U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0251 BLA

TRECY M. VANDYKE (Widow of RAY E. VANDYKE) Claimant-Respondent v. CONSOLIDATION COAL COMPANY/BEATRICE POCAHONTAS COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/28/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-BLA-05638) of Administrative Law Judge Christine L. Kirby, rendered on claimant's request for modification of a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This is the third time that this case has been before the Board.[1] In its initial Decision and Order, the Board vacated the award of benefits rendered by Administrative Law Judge William S. Colwell, agreeing with employer that Judge Colwell erred in admitting Dr. Naeye's biopsy report. *T.M.V.* [*Vandyke*] *v. Consolidation Coal Co.*, BRB No. 08-0744 BLA, slip op. at 9 (July 29, 2009) (unpub.). The Board remanded the case for reconsideration of the biopsy and medical opinion evidence relevant to the existence of complicated pneumoconiosis. *Id*. at 9-10. On remand, Judge Colwell determined that claimant established that the miner suffered from complicated pneumoconiosis and was therefore entitled to the irrebuttable presumption of death due to pneumoconiosis set forth at 20 C.F.R. §718.304, and he awarded benefits accordingly.[2] Employer appealed.

[1] Claimant is the widow of the miner, who died on October 15, 2003. Director's Exhibit 2. She filed a claim for survivor's benefits on December 4, 2003. *Id.* On July 27, 2004, the district director denied benefits because claimant did not prove that the miner had pneumoconiosis arising out of coal mine employment or that his death was due to pneumoconiosis. Director's Exhibit 18. Claimant filed a second application for benefits on August 27, 2004, which the district director treated as a request for modification, and denied on November 17, 2004. Director's Exhibits 21, 22. On November 7, 2005, claimant timely requested modification. Director's Exhibit 24. The district director granted claimant's request on March 13, 2006, finding that the evidence was sufficient to establish that the miner had complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Director's Exhibit 30. At employer's request, the district director transferred the case to the Office of Administrative Law Judges for a hearing. Following the hearing, Administrative Law Judge William S. Colwell issued a Decision and Order dated June 24, 2008, in which he granted modification and awarded benefits, based on his finding that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.

[2] In light of the fact that claimant filed her survivor's claim before January 1, 2005, the rebuttable presumption of death due to pneumoconiosis, set forth at 30 U.S.C §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305, and the derivative entitlement provision set forth at 30 U.S.C. §932(*l*) (2012), are not applicable to this claim. 20 C.F.R. §718.305(a); Director's Exhibit 2.

In its second Decision and Order, the Board again reversed the award of survivor's benefits, holding that claimant could not invoke the irrebuttable presumption because there was no medical evidence establishing that the nodule detected on biopsy would be seen as an opacity measuring greater than one centimeter on x-ray. *Vandyke v. Consolidation Coal Co.*, BRB No.11-0612 BLA (June 19, 2012) (unpub.). Claimant thereafter filed a timely request for modification on June 17, 2013, which was granted by the district director. Employer requested a hearing, which was conducted by Administrative Law Judge Christine L. Kirby (the administrative law judge). In her Decision and Order, which is the subject of this appeal, the administrative law judge found that claimant was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis.[3] The administrative law judge further determined, therefore, that claimant met her burden to establish that there was a mistake in a determination of fact in the previous denial of her claim pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits.

In its current appeal, employer asserts that the administrative law judge erred in finding that the medical opinion of Dr. DePonte, as supported by Dr. Binns's x-ray reading and Dr. Bechtel's surgical pathology report, was sufficient to establish the existence of complicated pneumoconiosis and invocation of the irrebuttable presumption of death due to pneumoconiosis. Employer further contends that the administrative law judge erred in finding that modification of the prior denial renders justice under the Act. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge properly credited Dr. DePonte's opinion and properly determined that granting modification would render justice under the Act.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

[3] Prior to the hearing, the administrative law judge issued an order rejecting employer's Motion to Dismiss claimant's request for modification because she did not submit new evidence containing an equivalency determination. January 23, 2014 Order Denying Employer's Motion to Dismiss. The administrative law judge also issued a prehearing evidentiary order granting employer's request to limit claimant to one x-ray interpretation in support of her request for modification and rejecting employer's allegation that granting modification would not render justice under the Act. December 16, 2014 Evidentiary Order.

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). We review the administrative law judge's rulings on procedural issues, including a modification request, for abuse of the discretion granted to her in resolving these matters. *See Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 327, 25 BLR 2-157, 2-173 (4th Cir. 2012), *citing Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 130, 24 BLR 2-56, 2-67 (4th Cir. 2007).

ENTITLEMENT IN THE SURVIVOR'S CLAIM

To establish entitlement to survivor's benefits, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). Relevant to this survivor's claim, death is considered to be due to pneumoconiosis where the irrebuttable presumption set forth at 20 C.F.R. §718.304 is applicable, or where the evidence establishes that pneumoconiosis caused the miner's death, was a substantially contributing cause or factor leading to death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4).

To successfully establish a basis for modification of the denial of her claim, claimant must demonstrate that there was a mistake in a determination of fact in the prior decision.[5] *See* 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The United States Court of Appeals for the Fourth Circuit has held that "[i]f a claimant avers generally that the [administrative law judge] improperly found the ultimate fact and thus erroneously denied the claim, the [administrative law judge] has the authority, without more, to modify the denial of benefits. There is no need for a smoking-gun factual error . . . or startling new evidence." *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

In this case, claimant alleges that the prior denial of her claim was erroneous, as she has established that the miner had complicated pneumoconiosis, thereby invoking the

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] Establishing a mistake in a determination of fact is the sole basis available for modification of a survivor's claim. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

irrebuttable presumption that the miner's death was due to pneumoconiosis.[6] Pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffers or suffered 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 or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c).

The Fourth Circuit has held that the administrative law judge must determine whether a medical expert has provided an equivalency determination such that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *See Scarbro v. Eastern Assoc. Coal Corp.*, 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). Specifically, the court has held that "'[b]ecause prong (A) sets out an entirely objective scientific standard' – i.e., an opacity on an x-ray greater than one centimeter – x-ray evidence provides the benchmark for determining what under prong (B) is a 'massive lesion' and what under prong (C) is an equivalent diagnostic result reached by other means." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, *quoting Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61. In addition, "all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on x-ray." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282, 24 BLR 2-269, 2-280 (4th Cir. 2010). Further, the Fourth Circuit has recognized that a diagnosis of massive lesions, standing alone, can satisfy the "statutory ground" for invocation of the irrebuttable presumption at 20 C.F.R. §718.304(b). *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered the x-ray evidence before Judge Colwell, and a newly submitted reading by Dr. Binns of an x-ray dated September 9, 1985. Decision and Order at 9-10. The administrative law judge noted that Judge Colwell found that the x-ray evidence before him was negative for complicated pneumoconiosis and stated, "I agree with his analysis." *Id*. at 10. When summarizing the x-ray evidence and setting forth her findings, she noted that Dr. Binns classified the September 9, 1985 x-ray as 0/1 s, p, and described a large opacity measuring approximately three centimeters in diameter in the right upper lobe, which he

[6] Although the miner died as a result of a traumatic injury, claimant can establish entitlement to survivor's benefits by invoking the irrebuttable presumption of death due to pneumoconiosis. 20 C.F.R. §718.205(b)(5).

indicated could be carcinoma. *Id*. at 6; Claimant's Exhibit 1. The administrative law judge also acknowledged, but rejected, employer's argument that Dr. Binns found the September 9, 1985 x-ray to be negative for complicated pneumoconiosis.[7] Decision and Order at 6, *citing* Employer's Post-Hearing Brief at 14, 17, 19-21. Although the administrative law judge found that Dr. Binns did not read the x-ray as negative for complicated pneumoconiosis, she similarly determined that she could not treat his x-ray reading as positive for complicated pneumoconiosis because he could not definitively state whether the disease was present without further testing for cancer. Decision and Order at 10. Based on her review of the newly submitted evidence, and the evidence before Judge Colwell, the administrative law judge concluded that claimant did not establish the existence of complicated pneumoconiosis by a preponderance of the x-ray evidence under 20 C.F.R. §718.304(a). *Id*.

With respect to 20 C.F.R. §718.304(b), the administrative law judge stated that she agreed with Judge Colwell that Dr. Hansbarger's biopsy report diagnosing granulomatous disease was entitled to less weight than Dr. Bechtel's diagnosis of complicated pneumoconiosis because Dr. Hansbarger did not identify the documentation on which he relied.[8] Decision and Order at 11; Director's Exhibit 24. The administrative law judge found that Dr. Bechtel provided a "highly detailed" pathology report and fully explained his conclusion that the presence of a fungal infection in the 4 x 3.5 x 3.5 centimeter nodule from the resected right upper lobe of the miner's lungs did not contradict his diagnosis of complicated pneumoconiosis. Decision and Order at 11; Director's Exhibits 24, 29. The administrative law judge concluded that "Dr. Bechtel's opinion is well-reasoned and well-documented and supports a finding that [the] Miner suffered from complicated pneumoconiosis." Decision and Order at 12. We affirm this finding as it is unchallenged by employer on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] Dr. Binns, a Board-certified radiologist and B reader, indicated in a narrative report of his x-ray reading that the September 9, 1985 film showed "an ill-defined large opacity measuring approximately 3 [centimeters] in diameter in the apical posterior portion of the right upper lobe . . . I would be very concerned as to the possibility of a carcinoma in the right upper lobe, unless it could be demonstrated that the changes are long standing." Claimant's Exhibit 1. Dr. Binns further indicated "there is no conclusive evidence of occupational pneumoconiosis." *Id.*

[8] The administrative law judge agreed with Judge Colwell's finding that the autopsy evidence did not meet the quality standards set forth in 20 C.F.R. §718.106, as "it was limited to a gross description of the respiratory system and only contained a microscopic examination of the thyroid." Decision and Order at 10.

The administrative law judge observed that the remaining issue for her to consider was whether Dr. DePonte's newly submitted medical opinion contained a determination that the 4 x 3.5 x 3.5 centimeter nodule described by Dr. Bechtel would appear as an opacity greater than one centimeter in diameter if viewed on an x-ray. Decision and Order at 12. The administrative law judge noted that Dr. DePonte reviewed the x-ray interpretations of record, Dr. Bechtel's pathology report from the resection of the right upper lobe of the miner's lungs on April 22, 1992, and the miner's death certificate.[9] Decision and Order at 13; Claimant's Exhibit 2. The administrative law judge fully credited Dr. DePonte's opinion that the large lesion Dr. Binns viewed on the 1985 x-ray, and the nodule diagnosed as complicated pneumoconiosis by Dr. Bechtel in his 1992 surgical pathology report, were identical. Decision and Order at 13-14. She also fully credited Dr. DePonte's statement that the nodule, if viewed on x-ray, would measure more than one centimeter in diameter. *Id*. at 14. Based on Dr. DePonte's equivalency determination, the administrative law judge found that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. *Id*. The administrative law judge further found that claimant established a mistake in a determination of fact in the prior denial of her claim pursuant to 20 C.F.R. §725.310. *Id*.

Employer argues that the administrative law judge erred in finding that Dr. Binns's interpretation of the September 9, 1985 x-ray supported Dr. DePonte's diagnosis of complicated pneumoconiosis. Employer maintains that, in finding Dr. Binns's interpretation "consistent with complicated pneumoconiosis," despite the physician's statement that there was "no conclusive evidence of occupational pneumoconiosis," the administrative law judge shifted the burden of proof to the employer. Brief in Support of Petition for Review at 10, *quoting* Decision and Order at 10; Claimant's Exhibit 1. Employer further contends that the administrative law judge improperly credited Dr. DePonte's equivalency determination, asserting that the probative value of Dr. DePonte's opinion is undercut by her failure to personally review the 1992 biopsy slides or read the 1985 x-ray. Employer also argues that Dr. DePonte erroneously assumed that Dr. Bechtel correctly diagnosed complicated pneumoconiosis in his 1992 biopsy report, and

[9] The administrative law judge also considered the previously submitted medical opinions of Drs. Rosenberg, Hippensteel, Spagnolo and Forehand, that the miner did not have complicated pneumoconiosis. Decision and Order at 13. She discredited the opinions of Drs. Rosenberg, Hippensteel and Spagnolo because they relied on Dr. Hansbarger's discredited biopsy report, and pulmonary function studies and blood gas studies that did not produce qualifying values for total disability at 20 C.F.R. §718.204(b)(2)(i), (ii). *Id*. She also discredited Dr. Forehand's opinion, based on his reliance on Dr. Hansbarger's discredited biopsy report, and his erroneous belief that the miner was a nonsmoker. *Id*. These findings are affirmed as unchallenged by employer on appeal. *See Skrack*, 6 BLR at 1-711.

that the nodule Dr. Bechtel described was the same three centimeter mass that Dr. Binns viewed on the 1985 x-ray. Employer's contentions lack merit.

Contrary to employer's allegation, the administrative law judge acted within her discretion as fact-finder in determining that Dr. Binns did not read the September 9, 1985, x-ray as negative for complicated pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). The administrative law judge acknowledged that Dr. Binns "stated that he could not *conclusively* state that Miner had occupational pneumoconiosis." Decision and Order at 6; Claimant's Exhibit 1. She reasonably found, however, "[t]he fact that he opined that this opacity could represent carcinoma[10] and that he could not therefore *conclusively* say that it represented occupational pneumoconiosis does not mean that he found the x-ray to be 'negative for complicated pneumoconiosis'." Decision and Order at 6, *quoting* Employer's Brief in Support of Petition for Review at 14; *see Underwood v Elkay Mining Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-2-28 (4th Cir. 1997). Accordingly, we affirm the administrative law judge's determination that Dr. Binns's x-ray reading was not negative for complicated pneumoconiosis. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997).

Further, the administrative law judge rationally found that Dr. DePonte's opinion, that the miner suffered from complicated pneumoconiosis, and her equivalency determination, are well-reasoned and well-documented. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336. The administrative law judge acted within her discretion in determining that Dr. DePonte was "well-qualified to interpret the evidence in this case," based on her status as a Board-certified radiologist with twenty-eight years of experience. Decision and Order at 14; *Grizzle v. Pickands Mather and Co./Chisolm Mines*, 994 F.2d 1093, 1096, 17 BLR 2-123, 1-126 (4th Cir. 1993). We reject employer's allegation that Dr. DePonte could not make a credible diagnosis without personally viewing the 1985 x-ray and the 1992 tissue slides from the right upper lobe of the miner's lungs. The administrative law judge permissibly determined that Dr. DePonte's opinion was adequately documented by her review of Dr. Binns's reading of the 1985 x-ray and Dr. Bechtel's 1992 surgical pathology report. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-169 (4th Cir. 2000). Moreover, the administrative law judge accurately noted that Dr. DePonte explained her determination that the three centimeter lesion seen by Dr. Binns in the right upper lobe on the miner's 1985 x-ray was

[10] The administrative law judge determined that "the record does not contain any evidence indicating that Miner had carcinoma." Decision and Order at 13 n.11. We affirm this finding because it is not challenged by employer on appeal. *See Skrack*, 6 BLR at 1-711.

the nodule removed during the miner's right lung lobectomy in 1992, and diagnosed as complicated pneumoconiosis by Dr. Bechtel.[11] Decision and Order at 13-14; Claimant's Exhibit 2. The administrative law judge further observed correctly that Dr. DePonte addressed the presence of a fungal infection in the right upper lobe of the miner's lungs, and explained that it was not responsible for the large opacity that Dr. Binns viewed on the 1985 x-ray. She stated, "[i]t is common for these large opacities to cavitate due to outgrowing their blood supply and central necrosis. When the cavities form, there are often opportunistic infections, which in this case, was the typical aspergilloma." Claimant's Exhibit 2; *see* Decision and Order at 14. Finally, the administrative law judge reasonably found that "Dr. DePonte rendered an adequate equivalency determination in which she very clearly stated that the 4 x 3.5 x 3.5 centimeter nodule described in the surgical specimen of the right upper lobe would definitely appear larger than one centimeter on standard chest film." Decision and Order at 14; *see Cox*, 602 F.3d at 282, 24 BLR at 2-280.

We affirm, therefore, the administrative law judge's finding that Dr. DePonte's opinion, including her equivalency determination, was well-reasoned and well-documented and sufficient to establish that the miner suffered from complicated pneumoconiosis. *See Akers*, 131 F.3d at 441, 21 BLR at 2-274. Accordingly, we also affirm the administrative law judge's determinations that claimant is entitled to the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, and that she established a mistake in a determination of fact in the prior denial of her claim pursuant to 20 C.F.R. §725.310. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Betty B*

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[11] Dr. DePonte stated:

> I feel . . . with a high degree of medical certainty that the large opacity which was described on the chest film report of 9/9/1985 and surgically removed as part of the right upper lobe on 4/22/1992 was conclusively a large opacity of coal worker's pneumoconiosis. This opacity showed interval growth from 3 centimeters to 4 x 3.5 x 3.5 centimeters within the interval consistent with the typical growth rate of a large opacity of coal worker's pneumoconiosis.
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> There is no doubt in my mind that this opacity in 1985 represented a large opacity of coal worker's pneumoconiosis which was subsequently surgically resected in 1992 and clearly was not present on the chest film in 2003. There is no other explanation but for this.

Claimant's Exhibit 2.

Coal Co. v. Director, OWCP [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).

JUSTICE UNDER THE ACT

Employer contends that the administrative law judge erred in finding that granting claimant's request for modification renders justice under the Act. Employer argues that claimant did not diligently pursue her claim, and now seeks to re-litigate this case by submitting a previously available x-ray that is twenty-seven years old, and a medical opinion that could have been submitted over a decade ago to satisfy the equivalency requirement set forth in *Scarbro.* Employer further contends that the interest in finality is especially compelling in this case, because claimant had her day in court by litigating her claim for twelve years, and had her entitlement to benefits twice reversed by the Board.

The modification of a claim does not automatically flow from a finding that a mistake in a determination of fact was made in a prior adjudication. Rather, the administrative law judge must conclude that granting modification will render justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968). The determination of whether this standard has been met is committed to the administrative law judge's discretion. *Sharpe II*, 692 F.3d at 327, 25 BLR at 2-173. Reversal of the administrative law judge's finding is appropriate only where it "was 'guided by erroneous legal principles,' or if the adjudicator 'committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Id.*, *quoting Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999). The relevant factors identified by the Fourth Circuit include: the accuracy of the adjudication; the interest in finality; the diligence and motive of the requesting party; the quality of the new evidence; and whether the requesting party will actually benefit from modification. *Sharpe II*, 692 F.3d at 327-29, 25 BLR at 2-173.

In this case, the administrative law judge acted within her discretion in finding that these factors weigh in favor of granting modification, based on claimant's diligent pursuit of an award of survivor's benefits for over eleven years; the two previous determinations by administrative law judges that she is entitled to benefits; and her submission of additional evidence in support of her current request for modification. *See Sharpe II*, 692 F.3d at 327-29, 25 BLR at 2-173-176. In addition, despite employer's argument to the contrary, the administrative law judge was not required to deny claimant's modification request based on the number of prior requests she made, or the availability of evidence at an earlier stage in the adjudication process. *See O'Keeffe*, 404 U.S. at 256, 92 S.Ct. 405; *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). Because the administrative law judge's finding is supported by substantial evidence, and we discern no abuse of discretion in her determination that granting

modification would render justice under the Act, it is affirmed. *See Sharpe II*, 692 F. 3d at 327-29, 25 BLR at 2-173-176. We also affirm, therefore, the administrative law judge's decision to grant claimant's request for modification under 20 C.F.R. §725.310 and to award benefits in this survivor's claim.

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge