U.S. Department of Labor

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

BRB No. 20-0484 BLA

KATHY LUTHER (o/b/o JOSEPH T. LUTHER)	)	
Claimant-Respondent	)	
v.	)	
EASTOVER MINING COMPANY	)	DATE ISSUED: 01/31/2022
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 of Dana Rosen, 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.

Steven Winkelman (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 GRESH, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Dana Rosen's Decision and Order Awarding Benefits (2019-BLA-05539) 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[1] filed on February 13, 2014.

The ALJ found the Miner worked 15.11 years in underground coal mine employment based on the parties' stipulation. She also determined Claimant established the Miner had complicated pneumoconiosis arising out of coal mine employment, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The ALJ concluded Claimant established a basis for modification pursuant to 20 C.F.R. §725.310, and that granting her request for modification rendered justice under the Act. Accordingly, the ALJ awarded benefits.

On appeal, Employer argues the ALJ erred in finding the Miner had complicated pneumoconiosis and that Claimant established a mistake in a determination of fact with regard to the prior denial of benefits. It also asserts the ALJ improperly concluded 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), filed a response, urging affirmance of the ALJ's finding that granting modification renders justice under the Act.

The Benefits Review 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

[1] The Miner filed his initial claim for benefits on December 13, 1993, which was denied on March 31, 1994, for failure to establish any of the elements of entitlement. Director's Exhibit 1. He filed his second claim for benefits on May 23, 2011, but subsequently withdrew it; therefore, it is considered not to have been filed. 20 C.F.R. §725.306; Director's Exhibit 2. The Miner filed his third and current claim for benefits on February 13, 2014. Director's Exhibit 4. He died on April 4, 2015, while the claim was pending before the district director, and Claimant, his widow, is pursuing it on his behalf. Director's Exhibits 35, 36. ALJ Adele Higgins Odegard denied the claim on August 29, 2017, finding Claimant established simple clinical pneumoconiosis and thus a change in conditions, but did not establish that the Miner was totally disabled, an essential element of entitlement. Director's Exhibits 4, 74. On July 31, 2018, Claimant filed the current modification request. Director's Exhibits 76, 77, 79.

accordance with applicable law.[2] 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).

Because this case involves a request for modification, the ALJ 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 the 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). Because Claimant could not establish a change in her deceased husband's condition, the ALJ reviewed the record for a mistake of fact in ALJ Odegard's prior determination that the evidence was insufficient to establish complicated pneumoconiosis. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Jessee*, 5 F.3d at 725; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). Thus, the ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Invocation of the Section 411(c)(3) Irrebuttable Presumption

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of total disability due to pneumoconiosis if a miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *see E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999). In determining whether Claimant has invoked the irrebuttable presumption, the ALJ 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); *Scarbro*, 220 F.3d at 255-56; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine work in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 6, 23; Director's Exhibit 5; Decision and Order at 3.

The ALJ found Claimant established complicated pneumoconiosis based on the x-ray evidence, CT scan evidence, and Dr. Copley's medical opinion. Employer contends the ALJ erred in weighing the x-ray evidence. It argues the x-ray readings of the doctors who diagnosed complicated pneumoconiosis were equivocal, and the ALJ's analysis of the conflicting x-rays is not sufficiently explained and fails to consider all the relevant factors in concluding Claimant established the disease. For the reasons discussed below, we reject Employer's contentions and affirm the ALJ's finding that Claimant invoked the irrebuttable presumption.

X-Ray Evidence

The record includes nine interpretations of three x-rays taken on March 27, 2014, October 18, 2014, and October 23, 2014. With the exception of Dr. Rosenberg, who is only a B reader, all of the physicians who read these x-rays are dually-qualified B readers and Board-certified radiologists. Decision and Order at 6-11.

On the March 27, 2014 x-ray, Dr. Crum observed small opacities for simple pneumoconiosis and Category B large opacities consistent with complicated pneumoconiosis. Director's Exhibit 14. Dr. Alexander observed small opacities for simple pneumoconiosis and Category A large opacities consistent with complicated pneumoconiosis. Director's Exhibit 15. In the comments section of the ILO x-ray forms they completed, both doctors reaffirmed the presence of large opacities consistent with complicated pneumoconiosis but also noted that other diseases, like neoplasm or lung cancer, should be ruled out. Director's Exhibits 14-15. Dr. Meyer did not identify any opacities or abnormalities consistent with simple or complicated pneumoconiosis but noted a three millimeter irregular mass and a two millimeter soft tissue density that was "suspicious" for cancer. Director's Exhibit 16. He further opined, "There are no background diffuse small round opacities to suggest coal workers' pneumoconiosis." *Id*.

The ALJ gave "significant weight" to the interpretations of Drs. Crum and Alexander, finding them well reasoned and consistent with the biopsy and CT scan evidence, discussed infra, which included diagnoses of anthracosis and large masses attributed to coal workers' pneumoconiosis. Decision and Order at 30. She found Dr. Meyer's interpretation unpersuasive because he did not explain how he "positively excluded" a diagnosis of coal workers' pneumoconiosis for the large mass he observed. *Id*. at 31. Thus, the ALJ found the March 27, 2014 x-ray supports a finding of simple and complicated pneumoconiosis. *Id*.

Dr. DePonte interpreted the October 18, 2014 x-ray as showing small opacities for simple pneumoconiosis and Category B large opacities consistent with complicated pneumoconiosis; however, she also indicated the large opacities could be lung carcinoma.

Director's Exhibit 59; Claimant's Exhibit 1. In her December 1, 2014 addendum comparing the October 18, 2014 and March 27, 2014 x-rays, Dr. DePonte noted the large opacities "were considerably smaller on the prior study" and opined the "growth rate is inconsistent with large opacities of coal workers' pneumoconiosis and likely represents bilateral lung carcinoma. Biopsy is indicated." *Id*. Dr. Meyer interpreted the same x-ray as having "[n]o radiographic findings of coal workers' pneumoconiosis" and opined the masses were consistent with lung cancer. Director's Exhibit 62. The ALJ found Dr. DePonte's interpretation equivocal as to whether the Miner's lungs showed complicated pneumoconiosis or cancer. Decision and Order at 30. The ALJ also found Dr. Meyer's reading less probative because he did not identify *any* opacities consistent with even simple pneumoconiosis, which is contrary to the ALJ's finding that the weight of the evidence establishes the Miner has the disease, including Dr. DePonte's interpretation, Drs. Crum's and Alexander's readings of the March 27, 2014 x-ray, as well as the CT scan and biopsy evidence. *Id*. at 31. The ALJ found the October 18, 2014 x-ray negative for complicated pneumoconiosis. *Id*.

Concerning the October 23, 2014 x-ray, Dr. Crum observed Category B large opacities "most consistent" with complicated pneumoconiosis, but again noted neoplasm should be ruled out. Director's Exhibit 59; Claimant's Exhibit 4. Neither Dr. Meyer nor Dr. Rosenberg observed small or large opacities consistent with pneumoconiosis. Director's Exhibits 60, 75. The ALJ found Dr. Meyer's interpretation unpersuasive because he did not see any opacities on Claimant's x-ray consistent with underlying simple pneumoconiosis, contrary to the credible evidence consistently identifying at least simple clinical pneumoconiosis. Decision and Order at 31. She also noted Dr. Rosenberg is less qualified because he is not a dually-qualified radiologist. *Id*. The ALJ therefore determined the October 23, 2014 x-ray is positive for simple and complicated pneumoconiosis. *Id*.

Considering the x-ray evidence as a whole, the ALJ found two positive x-rays and one negative x-ray for complicated pneumoconiosis. Thus, she found the preponderance of the x-ray evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 31.

Biopsy Evidence

Dr. Pierce conducted a post-mortem biopsy on April 8, 2015 and diagnosed "anthracosis" in the right lung and the presence of "carbonaceous pigment," but noted her findings "[fall] short of a definitive diagnosis of coal workers' pneumoconiosis." Director's Exhibit 62. She found "fragments of rubbery to fum [sic], nodular gray-yellow tissue surrounding the bronchial structures" in the Miner's lung. *Id.* She also stated that

the biopsy showed "poorly differentiated non-[s]mall cell carcinoma, slightly favor[ing] poorly differentiated adenocarcinoma." Director's Exhibit 62.

The ALJ noted Dr. Pierce did not report the sizes of any masses that she observed and that a majority of the report was illegible. Decision and Order at 32. Thus, the ALJ stated she was unable to make an equivalency determination as to whether Dr. Pierce's findings "constituted 'massive lesions' equivalent to the 'A' and 'B' masses observed on [the] Miner's x-rays by Drs. Crum, Alexander, and DePonte." *Id*. The ALJ also found Dr. Pierce did not adequately explain why she was unable to make a "definitive diagnosis" of coal workers' pneumoconiosis or why the biopsy findings "slightly favor poorly differentiated adenocarcinoma." *Id*., *quoting* Director's Exhibit 62. The ALJ concluded the biopsy evidence was equivocal as to the existence of complicated pneumoconiosis but determined Dr. Pierce's "anthracosis" finding was consistent with the regulatory definition of clinical pneumoconiosis at 20 C.F.R. §718.201(a)(1). Decision and Order at 32.

CT Scans

The ALJ also considered two CT scans contained in the Miner's treatment records. Decision and Order at 32-33; Director's Exhibit 60. Dr. Boyd read a May 27, 2014 CT scan as showing a "2.2 [centimeter] noncalcified mass in the superior aspect of the right hilum[,]"and stated "[t]he diagnosis of exclusion is a primary bronchogenic carcinoma." Director's Exhibit 60. He also identified a one centimeter mass in the right lung apex that "may also" be carcinoma and some smaller pulmonary nodules. *Id*. The ALJ found the May 27, 2014 CT scan confirmed the presence of masses equivalent to the Category A and B opacities seen on the Miner's chest x-rays. However, she concluded the scan "does not weigh in favor or against" a diagnosis of complicated pneumoconiosis. Decision and Order at 33.

Dr. Saddeh interpreted a June 4, 2014 PET-CT scan as revealing "likely a significant element of coal worker[s'] pneumoconiosis" and "[t]he areas of apparent bilateral perihilar lung cancer could be areas of progressive massive fibrosis." Director's Exhibit 60. The ALJ interpreted Dr. Saadeh's opinion as indicating that "both lung cancer and coal workers' pneumoconiosis contributed to the masses found in [the Miner's] lungs." Decision and Order at 33. Having already determined the large masses on the earlier CT scan were equivalent in size to large opacities revealed on the Miner's x-rays, the ALJ found the June 4, 2014 PET-CT scan supports a finding that the Miner had complicated pneumoconiosis. *Id.* We affirm the ALJ's finding as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co*., 6 BLA 1-710, 1-711 (1983).

Medical Opinions

The ALJ next considered the medical opinions of Drs. Copley, Rosenberg, and Vuskovich. Decision and Order at 33-35; Director's Exhibits 14, 60. She gave "significant weight" to Dr. Copley's opinion because he explained that the presence of large Category B opacities on the Miner's x-rays were consistent with progressive massive fibrosis and attributable to the Miner's fourteen years of heavy coal dust exposure, not tobacco use. She also found his opinion well-reasoned and documented and supported by the Miner's chest-x-rays, symptoms, objective testing, and occupational history. Decision and Order at 33-34; Director's Exhibit 14.

She gave little weight to Dr. Rosenberg's opinion, attributing the masses in the Miner's lungs solely to lung cancer, because he did not adequately explain how "he, unlike Drs. Shah and Saadeh [the Miner's treating physicians], was able to conclude that the Miner's condition, including small nodule formation, was not caused or contributed to by coal workers' pneumoconiosis." Decision and Order at 34-35; Director's Exhibit 60. Further, the ALJ gave no weight to Dr. Vuskovich's opinion as it was not well reasoned or documented because at times he addressed a completely different patient and did not specifically address whether the Miner had clinical pneumoconiosis. Decision and Order at 35; Director's Exhibit 60.

We affirm, as unchallenged, the ALJ's reliance on Dr. Copley's opinion on complicated pneumoconiosis and her rejection of Drs. Rosenberg's and Vuskovich's opinions. *Skrack*, 6 BLA at 1-711.

Weighing the evidence as a whole

Considering the totality of the evidence, the ALJ concluded the Miner had complicated pneumoconiosis. Decision and Order at 35. She noted Drs. Crum, Alexander and DePonte all found Category A or B opacities on their ILO x-ray forms consistent with complicated pneumoconiosis. Decision and Order at 35-36; Director's Exhibits 14, 15, 59, 64; Claimant's Exhibits 1, 4. Even though they also recommended exclusion of cancer or neoplasm as a possible etiology, the ALJ found the etiology of the Miner's large opacities was due to coal mine dust exposure, given that the biopsy evidence revealed coal workers' pneumoconiosis in the form of anthracosis; and both CT scans confirmed the presence of the large masses seen on x-ray, while Dr. Saddeh's CT scan interpretation confirmed coal workers' pneumoconiosis as a cause of the masses.

Conversely, the ALJ found the readings of Drs. Meyer and Rosenberg, indicating the Miner had no radiographic evidence of *any* condition related to his coal mine dust exposure, unpersuasive and contradicted by the aforementioned evidence clearly

establishing the presence of coal workers' pneumoconiosis, including a preponderance of the radiologists who observed at least small nodules of coal workers' pneumoconiosis in the Miner's lungs. Decision and Order at 36. Having specifically credited Drs. Crum's and Alexander's diagnoses of complicated pneumoconiosis, as supported by the CT scan and biopsy evidence, and having discredited the contrary readings by Drs. Meyer and Rosenberg, the ALJ concluded Claimant invoked the irrebuttable presumption. *Id.*

Arguments and Analysis

Employer contends the ALJ's analysis ignores that Drs. Crum and Alexander each recommended that a diagnosis of lung cancer be excluded and thus asserts their radiological findings are not "certain." Employer's Brief at 15. Employer states that "[u]known to [Drs. Crum and Alexander] but known to the ALJ was that [the Miner] was diagnosed with lung cancer which he elected not to treat." Employer's Brief at 15-16, *citing* Claimant's Exhibit 2.

First, as noted above, Employer does not contest the ALJ's finding that the CT scan evidence both confirms the presence of large masses as seen on x-rays and supports a finding that those masses *are* complicated pneumoconiosis. Therefore, even assuming the Miner also has untreated lung cancer, Employer has not explained how that fact undermines the ALJ's finding that he also has complicated pneumoconiosis based on Drs. Crum's and Alexander's affirmative diagnoses of complicated pneumoconiosis on x-ray, as supported by CT scan evidence of the disease. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

Moreover, Employer's argument is based on a mischaracterization of the evidence. When reviewing the Miner's June 4, 2014 PET-CT scan and Dr. Saaheed's reading of it, Dr. Shah did not definitively diagnose lung cancer to the exclusion of complicated pneumoconiosis. Rather, he indicated "it is difficult to differentiate between Pneumoconiosis related progressive massive fibrosis and Lung mass being cancer." Claimant's Exhibit 2. Dr. Shah explained that the PET portion of the exam suggested "bilateral multifocal upper lobe lung cancer with involvement of bilateral hilar and mediastinal lymph nodes." *Id.* However, based on a review of the CT scan images, Dr. Shah stated "[t]he areas of apparent bilateral perihilar lung cancer could be areas of progressive massive fibrosis." *Id.* Thus, Dr. Shah did not definitively diagnose the Miner

with lung cancer but rather suggested a biopsy be done to determine the nature of the masses observed.[3]

Moreover, the ALJ was not required to weigh the evidence for absolute certainty as Employer insists. It is sufficient that she was persuaded the evidence more likely than not establishes complicated pneumoconiosis. *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997). Contrary to our dissenting colleague's assertion, the ALJ fully considered the notations Drs. Crum and Alexander made, suggesting that diagnoses of cancer or neoplasm be ruled out. However, the ALJ permissibly relied on their identification of Category A and B large opacities, both on the ILO x-ray forms they completed and in the comments section of the form, as sufficient to establish complicated pneumoconiosis, particularly in light of her uncontested finding that the PET-CT scan evidence also supports a finding of complicated pneumoconiosis. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); Decision and Order at 30-31, 35-36; *Wojtowicz*, 12 BLR at 1-165. We also see no error in the ALJ's overall finding that Dr. Meyer's negative readings were less credible because he did not believe Claimant had even simple pneumoconiosis, contrary to the weight of the opinions of Drs. Crum and Alexander, and the biopsy and CT scan evidence of the disease.[4] *See Looney*, 678 F.3d at 316-17.

Employer's arguments are a request to reweigh the evidence which we are not empowered to do. See *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999) (the Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis."); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ considered

[3] Dr. Shah wrote that the Miner did not want to have a "tissue diagnosis" done in light of his brother's cancer spreading following a biopsy. Claimant's Exhibit 2.

[4] As the ALJ provided a permissible reason for discrediting Dr. Meyer's negative x-ray interpretations, we disagree with our dissenting colleague's assertion that the ALJ must further explain her decision to assign Dr. Meyer's opinion less weight. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). Moreover, the ALJ did not place the burden on Dr. Meyer to disprove that the Miner had complicated pneumoconiosis. *See* slip op. at 14. Rather, she found he did not persuasively explain how *he* "positively excluded" coal workers' pneumoconiosis as a diagnosis for the large masses he observed. Decision and Order 31. Far from placing the burden on Employer, the ALJ simply complied with her duty to evaluate whether the physician credibly explained his own conclusions.

all the relevant evidence and explained her findings, we affirm her determination that Claimant established complicated pneumoconiosis and grounds for modification based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.[5] *See Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 35-36.

Justice under the Act

Before granting a request for modification, the ALJ must determine whether doing so will render justice under the Act. *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327- 28 (4th Cir. 2012). In making that determination, the ALJ must consider several factors, including the need for accuracy, the quality of the new evidence, the moving party's diligence and motive, and whether a favorable ruling would still be futile. *Sharpe v. Dir., OWCP* [*Sharpe I*], 495 F.3d 125, 132-33 (4th Cir. 2007). The ALJ has broad discretion in deciding whether modification is warranted. *Sharpe II*, 692 F.3d at 335. Thus, the party opposing modification, bears the burden of establishing the ALJ committed an abuse of discretion. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

The ALJ explained that she "fully reviewed the record to make a determination on whether Claimant's request for modification is warranted to render justice under the Act." Decision and Order at 28. She concluded that "[a]fter full consideration of the evidence, record, and argument," modification would "would render justice under the Act." *Id*.

Employer challenges the timing of the ALJ's analysis, asserting it must be conducted before weighing the evidence on modification for a mistake of fact or change in condition. Employer also contends the ALJ did not adequately explain how she evaluated each factor. Employer's Brief at 8, 10, 16. We reject Employer's contentions.

There is no requirement that an ALJ conduct a threshold analysis as to whether granting modification would render justice under the Act before addressing the merits of a modification request and the new evidence submitted. Indeed, because accuracy is a relevant factor, it follows that an ALJ must consider the evidence and render findings on the merits to properly assess whether modification is warranted. *See* 65 Fed. Reg. at 79,920, 79,975 (Dec. 20, 2000) (rejecting limits on modification because Congress's overriding concern in enacting the Act was to ensure miners who are totally disabled due to pneumoconiosis arising out of coal mine employment receive compensation);

[5] We affirm, as unchallenged, the ALJ's determination that Claimant's complicated pneumoconiosis arose out of his coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLA 1-710, 1-711 (1983).

Westmoreland Coal Co. v. Sharpe (*Sharpe II*), 692 F.3d 317, 330 (4th Cir. 2012) (the search for "justice under the Act" should be guided, first and foremost, by the need to ensure accurate benefit distribution).

Further, although Employer correctly notes the ALJ did not separately address each of the factors relevant to rendering justice under the Act, remand is not required as we can discern why she concluded the relevant factors, as a whole, weighed in favor of modification. *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998); *Looney*, 678 F.3d at 316, *quoting Mays*, 176 F.3d at 762 n.10 (an ALJ's "duty of explanation" is satisfied if "a reviewing court can discern what the ALJ did and why [s]he did it."). As the Director correctly notes, once the ALJ determined Claimant established complicated pneumoconiosis, Claimant clearly showed her modification request was not futile, and the need for accuracy became the overriding factor supporting granting her modification request. *See Hilliard*, 292 F.3d at 547.

Although Employer alleges Claimant's "motive is suspect," it provides no evidence to support such an allegation. Employer's Brief at 6. Additionally, while Employer maintains Claimant relies on "stale evidence" to claim a mistake in a determination of fact, and suggests Claimant willingly withheld evidence, the record belies its allegation. Employer's Brief at 6-15. In the prior claim, ALJ Odegard admitted and considered the same exhibits as the ALJ reviewed on modification, including Claimant's Exhibits 1 through 4 and Director's Exhibits 14 and 15. Moreover, Employer ignores that the ALJ was authorized to consider wholly new evidence, cumulative evidence, or merely further reflect on the evidence initially submitted, in determining whether a mistake of fact was made. *See O'Keeffe,* 404 U.S. at 256. Even if new evidence had been introduced in the current claim that was available at the time of the prior hearing, "a modification request cannot be denied out of hand . . . on the basis that the evidence may have been available at an earlier stage in the proceeding." *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 546 (7th Cir. 2002). Rather, the "modification procedure is flexible, potent, [and] easily invoked," *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999), and embodies a policy favoring accuracy of determination over finality. *Hilliard*, 292 F.3d at 541. Thus, "[o]nce a request for modification is filed, no matter the grounds stated, if any, the [ALJ] has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions." *Worrell*, 27 F.3d at 230. The ALJ properly reweighed all of the evidence in this case regarding whether Claimant had complicated pneumoconiosis and Employer has not demonstrated any improper motive by Claimant in seeking modification.

Employer also contends that granting modification and ignoring the findings of ALJ Odegard is a "violation of the deference the agency owes to the prior decision." Employer's Brief at 11. However, "while finality interests may sometimes be relevant to

a proper modification ruling," the "principle of finality just does not apply to . . . black lung claims as it does in ordinary lawsuits." *Sharpe I*, 495 F.3d at 133 n.15 (citation omitted); *see* Employer's Brief at 8, 11, 17. Seeing no error in the ALJ's determination that granting Claimant's modification request renders justice under the Act, we affirm it. *See Sharpe II*, 692 F.3d at 327; *Kinlaw*, 33 BRBS at 72; Decision and Order at 28.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

I generally concur in the majority opinion that Employer did not establish that the ALJ abused her wide discretion in determining modification would render justice under the Act.[6] I respectfully dissent, however, from their decision to affirm the ALJ's finding that Claimant established complicated pneumoconiosis. I would therefore vacate this finding and remand the case for further consideration.

Employer's argument that the ALJ did not properly evaluate the x-ray interpretations has merit. Employer's Brief at 15-16. As Employer asserts, Drs. Crum and Alexander asked for either additional studies to be conducted or that other diseases, like lung cancer, be excluded to confirm the diagnosis of complicated pneumoconiosis.

[6] The Fourth Circuit and the Board 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 (4th Cir. 2007) (*Sharpe I*); *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33 (2008). I note, however, that in this case the ALJ failed to specifically apply the factors outlined in *Sharpe*.

Employer's Brief at 15; Director's Exhibits 14, 15, 64; Claimant's Exhibit 4. The ALJ acknowledged their comments but, contrary to the majority's holding, failed to address whether these comments made their findings equivocal. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Melnick*, 16 BLR at 1-37; *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985) (if the ALJ misconstrues relevant evidence, the case must be remanded for reevaluation of the issue to which the evidence is relevant); Decision and Order at 30. Because the ALJ did not adequately explain her finding that Dr. Crum's and Dr. Alexander's interpretations of the March 27, 2014 are reasoned, she also erred in giving more weight to their opinions when discrediting Dr. Meyer's contrary interpretations on the March 27, 2014, October 18, 2014, and October 23, 2014 x-rays.[7] Decision and Order at 30-31.

In addition, Dr. DePonte compared the March 27, 2014 and October 18, 2014 x-rays, stating the growth rate is inconsistent with large opacities of coal workers' pneumoconiosis and "likely" indicated lung cancer. Director's Exhibit 14; Claimant's Exhibit 1. However, the ALJ discredited Dr. DePonte's opinion because she did not definitively exclude coal workers' pneumoconiosis and "was equivocal in attributing these masses to lung cancer." Decision and Order at 30. The ALJ therefore treated the opinions disparately in giving less weight to the opinions of Drs. Meyer and DePonte without a comparable analysis of whether the diagnoses of complicated pneumoconiosis by Drs. Crum and Alexander were equally equivocal. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984) (ALJ may not engage in selective analysis).

The ALJ also used the wrong standard in evaluating Dr. Meyer's opinion by requiring him to exclude coal workers' pneumoconiosis as a cause of the identified lung mass – it is Claimant's burden to establish complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *see E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*],

[7] Dr. Meyer opined that the large opacities he observed on the March 27, 2014 x-ray were suspicious for lung cancer. Director's Exhibit 16. The ALJ discredited his interpretation because he did not address how the "irregular soft tissue density" he identified "could be positively excluded as coal workers' pneumoconiosis" and because he did not address differential diagnoses, unlike Drs. Crum, Alexander, and DePonte. Decision and Order at 30-31. Dr. Meyer similarly found on the October 18, 2014 and October 23, 2014 x-rays that there were no radiographic findings of coal workers' pneumoconiosis and the masses he observed were consistent with lung cancer. Director's Exhibits 60, 62. The ALJ gave less weight to Dr. Meyer's interpretations of these x-rays because they are inconsistent with Dr. Crum's and Dr. Alexander's interpretations of the earlier March 27, 2014 x-ray. Decision and Order at 31.

220 F.3d 250, 255 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999).

Moreover. she did not explain, as the Administrative Procedure Act requires,[8] her basis for giving weight to the Miner's death certificate, listing coal workers' pneumoconiosis as a contributing cause of the Miner's death, when discrediting the opinions of Drs. Rosenberg and Vuskovich.[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 21, 23-24; Director's Exhibits 35-36.

Thus, I would vacate the award and remand the case for further consideration of whether Claimant established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. I would instruct the ALJ to equally scrutinize the evidence and explain her findings in accordance with the APA.

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

[9] The ALJ found that Dr. Rosenberg, aside from discussing bronchogenic carcinoma, "did not address the Miner's death certificate, which also stated that 'coal workers' pneumoconiosis' was a condition leading to his cause of death." Decision and Order at 21, *quoting* Director's Exhibits 35, 36. She similarly determined "while Dr. Vuskovich stated the death certificated reflected cancer . . . was the cause of death, Dr. Vuskovich did not address or discount why the coal workers' pneumoconiosis, also listed as a cause on the death certificate, did not contribute to [the] Miner's death." Decision and Order at 23-24.

Accordingly, I concur in part and dissent in part from the majority's opinion.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge