U.S. Department of Labor

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

BRB No. 22-0475 BLA

CLARA DAWSON (o/b/o KARL R. DAWSON)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	
and	)	DATE ISSUED: 03/11/2024
CONSOL ENERGY, INCORPORATED, c/o SMART CASUALTY CLAIMS	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.[1]

[1] Claimant was previously represented by John Cline who filed a response brief on her behalf. On August 25, 2023, John Cline filed a Motion for Permission to Withdraw as Counsel for the Claimant due to his retirement. On August 30, 2023, Wes Addington with The Appalachian Citizens' Law Center filed a Notice of Appearance as counsel for

William S. Mattingly and Jennifer Horan (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor, Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Modification (2021-BLA-05586) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a second request for modification of a subsequent miner's claim filed on August 22, 2017.[2]

The Miner initially filed this claim on August 4, 2016. Director's Exhibit 3. The district director denied benefits on August 22, 2017, for failure to establish the existence

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Claimant. The Board grants Mr. Cline's request to withdraw and substitute Mr. Addington as counsel for Claimant.

[2] On June 19, 2013, the district director denied the Miner's prior claim for benefits, filed on August 2, 2012. Director's Exhibit 1. Although the Miner demonstrated he had a totally disabling respiratory impairment, he failed to establish the existence of pneumoconiosis or that his totally disabling impairment was due to pneumoconiosis. *Id*. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). As the Miner's prior claim was denied for failure to establish that he had pneumoconiosis or that his total disability was due to pneumoconiosis, he had to submit new evidence establishing at least one of these elements to warrant a review on the merits of his claim. *White*, 23 BLR at 1-3; Director's Exhibit 1.

of pneumoconiosis or that his totally disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 39. Claimant[3] timely requested modification on May 1, 2018. Director's Exhibit 20. The case was ultimately referred to the Office of Administrative Law Judges (OALJ) and assigned to ALJ Natalie A. Appetta, who issued a January 17, 2020 Decision and Order Denying Benefits.

ALJ Appetta accepted the parties' stipulation that the Miner had sixteen years of coal mine employment, but she found Claimant failed to establish that the Miner's work was underground or in conditions substantially similar to those in an underground mine. Thus, she 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).[4] Considering whether Claimant could establish entitlement without the presumption at 20 C.F.R. Part 718, ALJ Appetta found that Claimant established the Miner had a totally disabling respiratory impairment but failed to establish the Miner had pneumoconiosis. Accordingly, she denied benefits. She subsequently denied Claimant's request for reconsideration on May 19, 2020.

Claimant timely filed a second request for modification on September 13, 2020. Director's Exhibit 63. The claim was referred to the OALJ on February 17, 2021, and assigned to ALJ Swank (the ALJ). Director's Exhibit 71.

In a July 29, 2022 Decision and Order on Modification, which is the subject of this appeal, the ALJ found Claimant established 16.75 years of surface coal mine employment, all of which he found occurred in conditions substantially similar to those in an underground mine. The ALJ further found Claimant established the Miner had a totally disabling respiratory or pulmonary impairment, and therefore invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Thus, he found Claimant established modification based on a mistake in a determination of fact. 20 C.F.R. §725.310. The ALJ further found Employer failed to rebut the presumption and awarded benefits.

[3] Claimant is the widow of the Miner, who died on November 1, 2016, and is pursuing this claim on his behalf. Decision and Order on Modification at 2 n.1; Director's Exhibit 11.

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

On appeal, Employer argues the ALJ erred in admitting evidence that could have been obtained while the case was pending before ALJ Appetta. Employer further argues the ALJ failed to consider all relevant evidence, thus requiring his decision be vacated and remanded for reconsideration. Finally, it argues the ALJ erred in finding that granting modification renders justice under the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing the ALJ did not err in in finding that granting modification would render 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 accordance with applicable law.[5] 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 (1965).

Evidentiary Issues

The Miner worked as a warehouse supervisor for Employer for the entirety of his coal mine employment at the Humphrey Number 7 mine. Director's Exhibits 5, 68. While the case was before ALJ Appetta, Claimant submitted testimony to establish the dust conditions at the warehouse and the location of the warehouse.[6] Director's Exhibits 8, 23, 35, 73. ALJ Appetta concluded the evidence was insufficient to establish that the Miner worked at an actual mine site and, even if he did, whether the warehouse was at a surface mine or at the surface of an underground mine. Decision and Order at 7. She further concluded there was insufficient evidence to establish the Miner's work occurred in conditions substantially similar to those in an underground mine. *Id*. at 10.

On modification, in addition to submitting new medical evidence, Claimant submitted several pieces of documentary evidence relevant to the mine site and the Miner's

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Transcript at 9.

[6] In his application, the Miner indicated he worked at the "surface." Director's Exhibit 5. At the 2019 hearing, Claimant presented evidence regarding the Miner's dust exposure and the layout of the mine including an affidavit from her son; the affidavit of Lou Hamrick, a family friend who visited the Miner's work site regularly; the medical opinion of Dr. Jaworski; and her own testimony. Director's Exhibits 8, 23, 35, 73. Employer also deposed Mr. Hamrick. Director's Exhibit 81 (Employer's Exhibit 6).

dust exposure.[7] Specifically, she submitted maps of the mine site obtained through Freedom of Information Act requests to the Mine Safety and Health Administration, *see* Claimant's Exhibit 1; an affidavit from one of the Miner's coworkers, John Willis, regarding the dust conditions in the warehouse, *see* Claimant's Exhibit 2; and an affidavit from the Miner's son regarding the dust conditions in the warehouse at the mine, *see* Claimant's Exhibit 3.

Initially, pursuant to Employer's objections, the ALJ excluded Claimant's Exhibits 2 and 3, because they "fall outside the evidentiary rules for modification requests" set forth in the regulations, and because they could and should have been developed and submitted when the case was previously before ALJ Appetta. June 21, 2022 Order Addressing Outstanding Evidentiary Issues at 3; 20 C.F.R. §725.310(b).

However, over Employer's objections, the ALJ admitted Claimant's Exhibit 1 because it was submitted while the case was before the district director on modification and thus was already included in the record at Director's Exhibit 68. June 21, 2022 Order at 3. The ALJ also excluded several pieces of medical evidence that he found Claimant could and should have developed previously, including treatment records, objective testing, and curriculum vitae of physicians. June 21, 2022 Order at 3-4 (excluding Claimant's Exhibits 4-6).

Pursuant to Motions for Reconsideration filed by Claimant and the Director, the ALJ admitted Claimant's Exhibits 2 and 3 into the record. July 7, 2022 Order Addressing the Motions for Reconsideration of the Admissibility of Claimant's Exhibits. The ALJ determined that because Claimant's Exhibits 2 and 3 are not medical evidence, they are not barred by the evidentiary limitations at 20 C.F.R. §725.310(b). *Id.* at 3. In addition, he noted that Claimant "detailed the difficulty in obtaining" Claimant's Exhibit 2, and that ALJ Appetta had already admitted Claimant's Exhibit 3 as Claimant's Exhibit 3 (Director's Exhibit 75). *Id*.

On appeal, Employer contends the ALJ erred in admitting Claimant's Exhibits 1-3 into the record. Employer's Brief at 9-16. It asserts that because this evidence was

[7] While the claim was pending before the district director on modification, Claimant also submitted a written statement from Mr. R. Michael Rohaly, Jr., a project engineer who regularly visited the Humphery Number 7 Mine, stating that the mine opening was located 500 feet from the maintenance shop. Director's Exhibit 63. Claimant also submitted records from the Mine Safety and Health Administration (MSHA) classifying employees at this site as underground miners. *Id*. While these were admitted into the record, the ALJ did not consider them.

available when the case was before ALJ Appetta and Claimant did not obtain it at that time, she was not diligent in pursuing her claim and the evidence should thus be excluded. *Id.* We disagree.

An ALJ has broad discretion to make procedural and evidentiary rulings. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned only if the party challenging them demonstrates the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

Moreover, in modification proceedings, ALJs are authorized to consider wholly new evidence or cumulative evidence, or merely further reflect on the evidence initially submitted, in determining whether a mistake of fact was made. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Even when new evidence has been introduced on modification 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).

Claimant timely filed a request for modification, submitting new evidence that the Miner worked at the site of an underground mine, that he worked in dusty conditions, and that he was totally disabled due to pneumoconiosis. Claimant's Exhibits 1-9. Even though Employer challenged the admissibility of Claimant's Exhibit 1, consisting of maps from MSHA to demonstrate that the Miner worked at the site of an underground mine, *see* Director's Exhibits 63, 64, 67; February 4, 2022 Hearing Transcript at 7; Employer's Response to Motions for Reconsideration at 4-5, the ALJ admitted them on the basis that they were submitted to the district director. June 21, 2022 Order at 3. While the ALJ should have addressed Employer's challenges to the admissibility of Claimant's Exhibit 1 on modification (because the maps were not obtained and submitted until after Judge Appetta denied the claim), the ALJ did not rely on this evidence, but instead found Claimant's testimony and the affidavits from Mr. Willis and the Miner's son, *see* Claimant's Exhibits 2-3, establish that he worked in conditions substantially similar to those in an underground mine. Decision and Order on Modification at 9, Director's Exhibits 68 at 3. Thus, any error in not addressing Employer's challenges to the admissibility of Claimant's Exhibit 1 is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (alleged error is harmless unless it "could have made [a] difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We further reject Employer's argument that the ALJ did not adequately address its objections to the admission of Mr. Willis's and the Miner's son's affidavits contained in Claimant's Exhibits 2 and 3. Claimant explained that obtaining sworn testimony or affidavits from the Miner's coworkers to address his coal dust exposure was difficult as the

Miner had a limited number of coworkers and, other than obtaining the affidavit from Mr. Willis, her efforts proved futile in finding coworkers and obtaining information from them, even after consulting with multiple attorneys, contacting the United Mine Workers of America (UMWA), reaching out to former coworkers on social media, conducting research at the local library and online, and attempting to contact a coworker through a newspaper advertisement. Claimant's Request for Reconsideration of Order Addressing Outstanding Evidentiary [Issues] at 2 n.1, 3. The ALJ considered all of these circumstances and found that Claimant's struggle to obtain sworn testimony or affidavits from coworkers, her exhaustion of all options, and the considerable steps she took to obtain evidence regarding the Miner's coal dust exposure establish that she acted diligently in pursuing her claim. Decision and Order on Modification at 5.

The ALJ also considered Employer's argument that Claimant's submission of this evidence was an attempt to fix a litigation error. Decision and Order on Modification at 4-5. He permissibly found that the circumstances here, where Claimant had to take considerable steps to obtain the information, are different from a case where a party seeks to submit routine and commonplace evidence on modification, such as a curriculum vitae of a physician. *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999); Decision and Order on Modification at 4, *citing Wilson v. Peabody Coal Co.*, BRB No. 09-0770 BLA (Aug. 11, 2010) (unpub.) (affirming an ALJ's determination that granting modification was not warranted, as within the ALJ's discretion, in light of Employer's repeated failure to submit the curriculum vitae of its radiologists and its attempt to correct that oversight using modification).[8]

Under the facts of the case, we see no abuse of discretion in the ALJ's determination to admit Claimant's Exhibits 2 and 3 into the record as no regulation bars their admission and he permissibly determined that, given the difficulty of developing the evidence, Claimant was diligent in pursuing her claim. *Blake*, 24 BLR at 1-113; Decision and Order

[8] We note that neither *Kinlaw* nor the unpublished decision in *Wilson* cited by the ALJ supports Employer's contention that Claimant's evidence must be excluded from the record. Those cases did not address the *admissibility* of evidence submitted on modification but, rather, addressed the parties' *diligence* in developing that evidence for purposes of determining whether granting modification renders justice under the Act. In *Kinlaw* specifically, the ALJ admitted the evidence into the record and considered it, but ultimately acted within his discretion in finding both that the evidence was not credible and that the party's lack of diligence in developing it would not render justice under the Act. As explained herein, under the facts of the present case, the ALJ acted within his discretion in determining that Claimant was diligent and that considering the newly-submitted evidence supports a finding that granting modification renders justice under the Act.

on Modification at 4. Moreover, there is no merit to Employer's argument that Claimant's Exhibit 3 should have been excluded on the basis that it could and should have been submitted before ALJ Appetta. Employer's Brief at 12-14. As the ALJ found, the affidavit of the Miner's son in Claimant's Exhibit 3 was submitted to ALJ Appetta and admitted into the record without objection. July 2, 2022 Order at 3; July 16, 2019 Hearing Transcript at 10.

Furthermore, as Employer does not challenge the ALJ's finding that this evidence establishes that the Miner's coal mine employment was qualifying, we affirm the ALJ's determination that the Miner had more than fifteen years of qualifying coal mine employment for invoking the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 9.

Entitlement to Benefits

Employer argues the ALJ erred in failing to acknowledge or discuss the opinions of Drs. Basheda or Farney in finding Claimant entitled to benefits. Employer's Brief at 16-18; Employer's Exhibits 3-5, 7, 8. Employer contends that by failing to address all relevant evidence, the ALJ's decision must be vacated and the case must be remanded for reconsideration. *Id.* We agree with Employer in part.

When a request for modification is filed, "[t]he fact finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider *all evidence* for any mistake in fact or change in conditions." *See Jonida Trucking Inc. v. Hunt*, 124 F.3d 739, 743 (6th Cir. 1997) (emphasis added). The ALJ is tasked with weighing all the evidence and drawing his own conclusions and inferences from the evidence. *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-196 (1985); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). As Employer asserts, the ALJ failed to address all relevant evidence by failing to evaluate the opinions of Drs. Basheda and Farney. Decision and Order at 16-18; Employer's Exhibits 3-5, 7, 8.

Employer submitted two medical opinions from Dr. Basheda reviewing the Miner's medical records and a deposition of the physician, which ALJ Appetta admitted into evidence as Employer's Exhibits 3, 5, and 7. July 16, 2019 Hearing Transcript at 11-12; Director's Exhibit 81. Similarly, Employer submitted a medical opinion from Dr. Farney reviewing the Miner's medical records and a deposition, both of which ALJ Appetta admitted into evidence as Employer's Exhibits 4 and 8. Hearing Transcript at 11-12; Director's Exhibit 81. Although the district director failed to include them in the Director's Exhibits, the ALJ re-admitted them as Director's Exhibit 81. June 21, 2022 Order at 2 n.1.

Both Drs. Basheda and Farney opined the Miner had a totally disabling respiratory impairment.[9] Director's Exhibit 81 (Employer's Exhibit 3-5, 7, 8). Thus, any error in not considering their opinions in finding Claimant established the Miner had a totally disabling respiratory or pulmonary impairment is harmless, as it would not have made a difference to the ALJ's conclusion that the medical opinion evidence, and evidence as a whole, established total disability. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; Decision and Order on Modification at 16-18. Consequently, we affirm the ALJ's determination that Claimant established total disability and invoked the Section 411(c)(4) presumption. Decision and Order on Modification at 19.

However, the opinions of Drs. Basheda and Farney are relevant to the ALJ's determination that Employer did not rebut the existence of legal pneumoconiosis[10] and that it did not rebut disability causation. Director's Exhibit 81 (Employer's Exhibit 3-5, 7, 8). Dr. Basheda reviewed the medical evidence, found no evidence of legal pneumoconiosis, and diagnosed "severe obstructive lung disease with an asthmatic component unrelated to coal dust exposure" but related to tobacco induced chronic obstructive pulmonary disease and asthma, as well as cardiovascular disease. Director's Exhibit 81 (Employer's Exhibits 3 at 16, 5 at 18). He reiterated in his deposition that the Miner had "classic features of tobacco induced [chronic obstructive pulmonary disease], or possibly just purely asthma," based on the clinical and objective data and "based on the progression of his pulmonary disease long after leaving the coal mines." Director's Exhibit 81 (Employer's Exhibit 7 at 30-31).

Similarly, Dr. Farney opined the Miner "did not meet the criteria" for a diagnosis of legal pneumoconiosis, but instead has "multiple co-morbidities with overlapping clinical manifestations[,] including [chronic obstructive pulmonary disease] secondary to tobacco smoke, asthma or asthmatic bronchitis, and [congestive heart failure]." Director's Exhibit 81 (Employer's Exhibit 4 at 19). At his deposition, he explained that the Miner would have been exposed to a concentration of coal dust "far below the minimal permissible exposure level," and he opined the Miner's loss of lung function was due to age, physiological

[9] We affirm, as unchallenged on appeal, the ALJ's determinations that the pulmonary function study evidence supports a finding of total disability; the arterial blood gas study evidence does not support a finding of total disability; and there is no evidence of cor pulmonale. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 12-16.

[10] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. Decision and Order on Modification at 23.

deterioration of his lungs and asthma, and lung edema and heart failure. Director's Exhibit 81 (Employer's Exhibit 8 at 35, 38-41).

As the ALJ failed to consider this evidence, we must vacate his determination that Employer did not rebut the Section 411(c)(4) presumption and remand the case for him to consider the medical opinions of Drs. Basheda and Farney. *See* 30 U.S.C. §923(b); *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-988 (1984) (ALJ's failure to discuss relevant evidence requires remand). We also must therefore vacate the award of benefits.

Justice Under the Act

Finally, Employer contends the ALJ erred in determining that granting modification renders justice under the Act, arguing that the ALJ erred in finding Claimant was diligent in pursuing her claim when the evidence she relied upon to establish a mistake of fact was available at the time the case was before the prior ALJ. Employer's Brief at 9-16. We disagree.

Before ultimately 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 be futile. *Sharpe v. Dir., OWCP* [*Sharpe I*], 495 F.3d 125, 132-33 (4th Cir. 2007). Because the ALJ has broad discretion in deciding whether modification is warranted, *Sharpe II*, 692 F.3d at 335, the party opposing a justice under the Act finding bears the burden of establishing the ALJ abused his discretion. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

Claimant bore the burden of establishing that the Miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.305. ALJ Appetta found that there was insufficient evidence to establish that the Miner's job exposed him to substantially similar dust conditions as an underground mine. Decision and Order at 9. On modification, as discussed above, the ALJ permissibly found that Claimant was diligent in pursuing her claim when she took considerable steps to obtain information from the Miner's coworkers relevant to establishing the dust conditions in the warehouse where the Miner worked. *Blake*, 24 BLR at 1-113; Decision and Order on Modification at 4.

While Employer maintains it was prejudiced by Claimant's submission of evidence on modification that was available before the initial denial of her claim, it has not alleged that it was denied an opportunity to develop its own evidence on the issues relating to the

Miner's employment. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999) (to establish a due process violation, party must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim). Moreover, as discussed, new evidence is specifically permitted in modification proceedings, as the ALJ has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence or merely further reflection on the evidence initially submitted." *See O'Keeffe*, 404 U.S. at 256. Furthermore, Claimant also sought and submitted new medical evidence indicating that the Miner was totally disabled due to pneumoconiosis, in addition to the evidence regarding the Miner's job site conditions. Claimant's Exhibit 7.

Modification favors accuracy over finality, and modification may be employed to present argument or evidence that could have been presented at an earlier stage of litigation. *See Sharpe I*, 495 F.3d at 141; *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Hilliard*, 292 F.3d at 547. The ALJ assessed Claimant's diligence and motive in obtaining evidence regarding the Miner's coal dust exposure and determined that the newly submitted evidence casts doubt on ALJ Appetta's prior findings. Decision and Order on Modification at 4-5. Under the circumstances of the case, he permissibly determined Claimant's diligence weighs in favor of granting modification. *See Sharpe I* 495 F.3d at 132-133; Decision and Order on Modification at 4-5.[11]

[11] A determination of whether granting modification would render justice under the Act is not a threshold issue to be considered by the ALJ before he considers the merits of a request for modification. *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 4 (Nov. 17, 2023). Thus, while we affirm the ALJ's finding that Claimant's diligence weighs in favor of a finding of justice under the Act, if the ALJ determines the Miner is entitled to benefits on remand he must still determine whether granting modification would render justice under the Act taking into consideration all of the relevant factors. *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327-28 (4th Cir. 2012).

Accordingly, the ALJ's Decision and Order Awarding Benefits on Modification is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge