No. 20-2131

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TERRY EAGLE LIMITED PARTNERSHIP,

Petitioner

v.

MERLE H. PAYNE

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by Merle H. Payne, a former coal miner. On August 13, 2019, Administrative Law Judge (ALJ) Drew A. Swank issued a decision awarding benefits. Petitioner's Appendix (A.) 59. Terry Eagle Limited Partnership (Terry Eagle) appealed this decision to the United States

Department of Labor (DOL) Benefits Review Board on August 22, 2019 (A. 57), within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review ALJ Swank's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On September 28, 2020, the Board affirmed the award of benefits. A. 10. Terry Eagle filed its petition for review on October 21, 2020. A. 6. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals where the injury occurred. Mr. Payne's exposure to coal mine dust——the injury contemplated by 33 U.S.C. § 921(c)—occurred in the state of West Virginia, within this Court's territorial jurisdiction. The Court therefore has jurisdiction over Terry Eagle's petition for review.

STATEMENT OF THE ISSUES

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, incorporated into the BLBA by 30 U.S.C. § 932(a), permits any party to a black lung proceeding to request modification of a prior decision on the ground of a change in condition or a mistake in a determination of fact. Section 22 "is extraordinarily broad," *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497 (4th Cir. 1999), vesting the factfinder with broad discretion to correct a mistake in

a determination of fact based on "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) (per curiam); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993). In this appeal, Terry Eagle summarily rejects this binding precedent and argues that granting modification based on new evidence and "further reflection on the evidence initially submitted" violates the due process and equal protection clauses of the Constitution. The first issue on appeal is whether ALJ Swank's correction of a mistake in a determination of fact based on new evidence and further reflection on evidence initially submitted violates Terry Eagle's due process rights, despite the company's informed participation in the modification proceeding at every level, or its equal protection rights, despite this basis for modification being available to any party in a black lung proceeding.

Modification may be denied if it would not render justice under the BLBA. *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 464 (1968); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131 (4th Cir. 2007) (*Sharpe I)*. ALJ Swank determined that granting Mr. Payne's modification petition would render justice under the BLBA because it was his first modification request and because he submitted new evidence which, if credited, could change the prior denial. Terry Eagle challenges ALJ Swank's analysis as incomplete, despite the fact that the ALJ

identified the relevant factors in the "interest of justice" inquiry delineated by this Court, and reasonably found Mr. Payne's motive and interest in an accurate decision to be the most important factors here. The second issue is whether ALJ Swank acted within his discretion in finding that granting Mr. Payne's modification petition would render justice under the BLBA.

STATEMENT OF THE CASE

Mr. Payne filed the instant claim for benefits on June 30, 2014.[1] A. 60. DOL's district director issued a proposed decision and order awarding benefits. A. 951. Terry Eagle disagreed with this determination and requested a hearing and decision by an ALJ. A. 944. The case came before ALJ Richard Morgan who denied benefits on December 19, 2017. A. 206. ALJ Morgan determined that Mr. Payne suffered from clinical and legal pneumoconiosis, but was not totally disabled.[2]

One month later, on January 22, 2018, Mr. Payne requested modification. A. 205. The district director denied modification, finding no mistake in fact in ALJ Morgan's denial and no new evidence establishing a change of condition. A. 200. Mr. Payne disagreed with this determination and requested review by an

[1] Mr. Payne filed a previous claim for BLBA benefits which was finally denied by the DOL's district director on May 10, 2010, for failure to establish a totally disabling respiratory or pulmonary impairment. *See* A. 60.
[2] In general, miners seeking BLBA benefits must prove by a preponderance of the evidence that (1) they have pneumoconiosis; (2) their pneumoconiosis arose at least in part out of coal mine employment; (3) they are totally disabled by a respiratory or pulmonary impairment; and (4) the total disability is due to pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207 (4th Cir. 2000); 20 C.F.R. §§ 718.202-.204.

ALJ.

The case came before ALJ Swank, who granted modification and awarded benefits. ALJ Swank found that the evidence established total respiratory disability and, given Mr. Payne's 19 years of coal mine employment, invoked the BLBA's fifteen-year presumption of total disability due to pneumoconiosis. ALJ Swank further ruled that Terry Eagle did not rebut the presumption.[3] Terry Eagle appealed ALJ Swank's decision, but the Benefits Review Board affirmed the award. Terry Eagle then petitioned this Court for review.

STATEMENT OF THE FACTS

A. Statutory and regulatory background

The BLBA incorporates Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (Longshore Act), which provides:

> Upon his own initiative, or upon the application of any party in interest * * *, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, * * * or at any time prior to one year after the rejection of a claim, review a compensation case * * * [and] issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

[3] Under BLBA Section 921(c)(4)'s fifteen-year presumption, claimants who establish total respiratory disability and fifteen or more years of qualifying coal mine employment are presumed to be totally disabled due to pneumoconiosis. 30 U.S.C. § 921(c)(4). The employer can rebut the presumption by disproving either the existence of pneumoconiosis or total disability due to pneumoconiosis. *See* 20 C.F.R. § 718.305 (implementing fifteen-year presumption); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502 (4th Cir. 2015).

33 U.S.C. § 922; as incorporated by 30 U.S.C. § 932(a).[4] DOL's implementing black lung regulation largely reiterates these statutory requirements. 20 C.F.R. § 725.310(a).

This Court has recognized that the "modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings." *Betty B Coal Co.*, 194 F.3d at 497. Unlike other areas of law in which finality of judgment is given great weight, modification affords the factfinder "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 256; *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 180-181 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).

A "mistake in fact" extends to "the ultimate fact—disability due to pneumoconiosis" and "[t]here is no need for a smoking-gun factual error, changed conditions, or startling new evidence." *Jessee*, 5 F.3d at 725; *Borda*, 171 F.3d at 181. Modification's expansive nature thus demonstrates the statute's preference for accuracy in the decision over finality. *Jessee*, 5 F.3d at 725; *Banks,* 390 U.S. at

[4] Section 22 was initially enacted in 1927 in order to permit modification of final decisions awarding benefits on the ground of change of conditions during the term of the award. *Banks,* 390 U.S. at 463; *O'Keeffe,* 404 U.S. at 255. Congress amended the provision in 1934 to permit review "any time within one year after the date of the last payment of compensation," and added a mistake in a determination of fact as a second ground for relief. *Banks,* 390 U.S. at 464; *O'Keeffe,* 404 U.S. at 255-256. Finally, in 1938, the statutory language was amended to set a one-year period for requesting modification of a denial of benefits. *Banks,* 390 U.S. at 464.

461-464.

Modification of a denial of a black lung award, however, "does not automatically flow from a mistake in an earlier determination of fact." *Sharpe I*, 495 F.3d at 132; *Banks*, 390 U.S. at 464. *Sharpe I* directs the ALJ to determine whether reopening a case will render justice under the Act. *Id*. In making this determination, *Sharpe I* instructs an ALJ to consider, among other things, the accuracy of the prior decision, the diligence and motive of the party seeking modification, and the possible futility of modification. *Id*. at 134. This Court has also emphasized that an improper motive would preclude modification. *Westmoreland Coal Co., Inc. v. Sharpe ex rel. Sharpe*, 692 F.3d 317 (4th Cir. 2012) (*Sharpe II*).

B. Relevant record evidence

Terry Eagle challenges the validity of the modification procedures used here to award black lung benefits to Mr. Payne. Notably, it does not challenge Mr. Payne's *medical* entitlement benefits, *i.e.*, whether he was totally disabled by pneumoconiosis. Opening Brief (OB) 4 n.2. Accordingly, the facts relevant to Terry Eagle's arguments concerning Mr. Payne's modification petition are described in the summary of the prior decisions below.

C. Decisions below

1. ALJ Morgan denies benefits.

ALJ Morgan first credited Mr. Payne with 19.86 years of underground coal mine employment. He then found that the evidence established the presence of clinical pneumoconiosis arising out of coal mine employment, and legal pneumoconiosis (chronic obstructive pulmonary disease, related, in substantial part, to coal dust exposure). A. 240-244.[5] ALJ Morgan denied benefits, however, because the evidence failed to establish total respiratory disability.[6] A. 244-249. He determined that neither the pulmonary function studies nor the arterial blood gas tests established total disability, and found the medical opinions of Drs. Zaldivar and Vuskovich, who opined Mr. Payne was not totally disabled, more

[5] There are two types of pneumoconiosis for purposes of the BLBA: "clinical" and "legal." 20 C.F.R. § 718.201(a). "Clinical" pneumoconiosis refers to the cluster of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs[.]" 20 C.F.R. § 718.201(a)(1). This cluster of diseases includes, but is not limited to, "coal workers' pneumoconiosis" as that term is commonly used by doctors. *Id.* "Legal pneumoconiosis" refers to "any chronic lung disease or impairment … arising out of coal mine employment" and specifically includes "any chronic restrictive or obstructive pulmonary disease." 20 C.F.R. § 718.201(a)(2).

[6] 20 C.F.R. § 718.204(b) provides four methods by which a miner can prove a totally disabling respiratory impairment: (1) results of pulmonary function studies meeting the table criteria set forth at Section 718.204(b)(2)(i), Appendix B; (2) results of blood gas studies meeting the table criteria set forth at Section 718.204(b)(2)(ii), Appendix C; (3) proof of pneumoconiosis and "cor pulmonale with right-sided congestive heart failure," 20 C.F.R. § 718.204(b)(2)(iii); and (4) medical opinion evidence "based upon medically acceptable clinical and laboratory diagnostic techniques, conclud [ing] that a miner's respiratory or pulmonary condition prevents . . . the miner from engaging in [his or her usual coal mine work]," 20 C.F.R. § 718.204(b)(2)(iv). "The miner can establish total disability upon a mere showing of evidence that satisfies any one of the four alternative methods, but only '[i]n the absence of contrary probative evidence.'" *Lane v. Union Carbide Corp.*, 105 F.3d 166, 171 (4th Cir. 1997) (quoting 20 C.F.R. § 718.204(b)(2)). "If contrary evidence does exist, the ALJ must assign the contrary evidence appropriate weight and determine whether it outweighs the evidence that supports a finding of total disability." *Id.*

credible than the opinions of Drs. Rasmussen, Silman, and Habre, who said that he was. ALJ Morgan was not persuaded by (1) Dr. Rasmussen's opinion because the doctor did not consider subsequent non-qualifying pulmonary function studies; (2) Dr. Silman's opinion because the doctor relied on non-qualifying pulmonary function and blood gas studies; and (3) Dr. Habre's opinion because the doctor relied on a pulmonary function study that Dr. Vuskovich had found invalid, and because a pulmonary function study, performed just two days before Dr. Silman's, yielded non-qualifying results. A. 247. In contrast, ALJ Morgan credited the opinions of Drs. Zaldivar and Vuskovich primarily because their opinions were supported by the preponderant non-qualifying pulmonary function and blood gas study results. A. 248. Because ALJ Morgan denied benefits based on the absence of total respiratory disability, he did not consider whether pneumoconiosis caused Mr. Payne's disability. A. 250.

2. ALJ Swank grants modification and awards benefits.

One month after ALJ Morgan denied benefits, Mr. Payne requested modification of the denial of benefits. A. 205. The district director denied modification on June 20, 2018, A. 200, and Mr. Payne timely requested a formal hearing by an ALJ. A. 190. The district director referred the claim to the Office of Administrative Law Judges on September 7, 2018. A. 185-86.

The case was reassigned to ALJ Swank.[7] On August 13, 2019, ALJ Swank granted modification and awarded benefits. A. 59-105. He first found that consideration of Mr. Payne's modification petition would render justice under the Act because it was his first request, and he had submitted new evidence (a new x-ray reading diagnosing complicated pneumoconiosis, A. 175), which, if fully credited could change the previous denial. A. 63.

ALJ Swank next determined that ALJ Morgan had made a mistake in determination of fact with regard to the existence of total respiratory disability. A. 84-85, 101-02. ALJ Swank observed that all the doctors of record (including Drs. Zaldivar and Vuskovich) agreed that Mr. Payne suffered from "an obstructive ventilatory impairment," A. 77, 80, 82; that two of the four pre-bronchodilator pulmonary function studies were qualifying, and that all pulmonary function tests demonstrated some level of impairment, A. 84-85; that *exercise* arterial blood gas tests could not be conducted because of Mr. Payne's ill-health, and these would have best depicted his respiratory condition while he performed heavy labor at work, A. 85; and that Dr. Silman reasonably concluded that the resting arterial blood test he conducted, although non-qualifying, revealed hypoxemia because the

[7] ALJ Morgan retired from government service on August 31, 2018, as the following order (from a different case) indicates, https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2014/STEELE_JACK_W_v_ADDINGTON_INCPITTSTO_2014BLA05940_(AUG_16_2018)_074543_ORDER_PD.PDF?_ga=2.264450189.349567076.1615404238-863758181.1615404238.

miner was using supplemental oxygen during the study.[8] *Id*.

In addition, ALJ Swank found the medical opinions of Drs. Rasmussen, Silman, and Habre diagnosing total respiratory disability to be "most well-reasoned and documented" because all the pulmonary function studies of record showed "some degree of impairment," and these doctors "took into consideration the requirements of the miner's last coal mine employment, which involved heavy labor," in reaching their assessments. A. 82, 84. Conversely, the ALJ found Dr. Vuskovich's opinion that the miner was not totally disabled "poorly reasoned" because the doctor's conclusion that "the miner had normal pulmonary oxygen transfer" failed to consider Mr. Payne's use of supplemental oxygen. A. 84. ALJ Swank likewise faulted Dr. Zaldivar's no total disability diagnosis because the doctor believed that an exercise arterial blood gas test was necessary (despite Mr. Payne's inability to perform one), and that Mr. Payne could do his job so long as he "was using bronchodilators on a regular basis." A. 83 (citing *Maynard v. Pen Coal Corp.*, 2010 WL 3073532 at *4 n.3 (Ben. Rev. Bd. July 27, 2010) (in determining total respiratory disability, the question is whether the miner is able to perform his usual coal mine employment, not whether he is able to perform his job after taking medication)).

[8] "Hypoxemia" is deficient oxygenation of the blood. *Dorland's Illustrated Medical Dictionary* 908 (32nd ed. 2012).

In view of Mr. Payne's 19.86 years of coal mine employment and total respiratory disability, ALJ Swank invoked the fifteen-year presumption of total disability due to pneumoconiosis. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305(b)(1). He further found that Terry Eagle did not rebut the presumption by disproving the existence of pneumoconiosis, or that "no part" of Mr. Payne's disability was caused by pneumoconiosis. 20 C.F.R. §§ 718.305(d)(1)(i),(ii); *see Hobet Mining, LLC*, 783 F.3d at 502. Accordingly, ALJ Swank awarded benefits.[9]

3. The Benefits Review Board affirms.

The Board rejected Terry Eagle's argument that Mr. Payne's modification petition must fail because he neither identified a specific mistake of fact made by ALJ Morgan nor submitted truly new supporting evidence. The Board held that a claimant "may simply allege the ultimate fact [the denial of benefits] … was mistakenly decided" to establish a basis for modification. A. 13 (citing *Betty B Coal Co.*, 194 F.3d at 497-98 and *Jessee*, 194 F.3d at 725). The Board also affirmed ALJ Swank's finding that granting modification rendered justice under the BLBA, holding that he had not abused his discretion and had considered the relevant factors. A. 16-17. Finally, the Board affirmed ALJ Swank's finding that Mr. Payne had established entitlement to benefits under the fifteen-year

[9] Terry Eagle has not challenged ALJ Swank's weighing of the medical evidence or his finding that Mr. Payne established entitlement under the fifteen-year presumption. OB 4 n.2. Accordingly, it has waived those arguments on appeal. *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 248-49 (4th Cir. 2013).

presumption. A. 13-16.

SUMMARY OF THE ARGUMENT

Section 22 is a generous reopening provision that allows for modification of orders when a factual mistake is made or when a claimant's condition changes. The Supreme Court has broadly construed the mistake of fact requirement to allow a fact-finder to correct a mistake based on wholly new evidence, cumulative evidence or merely further reflection on the evidence submitted in the initial claim proceeding. This Court, as well as the other circuit courts, have consistently followed the Supreme Court's mandate.

Terry Eagle contends that permitting a fact-finder merely to rethink a previous benefits decision violates due process and equal protection. The company offers no legal authority for this broad assertion, which is contrary to governing Supreme Court and Circuit precedent, and no case-specific evidence demonstrating a deprivation of due process here. In fact, Terry Eagle had immediate notice of Mr. Payne's modification request, knew what it entailed, and had every opportunity to defend itself against the petition. That is all due process requires. As for equal protection, Terry Eagle's speculation that the "mistake of fact" standard treats coal companies differently from miners in the BLBA's modification proceedings is simply incorrect: the same "mistake of fact" standard applies equally to all parties to a BLBA claim.

Terry Eagle's final argument, that the ALJ failed to undertake a sufficient analysis in finding modification would render justice under the BLBA, is incorrect. The ALJ identified the factors relevant to making this judgment, and reasonably determined that Mr. Payne acted with no ill motive in requesting modification and that concerns for accuracy in reaching a correct result outweighed those for finality.

By means of the modification proceeding, Mr. Payne established his medical entitlement to black lung benefits. Terry Eagle does not dispute that Mr. Payne is totally disabled by pneumoconiosis. There is no question that justice was served in this case. Terry Eagle's petition should be denied.

ARGUMENT

A. Standard of review

Whether the black lung modification procedure deprived Terry Eagle of due process and equal protection are questions of law that are reviewed *de novo*. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). The Court reviews an ALJ's decision to grant modification for an abuse of discretion. *O'Keeffe*, 404 U.S. at 256; *Sharpe I*, 495 F.3d at 130-32.

B. Terry Eagle was not deprived of due process or equal protection.

Terry Eagle concedes that the law governing modification is "relaxed," but asserts that the statutory and regulatory requirements for establishing the "mistake

in fact" ground for modification have been "rendered meaningless. OB 7, 11. Terry Eagle complains about an "anything goes" approach where a fact-finder simply re-reviews the record and comes to a different conclusion regarding the ultimate fact of the miner's entitlement to benefits without requiring the miner to plead a specific mistake in fact or change in condition. OB 8, 11-12. Thus, it asserts that black lung claimants are simply "judge shopping until they find a favorable fact-finder." OB 12. In Terry Eagle's view, this state of the law deprives a coal company of due process because a coal company does not know "what allegation it is defending against" and may be found liable for benefits "years" after an initially favorable decision, thus incurring substantial costs and attorney fees. OB 11-15. Terry Eagle also asserts that the mistake in fact standard disfavors petitions by coal companies, thus depriving it of equal protection. OB 18-20. Terry Eagle urges this court to rectify these purported constitutional deprivations by requiring claimants to allege and demonstrate a specific factual mistake in their modification petitions. OB 15-17.

The Court should reject Terry Eagle's arguments. Longstanding precedent from the Supreme Court and this Court instructs that the mistake of fact requirement is to be broadly construed and exactly in the manner with which Terry Eagle disagrees.

The Supreme Court first construed Section 22's "mistake in a determination

of fact" ground in *Banks,* 390 U.S. 459, a case arising under the Longshore Act. After coming home from work on January 30, 1961, the employee fell down his basement steps, causing injuries from which he later died. The employee's widow claimed that the fall was the result of an injury the employee had suffered at work on January 26, 1961. The employer disputed the claim and the deputy commissioner denied benefits, either because he did not believe that the January 26 injury had occurred or because he did not believe that the employee's death was related to the injury.

The employee's widow filed a second claim, asserting that the employee's death was the result of an injury suffered at work on January 30, rather than January 26. Although the widow apparently had told her attorney about the January 30 injury prior to the first hearing, evidence regarding the January 30 injury had not been proffered during the first hearing. *Chicago Grain Trimmers Ass'n v. Enos*, 369 F.2d 344, 347 n.3 (7th Cir. 1966). The deputy commissioner found that the employee's death was related to the January 30 injury, and awarded benefits. The district court affirmed.[10]

The Seventh Circuit reversed the award on *res judicata* grounds, reasoning that "it was incumbent upon the claimants to assert in one claim all the incidents of

[10] *Banks* was decided prior to the 1972 amendments to the Longshore Act, which established the current ALJ-Benefits Review Board-court of appeals review process. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116 (6th Cir. 1984).

employment which singly or in combination were alleged to have caused the fall in the home." 369 F.2d at 348. The Court concluded that Section 22 was inapplicable "because the claimants at no time disputed the findings of fact made by the deputy commissioner at the first hearing." *Id*. at 349 n.4.

The Supreme Court reversed, holding that Section 22 allowed the correction of the deputy commissioner's mistaken finding that the employee's fall at home did not result from a work-related injury. That court found nothing in Section 22's legislative history to demonstrate "that a 'determination of fact' means only some determinations of fact and not others," and held that the widow's "second compensation action, filed a few months after the rejection of her original claim, came within the scope of § 22." 390 U.S. at 465.

Three years later, the Supreme Court elaborated on the meaning of "mistake of fact" in *O'Keeffe*, 404 U.S. 254. There, a deputy commissioner instituted modification proceedings following a denial and awarded benefits, finding the employee's disability was work-related. The Fifth Circuit reversed, holding that Section 22 "simply does not confer authority upon the Deputy Commissioner to receive additional but cumulative evidence and change his mind." *Aerojet-General Shipyards, Inc. v. O'Keeffe*, 442 F.2d 508, 513 (5th Cir. 1971). That court also emphasized (as Terry Eagle does here) that relief under Section 22 required "demonstrable mistake," and no mistake in fact in the deputy commissioner's

previous denial had been shown. *Id*.

The Supreme Court unanimously disagreed, reasoning that "[n]either the wording of that statute nor its legislative history supports this 'narrowly technical and impractical construction.'" 404 U.S. at 255 (citation omitted). After quoting Section 22, the Court explained:

> There is no limitation to particular factual errors, or to cases involving new evidence or changed circumstances . . . The plain import of [the 1934 amendment adding mistake of fact as a basis for modification] was to 'broaden the grounds on which a deputy commissioner can modify an award'[and] to vest a deputy commissioner with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.

404 U.S. at 255-256 (quoting S. Rep. No. 588, 73d Cong., 2d Sess., 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934)).

This Court has consistently applied Section 22 in accord with *Banks* and *O'Keeffe* to permit modification based on new or cumulative evidence or simply upon reconsideration of the existing evidence.[11] *E.g. Jessee*, 5 F.3d at 724-25; *see supra* at 6-7. *Jessee* further explained "that a claimant may simply allege that the ultimate fact—disability due to pneumoconiosis—was mistakenly decided, and the

[11] The other courts of appeals have done so as well, under both the Longshore Act and the BLBA. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276-277 (2d Cir. 2003); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 546 (7th Cir. 2002); *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 227 (1st Cir. 2001); *Keating v. Director, OWCP*, 71 F.3d 118, 1123 (3d Cir. 1995); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1347 n.1 (9th Cir. 1993).

deputy commissioner may, if he so chooses, modify the final order on the claim. There is no need for a smoking-gun factual error, changed conditions, or startling new evidence." 5 F.3d at 724-725.

Terry Eagle's attempts to distinguish this precedent fall short. It asserts that the Supreme Court's interpretation of the mistake of fact requirement in *O'Keeffe* is inapplicable because that case arose under the Longshore Act, not the BLBA. OB 9. Terry Eagle, however, does not explain why this fact mandates a different interpretation of identical statutory language. Indeed, this Court has been untroubled by the different programmatic settings.[12] In any event, even if there were a meaningful basis on which to distinguish *O'Keeffe*, DOL has promulgated binding regulations adopting the decision. 20 C.F.R. §§ 725.310(a) (district director may "reconsider the terms of an award or denial of benefits."); 725.310(c) (administrative law judge must consider "regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact."); 65 Fed. Reg. 79975 (Dec. 20, 2000) (explaining that Section 22 and *O'Keeffe* provide the legal authority for "the revised regulation [to] allow an adjudicator simply to reweigh the evidence of record and reach a

[12] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons,* 434 U.S. 575, 580 (1978). Less than six months after *O'Keeffe* was decided, Congress added Section 7 of the Longshore Act, 33 U.S.C. § 907 (providing for medical benefits) to the list of provisions incorporated into the BLBA, but did not otherwise amend its incorporation of Section 22. Pub. Law 92-303, May 19, 1972, 86 Stat. 155.

conclusion different from the one reached before").

Terry Eagle further argues that *Jessee* differs from the instant case because the ALJ there committed a true mistake of fact by overlooking two pieces of evidence. OB 17. But *Jessee* itself rejected this limitation, characterizing the overlooked evidence as "irrelevant" and "not an essential underpinning of [Jessee's] right to seek modification." 5 F.3d at 725. Instead, the Court restated its fundamental holding that "[i]f a claimant avers generally that the ALJ improperly found the ultimate fact and thus erroneously denied the claim, the deputy commissioner (including his ALJ incarnation) has the authority, without more, to modify the denial of benefits." 5 F.3d at 725-26.[13] Similarly, Terry Eagle points out that in *Consolidation Coal Co. v. Latusek*, 717 F. App'x 207 (4th Cir. 2018), completely new evidence was submitted to support a modification petition. But there, too, the Court reiterated that the modification procedure is "extraordinarily broad, especially insofar as it permits correction of mistaken factual findings," and new evidence is not needed to modify a benefits order. *Id*. at 209 (citations omitted).

Terry Eagle's allegation that the modification proceedings violated its due

[13] *Jessee* also rebuffs Terry Eagle's complaint that modification permits "judge shopping." OB at 12. The Court responded to this type of concern by stating "We suspect that such uncompelled changes of mind will happen seldom, if at all, but the power is undeniably there." 5 F.3d at 726. Here, in fact, the modification petition was assigned to ALJ Swank because ALJ Morgan had retired.

process is likewise without foundation. It asserts that "process made available to it was far from adequate," and that ALJ Swank ordered it to pay benefits "years" after ALJ Morgan found that benefits were not due. OB 11, 14. The test for due process is whether an employer has been deprived of the opportunity to mount a meaningful defense. *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 808 (4th Cir. 1998). Here, Mr. Payne promptly filed his modification request one month after ALJ Morgan's initial decision. Terry Eagle was immediately notified of the request and was involved at every stage of the ensuing administrative proceedings. Specifically, Terry Eagle was able to assert its preferred defenses, was apprised of the disputed issues, and submitted evidence against Mr. Payne's modification request. A. 112-113, 135-145, 185-86. Moreover, given that benefits were previously denied on the sole ground that total respiratory disability was not established, A. 244-50, the supposed mistake of fact that Mr. Payne alleged was obvious to all litigants. Indeed, Terry Eagle never protested to ALJ Swank that it was surprised by the issues or could not defend itself. *E.g.* A. 112. Finally, the entire modification proceeding was completed less than two years after ALJ Morgan's initial decision. There has been no deprivation of due process here. *See Betty B Coal Co.*, 194 F.3d at 161 (if the course of the administrative proceedings is fair and the outcome reliable then due process is achieved).

Also utterly unfounded is Terry Eagle's claim that the standard for

establishing a mistake of fact denies coal companies equal protection.[14] Terry Eagle asserts that "if it was the individual and not the corporation who had pursued a claim for benefits, won, then had the benefits stolen away on modification simply by having a new judge review the same evidence, no one would stand for it." OB 19. Not surprisingly Terry Eagle cites no support for this cynical contention. That is because there is none. "Any party in interest" may request modification, and the grounds for granting modification apply equally to all parties. 33 U.S.C. § 922; *see* 20 C.F.R § 725.310(a) (modification permitted "upon the request of any party"); *McCord v. Cephas*, 532 F.2d 1377, 1380 (D.C. Cir. 1976) ("Although *Banks* and *O'Keeffe* dealt only with reopening under section 22 for the benefit of claimants, there is nothing in the Court's language or the legislative history to suggest that the ambit of section 22 is narrower for employers seeking to 'decrease' or 'terminate' a prior award."); *see also Branham v. BethEnergy Mines, Inc.*, 20 Black Lung Rep. (MB) 1-25, 1-34, 1996 WL 33469465 at *4 (Ben. Rev. Bd. 1996) (ALJ's ruling that the employer was precluded from modification contravenes express language of Section 22 and implementing regulations); 65 Fed. Reg. 79976 (Dec. 20, 2000) (explaining that 20 C.F.R. § 725.310's

[14] The Equal Protection Clause of the Constitution "directs that 'all persons similarly circumstanced shall be treated alike.' " *Plyler v. Doe,* 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)). The Due Process Clause of the Fifth Amendment to the Constitution applies to the federal government the same guarantee of equal protection under law that the Fourteenth Amendment applies to the states. *Bolling v. Sharpe,* 347 U.S. 497, 499-500 (1954).

evidentiary limitation ensures that the claimant and the responsible operator have equal opportunity to present evidence to the fact-finder on modification). Accordingly, Terry Eagle's baseless equal protection argument must be rejected.

Finally, Terry Eagle's proffered solutions to these alleged constitutional deprivations have no merit. It urges that the Court to (1) require the party moving for modification to specify whether change of condition or mistake of fact is alleged, (2) if mistake of fact, require that the movant specifically identify and demonstrate what mistake has occurred, (3) if change of condition, require the submission of truly new evidence and not just evidence which could have been submitted earlier in the proceedings. As explained above, *supra* at 17-20, these exact constraints on modification already have been soundly rejected by the Supreme Court and this Court. *See O'Keeffe*, 404 U.S. at 456 ("The plain import of [the modification statute] was to vest a deputy commissioner with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."); *Banks*, 390 U.S. at 465 n.8 ("irrelevant" that modification request was labeled a new claim for compensation); *Jessee*, 5 F.3d at 725 ("A claimant may simply allege that the ultimate fact-disability due to pneumoconiosis-was mistakenly decided …. There is no need for a smoking-gun factual error, changed conditions, or startling new evidence."); *Consolidation Coal Co. v.*

Worrell, 27 F.3d 227, 230 (6th Cir. 1994) ("The fact that Mr. Worrell did not specifically plead mistake of fact or change in condition in his second claim is irrelevant."). Accordingly, Terry Eagle's invitation to curb the "flexible, potent, easily invoked" modification procedure must be rejected. *Betty B Coal Co.*, 194 F.3d at 497.

C. ALJ Swank acted within his discretion in finding that modification would render justice under the BLBA.

A modification petition can be denied if it does not "render justice under the [A]ct." *Banks*, 390 U.S. at 464; *Sharpe I*, 495 F.3d at 131-32. ALJ Swank determined that reopening Mr. Payne's claim would render justice because it was his first request and he submitted new evidence that could change the prior denial. A. 63. Terry Eagle argues that ALJ Swank's analysis was incomplete and that the ALJ did not recognize that Mr. Payne's "new" evidence was merely a rereading of a previously-submitted x-ray that ultimately was found not compelling.[15] Terry Eagle further asserts that Mr. Payne was not diligent in his modification request because he made the request with the sole motive of trying "to obtain a different

[15] Terry Eagle's assertion that Mr. Payne did not submit "truly new evidence" with his modification request is incorrect. OB 2, 22-23. Although the new x-ray reading was of a previously-submitted x-ray, A. 175, the new reading's diagnosis of complicated pneumoconiosis could have tipped the balance of the x-ray readings, and established total disability and a mistake of fact. *See* 30 U.S.C. § 921(c)(3); *accord* A. 63. Terry Eagle appears to confuse evidence demonstrating a mistake of fact with evidence showing a change in condition. Generally speaking, in a modification proceeding, a rereading of a previously-submitted x-ray would not establish a change of condition since the earlier decision (but would establish a mistake of fact). That ALJ Swank ultimately found a mistake of fact for other reasons does not undermine Mr. Payne's use of this new x-ray reading to support his modification request.

outcome with the same primary evidence." OB 23. It thus asks that the case be remanded to ALJ Swank for reconsideration of whether reopening this claim serves justice. OB 24.

As an initial matter, ALJ Swank was not required to conduct a more thorough analysis in his "interest of justice" inquiry, as Terry Eagle contends. ALJ Swank identified the same relevant factors that this Court delineated in *Sharpe I*, 495 F.3d at 133-34, namely, diligence, motive (number of times reopening sought), futility, and accuracy (quality of the new evidence submitted) as the relevant factors in his assessment. A. 63. And, as discussed below, he reasonably found accuracy and motive to be the most significant and therefore favored reopening. *Id*. Nothing more was required from the ALJ. There is no duty of long-windedness or verbosity, and the ALJ's reasoning here is easy to discern. *Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 316 (4th Cir. 2012).

Turning to the *Sharpe I* factor of accuracy, there is no question that reopening was warranted because it is undisputed that ALJ Morgan erred in finding no total respiratory disability. For modification, the possibility of an incorrect determination *is precisely* a reason for granting the request. *See O'Keeffe*, 404 U.S. at 255 (the plain purpose of modification is to vest an adjudicator "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further

reflection on the evidence initially submitted"). The need for accuracy here—determining whether Judge Morgan had committed a mistake in a determination of fact—outweighed the need for finality, especially since ALJ Morgan's decision was only one month old when modification was requested. *Sharpe II*, 692 F.3d at 330 (noting "the modification statute's general 'preference for accuracy over finality in the substantive award'").

In regards to the other factors, Mr. Payne acted diligently because, as noted, he filed for modification one month after the earlier denial, well within one year of the prior denial, and his motive—establishing his entitlement to black lung benefits—was entirely permissible. Finally, a favorable ruling would not have been futile since Mr. Payne, and later his widow, could collect benefits once awarded.[16]

This case is easily distinguished from those rare cases denying modification on the ground that justice would not be rendered. In *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982), the employer filed for modification in order to assert a new argument based on existing law regarding the limits of its liability. The court held that granting modification would not render justice under

[16] Mr. Payne passed away on October 13, 2019. Affirmance of his award would entitle Rosemary Payne, his surviving spouse, to the unpaid benefits due on his claim and allow her to continue to collect automatic survivor benefits. *See* 20 C.F.R. § 20 C.F.R. § 725.545(c)(1); *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 381 (4th Cir. 2011); https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2020/PAYNE_ROSEMARY_v_TERRY_EAGLE_LIMITED__2020BLA05365_(OCT_01_2020)_094821_CADEC_PD.PDF?_ga=2.45200228.1597716042.1615405542-1764313614.1615405542 (ALJ award of Mrs. Payne's claim for survivor benefits).

the Longshore Act: "Parties should not be permitted to invoke s[ection] 22 to correct errors or misjudgments of counsel, nor to present a new theory of the case when they discover a subsequent decision arguably favorable to their position." *Id*. at 26. Mr. Payne, by contrast, is not blaming his attorney for the previous denial, relying on recently discovered precedent, or presenting a new argument. He is simply alleging that ALJ Morgan made a mistake in weighing the medical evidence.

In *Sharpe II*, the operator filed a petition for modification of the award in a miner's claim seven years after he was awarded benefits and, not coincidentally, less than two months after his widow filed for survivor's benefits. 692 F.3d 317. The court affirmed the Board's decision that the ALJ had erred in granting modification (and in denying the miner's claim), holding that the operator's motive in filing for modification was "patently improper." *Id*. at 329. The operator was using modification to attack the complicated pneumoconiosis finding from the miner's claim which, if allowed to stand, would guarantee the widow's entitlement because the operator would have been collaterally estopped from contending that the miner had not suffered from the disease in the widow's claim. The court explained, "At bottom, allowing employers to regularly use modification to evade application of the collateral estoppel doctrine and the irrebuttable presumption of death due to pneumoconiosis would effectively eradicate those entrenched legal

principles." *Id*. The court further noted "the modification statute's general 'preference for accuracy over finality in the substantive award,'" and that "modification does not always require 'a smoking gun factual error, changed conditions, or startling new evidence.'" *Id*. at 330. Here, Mr. Payne was not attempting to indirectly circumvent entrenched principles; he was simply using a tool that Congress made available to him in the way that Congress provided.

In *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976), the employer refused to participate in a claim under the Longshore Act. When benefits were awarded against him, the employer filed a modification petition. The ALJ granted the petition and reversed the award, but the Board found the modification petition untimely. Although the court found the petition timely and accordingly remanded to the Board, it instructed the Board to consider whether granting modification would render justice under the Longshore Act based on the employer's "history of great[] reluctance, of great[] recalcitrance, of great[] callousness towards the process of justice, and of great[] self-serving ignorance[.]" *Id*. at 1381. If the D.C. Circuit could not hold as a matter of law that the employer's complete disregard of legal process defeated his modification petition, then there should be no question that ALJ Swank acted within his discretion in finding that Mr. Payne pursued his claim in a diligent and timely fashion.

And in *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533 (7th Cir. 2002),

the court held that an ALJ had erred in concluding that an *operator's* modification petition would not render justice under the BLBA. The court found that the ALJ had improperly denied modification merely because the operator's new evidence had been available to the operator prior to the modification petition. It explained that "finality simply is not a paramount concern of the Act" and that "the ALJ gave no credence to the statute's preference for accuracy over finality[.]" *Id*. at 546. Here, ALJ Swank likewise correctly favored accuracy over finality.

In short, ALJ Swank's conclusion that modification of ALJ Morgan's prior denial would render justice under the BLBA is unassailable.

CONCLUSION

The Court should reject Terry Eagle's arguments and affirm ALJ Swank's decision on modification awarding benefits.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director does not object to Terry Eagle's request for oral argument, but believes it is unnecessary.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 7,409 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2021, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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