BRB Nos. 10-0219 BLA
and 12-0519 BLA-A

CATHERINE D. BARTLEY (Widow of ARNOLD BARTLEY)	)	
Claimant-Petitioner	)	
v.	)	
UNION CARBIDE CORPORATION	)	DATE ISSUED: 07/30/2013
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Third Remand – Denying Benefits and Decision and Order – Denying Benefits on Modification of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Roger D. Foreman (The Law Office of Roger D. Foreman, L.C.), Charleston, West Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (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: DOLDER, Chief Administrative Appeal Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Third Remand – Denying Benefits (2001-BLA-1008) and the Decision and Order – Denying Benefits on Modification (2011-BLA-5309) of Administrative Law Judge Michael P. Lesniak, rendered on a survivor's claim filed on September 28, 2000,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for a fourth time. The relevant procedural history is as follows. Administrative Law Judge Robert J. Lesnick initially awarded survivor's benefits based on his finding that claimant established that the miner suffered from complicated pneumoconiosis. In consideration of employer's appeal, the Board vacated the award of benefits and remanded the case for further consideration. *Bartley v. Union Carbide Corp*., BRB No. 04-0361 BLA (Jan. 27, 2005) (unpub.).

On remand, the case was reassigned to Administrative Law Judge Michael P. Lesniak (the administrative law judge), who reconsidered the evidence and denied benefits. Pursuant to claimant's appeal, the denial was vacated and the case was remanded for the administrative law judge to address whether employer was collaterally estopped from relitigating the issue of whether the miner had pneumoconiosis, in light of *Collins v. Pond Creek Mining Co*., 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006). *Bartley v. Union Carbide Corp*., BRB No. 06-0382 BLA (Feb. 28, 2007) (unpub.).

In a Decision and Order on Second Remand, the administrative law judge found that employer was collaterally estopped[2] from relitigating whether the miner had simple or complicated pneumoconiosis and, thus, awarded benefits pursuant to 20 C.F.R. §718.304. Employer appealed, and the Board affirmed, as unchallenged, the administrative law judge's finding that employer was collaterally estopped from litigating whether the miner had simple pneumoconiosis. However, the Board vacated the administrative law judge's determination that employer was precluded from contesting

[1] Claimant is the widow of the miner, Arnold Bartley, who died on August 20, 2000. Director's Exhibit 4. The miner filed a claim for benefits on February 14, 1983, which was awarded by the district director on June 13, 1984. Director's Exhibit 23. Following the miner's death, claimant filed a survivor's claim on September 28, 2000. Director's Exhibit 1. Based on the filing date of the survivor's claim, amendments to the Black Lung Benefits Act, as amended at U.S.C. §§921(c)(4) and 932(*l*), are not applicable.

[2] The doctrine of collateral estoppel refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that actually has been litigated and decided in the initial action. *Freeman v. United Coal Mining Co. v. Director, OWCP* [*Forsythe*], 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994).

the existence of complicated pneumoconiosis, as the record contained insufficient information from which to conclude that the issue had actually been litigated in the miner's claim. *C.B.* [*Bartley*] *v. Union Carbide Corp*., BRB No. 08-0337 BLA, slip op. at 4 n.5 (Jan. 16, 2009) (unpub.). Accordingly, the Board remanded the case for further consideration under 20 C.F.R. §§718.205(c), 718.304.

In his Decision and Order on Third Remand – Denying Benefits, the administrative law judge found that there was no persuasive evidence to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) and also found that claimant failed to establish that the miner suffered from complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant filed an appeal with the Board, which was assigned BRB No. 10-0219 BLA, but later withdrew her appeal in order to pursue modification. *See Bartley v. Union Carbide Corp*., BRB No. 10-0219 BLA (Mar. 10, 2010) (unpub. Order).

In a Decision and Order – Denying Benefits on Modification, the administrative law judge made a preliminary finding that granting claimant's modification request would not render justice under the Act and, therefore, he did not consider claimant's new evidence, and did not render any specific findings at 20 C.F.R. §725.310. Claimant filed a motion for reconsideration, which the administrative law judge denied on July 9, 2012. Claimant appealed to the Board, requesting both reinstatement of the appeal in BRB No. 10-0219 BLA and review of the administrative law judge's denial of her modification request.[3]

On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant also argues that the administrative law judge erroneously found that consideration of her modification request, along with her new evidence, would not render justice under the Act. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter brief, asserting that the administrative law judge's bases for denying claimant's modification request were erroneous.

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] On August 14, 2012, the Board acknowledged claimant's appeal of the Decision and Order Denying Benefits on Modification and it was assigned BRB No. 12-0519 BLA. On May 31, 2013, the Board reinstated claimant's appeal of the Decision and Order on Third Remand – Denying Benefits, BRB No. 10-0219 BLA. The Board has consolidated the appeals for purposes of a decision only.

and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). The miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

I. BRB No. 10-0219 BLA/Decision and Order on Third Remand/Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, there is an irrebuttable presumption of death due to pneumoconiosis if the miner 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. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether a claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *See Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000);

[4] Because the miner's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 2.

Lester v. Director, OWCP, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered twelve readings of four x-rays dated November 30, 1981, June 30, 1983, April 26, 2000 and June 28, 2000. Decision and Order on Third Remand at 4-7. The November 30, 1981 x-ray was read as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis by Dr. Gale, dually qualified as a Board-certified radiologist and B reader. Director's Exhibit 23. The June 30, 1983 x-ray was read as positive for simple and complicated pneumoconiosis, Category B, by Dr. Gaziano, a B reader, and positive for simple and complicated pneumoconiosis, Category C, by Dr. Sargent, a dually qualified radiologist. *Id*.

The April 26, 2000 x-ray was read by Dr. Soong, whose qualifications are not of record, as showing "large conglomerate masses which may be related to progressive massive fibrosis[.]" Director's Exhibit 5. The same x-ray was read as positive for simple and complicated pneumoconiosis, Category C, by Dr. Sargent, but as negative for simple and complicated pneumoconiosis by Drs. Wheeler, Scott and Kim, each of whom is a dually qualified radiologist. Director's Exhibit 11; Employer's Exhibit 1. Dr. Wheeler wrote in the "Comments" section of the ILO form that there was a "well defined oval 9x4 [centimeter] mass" and an "8x5 [centimeter] mass . . . compatible with conglomerate [tuberculosis] more likely than large opacities of [coal workers' pneumoconiosis] because there are no background nodular infiltrates." Employer's Exhibit 1. Dr. Scott identified a "5x8 [centimeter] mass . . . probably granulomatous . . . due to tuberculosis." *Id*. Dr. Scott also noted that there is "[n]o background of small rounded opacities to suggest silicosis." *Id*. Dr. Kim identified "well defined masses in both upper lobes and bullous emphysema." Employer's Exhibit 3. He wrote, "[o]verall changes of upper lungs [probably] represent granulomatous process [rather] than silicosis due to lack of nodules in the background." *Id*.

The June 28, 2000 x-ray was read as positive for simple and complicated pneumoconiosis, Category C, by Dr. Sargent, but as negative for simple and complicated pneumoconiosis by Drs. Wheeler, Scott and Kim. Director's Exhibit 13; Employer's Exhibits 1, 3. Dr. Wheeler observed that the "same calcifications are ring[-]like . . . no background nodules . . . to suggest silicosis and histoplasmosis often has ring calcifications in nodes." Employer's Exhibit 1. Drs. Scott and Kim made comments similar to those stated on the ILO forms for the April 26, 2000 x-ray, indicating that there are no background nodules. Employer's Exhibits 1, 3.

After summarizing the conflicting x-ray evidence, the administrative law judge found that there are five positive readings, but concluded that claimant "has not demonstrated on the basis of these interpretations that the [m]iner suffered either from

simple or complicated pneumoconiosis." Decision and Order at 16. The administrative law judge noted that while Drs. Gale, Sargent, Wheeler, Scott and Kim are each dually qualified radiologists, Drs. Scott and Wheeler have "additional, more extensive teaching credentials[,]" which he considered to be "a relevant factor" in determining the weight to accord the x-ray evidence. *Id*. The administrative law judge found that Dr. Wheeler expressed views "that are demonstrably hostile to the Act," insofar as he is "unaware that coal mine dust exposure may cause emphysema" and "would not expect large opacities of pneumoconiosis to progress after the cessation of exposure."[5] *Id*. at 17. However, the administrative law judge determined that "Dr. Wheeler's views on these issues do not detract from his specific radiological interpretations that there are *no rounded, background nodules* present and that the absence of such nodules militates against a diagnosis of complicated pneumoconiosis." *Id*. (emphasis added). The administrative law judge also noted Dr. Wheeler's additional explanation that "the calcified granulomata that are inside the mass regions in the upper lobes are characteristic of conglomerate [tuberculosis] or histoplasmosis." *Id*. The administrative law judge concluded that the x-ray evidence was "at best in equipoise" and found that claimant did not satisfy her burden to establish that the miner suffered from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id*.

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge found that the biopsy evidence was "inconclusive."[6] Pursuant to 20 C.F.R. §718.304(c), the administrative law judge summarized claimant's treatment records and found that they do not contain a "cogent diagnosis of complicated pneumoconiosis or an equivalent." Decision and Order on Third Remand at 18. He noted that there was only one CT scan of record dated June 29, 2000, which had three readings, each of which was negative for complicated pneumoconiosis by Drs. Kim, Wheeler and Scott.[7] The administrative law

[5] Dr. Wheeler stated, "in my experience[,] without ongoing exposure, areas of proven progressive massive fibrosis do not progress; they stop." Employer's Exhibit 6.

[6] The administrative law judge noted that claimant underwent a right upper lobe biopsy on April 22, 1987, which revealed "neural tumor of bronchus." Director's Exhibit 5. Dr. Naeye opined that there was no evidence of complicated pneumoconiosis, based on his review of one biopsy slide. Employer's Exhibit 2. Dr. Oesterling also reviewed one biopsy slide but stated that "[t]here is no lung [tissue] available to establish the presence or absence of [coal workers'] pneumoconiosis." Employer's Exhibit 4. The administrative law judge credited Dr. Oesterling's opinion and found that the biopsy evidence was inconclusive as to whether the miner had complicated pneumoconiosis. Decision and Order on Third Remand at 17.

[7] Dr. Wheeler identified large masses in claimant's left upper lung, right upper lung, and lower lung regions. Employer's Exhibit 1. He concluded that the masses were

judge rejected Dr. Gaziano's diagnosis of complicated pneumoconiosis because it "appears to be based solely on the x-ray" he read as positive for complicated pneumoconiosis and is not adequately explained. Decision and Order on Third Remand at 18-19; *see* Director's Exhibit 23. The administrative law judge also noted that Dr. Dahhan's opinion did not assist claimant, as Dr. Dahhan opined that the miner did not have pneumoconiosis, simple or complicated. Employer's Exhibit 5. Thus, the administrative law judge concluded that claimant did not establish the existence of complicated pneumoconiosis under 20 C.F.R. 718.304(c). *Id*.

Weighing all the relevant evidence together, the administrative law judge found that, "[e]ven assuming that the x-ray interpretations of Drs. Gaziano, Gale and Sargent" established complicated pneumoconiosis, "the CT scan readings of Drs. Kim, Scott and Wheeler, in concert with the deposition testimony of the latter, diminish the probative force of the x-ray evidence." Decision and Order on Third Remand at 19, *citing Scarbro*, 220 F.3d at 256. The administrative law judge, therefore, found that claimant did not satisfy her burden to establish the existence of complicated pneumoconiosis and was not entitled to the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.

Claimant argues that the administrative law judge erred by not giving preclusive effect to the finding of simple pneumoconiosis in the miner's claim in resolving the conflict in the x-ray evidence at 20 C.F.R. §718.304(a).[8] We agree. The administrative

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due to calcified granulomata, "compatible with conglomerate [tuberculosis or histoplasmosis]." *Id*. Dr. Scott identified two five centimeter masses in both upper lungs which were "probably granulomatous masses due to tuberculosis[.]" Employer's Exhibit 1. Dr. Kim identified a "5x6" centimeter mass in the upper lobes of the lungs "probably represent[ing] [a] granulomatous process." Employer's Exhibit 3. All three physicians reiterated that the absence of rounded background opacities made it unlikely that the masses were due to complicated pneumoconiosis. Employer's Exhibits 1, 3.

[8] Claimant makes a general assertion in this appeal that the administrative law judge erred in giving any weight to the opinions of Drs. Kim, Scott, and Wheeler because they were hired by employer. Claimant's Brief in Support of Petition for Review at 7-8. Contrary to claimant's assertion, in the absence of specific evidence of bias, party affiliation, alone, is not a dispositive factor in determining the weight to be assigned to the medical evidence of record. *See Urgolites v. BethEnergy Mines, Inc*., 17 BLR 1-20, 1-23 n.4 (1992); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-35-36 (1991) (en banc), (holding that it is error to discredit, as biased, a medical report prepared for litigation absent a specific basis for finding the report to be unreliable).

law judge appears to credit the opinions of Drs. Scott, Kim and Wheeler, that the masses seen on claimant's x-rays are not complicated, because he accepts their explanation that "complicated pneumoconiosis is unlikely *absent a background of smaller nodules* [*of simple pneumoconiosis*]." Decision and Order on Third Remand at 16. The administrative law judge concluded, specifically, that claimant "has not demonstrated on the basis of these interpretations that the [m]iner suffered *either from simple or complicated* pneumoconiosis." *Id*. (emphasis added).[9] Contrary to the administrative law judge's finding, the Board has affirmed that claimant established the existence of simple pneumoconiosis arising out of coal mine employment by application of the doctrine of collateral estoppel. *Bartley*, BRB No. 08-0337 BLA at 4 n.5. Because the administrative law judge's analysis of the credibility of the conflicting x-ray readings does no account for the fact that the miner had simple pneumoconiosis, we must vacate his finding under 20 C.F.R. §718.304(a). Additionally, because the administrative law judge did not consider whether the opinions of employer's experts were valid in light of the fact that the miner suffered from simple pneumoconiosis, we vacate the administrative law judge's findings at 20 C.F.R. §718.304(c).[10] Therefore, we vacate the Decision and Order on Third Remand – Denying Benefits and remand this case for further consideration as to whether claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis.

On remand, we instruct the administrative law judge to make a specific finding as to the existence of complicated pneumoconiosis with respect to each x-ray and then

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[9] Employer asserts that the administrative law judge had discretion to find that that the miner did not have radiographic evidence of simple pneumoconiosis because "[a] finding of coal worker's pneumoconiosis through estoppel does not mean that coal workers' pneumoconiosis is established through all mediums in all forms." Employer's Brief at 24.

[10] The administrative law judge stated:

> I also find that the CT scan interpretations of Drs. Kim, Scott and Wheeler amount to probative evidence that undermines support for this claim at Section 718.304(c). These experts confirmed to their satisfaction the *lack of background nodules* [of simple pneumoconiosis] and have persuasively explained why the opacities/masses that have been observed do not constitute complicated pneumoconiosis but are instead more likely the effects of either healed TB, histoplasmosis or granulomatous disease.

Decision and Order at on Third Remand at 19.

determine, based on his consideration of the x-ray evidence as a whole, whether claimant has established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge should determine the weight to accord the conflicting x-ray readings, taking into consideration that claimant has established the existence of simple pneumoconiosis by application of collateral estoppel. The administrative law judge is also instructed to reconsider whether claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). In determining the credibility of the medical experts the administrative law judge should consider *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010). In rendering all of his findings on remand, the administrative law judge must explain the bases for his credibility determinations in accordance with the Administrative Procedure Act (APA).[11] If the administrative law judge determines that the miner had complicated pneumoconiosis, he must also render findings at 20 C.F.R. §718.203. If claimant is not entitled to the irrebuttable presumption at 20 C.F.R. §718.304, the administrative law judge should reconsider claimant's modification request as discussed below.

II. BRB 12-0519 BLA/Denial of Modification

Because we have vacated the administrative law judge's Decision and Order on Third Remand – Denying Benefits, we also vacate the administrative law judge's Decision and Order – Denying Benefits on Modification. However, in the interest of judicial economy, we will address the administrative law judge's findings on modification to avoid repetition of error.

When a survivor's claim is denied on the grounds that the evidence was insufficient to establish death due to pneumoconiosis, an issue pertaining to the miner's physical condition at the time of death, the only available basis for modification is to establish a mistake in a determination of fact under 20 C.F.R. §725.310. *Wojtowicz*, 12 BLR at 1-164. When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). However, the modification of a claim does not automatically flow from a finding

[11] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all 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 5 U.S.C. §554(c)(2), 30 U.S.C. §932(a) and 33 U.S.C. §919(d).

that a mistake was made in an earlier determination of fact, and should be granted only when doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (recognizing that the purpose of modification is to "render justice."); *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F. 3d 317, 327-28, 25 BLR 2-157, 2-173-174 (4th Cir. 2012), *cert. denied*, 570 U.S. (2013); *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *McCord v. Cephas*, 532 F.2d 1377, 1380 (D.C. Cir. 1976). In determining whether reopening a claim would render justice under the Act, the administrative law judge should consider all of the relevant factors and circumstances, including, but not limited to, delay in seeking modification, diligence, motive, mootness, the interest in finality, and whether granting modification would promote accuracy of adjudication. *See Sharpe II*, 692 F. 3d at 327-28, 25 BLR at 2-173-74; *Sharpe I*, 495 F.3d at 133, 23 BLR at 2-68-69.

In this case, the administrative law judge determined that granting claimant's modification request would not render justice under the Act, although he did not render any specific finding as to whether there was a mistake in a determination of fact under 20 C.F.R. §725.310. The administrative law judge noted that claimant submitted two pieces of evidence in support of her modification request: Dr. Alexander's positive reading for complicated pneumoconiosis of the June 29, 2000 CT scan and a July 10, 2010 medical report from Dr. Alexander, criticizing the opinion of Dr. Wheeler and his negative x-ray and CT scan readings. Decision and Order – Denying Benefits on Modification at 9. The administrative law judge observed that claimant "has never been limited by the evidentiary limitations" and "has offered no explanation for her failure to obtain an interpretation of this CT scan until now." *Id*. The administrative law judge found that "[c]laimant's substantial delay in providing this evidence demonstrates a lack of diligence." *Id*. The administrative law judge found that claimant's motive for seeking modification was improper, insofar as she used new evidence to "'fill in the gaps' in her previous case." *Id*. The administrative law judge further concluded:

> Finally . . . the court's interest in finality may outweigh the competing interest in accuracy, especially where there is nothing qualitatively different about newly submitted evidence. In the present case, Dr. Wheeler explained how an autopsy would have been dispositive in this case; however, [c]laimant never obtained an autopsy. Short of this kind of evidence, additional CT scans and medical reports do little to shed additional light on [the] miner's condition. Therefore, I agree that the "possibility that the initial decision was incorrect is no reason to disturb it."

Id., *quoting Sharpe v. Westmoreland Coal Co.*, BRB No. 08-0563 BLA (June 17, 2009) (unpub.).[12]

We agree with claimant and the Director that the administrative law judge erred in his consideration of claimant's modification request. In considering whether modification will render justice under the Act, the administrative law judge must keep in mind the underlying purpose of modification proceedings along with the purpose of the Act. *See Sharpe II*, 692 F. 3d at 327-28, 25 BLR at 2-173-74; *Sharpe I*, 495 F.3d at 133, 23 BLR at 2-69; *Hilliard*, 292 F.3d at 541, 22 BLR at 2-444. Contrary to the administrative law judge's analysis, "a modification request cannot be denied because it contains an argument or evidence that could have been presented at an earlier stage in the proceeding[.]" *Hilliard*, 292 F.3d at 541, 22 BLR at 2-444. The mere fact that claimant "attempt[ed] to 'fill in the gaps' in her previous case" with evidence that was available or could have been submitted earlier does not alone establish improper motive. *See* Decision and Order – Denying Benefits on Modification at 9. The purpose of modification is to "ensure the accurate distribution of benefits" and the regulation embodies a Congressional policy favoring accuracy of determination over finality. *See Hilliard*, 292 F.3d at 546-547, 22 BLR at 2-452-454.

Furthermore, contrary to the administrative law judge's suggestion, claimant was not required to submit "qualitatively different" evidence in order to justify her modification request. Decision and Order – Denying Benefits on Modification at 9. The administrative law judge has the authority on modification to reconsider whether the "ultimate fact" of entitlement was mistakenly decided, based on his consideration of "*new evidence, cumulative evidence*, or merely further reflection on the evidence initially submitted." *Jessee*, 5 F.3d at 725, 18 BLR at 2-28 (emphasis added). Therefore, the administrative law judge erroneously suggested that the only basis for modifying the prior denial would be if claimant submitted autopsy evidence. *See Sharpe I*, 495 F.3d at 133 n. 5, 24 BLR at 2-69 n.5; *Hilliard*, 292 F.3d at 541-42, 546-47, 22 BLR at 2-451-54.

[12] The administrative law judge's reliance on the Board's language in *Sharpe v. Westmoreland Coal Co.*, BRB No. 08-0563 BLA (June 17, 2009) (unpub.) is misplaced. That case presented a vastly different factual situation where the coal operator sought to overturn the miner's award of benefits many years later and its motive for seeking modification was improper because it was an attempt to thwart the good faith claim of the widow seeking survivor's benefits. *See Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F.3d 317, 25 BLR 2-157 (4th Cir. 2010), *cert denied*, 570 U.S. (2013). In this case, the modification request was not belated and there has been no credible explanation by the administrative law judge for "ignoring accuracy's general prominence in the modification analysis." *Sharpe II*, 692 F.3d at 330, 25 BLR at 2-178-79.

Consequently, we vacate the administrative law judge's determination that consideration of claimant's modification request would not render justice under the Act.

On remand, if the administrative law judge denies survivor's benefits and the issue of modification is reached, the administrative law judge must properly reconsider whether claimant has established a basis for modification pursuant to 20 C.F.R. §725.310 by proving a mistake in a determination of fact. In accordance with our holding in this appeal, the administrative law judge must also determine, as necessary, whether granting modification would serve justice under the Act and properly explain the basis for his findings in accordance with the APA and the factors set forth in *Sharpe I* and *II*.

Accordingly, the administrative law judge's Decision and Order on Third Remand – Denying Benefits and Decision and Order – Denying Benefits on Modification are vacated, and these cases are remanded for consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge