Exhibits 16, 25, 35.

[9] Dr. Tarver read the July 29, 2015, May 31, 2016, January 21, 2017, and December 5, 2017 x-rays as negative for the disease, but Dr. Crum read all these x-rays as positive for Category A opacities. Director's Exhibits 35-36, 38. Dr. DePonte read the August 18, 2016 x-ray as negative for complicated pneumoconiosis, but Dr. Crum read it as positive for a Category A opacity. *Id*.

not malignant. Director's Exhibit 35 (internally Employer's Exhibit 1). The administrative law judge found the biopsy evidence "does not address the existence of complicated pneumoconiosis" and thus Claimant cannot establish he has the disease by this evidence.[10] Decision and Order at 16-17; 20 C.F.R. §718.304(b).

Medical Opinions

The administrative law judge weighed the medical opinions of Drs. Rasmussen, Zaldivar, and Caffrey that Claimant does not have complicated pneumoconiosis and Drs. Green, Nader, and Vernon that he does. Decision and Order at 22-24; 20 C.F.R. §718.304(c); Director's Exhibits 16, 35, 36. He found none of the opinions well-reasoned or documented, and thus Claimant did not establish complicated pneumoconiosis based on the medical opinions. *Id*.

CT scans

The administrative law judge weighed the conflicting CT scan evidence. Decision and Order at 17-20; 20 C.F.R. §718.304(c). He noted the evidence the parties previously submitted to Judge Morgan included readings of CT scans taken on July 29, 2014, August 20, 2014, and March 23, 2016. Decision and Order at 17-19.

All the physicians who read these CT scans agreed that a large mass was present in Claimant's right upper lung, but disagreed as to its etiology. Director's Exhibits 25, 35; Claimant's Exhibit 1. Dr. Ramsay read the July 29, 2014 CT scan and indicated there was "no evidence" the mass was consistent "for metastatic disease." Director's Exhibit 25. He opined the mass "could be [the] beginning of progressive massive fibrosis as part of pneumoconiosis." *Id*. Dr. Crum attributed the large mass on the July 29, 2014, August 20, 2014, and March 23, 2016 CT scans to complicated pneumoconiosis. Director's Exhibit 35 (internally Claimant's Exhibits 5-6, 9). Dr. Tarver, however, opined the mass seen on all three scans was due to cancer and not pneumoconiosis. Director's Exhibit 35 (internally Employer's Exhibits 13-15). Dr. Rose read the August 20, 2014 CT scan and opined the mass is "potentially consistent with malignant-type activity." Director's Exhibit 25. He advised a biopsy be done. *Id*. He also read the March 23, 2016 CT scan and identified a mass consistent with, but not specific for, pneumoconiosis with progressive massive fibrosis. Director's Exhibit 35 (internally Claimant's Exhibit 9). Dr. Durham opined that Claimant's mass "was felt to represent complicated pneumoconiosis with progressive

[10] Dr. Caffrey also read this biopsy sample and opined ninety percent of the "tissue is a blood clot" with a "few bronchial epithelial cells and lung stroma." Director's Exhibit 35 (internally Employer's Exhibit 7). He opined the sample is not consistent with coal workers' pneumoconiosis. *Id*. The administrative law judge found his biopsy report inadequately explained. Decision and Order at 23.

massive fibrosis" as confirmed by "serial CT scans." Director's Exhibit 35 (internally Claimant's Exhibit 1). He further specifically opined that Claimant's CT scan from March 23, 2016, "shows complicated pneumoconiosis with progressive massive fibrosis." *Id.*

Claimant also submitted the results of a December 12, 2018 CT scan in support of his request for modification. Claimant's Exhibit 1. The administrative law judge noted Dr. Rose read the scan as revealing a right upper lung mass "which has been present for some time although growing." Decision and Order at 19-20; *see* Claimant's Exhibit 1. Dr. Rose opined "PET activity" puts the mass in "malignancy range," but stated a biopsy should be done. Claimant's Exhibit 1. The administrative law judge also found Dr. Durham opined this CT scan was consistent with a mass due to chronic lung disease. Decision and Order at 19-20; Claimant's Exhibit 1.

The administrative law judge credited Dr. Durham's opinion as to the CT scan evidence and Dr. Crum's CT scan readings.[11] Decision and Order at 20. He found Dr. Ramsay's CT scan reading not well-reasoned because it is equivocal, and Dr. Tarver's CT scan readings attributing the large mass in the right upper lung to cancer not well-reasoned or documented. *Id*. The administrative law judge explained the doctors who evaluated the "September 10, 2014 biopsy determined that the mass was not malignant," which "undermines Dr. Tarver's interpretations of the CT scans." *Id*. Therefore the administrative law judge found the CT scans support a finding of complicated pneumoconiosis. Decision and Order at 20; 20 C.F.R. §718.304(c).

[11] The administrative law judge stated:

> The record demonstrates that Claimant has been treating with Dr. Durham dating back to 2016 and [sic] has reviewed the most records, including the most recent CT scan. In forming his opinion, Dr. Durham reviewed Claimant's medical history, work history, the four CT scans, and his biopsy. In addition, Dr. Durham's interpretation is supported by Dr. Crum's interpretation of the CT scans. In forming his opinion, Dr. Crum considered the CT scans individually and as a whole, the relative stability of the opacity over a span of two years. Accordingly, the undersigned finds that the CT scans support the existence of complicated pneumoconiosis.

Decision and Order at 20.

Treatment Records

The administrative law judge noted the evidence before Judge Morgan included, among other records,[12] treatment notes from WVVA Health Care Alliance, PC and Greenbrier Pulmonology. Decision and Order at 19, 24-25. Dr. Durham stated on an October 26, 2016 treatment note that a mass in Claimant's right upper lung was "felt [to] represent complicated pneumoconiosis with progressive massive fibrosis. Serial CT scans have confirmed the same." Director's Exhibit 35 (internally Claimant's Exhibit 1). Dr. Durham further stated Claimant's "most recent CT scan done [on] March 23, 2016 again shows complicated pneumoconiosis with progressive massive fibrosis." *Id*.

Moreover, in support of his request for modification, Claimant submitted additional records from WVVA Health Care Alliance, PC and Greenbrier Pulmonology for treatment from March 15, 2016 through February 8, 2019. Claimant's Exhibit 1. The administrative law judge highlighted Dr. Durham's conclusion on a February 8, 2019 treatment note that "CT scan of the thorax indicates a progression of [Claimant's] chronic lung disease with a speculated mass in the right upper lobe [that] measures 4 [centimeters] x 2.7 [centimeters]." Claimant's Exhibit 1; Decision and Order at 24-25. He also indicated Claimant "had a PET scan based on the abnormalities found on the CT scan that showed a 3.8 speculated mass that was positive with an SUV value of 4.6" *Id*. Dr. Durham diagnosed "complicated coal worker's pneumoconiosis with progressive massive fibrosis." *Id*.

The administrative law judge found Dr. Durham's conclusions as set forth in Claimant's treatment records well-reasoned and documented. Decision and Order at 24-25. He explained Dr. Durham's diagnosis is "based on Claimant's CT scans dating back to 2014," and thus is "supported by the CT scans." *Id*. He therefore found Claimant established complicated pneumoconiosis by the treatment record evidence. Decision and Order at 25; 20 C.F.R. §718.304(c).

Finally, weighing all relevant evidence, the administrative law judge acknowledged "the June 17, 2014 x-ray was negative and the other five x-rays were found to be in equipoise, the biopsy did not establish the existence of complicated pneumoconiosis, and none of the physician opinions are entitled to weight." Decision and Order at 25. Nonetheless he concluded "Claimant has established the existence of complicated pneumoconiosis on the basis of CT scans and his examination and treatment records." *Id*.

[12] The administrative law judge noted the record contains treatment notes from "Summersville Regional Medical Center, dated March 30, 2012 through March 23, 2012." Decision and Order at 25. He found these records "do not address the presence of complicated pneumoconiosis" and thus "are not entitled to weight." *Id*.

Employer first argues Claimant is precluded from establishing modification based on a change in conditions because Judge Morgan found the etiology of the mass in Claimant's right upper lung was not complicated pneumoconiosis. Employer's Brief at 7-8, 10. To the extent Employer argues the doctrine of collateral estoppel precludes relitigating the etiology of the lung mass, its argument has no merit. In evaluating a request for modification, the administrative law judge is authorized to "reconsider the terms of an award or denial of benefits" based on a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). The "principle of finality" does not strictly apply to black lung claims "as it does in ordinary lawsuits." *Jessee*, 5 F.3d at 725, *citing Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *see* 65 Fed. Reg. 79972, 79975 (Dec. 20, 2000) (the regulation at 20 C.F.R. §725.310 destroys issue preclusion, as mandated by the statutory language that the regulation implements).

Employer next contends Claimant did not establish a change in conditions because the evidence he submitted in conjunction with his request for modification does not constitute "new evidence," and is evidence that was already before Judge Morgan. Employer's Brief at 8-10. We disagree. As discussed above, the administrative law judge weighed Dr. Durham's February 8, 2019 treatment note diagnosing complicated pneumoconiosis and taking into account Claimant's December 12, 2018 CT scan. Decision and Order at 24-25; Claimant's Exhibit 1. This evidence postdates Judge Morgan's denial of benefits. In finding Claimant established a change in conditions by establishing he has complicated pneumoconiosis, the administrative law judge weighed this new evidence in conjunction with the previously submitted evidence. *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-83 (1993).

Employer asserts Dr. Durham's February 8, 2019 treatment note does not constitute "new evidence" because treatment records in which Dr. Durham diagnosed complicated pneumoconiosis were part of the record before Judge Morgan. Employer's Brief 8-9. In *Kingery*, the Board rejected this argument, explaining that medical reports generated subsequent to a denial of benefits and based on a new examination constitute new evidence, notwithstanding whether the doctor previously issued a report. *Kingery*, 19 BLR at 1-13. Thus Dr. Durham's February 8, 2019 treatment note based on his review of Dr. Rose's December 12, 2018 CT scan reading constitutes new evidence.[13] Claimant's Exhibit 1.

[13] Moreover, even if there was merit to Employer's argument that the administrative law judge erred in considering the evidence that pre-dates Judge Morgan's denial on the issue of a change in conditions, this error would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As discussed above, the administrative law judge found Claimant established complicated pneumoconiosis based, in part, on Dr. Crum's credible CT scan readings that were before Judge Morgan. This finding would support the conclusion that Claimant established a mistake in a determination of fact in Judge

We also reject Employer's argument that the administrative law judge must defer to Judge Morgan's findings or must identify a specific error Judge Morgan made when he denied benefits. Employer's Brief at 7-11, 13. The administrative law judge is "in no way bound by the findings supporting the original denial. The sum of a de novo review and a de novo process [as is the case with modification] is a new adjudication."[14] *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 499 (4th Cir. 1999).

Employer does not specifically challenge the administrative law judge's credibility findings that Dr. Crum's CT scan readings are reasoned and documented, and that Dr. Durham's diagnosis of complicated pneumoconiosis in Claimant's treatment records is reasoned and documented and a proper basis for finding the existence of complicated pneumoconiosis.[15] Decision and Order at 17-20, 24-25. Nor does it challenge his finding

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Morgan's denial of benefits. A party is not required to submit new evidence because an administrative law judge has the authority "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). Any "mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

[14] Moreover, there is no merit to Employer's contention that allowing Claimant to file a request for modification after Judge Morgan denied benefits invites an abuse of the process and constitutes a due process violation. *See Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 500 (4th Cir. 1999) (rejecting similar argument); Employer's Brief at 12-13. Due process requires only that a party be given notice and the opportunity to respond. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998). As Employer does not allege it was not given notice and the opportunity to respond, it has not demonstrated a due process violation.

[15] Employer argues the administrative law judge erred to the extent he concluded Dr. Durham separately read the December 12, 2018 CT scan rather than reviewing Dr. Rose's reading of the scan. Employer's Brief at 9. The administrative law judge stated there were CT scan readings from four dually qualified physicians. Decision and Order at 17. He identified Dr. Durham as a pulmonologist, but did not identify him as a dually qualified physician. *Id*. at 19. Consequently, it is not apparent that he concluded Dr. Durham rendered an independent reading of the CT scan as opposed to factoring into his diagnosis the results of the CT scan as Dr. Rose described. Moreover, the administrative law judge found Dr. Crum's CT scan readings fully credible, and gave some weight to Dr. Ramsay's opinion diagnosing possible early complicated pneumoconiosis. *Id*. at 17-20. He discounted Dr. Tarver's opinion, the only contrary opinion. *Id*. Thus, error if any in finding Dr. Durham rendered a separate CT scan reading that further supports Claimant's

the contrary medical opinions of Drs. Rasmussen, Zaldivar, and Caffrey not reasoned or documented, Dr. Caffrey's contrary biopsy report not reasoned or documented, and Dr. Tarver's CT scan readings undermined by the biopsy evidence. Decision and Order at 22-24. Finally it does not challenge his finding that all the relevant evidence considered together establishes Claimant has complicated pneumoconiosis. Decision and Order at 25. Thus we affirm these findings. *See Skrack*, 6 BLR at 1-711.

Because we have rejected employer's allegations of error, we affirm the administrative law judge's finding Claimant established complicated pneumoconiosis by CT scans and Claimant's treatment records, invoked the irrebuttable presumption of total disability due to pneumoconiosis, and established a change in conditions. Decision and Order at 25-28; 20 C.F.R. §§718.304, 725.310; *Cox*, 602 F.3d at 283; *Melnick*, 16 BLR at 1-33-34. We further affirm, as unchallenged, the administrative law judge's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 31.

Justice under the Act

We also reject Employer's assertion that the administrative law judge did not adequately explain his finding that granting modification would render justice under the Act. Employer's Brief at 11-12. The administrative law judge properly identified the factors to be considered. Decision and Order at 4-5, *citing see Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 330 (4th Cir. 2012); *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 131-132 (4th Cir. 2007). He considered "the diligence of the parties, the number of times the party has sought reopening, and the quality of the new evidence which the party wishes to submit," along with "a party's motive and whether the modification petition is moot or futile." *Id*.

The administrative law judge found granting modification renders justice under the Act because Claimant submitted additional evidence before the administrative law judge to support his position, and established a change in conditions. *Sharpe II*, 692 F.3d at 335 (the search for "justice under the Act" should be guided, first and foremost, by the need to ensure accurate benefit distribution); 65 Fed. Reg. at 79975 (Dec. 20, 2000) (rejecting limits on modification because Congress's overriding concern in enacting the Act was to ensure that miners who are totally disabled due to pneumoconiosis arising out of coal mine employment receive compensation); Decision and Order at 4-5.

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burden of proof is harmless. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because we can discern what the administrative law judge did and why, the duty of explanation under the Administrative Procedure Act[16] is satisfied. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[16] The Administrative Procedure Act (APA) provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).