No. 16-1768

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CONSOLIDATION COAL COMPANY
Petitioner

v.

THEODORE M. LATUSEK, JR.
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

BRIEF FOR THE FEDERAL RESPONDENT

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IN THE UNITED STATES COURT OF APPEALS
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CONSOLIDATION COAL COMPANY

Petitioner,

v.

THEODORE M. LATUSEK
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents.

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

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BRIEF FOR THE FEDERAL RESPONDENT

Statement of Jurisdiction

The Director agrees with Consolidation Coal Company's (Consol) Statement of Jurisdiction.

Statement of the Issues

1. Whether the ALJ's application of the statutory right of modification, which supplants common law principles of res judicata, violated the law of the case, mandate, and separation of powers doctrines.

2. Whether substantial evidence supports the ALJ's finding that the evidence submitted on modification established that Latusek's 23 years of occupational coal mine dust exposure caused his totally disabling pulmonary fibrosis.

Statement of the Case[1]

A. Course of the proceedings

On July 5, 1994, former coal miner Theodore Latusek applied for federal benefits under the Black Lung Benefits Act (the "BLBA" or "the Act"), 30 U.S.C. §§ 901-44. Joint Appendix, "JA," 1. A Department of Labor district director identified Consol as the liable party (*i.e.*, the

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[1] Due to this claim's lengthy and complex procedural and evidentiary histories, and the word limitation, on this brief, the relevant proceedings, facts, and decisions below are only briefly summarized herein. This Court and the Board ably detailed these histories at JA 101-02, 185-88; and the ALJ fully and accurately described the new medical evidence at JA 161-77, 211-13.

responsible operator) and proposed awarding benefits. JA 51. Consol requested a hearing and decision by an ALJ. JA 6.

At the 1997 hearing before ALJ Leland, Consol conceded that it is the responsible operator, that Latusek worked at least 23 years in coal mine employment, that he has coal workers' pneumoconiosis, and that he has a totally disabling pulmonary disease. JA 11-12. The parties also agree that Latusek is disabled by interstitial pulmonary fibrosis (IPF).[2] JA 58. The only contested issue was—and remains—the cause of Latusek's disabling IPF, which is compensable if due in part to coal mine dust exposure. JA 11.

Evidence was also admitted at the hearing that formed the basis for multiple ALJ and Benefits Review Board decisions, and two unpublished, split decisions from this Court, which ultimately

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[2] Interstitial pulmonary fibrosis (IFP) is "chronic inflammation and progressive fibrosis of the pulmonary alveolar walls, with steadily progressive dyspnea." Dorland's Illustrated Medical Dictionary 704 (32nd ed. 2012). IPF is also known as usual interstitial pneumonia (UIP), JA 238, 65, as well as "idiopathic pulmonary fibrosis" (again IPF), which connotes that the disease is of unknown origin. JA 169-70. The medical experts here employed these terms interchangeably, and unfortunately, not always precisely (indicating, for instance, that the idiopathic pulmonary fibrosis was caused by coal dust exposure). For accuracy, we use the experts' original terminology when quoting them. Otherwise, we use IPF to mean "interstitial pulmonary fibrosis."

concluded that substantial evidence did not support the ALJ's award of benefits. JA 100-03. (The dissents in both appeals would have affirmed the awards as supported by substantial evidence.)

Within one year of the Court's denial, Latusek requested modification on the grounds that new evidence, including evidence obtained after the 1997 hearing, demonstrated a mistake in a determination of fact that justified modifying the prior denial of the claim.[3] JA 108-09. A new ALJ, ALJ Burke, presided over Latusek's modification proceedings. Following the submission of new evidence at the 2011 hearing, he granted Latusek's modification petition based on a mistake in a determination of fact and awarded benefits, payable by Consol, commencing April 1994, the date the medical evidence established the onset of total disability. JA 156-84.

Consol appealed to the Board which affirmed in part, vacated in part, and remanded for further consideration. JA 185-204. On remand,

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[3] Modification allows any party to re-litigate an award or denial "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. § 922, as incorporated by 30 U.S.C. § 932(a). Granting modification is within the factfinder's discretion, who must additionally decide if modification would render justice under the Act. *See infra* at 23-24.

the ALJ found Latusek entitled to modification and again awarded benefits. The Board then affirmed. JA 219-32. Consol appealed to this Court. JA 233-37.

B. Statement of the facts

1. Background

Latusek worked as an underground coal miner in West Virginia for at least 23 years. JA 11, 118. He never smoked cigarettes. JA 30. At age forty, Latusek was diagnosed with IPF and advised to remove himself from underground occupational dust exposure. JA 249 (Dr. Rose), 255 (Dr. Jennings). He last worked in the coal mines in April 1994. JA 1.

2. Medical evidence relevant to the cause of Latusek's IPF[4]

Pathology evidence

Latusek's deteriorating condition required a left lung transplant in July 2006. JA 787. The hospital pathology report of the explanted left lung described the pleural surfaces, parenchyma, and surrounding

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[4] In denying benefits, a split panel of this Court held that "no reasonable mind" could interpret the medical record as sufficient to carry claimant's burden of proving total disability due to pneumoconiosis. JA 103. Therefore, our summary (like the ALJ's decision) focuses on the medical evidence submitted on modification.

lymph nodes as anthracotic. *Id.* The final diagnosis was "usual interstitial pneumonia" of uncertain etiology, hamartoma (benign tumor) and "multiple hilar lymph nodes with focally calcified anthracosilicotic nodules." *Id.* (The report does not indicate that the pathologist knew of Latusek's clinical and work histories.)

Consol had two pathologists review tissue slides of the removed left lung. Dr. Naeye noted "collagen has massively replaced normal or near normal tissues in this man's lungs." JA 789. He observed "no black pigment and no very tiny berefringement crystals of toxic silica are associated with the fibrosis. The near absence of fibrosis in nearby lymph nodes is categorical confirmation that the fibrosis is not occupational-silicotic in origin." *Id.*

Dr. Crouch noted "chronic organizing interstitial pneumonia with subpleural accentuation and some areas of honeycomb change." JA 790. She observed "small amounts of irregular black to dark brown particles consistent with coal dust" but no coal dust micronodules, nodules or large lesions. *Id.* Dr. Crouch recognized that Latusek's "unusually long survival" suggested different, "less aggressive disorders" than IPF, but

nonetheless asserted these unknown disorders were not caused by coal dust. *Id.*

Medical opinion evidence

Dr. Dauber, the director of pulmonary transplant and interstitial lung disease programs at the University of Pittsburg, reported in 2004 on his ongoing treatment of Latusek, which began eight years earlier in 1996. JA 848-50, 707. Dr. Dauber explained that, to a reasonable degree of medical certainty, Latusek's IPF is due to coal mine dust exposure. He reached this conclusion after excluding other possibilities: he does not have typical IPF, which usually presents at a later age in smokers and has a survival rate of only three years; and he does not have an underlying autoimmune or connective tissue disease or any evidence of asbestos exposure or asbestosis. JA 709-11.

Dr. Dauber elaborated on his findings in a 2011 deposition. Despite retiring before Latusek's 2006 lung transplant, Dr. Dauber explained that "in the last ten years our thinking about idiopathic interstitial pneumonias has undergone a tremendous transformation. And before that everything was all sort of lumped together, and it was very confusing because we didn't have ways of distinguishing from one form

of the disease from another." JA 856. Dr. Dauber testified that a "clearer picture of idiopathic pulmonary fibrosis has emerged and it is a disease that strikes older people, age 60 to 70, more common in males, and smoking is a major predisposition to the disease. *Id.* Considering the early age at which Latusek was diagnosed, the eighteen-year duration of his disease, the lack of any family history, and his occupational exposure during coal mine employment, Dr. Dauber was comfortable concluding that coal dust exposure was the genesis of the disease process that led to his IPF. JA 856-60.

Dr. Parker, a pulmonary specialist, who had evaluated Latusek in 2001, explained in a 2004 deposition that IPF is found in the general population and is referred to as "idiopathic" when there is no evidence of disease origin. JA 676, 684. He further referenced a New Mexico study showing that individuals occupationally exposed to dust contract IPF fibrosis more often than those not occupationally exposed. He noted "the scientific community feels as if eventually we will identify the occupational environmental etiologies of those cases that are thought to be idiopathic." JA 684. Dr. Parker observed that Latusek is a lifetime nonsmoker, his occupational coal mine dust exposure resulted

in pathologic changes consistent with pneumoconiosis, and his pulmonary fibrosis was atypical. He thus concluded that Latusek's "lung function abnormality [is] a result of his coal mine dust exposure and not the idiopathic variety of pulmonary fibrosis." JA 693.

Dr. Doyle, who treated Latusek in 2001, was deposed in 2004. He testified that he adopted Dr. Parker's etiology opinion. JA 736.

Dr. Rose, board certified in internal medicine, pulmonary medicine and occupational medicine (JA 936), testified in a 2011 deposition that she had reviewed Latusek's medical records, the pathology reports, and the employer-generated statistical analysis of peer-reviewed articles. JA 958. She stated Latusek "has had a diffuse interstitial fibrosis that led to him undergoing a lung transplant." JA 959. She explained:

> Both his age at onset of symptoms around 39, as well as the more slow progression of his disease and his survival for over ten years before he finally underwent lung transplant, are typical for the diffuse interstitial fibrosis that coal miners can get compared to the idiopathic interstitial fibrosis that can occur in the general population.

JA 960. She stated her "opinion, to a reasonable degree probability, remained that Mr. Latusek's slowly progressive, early-age-of-onset interstitial fibrosis with histologic findings of a UIP pattern but with, in addition, findings of airway-centered injury was causally connected to

his 20-plus years of work as a coal miner." JA 962. Asked to quantify that probability, Dr. Rose stated it was "more than 50 percent" likely that "occupational exposure to coal mine dust was a risk factor for and an aggravator for his development of interstitial fibrosis." JA 982.

Dr. Rose pointed to epidemiological data to support a link between coal mine dust exposure and diffuse interstitial fibrosis, specifically a study of Welsh and West Virginia coal miners.[5] JA 946-47. Dr. Rose explained that the McConnochie study "found a lesion in coal miners, both in Wales and the United States, of interstitial fibrosis that clinically mimicked and was difficult to distinguish from idiopathic pulmonary fibrosis, or IPF, but at substantially higher rates than you would expect in terms of the general population, linking this coal mine dust exposure to risk for diffuse interstitial fibrosis." JA 947. Dr. Rose reported that of particular relevance to Latusek's disease, the McConnochie study showed "the coal miners who developed interstitial fibrosis developed it at a statistically significantly younger age than what is reported as the mean age of diagnosis for people with

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[5] *Interstitial Fibrosis is Coal Workers—Experience in Wales and West Virginia*, K. McConnochie et al., 32 Ann. Occup. Hyg. 553 (1988), at JA 1088-95.

nonoccupational-related idiopathic pulmonary fibrosis" and those miners tended to have a "fairly benign clinical course" and "a much better survival duration." JA 950-51.

At Consol's request, Dr. Tuteur reviewed claimant's medical records in 2011. He agreed that Latusek has coal workers' pneumoconiosis and IPF. JA 804. Dr. Tuteur concluded that the etiology of Latusek's IPF was "not immediately obvious." JA 805. He found it "unlikely" that coal dust would trigger pneumoconiosis in claimant's upper lungs at the same time it triggered IPF in his lower lungs. Thus, Dr. Tuteur characterized the IPF as idiopathic. *Id.*

After reviewing Latusek's records, Dr. Renn testified in 2011 that Latusek is disabled by "the usual interstitial pneumonitis pattern of interstitial pulmonary fibrosis." JA 830. Based on his experience and readings, Dr. Renn found "absolutely no suggestion that an exposure to coal mine dust causes interstitial pulmonary fibrosis or usual interstitial pneumonitis." JA 831. Dr. Renn did not believe Latusek's atypical IPF affected his etiology analysis. JA 834-35.

Dr. Rosenberg, board certified in internal medicine, pulmonary disease and occupational medicine, also reviewed claimant's records at

Consol's request and was deposed in 2011. JA 995. Questioned about the cause of claimant's IPF, Dr. Rosenberg ruled out coal mine dust exposure because that exposure causes coal macules and potentially macronodules and progressive massive fibrosis, not diffuse fibrosis associated with IPF. JA 1012. Dr. Rosenberg opined that the articles relied on by Dr. Rose "are not research that really proves that coal mine dust exposure causes idiopathic pulmonary fibrosis. The clinical course of Mr. Latusek is totally consistent with the natural history of this disease state." JA 1022-23. He then acknowledged that Latusek was diagnosed with the disease at an earlier age than most individuals. JA 1023.

3. Summary of the decisions below[6]

a. The ALJ awards benefits on modification.

After summarizing the procedural history and the medical evidence, with an emphasis on the evidence newly-submitted on modification, the ALJ observed that the doctors generally agreed that Latusek's IPF was atypical in that the onset occurred in his thirties, the disease progressed

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[6] Because Latusek's award is based on evidence developed on modification, we summarize only the post-modification decisions.

slowly, and there was no genetic component. JA 165, 167, 169, 173, 177. The ALJ found particularly persuasive Dr. Dauber's explanation relating the IPF to coal dust exposure because the IPF developed at the same time coal dust was causing silicotic nodules and coal macules in his lungs. JA 169-70. This indicated that the coal dust was not benign and was causing an inflammatory response that affected other lung processes. *Id.* Thus, Dr. Dauber did not believe that Latusek's pulmonary fibrosis was "idiopathic" because "it's clear that he got a lot of dust in his lung at the time this other disease was developing." *Id.*

The ALJ further observed that "Dr. Dauber found the McConnochie study convincing in helping to make a causal relationship between dust exposure and UIP." JA 170. In addition, the ALJ recognized that Dr. Dauber relied on "The Pathology of Occupational Lung Disease," edited by Drs. Churg and Green and published in 1998, which found "the presence of a UIP pattern in autopsied lungs from coal miners is approximately ten times higher than in the general population." JA 180, quoting JA 711.

Regarding the McConnochie study, the ALJ found it reliable. He determined that its findings were confirmed by a November 2008 article

by Drs. Cohen, Patel and Green, a 1994 treatise authored by Drs. Morgan and Seaton, and a 1994 textbook by Dr. Parkes, which favorably referenced the 1988 McConnochie study.[7] And last, pointing to Drs. Parker and Rose's testimony, as well as a National Institute of Health website, the ALJ agreed that it had become more broadly accepted in the scientific community that occupational dust exposure can cause IPF.[8] JA 182-83. The ALJ thus rejected the underlying

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[7] *Lung Disease Caused by Exposure to Coal Mine and Silica Dust*, Drs. Cohen, Patel and Green (Nov. 6, 2008); *Occupational Lung Diseases,* Drs. Morgan and Seaton (3d ed. 1994) at JA 1083; *Occupational Lung Disorder*, Dr. W. Raymond Parkes (3d ed. 1994) at JA 1079.

[8] Supporting the ALJ's finding regarding the scientific community are two peer-reviewed journal articles, published after the hearing and thus not part of the administrative record, which indicate that coal dust exposure can cause IPF. *Respiratory Diseases Caused by Coal Mine Dust*, Laney and Weissman, 56 JOEM 105, S18 (Oct. 2014) (Drs. Laney and Weissman are members of the Division of Respiratory Disease Studies, National Institute for Occupational Safety and Health, which is the scientific advisor for the black lung program. 30 U.S.C. § 902(f)(1)(D)); *Coal Mine Dust Lung Disease*, Petsonk, Rose, and Cohen, 187 Am J Respir Crit Care Med 11, pp. 1178-1185 (June 1, 2013). In addition, the Pulmonary Fibrosis Foundation lists coal dust as a possible cause of pulmonary fibrosis. *See* http://www.pulmonaryfibrosis.org/life-with-pf/about-pf (last checked Nov. 18, 2016).

premise of Consol's experts' opinions that coal dust is not a possible cause of IPF.[9]

Finally, the ALJ found the clinical evidence better supported the views of Latusek's physicians: Histologic findings showed abundant silicate crystals and deposits in the lungs and silica-diffuse interstitial lung disease; Latusek had extensive dust exposure as a coal driller and long wall miner; and his IFP's early onset and slow progression was "exceedingly unusual." JA 183.

The ALJ thus credited the opinions of Latusek's physicians—Drs. Doyle, Parker, Rose and Jennings—over Consol's experts.[10]

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[9] The coal industry's disputing of the science relied on by the Department regarding the effects of coal dust exposure has a long history. *See e.g.*, 65 Fed.Reg. 79938 (Dec. 20, 2000) (rejection of Dr. Fino's opinion that the scientific literature showing a reduction in lung function from coal dust exposure is flawed). Dr. Fino is one of Consol's experts here, and both he, and another Consol expert, Dr. Rosenberg, have been found to hold views contrary to the preamble to the 2000 regulations, which "simply sets forth the medical and scientific premises relied on by the Department in coming to the[ ] conclusions in its regulations." *Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 314 (4th Cir. 2012); *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 491 (6th Cir. 2014).

[10] The Board held the ALJ's reliance on Dr. Jennings was misplaced as no new report from Dr. Jennings was submitted on modification, but harmless as the other physicians provided substantial support for the ALJ's disability causation finding. JA 198 n.12.

Accordingly, he concluded that the evidence on modification established a mistake in a determination of fact and found Latusek entitled to benefits. *Id.*

b. The Board remands.

On appeal, the Board rejected Consol's argument that the law of the case doctrine precluded modification. It ruled the ALJ's modification decision was based on a different record, and moreover, the ALJ "did not set aside, collaterally attack or ignore any of the holdings of the Fourth Circuit." JA 192. The Board found that substantial evidence supported the ALJ's assessment of the newly-submitted evidence, including the new medical literature and the McConnochie study in particular. JA 193-201. But it ruled that the ALJ had failed to consider Consol's pathology reports of the explanted lung tissue by Drs. Naeye and Crouch, and so remanded for the ALJ to address this evidence and determine whether granting modification would render justice under the Act. JA 203.

c. The ALJ awards benefits on remand.

The ALJ found Drs. Naeye and Crouch's pathology reports unconvincing. He concluded that Dr. Naeye's opinion could not be credited because his finding of no black pigmentation on the lung tissue

slides was inconsistent with the rest of the pathology evidence (including Dr. Couch's) of the explanted lung. He further determined that Drs. Naeye and Crouch's opinions finding no connection between IPF and coal mine dust exposure were outweighed by the opinions of the other qualified physicians—Drs. Dauber, Jennings, Rose and Parker—who persuasively explained that the clinical evidence showed anthracotic nodules and was consistent with Latusek's interstitial fibrosis being caused by coal dust exposure. JA 212-13. Therefore, the ALJ found that Latusek proved by the weight of the evidence that his totally disabling pulmonary impairment was caused by coal dust exposure and thus established a mistake in a prior determination of fact. JA 213.

The ALJ then concluded that granting modification would render justice under the Act because "new evidence along with further reflection on the evidence previously submitted shows that the denial of entitlement was wrongly decided." JA 213.

d. The Board affirms.

The Board affirmed as supported by substantial evidence the ALJ's assessment of the pathology evidence to find disability causation

proved. The Board held that the ALJ adequately considered all the relevant evidence and permissibly concluded that the opinions of Drs. Dauber, Rose and Parker were more persuasive than those of Drs. Naeye and Crouch. (It also declined to revisit its prior holdings.) Finally, the Board found the ALJ did not err or abuse his discretion in finding that granting modification based on new evidence would render justice here.

Summary of the Argument

The Court should affirm Latusek's award of benefits on modification. Although this Court previously determined that substantial evidence did not support an award, Latusek timely exercised his right to modify the denial based on a mistake of fact and submitted a wealth of new evidence in support of his claim. The ALJ reasonably determined that substantial evidence now established that Latusek's totally disabling IPF was causally related to his coal mine dust exposure and therefore compensable. Moreover, since the newly-submitted evidence proved Latusek's entitlement, the ALJ permissibly concluded that granting modification rendered justice under the Act.

The Court should reject Consol's argument that granting modification based on a mistake of fact here violated the law of the case doctrine, this Court's mandate, and the separation of powers. Modification is a broad, statutory remedy that allows a claim to be reopened within one year of a prior denial for correction of mistakes in factual findings, including the ultimate finding of entitlement. On modification, the ALJ did not upset the Court's prior holding. Instead, he permissibly weighed newly-submitted evidence relevant to the cause of Latusek's IPF and reasonably determined that substantial evidence in the record before him now established disability causation. Granting modification did not subvert the finality of the Court's prior decision, but it did render justice.

Consol's contention that the ALJ erred in crediting Latusek's medical experts over its own is essentially a request for this Court to re-weigh the evidence. However, it is the ALJ's role to weigh the medical evidence and make credibility determinations. The ALJ's assessment of the medical record here is rational, supported by substantial evidence, and should be affirmed.

Argument

A. Standard of Review

The grant or denial of a modification request is reviewed under an abuse-of-discretion standard. *Sharpe v. Director, OWCP*, 495 F.3d 125, 130-32 (4th Cir. 2007) (*Sharpe I*). Under it, the Court "will reverse if the decision 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.* at 130 (quotation omitted).

The Court reviews an ALJ's findings of fact to determine whether they are supported by substantial evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999). Substantial evidence is of "sufficient quality and quantity 'as a reasonable mind might accept as adequate to support' the finding under review." *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389 (1971)). This Court exercises de novo review over the ALJ's and the Board's legal conclusions. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). The Director's reasonable interpretation of the black lung modification regulation, however, is entitled to substantial deference. *Jessee v. Director, OWCP*, 5 F.3d 723, 725-26 (4th Cir. 1993)

B. The ALJ did not abuse his discretion in finding a mistake of fact and determining that modification would render justice under the Act.

The ALJ committed no abuse of discretion in granting modification and awarding benefits. He reasonably found a mistake of fact—newly submitted evidence now established that Latusek's IPF was due to coal dust exposure—and permissibly determined that turning the denial into an award under these new facts would render justice under the Act. The Court should affirm.

Consol contends that by modifying a prior holding of this Court, the ALJ's mistake-in-a-prior-determination-of-fact finding does not render justice, disregards the law of the case and mandate doctrines, and violates the separation of powers. These contentions misunderstand the well-recognized nature of modification proceedings and mischaracterize this Court's prior decision and the ALJ's decision below.

Modification permits the reopening of a compensation order on the grounds of a mistake in a determination of fact or change in conditions. 33 U.S.C. § 922, incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 725.310(a). As this Court has recognized, the "modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings." *Betty B Coal Co. v. Director, OWCP*, 194

F.3d 491, 497 (4th Cir. 1999). 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 v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971); *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999); *Jesse,* 5 F.3d at 725.

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."[11] *Jessee*, 5 F.3d at 725. Modification's expansive nature thus demonstrates the statute's preference for accuracy in the decision over finality. *Sharpe I*, 495 F.3d at 131; *Jessee*, 5 F.3d at 725; *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968).

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[11]Per *Jessee*, Consol's contention (Pet. Br. at 28-29) that the ALJ must identify the previously unavailable evidence on which the mistake determination is based is plainly wrong. In any event, the ALJ clearly granted modification based on newly submitted evidence, as we discuss below.

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. *Sharpe I* directs the ALJ to determine whether reopening a case will render justice under the Act. *Id.* In considering whether a modification request will render justice under the Act, *Sharpe I* further 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. The Court 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*).

1. Granting Latusek's modification petition renders justice under the Act.

The ALJ properly applied the *Sharpe* factors here.[12] First, Latusek timely filed his modification request within one year. Second, the modification request was neither improper nor futile. Rather, the ALJ

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[12]The Board correctly observed that the ALJ's additional citation to the Seventh Circuit's "render justice" standard was harmless because it comports with, and is repeatedly cited in, the *Sharpe I* and *Sharpe II* decisions. JA 231 n.14 (discussing *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 546 (7th Cir.2002)).

determined that it was made for the simple reason of turning a denial into an award. And most important, Latusek was motivated by accuracy concerns—the new evidence he expected would demonstrate that his IPF was in fact related to his coal mine dust exposure. *See* J.A. 213; *cf. Sharpe I*, 495 F.3d at 134. In short, the ALJ did not abuse his discretion in finding that modification would render justice under the Act.

Consol nonetheless contends that an improper motive lurks behind Latusek's request: he seeks to collaterally attack this Court's prior decision. Pet. Br. at 19-20. But as detailed below, this Court's prior decision and the ALJ's do not conflict; they stand side-by-side, reaching different results on different evidence. *Cf. Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (*Res judicata* does not bar repeat black lung claims because "the health of a human being is not susceptible to once-in-a-lifetime adjudication.").

2. Neither the law of the case doctrine nor the Court's prior mandate precludes modifying the denial of benefits.

The law of the case doctrine "is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. U.S. Smelting Refining &*

Mining Co., 339 U.S. 186, 198 (1950). "The mandate rule is a specific application of the law of the case doctrine" to cases that have been appealed and remanded. *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 481 (4th Cir. 2007). It generally bars litigation of issues that were raised on appeal, and of issues that could have been raised before remand, but were not. *Id.* Exceptions to the mandate rule exist, in particular where there is new evidence. *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993) (noting exceptions, including where "significant new evidence has come to light" or there was a "blatant error" in the prior decision that will result in a "serious injustice" if left uncorrected).

Consol argues that these doctrines bar the ALJ from modifying the Court's prior denial of benefits. Pet. Br. at 20. This characterization misrepresents the force of these doctrines, the Court's prior holding, the modification proceedings, and the ALJ's decision below.

In its 2004 decision, the panel majority held that the record evidence at that time was legally insufficient to prove that Latusek's IPF was causally related to his occupational exposure. JA 103. On modification, Latusek did not assert that that ruling was mistaken. Rather, he

claimed that the new evidence on modification would make his case. To that end, Latusek submitted new medical evidence, including pathology reports from Latusek's 2006 lung transplant as well as medical opinions that addressed the growth in the medical understanding of IPF since the original 1997 ALJ hearing and explained how Latusek's particular circumstances fit within that understanding. And Consol submitted additional contrary evidence. Thus, the record previously before this Court and the one before the ALJ are substantially different. Based on the newly-submitted evidence, the ALJ determined that disability causation, and thus, a mistake in a prior determination of fact, had been established.

This finding does not upset the finality of the Court's prior decision. As this Court has explained in the context of a black lung benefits case involving multiple remands rather than a modification request:

> The law-of-the-case doctrine is not so restrictive that it binds a judicial officer, entitled to take new evidence and make new findings, to an earlier finding—even if it was a mixed question of law and fact—particularly when the preexisting evidence no longer supported the finding asserted to be the law of the case. *See Sejman v. Warner-Lambert Co.,* 845 F.2d 66, 69 (4th Cir.1988) (stating that the judicial doctrine does not operate when "a subsequent trial produces substantially different evidence"); *Smith v. North Carolina,* 528 F.2d 807, 810 (4th Cir. 1975) (stating that the district

> court was not bound by law of the case when new evidence established a conclusion previously found erroneous on appeal).

Colley & Colley Coal Co. v. Breeding, 59 F. App'x. 563, 2003 WL 1007197 **4 (4th Cir. 2003). Consequently, neither law of the case nor the mandate rule bars the ALJ from deciding Latusek's modification request following the appellate court's denial. *See Eastern Associated Coal Corp. v. Director, OWCP [Duelley]*, 104 F. App'x., 912, 2004 WL 1688333 (4th Cir. 2004) (holding where court previously affirmed grant of benefits, employer not precluded from filing for modification); *King v. Jericol Mining, Inc.*, 246 F.3d 822 (6th Cir. 2001) (holding employer successfully modified Board's prior affirmance of ALJ award).

3. Modification does not violate separation of powers.

Finally Consol argues that, because this Court previously reversed Latusek's award, his modification petition is precluded by the constitutional separation of powers doctrine. Pet. Br. at 26-27. The Court should reject this argument. Regardless of the denying tribunal, modification is a statutory waiver of finality and res judicata that allows a black lung claim to be reopened within one year of a prior denial on grounds of a mistake in a determination of fact or a change in conditions. *Jessee*, *supra*; *King*, *supra*. Because of this statutory

waiver, a denial does not become truly "final" until after the one year has elapsed. Thus, a timely request for modification simply does not implicate the separation of powers doctrine.

Consol's reliance on *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 232 (1995) is misplaced. In *Plaut*, the Supreme Court held that a statute violated Article III because it "retroactively command[ed] the federal courts to reopen final judgments." *Id.* at 219. Unlike *Plaut*, modification is not a *retroactive* congressional command. It has been a part of the BLBA since its inception. 33 U.S.C. § 922 as incorporated by 30 U.S.C. § 932; *O'Keeffe*, 404 U.S. at 255-56. And similarly, modification was not intended to circumvent judicial precedent as in *Plaut*; nor does it "require federal courts to reopen final judgments in suits dismissed with prejudice." 514 U.S. at 217.

Consol also contends, citing *Vision Processing, LLC v. Groves*, 705 F.3d 551 (6th Cir. 2013), that the Sixth Circuit "expressed doubt regarding Congress's authority to deprive judicial judgments of their conclusive effect in black lung benefits proceedings through modification." Pet. Br. at 27. This is a complete mischaracterization of the *Vision Processing* dicta, which speculated on the validity of

hypothetical new legislation that could reopen deceased (and closed) miners' claims. *Id.* at 557. (The *Sharpe* decisions likewise foreclosed a coal company's use of modification to reopen deceased miners' claims as not rendering justice under the Act.)

More to the point is *Eastern Associated Coal Corp. v. Director, OWCP [Toler]*, 805 F.3d 502 (4th Cir. 2015). There, this Court expressly rejected a separation of powers challenge to a miner's subsequent claim,[13] explaining "*Plaut* presents no obstacle to the ALJ's consideration of [the miner's] second claim under [the BLBA's amended] legal standards. The ALJ's award of benefits on [the miner's] second claim did not 'retroactively ... reopen' anything, much less a final judgment of an Article III court. As we explained in *Lisa Lee Mines,* a subsequent claim based on new evidence is not the same claim as the one previously denied." *Id.* at 514-15. *Accord Consolidation Coal Co. v. Maynes*, 739 F.3d 323 (6th Cir. 2014). As with subsequent claims, the

[13]A subsequent claim is one that is filed more than one year after the final denial of a prior claim. 20 C.F.R. § 725.309(c). Unlike modification, a subsequent claim is considered an entirely new assertion of entitlement and requires proof that a previously-denied element of entitlement changed since the prior denial. *Id.*

new evidentiary record on modification here provides additional justification for rejecting Consol's separation of powers argument.

Consol simply refuses to recognize that under modification "the 'principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits." *Jesse*, 5 F.3d at 725 (citing *Banks,* 390 U.S. at 461-465). Congress established a statutory waiver of res judicata if modification is requested within one year of a denial, and the broad scope of this statutory waiver has been considered and upheld by the judiciary. *Banks*, 390 U.S. at 465.

C. The ALJ permissibly determined that the weight of the medical evidence now proves Latusek's coal mine dust exposure caused his disabling IPF.

The ALJ reasonably determined that substantial evidence in the form of the 2006 pathology reports and the recent reports and deposition testimony from Drs. Doyle, Dauber, Rose, and Parker provided a reliable, persuasive explanation that Latusek's IPF was caused by his coal dust exposure. The ALJ reached this conclusion because the doctors relied on the unusual early onset and slow progression of Latusek's IPF, the medical literature addressing the developing understanding of IPF, and the clinical pathology evidence.

JA 177-83, 211-13. The ALJ's determination is adequately explained, supported by substantial evidence, is in accordance with law, and therefore should be affirmed. *Harman Mining Co.*, 678 F.3d at 310 ("As in all agency cases, we must be careful not to substitute our judgment for that of the ALJ…. As long as substantial evidence supports an ALJ's findings, '[w]e must sustain the ALJ's decision, even if we disagree with it.'") (citations omitted).

Consol argues that claimant's modification petition is supported by medical articles that are not "new" evidence because some of these articles pre-dated the 1997 hearing. Pet. Br. at 28-38. However, as explained above, there is no requirement that any new evidence be submitted on modification, let alone evidence that post-dates the prior hearing. *O'Keeffe*, 404 U.S. at 255.

Furthermore, Consol is simply wrong in asserting that the ALJ credited doctors based on their reliance on the three medical articles that this Court previously ruled unreliable. Pet. Br. at 44. The ALJ mentioned these articles only in passing when summarizing the prior ALJ's pre-modification decisions. JA 180. Instead, the ALJ here evaluated the doctors' causation conclusions set forth in their recent

reports and deposition testimony, which did not rely on the rejected medical articles.

Additionally, Consol challenges the ALJ's finding that the scientific journal articles submitted on modification supported the doctors' opinions. Scientific articles have meaning when medical experts apply them to the specific facts of the case at hand. *See generally, General Elec. Co. v Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrill Dow Pharmaceutical, Inc.*, 509 U.S. 570 (1993).[14] And ALJs, in turn, "have the skill needed to handle evidence" and "a corresponding obligation to *use* that skill when evaluating technical evidence." *Peabody Coal Co.*, 255 F.3d at 469 (emphasis in original). Thus, ALJs have the discretion to "consider the qualifications of the experts, the opinions' reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant

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[14] *Daubert* addresses the admissibility of scientific evidence and expert testimony under the Federal Rules of Evidence, which do not apply in black lung claims. 33 U.S.C. § 923(a) as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 725.455(b). Thus, contrary to Consol's extended analysis, the ALJ was not required to separately address the specific reliability factors listed in *Daubert*. *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001).

distractions and prejudices." *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951 (4th Cir. 1997).

That is precisely what the ALJ did here. He permissibly exercised his discretion and evaluated the medical opinions based on all relevant evidence, including the medical journal articles. JA 167, 177-81. He concluded that—in light of the published and accepted science, clinical findings, and their own reasoned medical judgment—Drs. Rose, Dauber and Parker each credibly explained that Latusek's early onset of IPF, its slow progression, his lack of any smoking history, lengthy coal mine employment history, and lung transplant pathology findings, together characterize a coal-mine-dust-induced lung disease. In particular, the ALJ noted that the McConnochie study, as confirmed by a subsequent article by Drs. Cohen, Patel and Green, found a greater incidence of IPF with a benign clinical course in coal miners of Wales and West Virginia than the general population. JA 181. The ALJ then found persuasive Drs. Rose, Dauber and Parker's reasoned medical judgment interpreting Latusek's condition in the context of these studies. He thus concluded that Latusek's atypical IPF was not idiopathic but caused by occupational dust exposure. JA 177, 181. These expert

opinions constitute substantial evidence establishing that coal mine dust exposure caused Latusek's disabling IPF.

Consol also contends that Dr. Rose's etiology conclusion is conjecture and should be rejected as was the medical opinion in *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. 2010). The comparison is not apt. *Tamraz*, a products liability case, turned on the cause of a welder's Parkinson's disease. The court held the district court erred in allowing a neurologist to present a purely speculative opinion that manganese exposure could have caused the welder's Parkinson's: the neurologist speculated that the welder was exposed to fumes presumably containing manganese, that manganese exposure theoretically could trigger Parkinson's disease, that this welder may have had genes predisposing him to Parkinson's and, therefore, manganese exposure induced Parkinson's by triggering the welder's genetic pre-disposition. *Id.* at 670. The court rejected the doctor's hypothesizing as based on multiple "leaps of faith" and especially on his reliance on a theoretical link between manganese and the development of Parkinson's when there was no scientific support for his premise. *Id.* In contrast, Dr. Rose fully explained the steps she took to directly, not hypothetically,

link Latusek's atypical IPF to his 23 years of coal mine dust exposure, instead of classifying his IPF as idiopathic. Therefore, the ALJ properly accorded her well-reasoned opinion full weight.

In contrast to the well-supported opinions of Latusek's doctors, the ALJ permissibly discounted Drs. Renn and Rosenberg's opinions because their explanations for excluding coal mine dust exposure were at odds with the atypical presentation of Latusek's IPF (the early onset, benign course, lack of a smoking history and genetic predisposition, and current medical knowledge). JA 178-79. The ALJ therefore reasonably concluded that the opinions of Drs. Rose, Dauber and Parker relating Latusek's IPF to coal mine dust exposure outweighed the contrary, but poorly reasoned, opinions from Consol's experts. JA 183.

Finally, the ALJ permissibly discounted the newly-submitted opinions of Consol's pathologists. Dr. Naeye did not find black deposits in the 2006 explanted lung tissue, contrary to the other pathologists, and Dr. Crouch equivocated in proposing that Latusek's "unusually long survival" indicated some unknown and unidentified "other less aggressive disorders." Thus, the ALJ permissibly found these opinions

outweighed by the reasoned and documented opinions provided by Drs. Dauber, Rose and Parker. JA 213.

In sum, when an ALJ explains his reasoning and does not rely on an impermissible basis, this Court must defer to his discretion and judgment in assessing the conflicts in the evidence. *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 342 (4th Cir. 1996). "[A]s the trier of fact, the ALJ is not bound to accept the opinion or theory of any medical expert." *Underwood*, 105 F.3d at 949. The ALJ need only provide a factual basis to support a valid reason for crediting or discrediting an opinion. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 n.13 (4th Cir. 2000). Here, the ALJ adequately explained his reasons based on the record evidence for crediting Latusek's doctors over Consol's experts. Accordingly, substantial evidence supports the ALJ's finding that Latusek is totally disabled due to pneumoconiosis.

Conclusion

The Court should affirm the decisions below.

Respectfully submitted,

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Certification of Compliance

Pursuant to Federal Rules of Appellate Procedure 32(a)(6) and 32(a)(7)(B), I hereby certify that this Brief for the Director, Office of Workers' Compensation Programs, was prepared using proportionally-spaced typeface, Century 14-point, and contains 6,997 words, as counted by the Microsoft Office Word 2010 software used to prepare this brief.

Furthermore, I certify that the text of the brief transmitted to the Court through the CM/ECF Document Filing System as a PDF file is identical to the text of the paper copies mailed to the Court and counsel of record. In addition, I certify that the PDF file was scanned for viruses using McAfee Security VirusScan Enterprise 8.8. The scan indicated there are no viruses present.

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Certificate of Service

I hereby certify that on November 21, 2016, the Director's brief was filed electronically with, and one paper copy, postage prepaid, was mailed to, the Clerk of the United States Court of Appeals for the Fourth Circuit. I further certify that the Director's brief was served on the following parties by using the appellate CM/ECF system:

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