U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 24-0183 BLA

STEVEN B. LESTER Claimant-Respondent v. ISLAND CREEK COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 04/11/2025 DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Awarding Benefits of Dierdra M. Howard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Dierdra M. Howard's Decision and Order Granting Modification and Awarding Benefits (Decision and Order on Modification) (2022-BLA-05088) rendered on a claim filed on April 19, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

In a March 5, 2020 Decision and Order Denying Benefits, ALJ Theodore W. Annos found that Claimant had 24.21 years of coal mine employment, of which at least fifteen years were spent underground. However, he found Claimant failed to establish a totally disabling respiratory or pulmonary impairment and thus could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] As Claimant failed to establish total disability, an essential element of entitlement under 20 C.F.R. Part 718, ALJ Annos denied benefits.

Claimant timely filed a request for modification on November 16, 2020. In her January 30, 2024 Decision and Order on Modification, the subject of the current appeal, ALJ Howard (the ALJ) accepted the parties' stipulation that Claimant has twenty years of qualifying coal mine employment. The ALJ also found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and, therefore, found Claimant established modification based on a change in conditions. 20 C.F.R. §725.310. In addition, she found granting modification would render justice under the Act. Consequently, the ALJ awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. It also argues the ALJ erred in finding it failed to rebut the presumption. Further, it argues the ALJ erred in finding that granting Claimant's request for modification would render justice under the

[1] Claimant filed a prior claim on April 29, 2014, and withdrew it. Director's Exhibits 24, 100. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Act.[3] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

The ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established, the ALJ is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated an award in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

Invocation of the Section 411(c)(4) Presumption – Total Disability

To invoke the Section 411(c)(4) presumption, a claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work[5] and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[6] evidence of

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 3, 10.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Modification at 11 n.45; Hearing Transcript at 23.

[5] The ALJ found Claimant's usual coal mine employment as a beltman involved heavy physical labor. Decision and Order on Modification at 13. As Employer does not challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711.

[6] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R.

pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order on Modification at 13-16. Employer challenges those findings.

Pulmonary Function Studies

ALJ Annos considered three pulmonary function studies, dated July 22, 2017, April 16, 2019, and April 26, 2019. Decision and Order at 7. As the April 16, 2019 and April 26, 2019 studies were more recent in time and non-qualifying, ALJ Annos determined the pulmonary function study evidence as a whole did not support a finding of total disability. *Id*. at 11-12. ALJ Annos stated his finding was further supported by the four non-qualifying pulmonary function studies that were submitted as part of Claimant's treatment records. *Id*. at 12. The ALJ found no mistake in a determination of fact with ALJ Annos's conclusions. Decision and Order on Modification at 12.

With regard to Claimant's modification request, the ALJ considered three new studies. The October 19, 2020 study produced qualifying results before the administration of a bronchodilator and non-qualifying results after the administration of a bronchodilator. Director's Exhibit 87. The July 25, 2022 study did not produce qualifying values. Employer's Exhibit 1 at 15. The September 28, 2022 study produced qualifying results without the administration of a bronchodilator. Claimant's Exhibit 2 at 7.

The ALJ noted that Dr. Sargent questioned the validity of the October 19, 2020 study and invalidated the July 25, 2022 study but acknowledged that the September 28, 2022 study was valid. Decision and Order on Modification at 6 nn. 19 & 20; 14; Employer's Exhibit 1 at 2, 15. She further reasoned that two of the three tests on

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Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The ALJ found the arterial blood gas studies do not support a finding of total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order on Modification at 14.

modification yielded qualifying values and that Dr. Sargent invalidated the sole non-qualifying study. Decision and Order on Modification at 14. She credited the September 28, 2022 study due to its validity and recency and concluded that the pulmonary function studies overall support a finding of total disability. *Id.*

Initially, we decline to address Employer's argument that the ALJ erred in calculating Claimant's "correct height for purposes of determining whether the [pulmonary function study] evidence was qualifying," because it is inadequately briefed. 20 C.F.R. §802.211(b); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-199, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Employer's Brief at 6 n.3.

Employer also asserts the ALJ did not compare the new pulmonary function studies on modification with the previously submitted pulmonary function study evidence to determine if Claimant established a change in conditions. Employer's Brief at 5-7. In addition, Employer argues the ALJ erred in discrediting the July 25, 2022 pulmonary function study and improperly relied on the most recent qualifying study to find Claimant is totally disabled. *Id*. at 6-8 (*Id*. at 6, citing *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993)).

Contrary to Employer's argument, the ALJ properly compared the studies submitted before Judge Annos with those the parties submitted on modification and explained the weight she accorded the evidence. *See Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-82; *Kovac*, 14 BLR at 1-156; Decision and Order on Modification at 13-14. As noted previously, the ALJ concluded that the earlier studies were preponderantly non-qualifying as ALJ Annos determined. Decision and Order on Modification at 13. She then permissibly found Claimant's September 20, 2016 non-qualifying study submitted on modification lacked "significant probative value" because it was "contemporaneous" with the older studies ALJ Annos considered. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order on Modification at 13, 14 nn.60, 61; Director's Exhibit 76; Claimant's Exhibit 1 at 44.

The ALJ also permissibly discredited the non-qualifying July 25, 2022 pulmonary function study since Dr. Sargent, the physician who conducted the study, specifically stated that Claimant was "unable to produce reproducible results." *See Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); Decision and Order on Modification at 14; Employer's Exhibit 1 at 14.

We also reject Employer's contention that the ALJ erred in crediting the most recent qualifying study. The ALJ conducted a qualitative and quantitative analysis of the

pulmonary function studies, and noting the progressive nature of pneumoconiosis, he permissibly relied on the September 28, 2022 study as the most persuasive pulmonary function study evidence that Claimant is totally disabled. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (because pneumoconiosis is a latent and progressive disease, more recent evidence may be rationally credited if it shows a miner's condition has worsened); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49-52 (2023); Decision and Order on Modification at 14. We therefore affirm the ALJ's finding that the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 14.

Medical Opinions

The ALJ initially found no mistake in a determination of fact with regard to ALJ's Annos's determination to credit the opinions of Drs. McSharry and Sargent that Claimant is not totally disabled over the contrary opinion of Dr. Green. Decision and Order on Modification at 12.

The ALJ considered three new medical opinions submitted on modification from Drs. McSharry, Sargent, and Nader. Decision and Order on Modification at 15-16. Dr. McSharry opined that Claimant has a pulmonary impairment in the form of mild-to-moderate asthma with "some degree" of fixed obstruction. Employer's Exhibit 4 at 3. He further opined that the impairment is "not definitely disabling" and that Claimant would likely have better lung function with improved treatment for his asthma. *Id*. Dr. Sargent opined Claimant is suffering from a "waxing and waning obstructive ventilatory impairment consistent with asthma" that would improve with a change in medication. Employer's Exhibit 1 at 2. Dr. Nader opined Claimant is totally disabled from a respiratory or pulmonary standpoint and could not perform his previous coal mine employment. Claimant's Exhibit 2 at 6. The ALJ credited Dr. Nader's opinion and concluded that the medical opinion evidence as a whole, considering the new and the previously submitted medical opinions, supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Modification at 16.

Employer asserts the ALJ erred in crediting the opinion of Dr. Nader since he did not review all of the pulmonary function study evidence of record. Employer's Brief at 8. However, the ALJ was not required to discredit Dr. Nader's opinion because he did not consider the non-qualifying pulmonary function studies. Rather, an ALJ may credit an opinion of a physician who did not review all of the medical evidence when the opinion is otherwise well-reasoned, documented, and based on the physician's own examination of the miner and objective testing results. 20 C.F.R. §718.202(a)(4); *Church v. Eastern*

Associated Coal Corp., 20 BLR 1-8, 1-13 (1996); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987) (a reasoned opinion is one in which the ALJ finds the underlying documentation adequate to support the physician's conclusion). Moreover, we see no error in the ALJ's conclusion that Dr. Nader's opinion was supported by the most recent qualifying pulmonary function study. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order on Modification at 16; Claimant's Exhibit 2.

Employer further argues the ALJ erred in rejecting Drs. McSharry's and Sargent's opinions "because they failed to give controlling weight to the most recent test results." Employer's Brief at 8. We disagree.

Contrary to Employer's argument, the ALJ permissibly rejected Drs. McSharry's and Sargent's opinions because they did not directly address whether Claimant is totally disabled without treatment for his asthma; they only speculated that Claimant's lung function could improve with treatment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (as the trier-of-fact, the ALJ has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses and assign those opinions appropriate weight); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999) (ALJ may not credit a purely speculative opinion); *see* Decision and Order on Modification at 15-16; Employer's Exhibits 1, 4.

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As Employer makes no other arguments and because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. *See* 20 C.F.R. §718.204(b); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order on Modification at 16.

We therefore affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[8] or that "no part of

[8] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is

[his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.[9] Decision and Order on Modification 23-24.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. McSharry and Sargent, including the reports submitted to ALJ Annos, that Claimant does not have legal pneumoconiosis. Decision and Order on Modification at 20-23. Dr. McSharry opined that Claimant has had variable spirometric studies over the past eight years consistent with asthma, rather than coal mine dust exposure and that because the abnormalities suggest asthma, he does not believe Claimant has legal pneumoconiosis. Employer's Exhibit 4 at 3. Dr. Sargent also opined Claimant's obstructive ventilatory impairment is caused by asthma, rather than coal mine dust exposure, and further noted that asthma associated with coal mine dust exposure resolves after exposure has ceased. Employer's Exhibit 1 at 2. The ALJ found their opinions, while reasoned and documented in part, were entitled to diminished weight and thus insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order on Modification at 20-23.

Employer contends the ALJ applied the wrong legal standard in evaluating Drs. McSharry's and Sargent's opinions on legal pneumoconiosis. Employer's Brief at 8-11. We disagree.

We reject Employer's contention that the ALJ applied the wrong legal standard in requiring its experts to "rule out" coal mine dust exposure as a factor in Claimant's

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significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[9] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order on Modification at 19, 23.

respiratory impairment. Employer's Brief at 9. The ALJ accurately noted that in order to disprove legal pneumoconiosis, Employer must establish that Claimant's impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order on Modification at 18; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). In any event, the ALJ discredited Drs. McSharry's and Sargent's opinions because she found they were speculative and not because they failed to meet a heightened legal standard. Furthermore, she discredited Dr. Sargent's opinion because it was inconsistent with the regulatory definition of pneumoconiosis as a latent and progressive disease. Decision and Order on Modification at 23.

The ALJ permissibly accorded less weight to Drs. McSharry and Sargent's opinions because they are "speculative and do not adequately address the issue of whether coal mine dust exposure could have been a contributing or aggravating factor" for Claimant's pulmonary impairment. *Jarrell*, 187 F.3d at 389; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Modification at 23.

Moreover, the ALJ permissibly discounted Dr. Sargent's opinion because his reasoning was based on the length of time between the worsening of Claimant's respiratory symptoms and when he left the mines, as such reasoning is inconsistent with the regulatory definition of pneumoconiosis as a latent and progressive disease that "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); Decision and Order on Modification at 22-23; Employer's Exhibit 1 at 2.

Because the ALJ acted within her discretion in discrediting the opinions of Drs. McSharry and Sargent, the only opinions supportive of Employer's burden, we affirm her finding that Employer did not disprove legal pneumoconiosis.[10] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order on Modification at 23. Employer's failure to rebut the presumption of legal pneumoconiosis precludes a rebuttal finding that Claimant did not have pneumoconiosis. 20 C.F.R.

[10] As Dr. Nader diagnosed legal pneumoconiosis, his opinion does not assist Employer in disproving legal pneumoconiosis. *See* Claimant's Exhibit 2. Thus, any error in the ALJ's consideration of Dr. Nader's opinion at legal pneumoconiosis is harmless and we decline to address Employer's challenge to it. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v, Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 9-10; Claimant's Brief at 20.

§718.305(d)(1)(i). Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order on Modification at 23.

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Modification at 23-24. Contrary to Employer's argument, the ALJ permissibly discredited the opinions of Drs. McSharry and Sargent because they did not diagnose legal pneumoconiosis, contrary to her determination that Claimant has the disease. *See Epling*, 783 F.3d at 504-05; Decision and Order on Modification at 23-24; Employer's Brief at 10-11. Thus, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption.

Justice Under the Act

Before ultimately granting a request for modification, the ALJ must determine whether doing so will render justice under the Act. *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327-28 (4th Cir. 2012). In making that determination, the ALJ must consider several factors, including the need for accuracy, the quality of the new evidence, the moving party's diligence and motive, and whether a favorable ruling would be futile. *Sharpe v. Dir., OWCP* [*Sharpe I*], 495 F.3d 125, 132-33 (4th Cir. 2007). Because the ALJ has broad discretion in deciding whether modification is warranted, *Sharpe II*, 692 F.3d at 335, the party opposing a justice under the Act finding bears the burden of establishing the ALJ abused her discretion. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

Employer contends the ALJ erred by failing to address the factors set out in *Sharpe I* and *II* before determining that granting Claimant's modification request would render justice under the Act. Employer's Brief at 11-12.

Employer's assertion is not correct. The ALJ properly considered the relevant factors in this case: she found that the new evidence is of a "sufficient quality to establish total disability" and, therefore, that ALJ Annos's prior finding that Claimant is not totally disabled is no longer accurate. *See Sharpe I*, 495 F.3d at 132-33; *Sharpe II*, 692 F.3d at 327-28; Decision and Order on Modification at 16. She further found Claimant's modification request was not futile, that the claim is not moot, that Claimant exercised due diligence, and that there is no reason to question Claimant's motive in seeking modification. *Id.*

Because the ALJ considered the factors set out in *Sharpe I* and *II*, and Employer has not alleged or established an abuse of discretion in the ALJ's determination that granting Claimant's modification request renders justice under the Act, we affirm it. *See Sharpe I*, 495 F.3d at 132-33; *Sharpe II*, 692 F.3d at 327-28; *Branham*, 20 BLR at 1-34; Decision and Order on Modification at 16.

Accordingly, we affirm the ALJ's Decision and Order Granting Modification and Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the result.

JUDITH S. BOGGS
Administrative Appeals Judge