

BRB Nos. 11-0388 BLA, 11-0388 BLA-A,  
11-0410 BLA and 11-0410 BLA-A

SHERRY SHAFF	)	
(Widow of EDWARD E. SHAFF)	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	
and	)	
	)	DATE ISSUED: 03/27/2012
c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order on Remand of Richard K. Malamphy,  
Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for  
claimant.

William J. Evans and Susan Baird Motschiedler (Parsons Behle &  
Latimer), Salt Lake City, Utah, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals, and employer/carrier (employer) cross-appeals, the Decision and Order on Remand (06-BLA-00051, 06-BLA-06101) of Administrative Law Judge Richard K. Malamphy denying modification on a miner's claim and denying benefits on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)).<sup>1</sup> This case involves a miner's claim filed on March 29, 1989, and a survivor's claim filed on March 23, 2004, and is before the Board for the second time.<sup>2</sup>

In the prior Decision and Order, pursuant to claimant's appeal, the Board initially held that employer's petition for modification pursuant to 20 C.F.R. §725.310 (2000)<sup>3</sup> was timely filed. *Shaff v. U.S. Steel Corp.*, BRB No. 09-0643 BLA, slip op. at 5 (May 28, 2010)(unpub.). The Board further held that the administrative law judge's finding of a mistake in a determination of fact in the miner's claim did not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law. *Shaff*, slip op. at 6. Specifically, the Board held that the administrative law judge failed to address all of the relevant evidence and did not explain how he resolved the conflicts in the evidence pursuant to 20 C.F.R. §718.202(a)(4). *Id.* Additionally, the Board held that the administrative law judge did not render specific findings as to whether reopening the award of benefits in the miner's

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<sup>1</sup> Because both claims were filed before January 1, 2005, recent amendments to the Act do not affect this case. *See* Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l)).

<sup>2</sup> The Board set forth the full procedural history of both claims in its last decision. *Shaff v. U.S. Steel Corp.*, BRB No. 09-0643 BLA, slip op. at 2-3 (May 28, 2010)(unpub.). For purposes of this appeal, we reiterate that the miner filed a claim on March 29, 1989, and he was awarded benefits, which employer paid until the miner's death on February 5, 2004. Claimant filed her survivor's claim on March 23, 2004. Additionally, within one year of its last payment of benefits to the miner, employer requested modification of the decision that awarded benefits in the miner's claim. *See* 20 C.F.R. §725.310 (2000). Employer's request for modification in the miner's claim, and claimant's survivor's claim, were consolidated for a hearing before the administrative law judge.

<sup>3</sup> The 2001 revisions to 20 C.F.R. §725.310 do not apply to claims, such as the miner's, that were pending on January 19, 2001, the effective date of the revised regulations. 20 C.F.R. §725.2(c). Where a former version of the regulations remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

claim would render justice under the Act. *Shaff*, slip op. at 8. Therefore, the Board vacated the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as well as his finding that employer was entitled to modification based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

With respect to the survivor's claim, the Board rejected claimant's assertion that the administrative law judge erred in failing to apply the doctrine of collateral estoppel to find that the miner had pneumoconiosis, based on the pneumoconiosis finding in the miner's claim. The Board held that, because the issue of the existence of pneumoconiosis in the miner's claim had not yet been considered on modification and was thus subject to change, the application of collateral estoppel was premature. *Shaff*, slip op. at 9. With respect to the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the Board held that the administrative law judge's credibility determinations regarding the conflicting medical opinions did not satisfy the requirements of the APA. *Shaff*, slip op. at 10. Thus, the Board vacated the administrative law judge's denial of benefits in the survivor's claim.

In summary, the Board instructed the administrative law judge, on remand, to make specific findings, in the miner's claim, as to whether employer's petition for modification should be granted based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Further, the Board instructed the administrative law judge to make a specific finding, if necessary, as to whether granting modification of the award of benefits in the miner's claim would render justice under the Act. With respect to the survivor's claim, the Board instructed the administrative law judge to reconsider whether the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Shaff*, slip op. at 10. Finally, the Board instructed the administrative law judge, on remand, to explain the bases for his credibility determinations, and his findings of fact and conclusions of law, in accordance with the APA. *Id.*

On remand, the administrative law judge determined that the finding of the existence of pneumoconiosis in the miner's claim was a mistake in a determination of fact. Decision and Order on Remand at 4. The administrative law judge also found, however, that modification of the miner's award of benefits would not render justice under the Act. *Id.* at 4. Thus, the administrative law judge denied employer's request for modification. In considering the survivor's claim, the administrative law judge initially noted that the Board had held that "collateral estoppel does not apply in this case" to preclude employer from relitigating the issue of the existence of pneumoconiosis. Decision and Order on Remand at 4. Without deciding whether claimant established the existence of pneumoconiosis, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis under 20 C.F.R.

§718.205(c). *Id.* at 4. Accordingly, the administrative law judge denied benefits in the survivor's claim. *Id.* Finally, the administrative law judge stated that, because claimant was not found to be entitled to benefits, attorney's fees were not permitted.

On appeal, claimant challenges the administrative law judge's decisions in both claims.<sup>4</sup> With respect to the miner's claim, claimant argues that the administrative law judge erred in finding a mistake in a determination of fact regarding the existence of pneumoconiosis, but urges affirmance of the administrative law judge's denial of employer's request for modification of the award of benefits. Claimant further asserts that the administrative law judge erred in finding that an award of attorney's fees is precluded in the miner's claim. In the survivor's claim, claimant contends that the administrative law judge erred in his evaluation of the medical opinion evidence in finding that claimant failed to establish that the miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the denial of attorney's fees in the miner's claim, and affirmance of the denial of survivor's benefits. Employer has also filed cross-appeals. With respect to the miner's claim, employer asserts that the administrative law judge erred in denying its request for modification of the award of benefits on the grounds that modification would not render justice under the Act. With respect to the survivor's claim, employer asserts that the administrative law judge erred in stating the basis for concluding that collateral estoppel does not apply, but otherwise urges affirmance of the denial of survivor's benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in either appeal or cross-appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.<sup>5</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

## **I. The Miner's Claim**

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<sup>4</sup> Claimant's appeal and employer's cross-appeal in the miner's claim were assigned BRB Nos. 11-0388 BLA and 11-0388 BLA-A, and claimant's appeal and employer's cross-appeal in the survivor's claim were assigned BRB Nos. 11-0410 BLA and 11-0410 BLA-A. By Order dated March 31, 2011, the Board consolidated these appeals for purposes of decision only.

<sup>5</sup> The record indicates that the miner's coal mine employment was in Utah. Director's Exhibits 1, 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

## A. Mistake in a Determination of Fact

Under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), the fact-finder may, on the ground of a change in conditions or because of a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310 (2000). The intended purpose of modification based on a mistake in a determination of fact is to vest the fact-finder “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.” *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).

Claimant asserts that the administrative law judge, on remand, again failed to explain the basis for his credibility determinations or how he resolved the conflicts in the evidence as to the existence of pneumoconiosis in the miner’s claim. We agree.

In reviewing, on remand, the medical opinions at 20 C.F.R. §718.202(a)(4), the administrative law judge initially noted that “Dr. Rasmussen’s reports were made in the early 1990s and the undersigned would agree with the decision[] of Judge Karst [awarding benefits] based on the evidence then of record.”<sup>6</sup> Decision and Order on Remand at 4. The administrative law judge further noted that the record contained the 2008 medical report and testimony of Dr. Monahan, the miner’s treating physician, who opined that the miner had legal pneumoconiosis,<sup>7</sup> in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, and contained “reports from Drs. Rasmussen and Farney at the time of the decisions in 1992 and in 1994” as well as “reports from Drs. Kanner, Dahl, Black, Repsher, and a more recent report from Dr. Farney.” Decision and Order on Remand at 4. The administrative law

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<sup>6</sup> In a medical report dated July 17, 1990, Dr. Rasmussen opined that coal mine dust exposure was “at least a potent and significant aggravating factor” in the miner’s respiratory condition. Director’s Exhibit 25. Administrative Law Judge Alexander Karst credited Dr. Rasmussen’s opinion to find that the miner established the existence of pneumoconiosis. April 8, 1994, Decision and Order on Remand at 7-8.

<sup>7</sup> Legal pneumoconiosis “includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b).

judge then summarily concluded, “Dr. Rasmussen’s reports were well reasoned in the early 1990s. However, the miner received a multitude of treatment after that time. Based on the medical evidence since 1995 and the reports of Drs. Black and Repsher, the undersigned would not grant living miner’s benefits.” Decision and Order on Remand at 4.

The administrative law judge’s finding of a mistake in a determination of fact was in error, as he again failed to discuss the evidence in any detail or explain how he resolved the conflicts in the evidence pursuant to 20 C.F.R. §718.202(a)(4). 5 U.S.C. §557(c)(3)(A); *see Gunderson v. U.S. Dep’t of Labor*, 601 F.3d 1013, 1024, 24 BLR 2-297, 2-314 (10th Cir. 2010); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Therefore, we must vacate his finding that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We instruct the administrative law judge, on remand, to reconsider the medical evidence, and explain the bases for his credibility determinations, and all of his findings of fact and conclusions of law, as required by the APA, in determining whether employer has established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *See Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *see also Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

## **B. Rendering Justice Under the Act**

The courts have held that modification of a claim does not automatically flow from a finding that a mistake was made in an earlier determination, and should be granted only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass’n*, 390 U.S. 459, 464 (1968) (recognizing that the purpose of modification is to “render justice.”); *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007). In *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), the Board held that “while the administrative law judge has the authority to reopen a case based on any mistake in fact, the administrative law judge’s exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice.” *Kinlaw*, 33 BRBS at 72, *citing Wash. Soc’y for the Blind v. Allison*, 919 F. 2d 763, 769 (D.C. Cir. 1991). The Board reviews an administrative law judge’s findings in this regard under the abuse of discretion standard. *Kinlaw*, 33 BRBS at 73.

In finding that modification of the prior award would not render justice under the Act, the administrative law judge stated, “A modification of the award after the miner’s death would not allow recovery of benefits by the employer. Modification in this case would not render justice under the Act.” Decision and Order on Remand at 4.

Employer asserts that the administrative law judge “should have considered all of the facts and circumstances of this case relevant to whether granting modification would render justice under the Act.” Employer’s Brief at 12, citing *Hilliard*, 292 F.3d at 547, 22 BLR at 2-453. Specifically, employer contends that both employer and claimant argued to the administrative law judge that, in determining whether reopening the miner’s claim would render justice under the Act, the administrative law judge should consider all of the relevant factors and circumstances, including, but not limited to, delay in seeking modification, diligence, motive, mootness, the interest in finality, and whether granting modification would promote accuracy of adjudication. Employer’s Brief at 13; Employer’s Brief on Remand (Nov. 23, 2010) at 35-36; Claimant’s Brief on Remand (Nov. 23, 2010) at 11-12, citing *Sharpe*, 495 F.3d at 133, 24 BLR at 2-68-69. Employer asserts that, in declining to modify the award of benefits, the administrative law judge failed to consider these factors, and further failed to explain his finding in accordance with the requirements of the APA. Employer’s Brief at 11-13. Employer’s contentions have merit.

While the administrative law judge has broad discretion in determining whether to grant modification, *O’Keeffe*, 404 U.S. at 256; *Hilliard*, 292 F.3d at 547, 22 BLR at 2-453, in all cases, the administrative law judge must exercise that discretion in accordance with the APA. See *Gunderson*, 601 F.3d at 1024, 24 BLR at 2-314; *Wojtowicz*, 12 BLR at 1-165. Here, the administrative law judge’s cursory analysis falls short of the requirement that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law. 5 U.S.C. §557(c)(3)(A). We, therefore, must vacate the administrative law judge’s finding that modification of the prior award would not render justice under the Act.

If, on remand, the administrative law judge finds that a mistake in a determination of fact has been established pursuant to 20 C.F.R. §725.310 (2000), he must consider whether granting modification of the prior award would render justice under the Act. The administrative law judge must consider the arguments of all the parties on this issue, including the position of the Director, as expressed in his 2009 brief filed with the Board,<sup>8</sup> and must explain the basis for his findings, as required by the APA. See

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<sup>8</sup> In the prior appeal, the Director argued that, because the miner is deceased and there is no evidence of an estate, and employer conceded that it does not seek to recoup the benefits paid to the miner, employer’s modification request “[would] not result in a change in benefits payments on the [miner’s] claim,” which, the Director asserted, is the only remedy available under 20 C.F.R. §725.310(d) (2000). 2009 Director’s Brief at 3-4. The Director explained that, pursuant to the regulation, an order issued on modification “may terminate, continue, reinstate, increase, or decrease benefit payments, or award benefits.” 20 C.F.R. §725.310(d) (2000). Thus, the Director contended, because the party seeking modification has the burden to establish that it can obtain a legally

*Gunderson*, 601 F.3d at 1024, 24 BLR at 2-314. We note that while the holdings in *Sharpe* and *Hilliard*, addressing relevant factors to consider in deciding whether to grant modification, are not controlling in this case arising within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, those cases are instructional, and may be consulted as guidance when considering whether to reopen the miner's claim.

## II. The Survivor's Claim

In a survivor's claim filed after January 1, 1982 and before January 1, 2005, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *see Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873-74, 20 BLR 2-334, 2-339-40 (10th Cir. 1996).

Claimant contends that the administrative law judge erred in finding that the evidence fails to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Three physicians, Drs. Monahan, Repsher, and Farney, addressed the cause of the miner's death. Dr. Monahan, the miner's treating physician, opined that the miner suffered from severe COPD due, in part, to coal mine dust exposure, and that pneumoconiosis contributed to the miner's death by weakening his heart, and depriving his tissues of oxygen.<sup>9</sup> Director's Exhibit 52. Dr. Repsher, who is Board-certified in Internal Medicine and Pulmonary Diseases, opined that the miner had congestive heart failure, and did not suffer from pneumoconiosis. Dr. Repsher concluded that, because pneumoconiosis was not present, it did not contribute to the miner's death. Employer's Exhibit 1. Dr. Farney, who is also Board-certified in Internal Medicine and Pulmonary Diseases, opined that the miner did not suffer from pneumoconiosis, but suffered from COPD due to smoking. Dr. Farney concluded that the miner died due to cardiorespiratory failure. Employer's Exhibits 3, 11.

In his prior decision, the administrative law judge stated:

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cognizable remedy on modification, and no such remedy is available here, employer's modification petition is moot. 2009 Director's Brief at 3-4.

<sup>9</sup> Dr. Monahan completed the miner's death certificate, listing the causes of the miner's death as chronic obstructive pulmonary disease and "Coal Miner's Pneumoconiosis." Director's Exhibit 69.

Dr. Monahan suggests that dust disease of the lung was a contributing factor to the miner's demise. Other physicians with more specialized credentials have determined that a dust disease of the lung was not present. Their opinions are persuasive. . . . I find that the Claimant has failed to establish that coal workers' pneumoconiosis was a substantially contributing cause or a factor in the death of the Miner.

2009 Decision and Order at 17. On appeal, the Board vacated the administrative law judge's finding, holding that the administrative law judge's credibility determinations did not satisfy the APA. *Shaff*, slip op. at 10. The Board instructed the administrative law judge, on remand, to "explain the bases for his credibility determinations, and his findings of fact and conclusions of law." *Shaff*, slip op. at 11. On remand, the administrative law judge rendered a similar finding to the one he made initially:

While Dr. Monahan was the last treating physician in this case, [he] has acknowledged that he is not [B]oard-certified in any specialty. Drs. Black,<sup>10</sup> Repsher, and Farney, who are [B]oard-certified in internal medicine and pulmonary disease, reviewed records after the miner's demise and concluded that an occupational lung disease did not contribute to the fatal event. Thus, survivor's benefits are not in order in this case.

Decision and Order on Remand at 5.

We agree with claimant that the administrative law judge's findings on remand do not differ substantially from his initial findings, in that he summarily credited employer's physicians, based on their qualifications, and did not address whether the opinions of Drs. Repsher and Farney are sufficiently reasoned. *See Clark*, 12 BLR at 1-155; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Further, the administrative law judge did not explain why the fact that Drs. Repsher and Farney reviewed additional records entitled their opinions to greater weight than that of Dr. Monahan regarding whether pneumoconiosis hastened the miner's death. Consequently, the administrative law judge's analysis fails to comport with the APA. *See Gunderson*, 601 F.3d at 1024, 24 BLR at 2-314; *Wojtowicz*, 12 BLR at 1-165. We, therefore, vacate the administrative law judge's finding at 20 C.F.R. §718.205(c) and remand this case for further consideration.<sup>11</sup>

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<sup>10</sup> Dr. Black opined that the miner did not suffer from pneumoconiosis, but did not offer an opinion as to the cause of the miner's death. Employer's Exhibit 10.

<sup>11</sup> We reject, however, claimant's additional argument that the administrative law judge erred in failing to consider Dr. Rasmussen's opinion at 20 C.F.R. §718.205(c). This argument lacks merit, as Rasmussen's opinion was not proffered at the hearing as

On remand, before determining whether the miner's death was due to pneumoconiosis, the administrative law judge must render a specific finding as to whether claimant has established that the miner suffered from pneumoconiosis. *Trumbo*, 17 BLR at 1-88. Claimant asserts that the doctrine of collateral estoppel applies to preclude employer from relitigating the issue of the existence of pneumoconiosis,<sup>12</sup> since the miner established pneumoconiosis in his claim against employer. In order for collateral estoppel to apply in the survivor's claim, there must be a final judgment in the miner's claim.<sup>13</sup> *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009); *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir. 1995); *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 293-94 18 BLR 2-189, 2-195 (7th Cir. 1994). If, on remand, the administrative law judge finds that a mistake of fact was made as to the establishment of pneumoconiosis in the miner's claim and grants modification, the finding of pneumoconiosis in the miner's claim will be superseded by the administrative law judge's determination on modification, and collateral estoppel will not apply as a means to establish pneumoconiosis in the survivor's claim. See 20 C.F.R. §725.502(a)(1); see *Moss*, 559 F.3d at 1161; *Forsythe*, 20 F.3d at 293-94, 18 BLR at 2-195. If, on remand, the administrative law judge denies modification of the award of benefits in the miner's claim, the administrative law judge should determine whether claimant has established the elements of collateral estoppel, n.12, *supra*, thus precluding employer from relitigating, in the survivor's claim, the issue of whether the miner

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evidence in the survivor's claim. Moreover, claimant does not explain the relevance of Dr. Rasmussen's 1990 opinion to determining the cause of the miner's death in 2005.

<sup>12</sup> The doctrine of collateral estoppel refers to the effect of a judgment in foreclosing relitigation, in a subsequent action, of an issue of law or fact that actually has been litigated and decided in the initial action. *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). In order to successfully invoke the doctrine of collateral estoppel, a party must establish: (1) that the issue sought to be precluded is identical to the one previously litigated; (2) that the issue was actually determined in the prior proceeding; (3) that the issue's determination was a critical and necessary part of the decision in the prior proceeding; (4) that the prior judgment is final and valid; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. See *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009); *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir. 1995); *Forsythe*, 20 F.3d at 293-4, 18 BLR at 2-195; see also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

<sup>13</sup> As employer asserts, the administrative law judge mischaracterized the Board's prior decision as holding that collateral estoppel does not apply in this case because the award of living miner's benefits was contested before such benefits ended. Decision and Order on Remand at 4; Employer's Brief at 21.

suffered from pneumoconiosis.<sup>14</sup> If the administrative law judge does not find the existence of pneumoconiosis established through application of the doctrine of collateral estoppel, he must consider whether claimant established the existence of pneumoconiosis based on the medical evidence, pursuant to 20 C.F.R. §718.202(a).

If the administrative law judge finds the existence of pneumoconiosis established, he must then consider whether claimant has established that pneumoconiosis hastened the miner's death. 20 C.F.R. §718.205(c). In weighing the medical opinion evidence on this issue, the administrative law judge must address whether the opinions of Drs. Monahan, Repsher, and Farney are sufficiently reasoned and documented, and must explain the bases for his credibility determinations. *See Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993).

### III. Attorney's Fees

At the end of his decision, the administrative law judge noted that an "award of an attorney's fee is permitted only in cases in which the Claimant has been found to be entitled to . . . benefits.<sup>15</sup> Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered . . . in pursuit of her claim."<sup>16</sup> Decision and Order on Remand at 5.

On appeal, claimant asserts that, because the administrative law judge's denial of employer's request for modification in the miner's claim resulted in the preservation of the miner's award of benefits, attorney's fees may be recovered for work performed in

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<sup>14</sup> If the administrative law judge, on remand, finds that a mistake was made as to the establishment of pneumoconiosis in the miner's claim, but *denies* modification because he finds that reopening the miner's claim would not render justice under the Act, he should take into account his finding that a mistake was made in the miner's claim when he considers whether the elements of collateral estoppel are met. *See Moss*, 559 F.3d at 1161; *Forsythe*, 20 F.3d at 293-94, 18 BLR at 2-195. If the administrative law judge finds that the elements of collateral estoppel are met, the administrative law judge should consider whether the application of collateral estoppel would be fair, where the pneumoconiosis finding in the miner's claim was found to be a mistake in a determination of fact. *See Parklane Hosiery*, 439 U.S. at 329-32; *Polly v. D&K Coal Co.*, 23 BLR 1-77, 1-82-84 (2005).

<sup>15</sup> It does not appear that a fee petition has yet been filed in this case.

<sup>16</sup> It is unclear whether the administrative law judge was referring only to the survivor's claim, where benefits were denied, or was also referencing the miner's claim, where he denied employer's modification request.

connection with the miner's claim. Claimant's Brief at 8. Employer responds, asserting that fees are not recoverable in the miner's claim because, pursuant to 20 C.F.R. §725.367(a) (2000), employer had already fully paid all of the miner's benefits and, thus, claimant received no economic benefit from the modification proceeding. Employer further asserts that the award of benefits was not "preserved" because employer never sought to challenge the award of benefits in the modification proceeding, and specified that it would not seek to recoup the miner's benefits even if its request for modification was successful. Employer's Response Brief at 21.

As we have vacated the administrative law judge's determination in the miner's claim and remanded the case for the administrative law judge to reconsider employer's request for modification, we decline to address, as premature, the parties' contentions with respect to attorney's fees.<sup>17</sup>

Finally, we are mindful that the necessity of another remand has occasioned delay and frustrated the efficient disposition of these claims. Reluctantly, therefore, we hold that it is in the interest of justice and judicial economy to remand this case for assignment to a new administrative law judge for a fresh look at the evidence and proper application of the law to the evidence. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

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<sup>17</sup> We note that the Board has upheld the award of a fee where the work performed by counsel in defending against the employer's request for modification was found to be reasonably necessary to preserve claimant's entitlement to benefits. *Duke v. Cowin & Co.*, BLR , BRB No. 10-0679 BLA (Jan. 27, 2012), slip op. at 3.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for reassignment to a different administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

I concur:

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JUDITH S. BOGGS  
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from my colleagues' holding that the administrative law judge did not adequately explain his decision to deny employer's request for modification in the miner's claim because he found that granting modification would not render justice under the Act. I would hold that the administrative law judge adequately considered the competing equities and permissibly determined that employer's request for modification is futile.

As the United States Court of Appeals for the Fourth Circuit recognized in *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007), the decision whether to grant or deny a request for modification is committed to the administrative law judge's discretion. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69. In particular, the administrative law judge, as fact-finder, is charged with rendering a finding as to whether granting modification would render justice under the Act. *Id.*; *see also Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 547, 22 BLR 2-429, 453 (7th Cir. 2002); *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976); *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27 (1996); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999).

The modification of a claim does not automatically flow from a finding that a mistake was made in an earlier determination, and should be granted only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459,

464 (1968) (recognizing that the purpose of modification is to “render justice”); *Sharpe*, 495 F.3d at 128, 24 BLR at 2-66. In *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), the Board held that “while the administrative law judge has the authority to reopen a case based on any mistake in fact, the administrative law judge’s exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice.” *Kinlaw*, 33 BRBS at 72, citing *Wash. Soc’y for the Blind v. Allison*, 919 F. 2d 763, 769 (D.C. Cir. 1991). Thus, while the Fourth Circuit’s holding in *Sharpe* is not controlling, it is instructional, as the administrative law judge, in considering whether to reopen a claim, must exercise the discretion granted under 20 C.F.R. §725.310 (2000) by assessing any factors relevant to the rendering of justice under the Act, including the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. See *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69; *Hilliard*, 292 F.3d at 547, 22 BLR at 2-453; *D.S. [Stiltner] v. Ramey Coal Co.*, 24 BLR 1-33, 1-38 (2008). The Board reviews an administrative law judge’s findings in this regard under the abuse of discretion standard. *Kinlaw*, 33 BRBS at 73.

In the last appeal, when the Board remanded this case to the administrative law judge with instructions to consider whether granting modification would render justice under the Act, the Board directed him to consider the Director’s position that modification of the miner’s award would be futile. *Shaff*, slip op. at 8 n.4. The Director specifically asserted that, because the miner is deceased and there is no evidence of an estate, and employer indicated that it would not seek to recoup the benefits paid to the miner, employer’s modification request “[would] not result in a change in benefits payments on the [miner’s] claim,” which, the Director asserted, is the only remedy available under 20 C.F.R. §725.310(d) (2000). 2009 Director’s Brief at 3-4. The Director explained that, pursuant to the regulation, an order issued on modification “may terminate, continue, reinstate, increase, or decrease benefit payments, or award benefits.” 20 C.F.R. §725.310(d) (2000). Thus, the Director contended, because the party seeking modification has the burden to establish that it can obtain a legally cognizable remedy on modification, and no such remedy is available here, employer’s modification petition is moot. 2009 Director’s Brief at 3-4.

On remand, the administrative law judge considered the competing equities of accuracy and finality, in light of the Director’s argument. Decision and Order on Remand at 4. In so doing, the administrative law judge acted within his discretion in concluding that, despite the arguable inaccuracy<sup>18</sup> of the pneumoconiosis finding in the

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<sup>18</sup> As discussed in the majority opinion, the administrative law judge did not explain his finding that a mistake was made when it was found that the miner had pneumoconiosis.

miner's claim, modification of the award after the miner's death would be moot or futile, *i.e.*, it could have no impact upon the substantive disposition of the miner's claim because it "would not allow recovery of benefits by the employer," and, therefore, "would not render justice under the Act." Decision and Order on Remand at 4; *see Sharpe*, 495 F.3d at 133, 24 BLR at 2-69 (holding that "a showing of futility may be pertinent to the proper handling of a modification request"); *Hilliard*, 292 F.3d at 547, 22 BLR at 2-453; *Kinlaw*, 33 BRBS at 72.

Contrary to employer's argument, the administrative law judge's finding of futility is not inconsistent with the language of 20 C.F.R. §725.310(d)(2000). Employer's Brief at 18-19. While employer is correct in noting that Section 725.310(d)(2000) allows for an order terminating benefits at a time when all payments to a miner have been made, and provides that modification shall not affect any compensation previously paid, the regulation also provides for the collection of any benefits paid in error. 20 C.F.R. §725.310(d) (2000). It is the ability to recoup benefits paid in error that would render such a modification request non-futile. *Cf. Hilliard*, 292 F.3d at 550, 22 BLR 2-458 (Wood, J., dissenting)(observing that the possibility that the Department of Labor might be able to recoup overpayment from the miner's widow "save[d] the case from nonjusticiability"). Here, however, employer concedes that it does not seek to recoup any benefits. Thus, the regulatory language employer relies upon to argue that its modification request is not futile lacks relevance to the facts of this case.

In addition, employer's assertion that its request for modification is not moot because it was filed to prevent the application of collateral estoppel in the survivor's claim, is not persuasive. Employer's Brief at 20. Noting that "the requesting party's motive may be an appropriate consideration in adjudicating a modification request," *Sharpe*, 495 F.3d at 132-133, 24 BLR at 2-61-62, the Fourth Circuit quoted with approval the statement of the United States Court of Appeals for the Seventh Circuit in *Hilliard*, that "if the party's purpose in filing a modification [request] is to thwart a claimant's good faith claim or an employer's good faith defense, the remedial purpose of the statute is no longer served." *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69, *quoting Hilliard*, 292 F.3d at 546, 22 BLR at 2-452.

Nor has employer explained how the administrative law judge's failure to explicitly address the factors of diligence and motive prejudiced employer, where the record reflects that employer waited to seek modification until almost a year after the miner's death, and nearly eleven years after an administrative law judge awarded benefits to the miner. The eleven-year delay here is four years longer than the seven-year delay that led the court in *Sharpe* to suggest that the employer's motive in seeking modification could be deemed suspect. *See Sharpe*, 495 F.3d at 129, 24 BLR at 2-63. Notably, in his prior decision, the administrative law judge specifically stated that he "question[ed] the

Employer's motives in not challenging the award in 1994 and waiting until 2005 to file a request for modification." 2009 Decision and Order at 14.

Because the administrative law judge properly considered the competing equities of accuracy and finality and adequately explained his finding, and because employer has not shown how the administrative law judge's failure to explicitly discuss employer's delay or motive was prejudicial to employer, I would hold that the administrative law judge did not abuse his discretion in determining that reopening the miner's claim would not render justice under the Act. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69; *Kinlaw*, 33 BRBS at 73. Therefore, I would affirm the administrative law judge's denial of employer's request for modification in the miner's claim. 20 C.F.R. §725.310 (2000).

I concur with the decision of my colleagues in all other respects.

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BETTY JEAN HALL  
Administrative Appeals Judge