



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 270**  
**March 2016**

Stephen R. Henley  
Chief Judge

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Associate Chief Judge for Longshore

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**I. Longshore and Harbor Workers' Compensation Act  
and Related Acts**

**A. U.S. Circuit Courts of Appeals<sup>1</sup>**

**[Bis Salamis, Inc. v. Dir., Office of Workers' Comp. Programs \[Meeks\], \\_\\_\\_ F.3d \\_\\_\\_ \(5th Cir. 2016\).](#)**

Reversing the Board, the Fifth Circuit held that the ALJ's denial of benefits for claimant's alleged back and neck injuries was rational and supported by substantial evidence. While claimant had a degenerative back condition, there was no definitive evidence showing he suffered a traumatic injury, and there was no evidence showing a difference in his spine before and after the work incident. More than a scintilla of evidence supported the ALJ's determination that claimant lacks credibility and thus could not *prima facie* prove that the work incident could have aggravated his preexisting condition to the extent he claims. The court upheld the Board's decision reversing the ALJ's denial of medical benefits related to claimant's loose/missing tooth caused by the work incident.

**Factual Background**

Claimant worked briefly for employer as a sandblaster and painter on offshore rigs. On April 9, 2010, claimant was involved in an accident when a personnel basket that was transporting him and others from an oil rig to a vessel collided with the vessel. Claimant alleged that this incident caused injuries to his back, neck, and teeth (*i.e.*, a loose tooth that later fell out and two chipped teeth). Immediately after the incident, claimant stated that he was all right. He asserted that within thirty minutes, he began to feel pain. The ALJ credited a statement from claimant's supervisor that claimant told him shortly after the incident that he had been "hurt before but . . . never got anything for it." Claimant filled out an accident report, was given a neck brace, attached to a spine board, and transported ashore in a helicopter. During his hospital stay, claimant underwent a CT scan and other evaluations, and was diagnosed with extensive degenerative changes in both cervical and lumbar spine, and a back sprain or strain; the report noted no evidence of trauma. On April

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<sup>1</sup> Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at \*\_\_\_) pertain to the cases being summarized and refer to the Lexis identifier.

10, 2009, claimant reported to employer that he might have a loose tooth. Claimant subsequently saw several physicians. He was prescribed pain medication and physical therapy, and eventually underwent surgery on his lower back. He also saw a dentist in May 2009 and reported that the loose tooth had fallen out.

### Procedural History

In his initial order denying benefits, the ALJ found "the credible evidence of the record insufficient to find that Claimant suffered any new injuries or aggravated any preexisting conditions beyond the transient [back] strain that was initially diagnosed, and required only that medical treatment provided by Employer, and resulted in no loss of wages." The ALJ found that claimant and others had been "tossed about" during the incident. The ALJ acknowledged medical opinions in the record that claimant's symptoms were a result of his work injury, which aggravated a preexisting condition. Yet, he found the medical opinions "were based in large part on the subjective reports and histories provided" by claimant, and he found claimant totally unreliable and not credible. The ALJ cited claimant's "demeanor during the hearing" as failing to "create any confidence in the accuracy of his testimony or even his motivation to at least attempt to tell the truth." The ALJ found that the surveillance video contradicted claimant's previous testimony, that he filed false tax returns, and that he frequently misled or withheld information from his doctors and employers. The ALJ credited claimant's supervisor's statement that claimant said he had been injured before but never got anything for it and found that "the weight of the objective medical opinion" favored finding the changes to claimant's back were simply degenerative in nature. The ALJ further found that claimant's complaints about his teeth were not credible, because with broken teeth, there should have been evidence of bruising, swelling, or bleeding, none of which were noted during initial hospitalization.

In its first remand order, the Board faulted the ALJ for failing to discuss the presumption in a claimant's favor under § 20 (a). In addressing the dental claim, the Board concluded that the ALJ's inferences were rational regarding the broken teeth, but remanded for further findings with regard to the work-relatedness of the loose tooth.

In his second order, on remand, the ALJ found that claimant failed to invoke the § 20(a) presumption with respect to his alleged injuries. The ALJ found that any testimony or opinions based on claimant's statements were entitled to virtually no weight because he found claimant to be so dishonest and unreliable. He further found that if the presumption was raised with regard to the neck and back injuries, there was no evidence to rebut it. As to the loose tooth, the ALJ found that even if the presumption was invoked, sufficient evidence rebutted it, inferring that an intervening trauma could have cause it (*i.e.*, whatever chipped claimant's teeth before the dentist appointment likely knocked out the other tooth).

On second appeal, the Board vacated the ALJ's findings in favor of employer, reversed the ALJ's decision, and rendered a decision in favor of claimant on both claims. The Board found that the ALJ's order on remand was not supported by substantial evidence because, even if claimant was not credible, objective medical evidence supported his *prima facie* showing that the work incident aggravated or made symptomatic the pre-existing condition of his lumbar spine. Employer did not rebut the presumption. Further, claimant established entitlement to TTD benefits. The Board also awarded claimant medical benefits for his missing tooth, finding it irrational and not supported by substantial evidence to speculate that something else may have caused his tooth to fall out, when there was no record evidence of another incident and claimant had complained about his tooth on April 10, 2009.

On second remand, the ALJ determined claimant's average weekly wage based on the parties' stipulations and entered an order awarding benefits. The Board summarily affirmed the ALJ's order, and employer appealed the Board's final decision.

### Standard of Review

The court summarized as follows the applicable standard of review:

"We review the Board's decisions to correct any errors of law and to determine whether the Board 'adhered to its proper scope of review.' "The Board must uphold the ALJ's findings if those findings are rational, supported by substantial evidence, and consistent with the law. 'Substantial evidence is 'that relevant evidence—more than a scintilla but less than a preponderance—that would cause a reasonable person to accept the fact finding.'" Neither the court nor the Board may substitute their judgment for that of the ALJ. 'The ALJ . . . is exclusively entitled to assess both the weight of the evidence and the credibility of witnesses,' and this court may vacate the Board's decision if it improperly fails to accept the ALJ's assessments."

*Id.* at \*23-24 (citations omitted).<sup>2</sup>

### The LHWCA Framework for Assessing Claims

The LHWCA provides a three-step framework for adjudicating claims for work-related injuries and is to be liberally construed in favor of injured workers. First, a claimant may invoke the § 20(a) presumption that "claim comes within provisions" of the LHWCA by establishing a *prima facie* case, which requires the claimant to prove that (1) he suffered harm and (2) conditions of the workplace, or an accident at the workplace, could have caused, aggravated, or accelerated the harm. If claimant is successful, employer may rebut the presumption through facts—not mere speculation—that the harm was *not* work-related. If the employer presents substantial evidence to rebut the § 20(a) presumption, it falls out of the case and the ALJ determines whether the work conditions or incident caused the employee's injury by weighing all of the evidence, with the claimant bearing the burden of persuasion.

### Back and Neck Claims

The court initially rejected claimant's argument that this court has incorrectly imposed on claimants a burden of proving a *prima facie* case, rather than simply alleging a compensable injury, at the first step of the LHWCA analysis. The court stated that "[a] claimant for benefits under the LHWCA faces a fairly light burden, but our court and other courts have consistently required *prima facie* proof of a compensable injury." Slip op. at \*27 (citations omitted). The court further concluded that, contrary to claimant's contention, an ALJ may make credibility determinations in ascertaining whether a claimant has made a *prima facie* case.

Next, the court held that the Board erred in overturning the ALJ, because the ALJ's rejection of the claim was supported by substantial evidence, including the ALJ's determination that claimant had no credibility. The aggravation rule provides that when "an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable." Slip op. at \*28 (citations omitted). Here, multiple doctors opined that the current condition of claimant's spine, with its preexisting

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<sup>2</sup> The court noted that, in reviewing the Board's final decision, the court may also review intermediate orders remanding the case to the ALJ for further proceedings.

degenerative disorders, is capable of causing claimant severe pain and keeping him from working in his previous job. The record did not contain evidence that claimant's back condition was caused directly by the workplace incident. Thus, to prevail, he had to make a *prima facie* showing that his condition could have been aggravated by the incident or that the symptoms of his condition may have manifested as a result of that incident. In rejecting the Board's analysis, the court reasoned:

"The Board may reject findings that are irrational or unsupported by substantial evidence. In this case, the Board relied on the doctors' findings in concluding that the ALJ's denial of benefits was not supported by substantial evidence. The Board reasoned that even if [claimant] was not credible, some of this medical evidence was sufficiently objective that the ALJ should have accounted for it. For example, straight-leg raising, flexion, and extension tests suggested a lack of range of motion and the type of pain consistent with the injuries [claimant] claimed. Accounting for this evidence, the Board found [claimant] made a *prima facie* case that the incident with the personnel basket could have aggravated or made symptomatic the preexisting condition of his lumbar spine; therefore, the Board found that [claimant] invoked the Section 20(a) presumption.

We disagree. Although this is a difficult case, we conclude that substantial evidence supports the ALJ's determination that [claimant] failed to make a *prima facie* case that the work-related injury could have caused anything more than a transient back strain. An ALJ may accept or reject the conclusions of experts and 'is not required to accept the opinion or theory of a medical expert that contradicts the ALJ's findings based on common sense.' The ALJ may choose between reasonable inferences, and the ALJ exclusively determines the weight of the evidence.

In this case, plentiful evidence demonstrates that [claimant] has a degenerative back condition that could reasonably cause the type of pain he alleges. Yet there is no definitive evidence showing [claimant] suffered a traumatic injury, and there is no evidence showing a difference in his spine before and after the incident on the personnel basket. The Board determined that it was irrational to disregard the doctors' opinions that the aggravation of [claimant's] condition could have been caused by the incident. But these opinions were bare conclusions, unsupported by explanations of how the particular event with the personnel basket might aggravate a preexisting degenerative spinal condition. Apparently, neither [claimant] nor [employer] ever deposed the doctors, and they did not testify at the hearing. The record mostly consists of their medical notes and occasionally of short reports containing their conclusions.

Additionally, it is not at all clear that the doctors were assessing the event that actually occurred when they gave conclusory opinions that [claimant's] pain was linked to the incident at work. [Claimant] presented varying descriptions of the incident, testifying at his hearing that the basket 'flipped,' but telling his doctors that the basket 'dropped 10 feet' and hit the deck of the vessel. The ALJ did not have to credit the account [claimant] gave to his doctors. No definitive evidence answers whether the event was a small jostling of the personnel basket or a ten foot fall. In the absence of such evidence, we have the ALJ's finding that [claimant] was 'such an unreliable witness and dishonest individual that his testimony and the opinions and reports of the doctors who relied on what he told them had virtually no probative value or evidentiary weight.' 'As a result,' regarding what occurred on the boat, the ALJ found that 'the only relevant facts that are established as more likely than not' include that [claimant] 'was involved in an incident where he was tossed about in a personnel basket but [initially] reported he was OK when asked.' It was not irrational to give the doctors' conclusions little weight, given that they were based on what the

ALJ implicitly or explicitly found were non-credible descriptions of the incident and complaints of pain.

Although some of the doctors' findings were based on what they viewed as objective tests, it was not irrational to conclude that [claimant] probably faked pain and limited range of motion. [Claimant] admitted during the hearing that the surveillance videos accurately reflected his abilities. From June through September of 2009, before his surgery, [claimant] was able to walk, bend down to pick weeds and pick up his grandchild, drive, climb steps, squat, kneel to pull weeds for an extended period of time, and drag trash to the trash bin, all without evident pain. This account of his life contrasts with the intense pain he reported to his doctors around that time, and his deposition testimony that he mostly spent time in bed and could not clean, do yard work, or lift anything heavier than ten pounds. [Claimant's] lack of credibility was bolstered by his dodgy testimony and by his failure to accurately report or pay taxes on his income for years, a discrepancy [claimant] corrected only after it would serve his interests to report more income. Additionally, the ALJ noted that '[i]n more than 15 years as an administrative and criminal law judge, [he] [could] not recall any witness being less credible than [claimant].'

[Claimant's] treating physicians were influenced by his account of events and their role in attempting to treat the pain he reported to them. There is no indication [claimant's] doctors viewed the video surveillance evidence or opined on [claimant's] abilities based on such objective evidence. Even so, Dr. Vanderweide found [claimant] to lack credibility in his complaints of neck pain after his back surgery, noting 'worrisome' inconsistencies and that he could not explain [claimant's] subjective complaints of pain in light of the objective medical exams.

The Board improperly undervalued the ALJ's credibility determinations, given the lack of completely objective medical evidence supporting [claimant's] claim that his degenerative condition suddenly flared up some time after the workplace incident. Without further explanation of the doctors' conclusions, it was not irrational to conclude that [claimant] probably faked enough of his symptoms and pain to undermine the reliability of his doctors' conclusions. Accordingly, the Board erred in overturning the ALJ. The ALJ's determination that [claimant] failed to make a *prima facie* case of workplace-related, debilitating injury was rational and supported by substantial evidence. As we said before:

We are neither doctors nor the original fact finders in this matter, and so, under the appropriate standard of review, we need not assess the plausibility of these medical accounts, nor do we assess the weight they should be accorded relative to other evidence in the record. . . . Our task is more limited: we ask only whether this evidence was relevant to the ALJ's decision, and whether the ALJ's decision was reasonable based on this evidence."

*Id.* at \*30-35 (citations and footnotes omitted).

#### Dental Claim

The court further held that the Board did not exceed its authority in rendering judgment for claimant on his missing tooth. Substantial evidence supported the conclusion that claimant established a *prima facie* case based on his complaint of a loose tooth on April 10, 2009, plus a subsequently missing tooth. Employer produced no evidence to rebut this claim or to suggest how else claimant could have lost his tooth. The ALJ's alternate explanation was not supported by substantial evidence in the record.

The court noted that, while claimant did not contest the denial of his claim for the two chipped teeth, the ALJ's inference regarding the chipped teeth (*i.e.*, that the lack of reports about the chipped teeth or any bruising, bleeding, or mouth injuries on April 10, 2009, belied the work-relatedness of this problem) was rational and supported by substantial evidence.

**[Topic 20.2 PRESUMPTIONS -- 20(a) CLAIM COMES WITHIN PROVISIONS OF THE LHWCA (Claimant's *Prima Facie* Case; Employer's Burden of Rebuttal with Substantial Evidence; Secondary/Subsequent Injury); Topic 23 EVIDENCE (ALJ DETERMINES CREDIBILITY OF WITNESSES); Topic 21 Review of Compensation Order]**

**[Ed. Note:** The Fourth Circuit issued an unpublished decision in [Ceres Marine Terminals, Inc. v. Director, OWCP \[Jackson\], \\_\\_\\_ Fed. Appx. \\_\\_\\_, 2016 U.S. App. LEXIS 5510 \(4th Cir. 2016\).](#)]

## **B. Benefits Review Board**

**[Edwards v. Marine Repair Services, \\_\\_\\_ BRBS \\_\\_\\_ \(2016\).](#)**

The Board granted employer's motion for reconsideration of its decision in *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015).<sup>3</sup> In its original decision, the Board concluded that, since it was undisputed that claimant had complied with § 33(g)(2) by giving employer notice of his third-party settlement, but did not comply with the prior written approval provision of § 33(g)(1), the ALJ had to determine on remand which subsection of § 33(g) applies. In its motion for reconsideration, employer clarified that it did not concede to claimant's assertion that he had complied with the notice provision in § 33(g)(2). Accordingly, the Board vacated its prior conclusion that claimant complied with § 33(g)(2). The Board modified the remand order to instruct the ALJ to determine whether the § 33(g)(2) notice provision has been satisfied, such that, if claimant's third-party settlement was for an amount greater than or equal to his compensation entitlement under the Act, the ALJ would be able to state whether the § 33(g)(2) bar applies.<sup>4</sup>

**[Topic 33 COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE -- § SECTION 33(g); Subsection (g)(1) - Prior Written Approval; Subsection 33(g)(2) - Notice Provision]**

**[Moody v. Huntington Ingalls, Inc., \\_\\_\\_ BRBS \\_\\_\\_ \(2016\).](#)**

The Board reversed the ALJ's award of temporary total disability (TTD) compensation to a claimant who had voluntarily retired and later underwent surgery for his work-related shoulder injury, rendering him unable to work during the period of recuperation. The Board held that claimant is not entitled to post-retirement TTD, because his work injuries did not preclude his return to his usual work at the time of his voluntary retirement.

In August 2011, claimant notified employer that he intended to retire, and, pursuant to company policy, his last day of work was on October 31, 2011. He sustained a work-related shoulder injury during the interim, but was able to continue working. He first received medical treatment for his injury in November 2011, and he underwent shoulder

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<sup>3</sup> *Recent Significant Decisions – Monthly Digest Error! Main Document Only.* # 269 (September 2015 – February 2016).

<sup>4</sup> The Board rejected employer's assertion that *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), overruled *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558 (9th Cir. 1990), as it pertains to the timing of the § 33(g)(2) notice.

surgery in December 2011. The ALJ awarded claimant TTD compensation for his recuperative period. The ALJ rejected claimant's contention that his retirement was "involuntary," *i.e.*, due to his work-related injuries. In particular, the ALJ rejected as not credible claimant's assertion that his driving duties aggravated his 2001 work-related back injury and caused his retirement. Rather, the ALJ found that claimant retired due to his displeasure at having to work the second shift. However, the ALJ found that, pursuant to *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997), claimant's retirement prior to the time of his surgery was irrelevant; claimant need show only that his physical disability is due to the work injury and need not also establish a loss of wage-earning capacity (WEC) due to the injury. The Board disagreed.

The Board reasoned that § 2(10) of the LHWCA provides that: "'Disability' means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]"<sup>5</sup> 33 U.S.C. §902(10) (emphasis added). The Board concluded that "in a traumatic injury claim for post-retirement disability compensation, the only relevant inquiry is whether claimant's work injury precluded his return to his usual work at the time of his retirement such that the loss of earning capacity was 'because of injury.'" Slip op. at 4 (*citing Harmon*, 31 BRBS 45). In reaching this conclusion, the Board contrasted *Harmon* with *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001). In *Harmon*, the Board held that a claimant who suffered a work-related traumatic injury and became unable to perform his usual work prior to his longevity retirement remained "disabled" following his retirement. That is, because the claimant's work injury precluded his return to his usual work prior to or at the time of retirement, it was immaterial that he retired due to eligibility. In contrast, in *Hoffman*, a claimant suffered a traumatic knee injury, returned to light-duty work with his employer which was deemed suitable, and retired three years later by accepting the employer's early retirement package. After claimant's retirement, his knee condition worsened and his physician increased his permanent impairment rating and later performed surgeries, rendering him unable to work. Thus, his loss of WEC was not caused by his injury but was due to his retirement and, although he was entitled to increased benefits under the schedule as a showing of lost WEC is not required for such benefits, he was not entitled to permanent total disability benefits.

Contrary to the ALJ's statement, the issue concerning the reason for claimant's retirement is central to this case because resolution of that issue determines whether claimant's disability is "because of injury" pursuant to § 2(10). The Board affirmed the ALJ's finding that claimant's retirement was "voluntary. Moreover, claimant did not contend that his shoulder injury precluded his continued work for employer. While claimant asserted that he is entitled to benefits because his surgery was rescheduled to a date after his retirement, this factual contention had no support in the record. Thus, claimant continued working in a suitable position until he voluntarily retired.

**[Topic 2.10 DEFINITIONS – SECTION 2(10) DISABILITY; 8.2.4.7 EXTENT OF DISABILITY -- Factors affecting/not affecting employer's burden (Retirement)]**

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<sup>5</sup> For example, where a claimant is performing suitable alternate work post-injury, and his inability to continue to do so is not due to the work injury, the employer is not liable for total disability benefits. Similarly, when a claimant leaves or is discharged from his usual work for reasons unrelated to his work-related injury, he does not have a "disability" within the meaning of the Act because his loss of WEC is not "because of injury." Slip op. at 3 (collecting cases).

## II. Black Lung Benefits Act

### A. Circuit Courts of Appeals

[There are no published Circuit Court decisions to report, though the Sixth Circuit issued an unpublished black lung decision in *Lance Coal Corp./Golden Oak Mining Co., Inc. v. Caudill*, 2016 WL 1104931 (Mar. 22, 2016) (unpub). The decision is available via Google Scholar [here](#).]

### B. Benefits Review Board

*Smith v. Director, OWCP, BRB No. 15-0229 BLA (Mar. 10, 2016) (unpub.)* involved a second petition for modification<sup>6</sup> of a survivor's claim arising out of the Sixth Circuit. After issuing an Order to Show Cause why consideration of the modification request would render justice under the Black Lung Benefits Act ("Act"), the ALJ dismissed the request. On appeal before the Board, Claimant argued that (1) the ALJ erred in finding that her modification request would not render justice under the Act, (2) the Order of Dismissal should be vacated, and (3) the matter should be remanded to a new ALJ for reconsideration. Both parties further contended that the ALJ improperly abstained from addressing the issue of the Director's adoption of the evidence submitted by the dismissed responsible operator.

After the case was referred to the OALJ, and prior to the scheduled hearing, the ALJ issued an Order to Show Cause stating the following:

Given the fact this survivor's claim has been considered twice before, by different judges who reached similar conclusions, the fact that no error has been identified, no change in conditions is applicable, and no evidence is presented, I direct the claimant to show cause why "justice under the Act" would be served by a consideration of the same evidence a third time. In the absence of such showing, the claim shall be dismissed.

*Smith*, slip op. at 3. The ALJ subsequently held a hearing, which Claimant, but not the Director, participated in through counsel. At that limited hearing, Claimant's counsel argued that, because the responsible operator had been dismissed from the case, the ALJ should not consider the responsible operator-submitted evidence and should award benefits based on the other evidence submitted. In a letter filed after the hearing, the Director agreed that the responsible operator and carrier should be dismissed and explained the reason for his absence from the hearing. Upon receipt of this letter, the ALJ formally dismissed the responsible operator and carrier.

A week later, the Director filed his response to the Order to Show Cause, stating that (1) the ALJ "was required to render a finding as to whether claimant established a mistake in a determination of fact in the denial of her survivor's claim," and (2) the second modification request could be denied for the reasons set forth in the denial of the first request. The Director also asked that the ALJ allow him to adopt the responsible operator-submitted evidence.

Following this submission, the ALJ issued an Order of Dismissal, in which he stated the following:

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<sup>6</sup> Claimant submitted no new evidence with either modification request. The survivor's claim was initially denied for failure to establish the existence of complicated pneumoconiosis or death due to pneumoconiosis.



Given the fact that Claimant has produced no evidence, I find that she has failed to present "compelling new evidence." However, as directed by [*O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)], I consider the wholly new evidence, the cumulative evidence, and further reflect upon the evidence initially submitted; I nonetheless find Claimant's modification petition futile despite the fact that I remain mindful that "modification does not always require 'a smoking-gun factual error, changed conditions, or startling new evidence.'"

Order of Dismissal at 7, quoting *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 330, 25 BLR 2-157, 2-176. The ALJ found that consideration of Claimant's second modification request would not render justice under the Act, and therefore dismissed the request without addressing the evidentiary issue.

On appeal, the Board held that the dismissal of Claimant's modification request must be vacated:

Consistent with the stated purpose of the Act, "to ensure that . . . benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis," 30 U.S.C. § 901(a), Congress "incorporat[ed] within the statute a broad reopening provision to ensure the accurate disposition of benefits." *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 546, 22 BLR 2-429, 2-447 (7th Cir. 2002). Moreover, parties to federal black lung claims are afforded the right to request modification, without limit as to the number of times that a request may be filed, and need not submit new evidence in support of their requests.

*Smith*, slip op. at 6, citing 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe*, 404 U.S. at 256. The Board also noted that the language of the implementing regulation at Section 725.310(c) signifies that an ALJ "is required to consider a request for modification and, when a survivor's claim is at issue, render a finding as to whether a mistake in a determination of fact has been demonstrated."

The Board emphasized that, as part of the modification request analysis, an ALJ must determine whether the granting of the request renders justice under the Act. Furthermore, the Board agreed with the Director that the ALJ, in finding that modification would not render justice under the Act, based his dismissal of the modification request "on an inaccurate understanding of 'futility' . . . ." According to the Board, the ALJ's futility determination was based on the fact that Claimant's claim had been denied twice previously, "the miner died several years ago, claimant submitted no new evidence, and did not identify a specific mistake in a determination of fact." The Board agreed with the Director that, in this context, "futility refers to whether there is any relief available to a party . . . [when] the party establishes that it is entitled to modify a prior decision." In this modification request, the Board concluded that "relief is plainly available to claimant because, if she succeeds on the merits of her request, she may establish entitlement to benefits." In light of the above, the Board vacated the ALJ's justice under the Act finding and remanded the matter for reconsideration.

The Board also "reluctantly grant[ed]" Claimant request that the case be reassigned to a different ALJ on remand, agreeing that "[t]here is support for claimant's concern that the [ALJ] has a fixed view of the modification process that may prevent him from considering her modification petition in accordance with the Board's instructions." The Board noted the ALJ's references to Board precedent in the area of modification leading, in part, to the result "that nearly each year the number of refiled claims processed equal[s] or exceed[s] new claims filed." The Board further noted the ALJ's elaboration of this concern:

[T]he proper inquiry may be not whether judicial resources are overly consumed, but rather whether there exists equity considerations – that are supported by the language and policies of the Act – between filers of new claims and filers of modifications that do not serve justice under the Act. In recent years, the number of refiled claims processed equals or exceeds the number of new claims filed. First-time filers rely on the same group of [administrative law judges] to hear their claims. As a result, the additional processing time for modifications may overly delay the disposition of a claim made by a first-time filer and thereby raise judicial equity concerns.

*Smith*, slip op. at 8, quoting Order of Dismissal at 5 n.6. The Board concluded that the above comments and the ALJ's dismissal of the modification request as futile "suggest that, to alleviate delays in the processing of new claims by the OALJ, the administrative law judge has decided to forego the consideration of subsequent petitions for modification, and dismiss them unless new evidence is submitted or a new argument is made." *Id.* According to the Board, this placement of dispositive weight on the absence of new evidence rendered the ALJ's decision inconsistent with Section 725.310 and the principle that neither new evidence nor the identification of a particular factual error is necessary in order to reopen a claim.

The Board directed the new ALJ, on remand, to first address the evidentiary issue raised by the parties and then consider Claimant's second modification request, based upon a mistake in a determination of fact. The Board noted that, as two ALJs "have rendered findings on the same body of evidence, the ruling on claimant's request for modification need not be exceedingly detailed if the new [ALJ] agrees with their reasoning." However, the Board noted that the plain language of the Act, the regulations, and the APA require that the new ALJ "examine the record prior to incorporating any previous findings, and to set forth those 'findings and conclusions, and the reasons or basis therefor.'" *Caudill*, slip op. at 9 n.8, quoting 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). The Board further clarified that an ALJ cannot "predetermine that review would be futile as a threshold matter." *Id.*

In light of the above, the Board vacated the ALJ's Order of Dismissal and remanded the matter for reassignment to a different ALJ for further consideration.

**[Petitions for Modification under 20 C.F.R. § 725.310: "Mistake in a determination of fact"]**

[\*Greathouse v. Old Ben Coal Co.\*, BRB No. 15-0253 BLA \(Mar. 10, 2016\) \(unpub.\)](#) involved a miner's subsequent claim arising out of the Tenth Circuit that was before the Board for the second time. Initially, the prior judge found that the new evidence did not establish the existence of legal pneumoconiosis,<sup>7</sup> and therefore found that Claimant failed to establish a change in an applicable condition of entitlement. The prior judge therefore denied benefits. On appeal, the Board concluded that the prior judge erred in focusing his subsequent claim analysis solely on the existence of legal pneumoconiosis, when the miner's earlier claim was denied because he had failed to establish any element of entitlement. For example, the Board noted that Claimant could establish a change in an applicable condition of entitlement by proving the existence of a totally disabling respiratory or pulmonary impairment. On remand, the Board instructed the prior judge to determine

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<sup>7</sup> Claimant has conceded that the miner was not afflicted with clinical pneumoconiosis.

whether Claimant could invoke the Section 411(c)(4) presumption and, if so, whether Employer could rebut the presumption.

On remand, the case was reassigned to the ALJ, who found that Claimant established a change in an applicable condition of entitlement based on the prior judge's implicit finding that the miner had a totally disabling respiratory or pulmonary impairment. Because the prior judge also had credited the miner with 25 years of qualifying coal mine employment, the ALJ found that Claimant invoked the rebuttable Section 411(c)(4) presumption. Incorporating the prior judge's findings, the ALJ concluded that Employer rebutted the presumption because the evidence established the miner suffered from neither clinical nor legal pneumoconiosis. The ALJ therefore denied benefits.

On appeal, Claimant challenged the ALJ's rebuttal finding. Employer responded in support of the denial of benefits, while the Director argued that the ALJ erred in incorporating the prior judge's findings to support her own finding of rebuttal and that remand was warranted.

In finding that the preponderance of the evidence established the absence of legal pneumoconiosis, the ALJ relied upon the prior judge's consideration of the medical evidence, which included the medical opinions of Drs. Istanbuly, Perper, Caffrey, Rosenberg, and Tuteur. Drs. Istanbuly and Perper opined that the miner suffered from COPD/emphysema due to coal mine dust exposure and smoking. In contrast, Drs. Caffrey, Rosenberg, and Tuteur believed that, while the miner suffered from COPD/emphysema, his lung disease was due to smoking. The prior judge found the opinions of Drs. Caffrey, Rosenberg, and Tuteur to be better reasoned than those of Drs. Istanbuly and Perper and found the medical opinion evidence failed to establish the presence of legal pneumoconiosis.

The Board agreed with Claimant and the Director that the ALJ erred in adopting the prior judge's findings as her own findings, on rebuttal, that the miner did not suffer from legal pneumoconiosis. According to the Board:

The [ALJ] stated that [the prior judge] "found that a preponderance of the evidence established that the [m]iner did not suffer from . . . legal pneumoconiosis . . . ." Decision and Order on Remand at 5. [The prior judge], however, did not state that "a preponderance of the evidence established" that the miner did not have pneumoconiosis. [The prior judge] placed the burden on claimant to establish the existence of pneumoconiosis, and he found that she did not meet that burden. Decision and Order at 15-16, 22. As the Director notes, "it does not necessarily follow that [the prior judge's] findings that the medical opinion evidence did not affirmatively establish legal pneumoconiosis are sufficient to establish rebuttal of the presumption by showing the absence of legal pneumoconiosis." Director's Brief at 4; see *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1481, 13 BLR 2-196, 2-212 (10th Cir. 1989). Once the [ALJ] found that claimant invoked the Section 411(c)(4) presumption, claimant was entitled to a presumption that the miner's diagnosed lung conditions constituted legal pneumoconiosis, and employer bore the burden of rebutting it.

Slip op. at 6 (footnote omitted). In so concluding, the Board rejected Employer's argument that the prior judge's finding regarding legal pneumoconiosis was sufficient to support the ALJ's finding, on remand, that Employer established rebuttal. The Board concluded that the prior judge's analysis of the opinions of Employer's doctors "was not sufficient for us to determine that substantial evidence supports the current [ALJ's] finding that employer disproved legal pneumoconiosis." The Board specifically noted that, while the prior judge found that the miner's lung disease did not arise out of his coal mine employment, it was

not clear whether the prior judge “applied the concept of ‘arising out of coal mine employment’ when he weighed the medical opinions of Drs. Caffrey, Rosenberg, and Tuteur as to the existence of legal pneumoconiosis.”

In light of the above, the Board vacated the denial of benefits and remanded the case to the ALJ “for reconsideration of whether employer has satisfied its burden to establish rebuttal of the Section 411(c)(4) presumption.”

**[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)]**