U.S. Department of Labor Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0522 BLA

NANCY BLEVINS (Widow of ONZIE BLEVINS) Claimant-Respondent v. ISLAND CREEK COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/23/2023 DECISION and ORDER

Appeal of the Decision and Order on Modification Awarding Benefits of Paul E. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order on Modification Awarding Benefits (2018-BLA-06261) rendered on a survivor's claim filed on April 13, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ stated this case is a request for modification on an adverse decision of a subsequent claim. He credited the Miner with at least thirty-five years of qualifying employment and found Claimant established complicated pneumoconiosis arising out of coal mine employment, invoking the irrebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act.[2] 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 718.203(b). Consequently, he found Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and a mistake in a determination of fact at 20 C.F.R. §725.310. Thus, he awarded benefits commencing with the month Claimant filed her claim, April 2016.

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[1] The district director denied Claimant's initial claim on January 9, 2017, because she did not establish the Miner had pneumoconiosis arising out of his coal mine employment or that his death was due to pneumoconiosis. Director's Exhibit 20. Claimant requested modification on January 25, 2018. Director's Exhibit 22. In a proposed decision and order dated July 25, 2018, the district director determined Claimant established a mistake in fact, granted Claimant's request for modification, and awarded benefits. Director's Exhibit 27. Employer timely appealed this decision, and the claim was transferred to the Office of Administrative Law Judges. Director's Exhibits 30, 31.

[2] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner's death was due to pneumoconiosis if he suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Because the ALJ found Claimant established complicated pneumoconiosis, he did not consider whether she could invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4) (2018); Decision and Order on Modification at 3.

On appeal, Employer contends the ALJ erred in admitting Dr. Perper's report, alleging it exceeds the evidentiary limitation at 20 C.F.R. §725.414(a)(2)(i). It also argues the ALJ erred in applying the subsequent claim standard[3] in a request for modification of a survivor's denied claim and erred in finding Claimant established complicated pneumoconiosis. Claimant[4] responds, urging affirmance of the ALJ's evidentiary ruling and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response agreeing the ALJ erred in conflating the subsequent claim and modification standards. He urges the Benefits Review Board to vacate the award and remand the case to the ALJ to apply the legal standard for a modification request, determine if granting modification would render justice under the Act, and reconsider the commencement date for benefits.[5]

The 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.[6] 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).

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[3] At the hearing, Employer advised the ALJ "I do believe this is a subsequent claim" and a "modification, I believe, of a [Proposed Decision and Order] denial." Hearing Transcript at 6.

[4] Claimant's obituary records her death as February 10, 2023. Director's Exhibit 10. However, the record does not contain her death certificate or any information concerning who is pursuing the claim on her behalf. She was the widow of the Miner, who died on December 29, 2014. Director's Exhibit 13. It is undisputed that the Miner filed an initial claim for benefits on April 20, 2012, which he later withdrew and therefore is considered not to have been filed, and subsequently filed a claim on November 2, 2012, which the district director denied on June 17, 2013. Decision and Order on Modification at 2; *see* 20 C.F.R. §725.306. Claimant does not allege the Miner was eligible to receive benefits at the time of his death; thus, she is not eligible for derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had at least thirty-five 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 4, 7 & n.30, 11, 13, 19; Hearing Transcript at 5.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as the Miner performed his last coal mine employment in Virginia. *See Shupe v.*

Evidentiary Challenge

Because the ALJ is given broad discretion in resolving procedural and evidentiary matters, a party seeking to overturn an ALJ's evidentiary ruling must establish that the ALJ's action represented an abuse of discretion. 20 C.F.R. §725.455(c); *see V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986).

Employer argues the ALJ erred in admitting Dr. Perper's report, alleging it exceeds the evidentiary limits for autopsy evidence at 20 C.F.R. §725.414(a)(2)(i). Employer's Brief at 7. We disagree.

On her evidence summary form, Claimant identified the report of Dr. Helms, the autopsy prosector, as her affirmative autopsy report and Dr. Perper's report as her affirmative medical report. *See* ALJ-3 (Claimant's Evidence Summary Form); Director's Exhibit 13;[7] Claimant's Exhibit 1. At the hearing, Employer objected to the admission of Dr. Perper's opinion in its entirety, asserting Claimant improperly submitted it as a second affirmative autopsy report in violation of the evidentiary limitations. Hearing Transcript at 12-16. Claimant responded, stating Dr. Perper's report was identified on the evidence summary form as a medical report and that he reviewed the medical record in addition to the autopsy slides to support his conclusion the Miner had complicated pneumoconiosis. *Id.* at 13. The ALJ indicated he would give the parties time to submit briefs on the issue of admissibility of Dr. Perper's report. Hearing Transcript at 14. Both Employer[8] and Claimant[9] submitted briefs reiterating their arguments.

Director, OWCP, 12 BLR 1-200, 2-202 (1989) (en banc); Decision and Order on Modification at 4; Hearing Transcript at 28; Director's Exhibit 3.

[7] The ALJ identified Dr. Helms's report as Director's Exhibit 11, but it is identified as Director's Exhibit 13 in the record. Decision and Order on Modification at 7.

[8] Employer asserted "it would be impossible to separate [Dr. Perper's] opinions based solely on the autopsy slides from those based on the other medical evidence of record"; therefore, it argued the report is inadmissible in its entirety. Employer's Brief in Support of Barring Claimant's Submission of CX-1 at 2.

[9] Claimant argued Dr. Perper's report is a "medical report and lung tissue review by a pathologist which is allowed and supported by case law." Claimant's Response to

On May 31, 2022, the ALJ issued an Evidentiary Order on Admissibility of CX 1. He determined that Dr. Perper's report was admissible both as a rebuttal autopsy report to Dr. Caffrey's report, which Employer designated as its affirmative autopsy report, and as an affirmative medical opinion. Order at 2, *citing Keener*, 23 BLR at 1-239.

On appeal, Employer contends Dr. Perper's report is Claimant's second affirmative autopsy report and argues the ALJ erred in admitting it as a rebuttal autopsy report. *See* Employer's Brief at 7; Claimant's Exhibit 1. Instead, it asserts, for the first time, that it in "error" designated Dr. Caffrey's report as "affirmative" autopsy evidence and that it was intended as a rebuttal report to Dr. Helms's, which had already been submitted as Claimant's affirmative autopsy report. Employer's Brief at 8 n.1.

On its Evidence Summary Form, Employer designated Dr. Caffrey's report as "initial," i.e., affirmative, autopsy evidence. ALJ-4. The ALJ properly recognized that a party may submit both an affirmative autopsy report and, where the opposing party has submitted affirmative autopsy evidence, a rebuttal autopsy report. Order on Modification at 3, *referencing* 20 C.F.R. §725.414(a)(2)(ii). As Dr. Perper reviewed the autopsy slides and other evidence, including medical reports and the Miner's occupational and social histories, in preparing his report, the ALJ accurately found it admissible as both a rebuttal autopsy report and an affirmative medical report. *See Keener*, 23 BLR at 1-239 (report constitutes both an autopsy report and a medical report when a physician reviews autopsy slides and additional medical records, and then bases his report on both the pathological and clinical evidence); Order at 2-3; Claimant's Exhibit 1. Because Employer has not established the ALJ abused his discretion, we affirm his admission of Dr. Perper's opinion into the record as both an autopsy and medical report. Consequently, we affirm the ALJ's Order overruling Employer's evidentiary objection.

Modification – Legal Standard

After accurately summarizing the procedural history of both the finally denied miner's claim and the request for modification of the current survivor's claim, the ALJ deemed "this case pertains to a request for modification of an adverse decision rendered on a subsequent claim filed on April 13, 2016." Decision and Order on Modification at 4; *see* supra at nn.1, 4. The ALJ maintained:

> Because the underlying claim is a subsequent claim, in order to establish that the Miner was entitled to benefits, the Claimant must also demonstrate that

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Employer's Objection at 2, *citing Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc).

> 'one of the applicable conditions of entitlement … has changed since the date upon which the order denying the prior claim became final.'[…] On *modification*, I must consider the *new* evidence and determine whether the Claimant has proved at least one of the elements of entitlement decided against the Miner in his prior claim. If so, then I must consider whether all of the evidence establishes that the Miner was entitled to benefits.

Id. at 5 (emphasis added).

Employer and the Director assert the ALJ erred in applying the subsequent claim standard to the modification of an initial survivor's claim and therefore remand is required. Employer's Brief at 4-7; Director's Response Brief at 2-3. Claimant responds, arguing the ALJ applied the proper standard, as 20 C.F.R. §725.310 provides a party can request modification based on "a change in conditions or because of a mistake in a determination of fact . . . " and that, once corrected, the mistake constituted both. Claimant's Brief at 6-7. She further argues that because the ALJ based his findings on autopsy and medical opinion evidence establishing complicated pneumoconiosis, any reliance on an incorrect legal standard would be harmless error. *Id.* at 7.

There is no evidence in the record, and Claimant has not alleged, that this is a subsequent survivor's claim.[10] *See* Director's Exhibit 2. The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993). Further, and contrary to the ALJ's assertion, Claimant need not submit new evidence on modification because an ALJ is authorized "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). We conclude the ALJ's error in applying the incorrect legal standard was not harmless, as it is impossible to determine what effect, if any, the ALJ's application of the improper legal

[10] Contrary to the ALJ's findings, for purpose of the current modification request, the miner's claim is not an "underlying claim" nor is the survivor's claim a "subsequent claim" of the denial in the miner's claim. *See* Decision and Order at 4-5.

standard on modification had on his finding of complicated pneumoconiosis.[11] *See* Decision and Order on Modification at 19-24.

Employer also argues the ALJ erred in "acknowledging the evidence of the living miner['s] claim" and considering it when it is not part of the record in the initial survivor's claim on modification. Employer's Brief at 15. We agree the ALJ did not properly resolve the evidentiary record for the survivor's claim, taking into consideration the evidentiary limitations. 20 C.F.R. §725.414. The ALJ noted that the Miner's prior claims "were stamped as Director's Exhibits, but they do not appear to have been assigned to a specific exhibit number and appear in the Table of Contents simply as LM1 and LM2." Decision and Order on Modification at 5 n.20. It is not clear from the record what document the ALJ is referring to as the Table of Contents or whether the entirety of these records was admitted into evidence in the current survivor's claim. *See* Hearing Transcript at 10-12, 17. Employer designated pulmonary function and blood gas studies dated May 9, 2012 and January 3, 2013 on its evidence summary form and Claimant designated readings of x-rays dated May 9, 2012 and January 3, 2013 on her evidence summary form. *See* ALJ-3 at 2; ALJ-4 at 3-4. All of these documents are from the Miner's prior claims, but the parties identified them as Director's Exhibits 1 and 2 even though they do not appear in the record at those exhibits. *Id.* Although the ALJ summarized this evidence, he indicated in the individual sections that he did not consider this evidence in determining whether Claimant has established a "change in conditions or an applicable condition of entitlement" because they were "read" or "performed in connection with the prior claims." Decision and Order on Modification at 9-12.

Lastly, the Director asserts the ALJ failed to evaluate whether Claimant's request for modification "rendered justice under the Act." *Westmoreland Coal Co. v. Sharpe* [*Sharpe II*], 692 F.3d 317, 327-28 (4th Cir. 2012); *see* Director's Brief at 3. Neither Employer nor Claimant specifically raised this argument before the Board. However, in her Post-Hearing Brief, Claimant states her request for modification was in good faith, and that granting modification would render justice under the Act. Claimant's Arguments in Support of an Award of Benefits on Modification at 5. Claimant argued she demonstrated diligence in pursuing her claim at every level, and that her claim is not futile. *Id.* She further asserted that her motive for pursuing her claim is that she believes she is entitled to survivor's benefits under the Act. *Id.* Whether modification renders justice under the Act is a determination to be made by the ALJ. In making that determination, the ALJ must consider multiple 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 still be

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[11] Consequently, we decline to address Employer's arguments concerning the ALJ's complicated pneumoconiosis findings at this time. *See* Employer's Brief at 10-15.

futile. *Sharpe v. Dir., OWCP* [*Sharpe I*], 495 F.3d 125, 132-33 (4th Cir. 2007). The ALJ has broad discretion in deciding whether modification is warranted. *Sharpe II*, 692 F.3d at 335.

Because the ALJ applied the incorrect legal standard in evaluating Claimant's initial survivor's claim, did not resolve the evidentiary record, and did not consider whether granting modification would render justice under the Act, we vacate the ALJ's award of benefits.

Remand Instructions

On remand, the ALJ must reconsider Claimant's survivor's claim to determine whether Claimant is entitled to modification based on a mistake in fact. 20 C.F.R. §725.210. If the ALJ finds Claimant has demonstrated a mistake of fact, he should then consider whether granting her modification request would render justice under the Act. *See O'Keeffe*, 404 U.S. at 256. In evaluating entitlement, the ALJ must consider all relevant evidence of record submitted in compliance with 20 C.F.R. §§725.310, 725.414. If the ALJ finds the existence of complicated pneumoconiosis established, Claimant will have invoked the Section 411(c)(3) irrebuttable presumption that the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.304. If the ALJ finds Claimant failed to establish the Miner had complicated pneumoconiosis arising out of coal mine employment, he must determine whether Claimant can invoke the Section 411(c)(4) rebuttable presumption of death due to pneumoconiosis[12] and, if so, whether Employer could rebut the presumption, 20 C.F.R. §718.305, or whether Claimant can independently establish a basis for entitlement at 20 C.F.R. §718.205(c) without the benefit of a presumption.[13] If the ALJ awards benefits, he must determine the commencement date for benefits because benefits

[12] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that the Miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

[13] In a survivor's claim, where entitlement is not established based on the Section 411(c)(3) or 411(c)(4) presumptions, a claimant must establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that the miner's death was caused by complications of pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205. Pneumoconiosis is a substantially contributing cause of death "if it hastens the miner's death." 20 C.F.R. §718.205(b)(6).

in a survivor's claim are payable beginning with the month of the miner's death,[14] not the month that Claimant filed for benefits. 20 C.F.R. §725.503(c).

[14] The ALJ noted that the Miner died in 2014, and the record supports he died on December 29, 2014. Decision and Order on Modification at 2; *see* Director's Exhibits 11, 13.

Accordingly, we affirm in part, and vacate in part and reverse in part, the ALJ's Decision and Order on Modification Awarding Benefits and remand the case for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge