No. 21-1015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ISLAND CREEK MINING,

Petitioner

v.

GARY MALCOMB

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page:**

Statutes

Regulations

Other Sources

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STATEMENT OF JURISDICTION

This case involves a claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944, filed by Gary Malcomb, a former coal miner. On August 27, 2019, Administrative Law Judge (ALJ) Drew A. Swank issued a decision awarding benefits. Petitioner's Appendix (A.) 68. Island Creek Mining appealed this decision to the United States Department of Labor (DOL) Benefits

Review Board on September 17, 2019 (A. 66), within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review ALJ Swank's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On December 21, 2020, the Board affirmed the award of benefits. A. 21. Island Creek filed its petition for review on January 6, 2021. A. 6. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals where the injury occurred. Mr. Malcomb's exposure to coal mine dust—the injury contemplated by 33 U.S.C. § 921(c)—occurred in the state of West Virginia, within this Court's territorial jurisdiction. A. 1310. The Court therefore has jurisdiction over Island Creek's petition for review.

STATEMENT OF THE ISSUES

Section 22 of the Longshore and Harbor Workers' Compensation Act, incorporated into the BLBA by 30 U.S.C. § 932(a), permits any party to a claim to request modification of a decision on the ground of a change in conditions or because of a mistake in a determination of fact. Consistent with Supreme Court precedent, this Court has recognized that the "modification procedure is extraordinarily broad." *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).

Island Creek contends that Section 22, as judicially interpreted, violates the due process and equal protection clauses of the United States Constitution. The first issue is whether Section 22, as interpreted, is constitutional.[1]

Modification may be denied if it would not render justice under the BLBA. *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 464 (1968); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131 (4th Cir. 2007) (*Sharpe I)*. ALJ Swank determined that granting Mr. Malcomb's modification petition would render justice under the BLBA because he submitted new evidence establishing his entitlement to benefits. Island Creek challenges ALJ Swank's analysis as incomplete, despite the fact that the ALJ identified the relevant factors in the "interest of justice" inquiry delineated by this Court. The second issue is whether ALJ Swank acted within his discretion in finding that granting Mr. Malcomb's modification petition would render justice under the BLBA.[2]

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[1] These same constitutional challenges have been raised by the employer in *Terry Eagle Partnership Ltd. v. Payne*, 4th Cir. No. 20-2131.

[2] The Director will not address Island Creek's arguments regarding the ALJ's analysis of the medical evidence (OB 20-30), and accordingly, takes no position on the validity of the underlying award of benefits to Mr. Malcomb.

STATEMENT OF THE CASE

A. Procedural history and decisions below

Mr. Malcomb filed the instant claim for benefits on April 24, 2014.[3] A. 1122-25. DOL's district director issued a proposed decision and order awarding benefits. A. 960-67. Island Creek disagreed with this determination and requested a hearing and decision by an ALJ. A. 957. The case came before ALJ Richard Morgan who denied benefits on July 28, 2017. A. 274-320. ALJ Morgan determined that Mr. Malcomb had failed to establish any form of pneumoconiosis, including complicated pneumoconiosis, or total respiratory disability.[4]

Less than six months later, on December 19, 2017, Mr. Malcomb petitioned

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[3] The district director denied Mr. Malcomb's previous claim for BLBA benefits on June 21, 2006, finding that he had established twenty-eight years of coal mine employment, but that he not established any medical element of his claim. A. 1133-40.

[4] In general, miners seeking BLBA benefits must prove by a preponderance of the evidence that (1) they have pneumoconiosis; (2) their pneumoconiosis arose at least in part out of coal mine employment; (3) they are totally disabled; and (4) the total disability is due to pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207 (4th Cir. 2000); 20 C.F.R. §§ 718.202-204. Complicated pneumoconiosis, sometimes referred to as progressive massive fibrosis or severe fibrosis, is a severe form of clinical coal workers' pneumoconiosis. *See generally Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 6-8 (1976). A finding of complicated pneumoconiosis creates "an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis, or that a miner was totally disabled due to pneumoconiosis at the time of death[.]" 20 C.F.R. § 718.304; *see* 30 U.S.C. § 921(c)(3).

for modification. A. 244. In support of his petition, Mr. Malcomb submitted a new, complete pulmonary evaluation by Dr. Nader, along with the associated testing, including Dr. Crum's reading of a December 5, 2017, x-ray, pulmonary function and arterial blood gas test results, and an electrocardiogram. A. 246-71. Dr. Nader concluded that Mr. Malcomb was totally disabled due to complicated pneumoconiosis. A. 248. Island Creek countered with a negative reading of the December 5, 2017, x-ray by Dr. Tarver. A. 132-35. The district director reviewed the evidence and denied modification. A. 204-09. Mr. Malcomb then requested review by an ALJ. A. 201.

ALJ Swank presided over the case.[5] In addition to Dr. Nader's new medical report, Mr. Malcomb submitted the following medical evidence: treatment notes from his physician, Dr. Durham, a reading of a December 12, 2018 PET-CT scan by Dr. Rose, and a re-reading of a July 29, 2014 CT scan by Dr. Crum. A. 175-80 (Dr. Durham), 181-82 (Dr. Rose), 189 (Dr. Crum). Island Creek did not submit any additional evidence beyond Dr. Tarver's negative reading, which it previously submitted to the district director. A. 113. The ALJ granted modification and

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[5] ALJ Morgan had retired from government service by the time the case came up for hearing on May 14, 2019, as the following order indicates, https://www.oalj.dol.gov/DECISIONS/ALJ/BLA/2014/STEELE_JACK_W_v_ADDINGTON_INCPITTSTO_2014BLA05940_(AUG_16_2018)_074543_ORDER_PD.PDF?_ga=2.264450189.349567076.1615404238-863758181.1615404238.

awarded benefits. Unlike ALJ Morgan, ALJ Swank found Mr. Malcomb's evidence established the presence of complicated pneumoconiosis, and, thus, his medical entitlement to benefits. ALJ Swank further determined that granting modification would render justice under the BLBA because Mr. Malcomb's "newly submitted evidence establishes the elements of entitlement." A. 72.

Island Creek appealed ALJ Swank's decision, but the Benefits Review Board affirmed the award. A. 21-33. As relevant here, the Board rejected Island Creek's argument that the standard and procedures for granting modification violate due process. The Board held that due process requires only notice and an opportunity to respond, and that Island Creek had not alleged a deprivation of either. A. 30 n.14. The Board further affirmed the ALJ's finding that granting modification would render justice under the BLBA. A. 31. The Board explained that the ALJ had identified the relevant factors in making this determination and reasonably relied on Mr. Malcomb's submission of new evidence to establish that his condition had changed. *Id*.

Following the Board's affirmance of ALJ Swank's decision, Island Creek petitioned this Court for review.

B. Statutory and regulatory background

The BLBA incorporates Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (Longshore Act), which provides:

> Upon his own initiative, or upon the application of any party in interest * * *, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, * * * or at any time prior to one year after the rejection of a claim, review a compensation case * * * [and] issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. § 922; as incorporated by 30 U.S.C. § 932(a) [6] DOL's implementing black lung regulation largely reiterates these statutory requirements. 20 C.F.R. § 725.310(a).

This Court has recognized that the "modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings." *Betty B Coal Co.*, 194 F.3d at 497. Unlike other areas of law in which finality of judgment is given great weight, modification affords the factfinder "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 256; *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 180-181 (4th Cir. 1999); *Jessee*, 5 F.3d at 725.

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[6] The term "deputy commissioner" derives from Section 22. DOL, however, employs the term "district director" to refer to the same administrative actor/position. 20 C.F.R. § 725.101(a)(16); 20 C.F.R., § 701.301(a)(7). The two terms are interchangeable.

A "mistake in fact" extends to "the ultimate fact—disability due to pneumoconiosis" and "[t]here is no need for a smoking-gun factual error, changed conditions, or startling new evidence." *Jessee*, 5 F.3d at 725; *Borda*, 171 F.3d at 181. Modification's expansive nature thus demonstrates the statute's preference for accuracy in the decision over finality. *Jessee*, 5 F.3d at 725; *Banks,* 390 U.S. at 461-464.

In addition to a mistake of fact, Section 22 permits modification based on a "change in conditions." Unlike a mistake of fact, new evidence is needed for modification based on a change in conditions. 20 C.F.R. § 725.310(c) ("[T]he administrative law judge. . . must consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact."). The Board has held that "in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. § 725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered 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 which defeated entitlement in the prior decision." *Kingery v. Hunt Branch Coal Co.*, 19 Black Lung Rep. (MB) 1-6, 1994 WL 712497 *2 (Ben. Rev. Bd. 1994); *Nataloni*

v. Director, OWCP, 17 BLR 1-82 (Ben. Rev. Bd. 1993).

Modification of a denial of a black lung award, however, "does not automatically flow from a mistake in an earlier determination of fact" (or a change in conditions). *Sharpe I*, 495 F.3d at 132; *Banks*, 390 U.S. at 464. *Sharpe I* directs the ALJ to determine whether reopening a case will render justice under the Act. *Id*. In making this determination, *Sharpe I* instructs an ALJ to consider, among other things, the accuracy of the prior decision, the diligence and motive of the party seeking modification, and the possible futility of modification. *Id*. at 134.

SUMMARY OF THE ARGUMENT

Section 22 is a generous reopening provision that allows for modification of orders when a factual mistake occurs or a claimant's condition changes. The Supreme Court has broadly construed the mistake of fact requirement to allow a fact-finder to correct a mistake based on wholly new evidence, cumulative evidence or merely further reflection on the evidence submitted in the initial claim proceeding. This Court, as well as the other circuit courts, have consistently followed the Supreme Court's mandate.

Island Creek contends that permitting a fact-finder merely to rethink a previous benefits decision violates due process and equal protection. The company offers no legal authority for this broad assertion, which is contrary to governing Supreme Court and Circuit precedent. Likewise, it offers no case-specific

evidence demonstrating a deprivation of due process here. In fact, Island Creek had immediate notice of Mr. Malcomb's modification request and had every opportunity to defend itself against the petition. That is all due process requires. As for equal protection, Island Creek's contention that coal companies are treated differently than miners in the BLBA's modification proceedings is incorrect: the same standards for establishing a mistake of fact or change in conditions apply equally to all parties to a BLBA claim.

Island Creek's final argument, that the ALJ failed to undertake a sufficient analysis in finding modification would render justice under the BLBA, is unpersuasive. The ALJ identified the factors relevant to making this judgment, and reasonably determined that concerns for accuracy in reaching a correct result outweighed those for finality.

ARGUMENT

A. Standard of review

Whether the standard and procedures for granting modification under the BLBA deprived Island Creek of due process and equal protection are questions of law that are reviewed *de novo*. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). The Court reviews an ALJ's decision to grant modification for an abuse of discretion. *O'Keeffe*, 404 U.S. at 256; *Sharpe I*, 495 F.3d at 130-32.

B. Island Creek was not deprived of due process or equal protection.

Island Creek concedes that the law governing modification is "relaxed," OB 5, but asserts that the statutory and regulatory requirements for establishing modification have become so "lenient" as to violate due process and equal protection. OB 3. Island Creek further complains about an "anything goes" approach where a fact-finder on modification simply reviews the record and may come to a different conclusion regarding the ultimate fact of a miner's entitlement to benefits, without requiring the miner to plead and prove a specific mistake in fact or change in conditions and without affording any deference to the determinations of a previous factfinder. OB 7-8, 12, 14, 16. In Island Creek's view, this state of the law deprives employers of due process because they do not "know exactly what they are defending" and may be found liable for benefits "years" after an initially favorable decision, thus incurring substantial costs and attorney fees. OB 3, 9, 13. Island Creek also asserts that modification disfavors petitions by coal companies, thus depriving them of equal protection. OB 18-20. Island Creek urges this Court to rectify these purported constitutional deprivations by requiring claimants to allege and demonstrate a specific factual mistake or change in conditions in their modification petitions. OB 15-17. Finally, Island Creek claims that only truly "*new*" evidence—evidence developed after the previous denial demonstrating a worsening of a miner's condition over time—can establish

change-in-conditions modification. OB 14-15.

The Court should reject Island Creek's arguments. Longstanding precedent from the Supreme Court and this Court instructs that both a mistake of fact and change in condition are to be broadly construed and exactly in the manner with which Island Creek disagrees.

The Supreme Court first construed Section 22's "mistake in a determination of fact" ground in *Banks,* 390 U.S. 459, a case arising under the Longshore Act. After coming home from work on January 30, 1961, the employee fell down his basement steps, causing injuries from which he later died. The employee's widow claimed that the fall was the result of an injury the employee had suffered at work on January 26, 1961. The employer disputed the claim and the deputy commissioner denied benefits, either because he did not believe that the January 26 injury had occurred or because he did not believe that the employee's death was related to the injury.

The employee's widow filed a second claim, asserting that the employee's death was the result of an injury suffered at work on January 30, rather than January 26. Although the widow apparently had told her attorney about the January 30 injury prior to the first hearing, evidence regarding the January 30 injury had not been proffered during the first hearing. *Chicago Grain Trimmers Ass'n v. Enos*, 369 F.2d 344, 347 n.3 (7th Cir. 1966). The deputy commissioner found that the

employee's death was related to the January 30 injury, and awarded benefits. The district court affirmed.[7]

The Seventh Circuit reversed the award on *res judicata* grounds, reasoning that "it was incumbent upon the claimants to assert in one claim all the incidents of employment which singly or in combination were alleged to have caused the fall in the home." 369 F.2d at 348. The Court concluded that Section 22 was inapplicable "because the claimants at no time disputed the findings of fact made by the deputy commissioner at the first hearing." *Id*. at 349 n.4.

The Supreme Court reversed, holding that Section 22 allowed the correction of the deputy commissioner's mistaken finding that the employee's fall at home did not result from a work-related injury. That court found nothing in Section 22's legislative history to demonstrate "that a 'determination of fact' means only some determinations of fact and not others," and held that the widow's "second compensation action, filed a few months after the rejection of her original claim, came within the scope of § 22." 390 U.S. at 465.

Three years later, the Supreme Court elaborated on the meaning of "mistake of fact" in *O'Keeffe*, 404 U.S. 254. There, a deputy commissioner instituted

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[7] *Banks* was decided prior to the 1972 amendments to the Longshore Act, which established the current ALJ-Benefits Review Board-court of appeals review process. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116 (6th Cir. 1984).

modification proceedings following a denial and awarded benefits, finding the employee's disability was work-related. The Fifth Circuit reversed, holding that Section 22 "simply does not confer authority upon the Deputy Commissioner to receive additional but cumulative evidence and change his mind." *Aerojet-General Shipyards, Inc. v. O'Keeffe*, 442 F.2d 508, 513 (5th Cir. 1971). That court also emphasized (as Island Creek does here) that relief under Section 22 required "demonstrable mistake," and no mistake in fact in the deputy commissioner's previous denial had been shown. *Id*.

The Supreme Court unanimously disagreed, reasoning that "[n]either the wording of that statute nor its legislative history supports this 'narrowly technical and impractical construction.'" 404 U.S. at 255 (citation omitted). After quoting Section 22, the Court explained:

> There is no limitation to particular factual errors, or to cases involving new evidence or changed circumstances . . . The plain import of [the 1934 amendment adding mistake of fact as a basis for modification] was to 'broaden the grounds on which a deputy commissioner can modify an award'[and] to vest a deputy commissioner 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.

404 U.S. at 255-256 (quoting S. Rep. No. 588, 73d Cong., 2d Sess., 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934)).

This Court has consistently applied Section 22's mistake-of-fact prong in

accord with *Banks* and *O'Keeffe* to permit modification based on new or cumulative evidence or simply upon reconsideration of the existing evidence.[8] *E.g. Jessee*, 5 F.3d at 724-25; *see supra* at 8. *Jessee* further explained "that a claimant may simply allege that the ultimate fact—disability due to pneumoconiosis—was mistakenly decided, and the deputy commissioner may, if he so chooses, modify the final order on the claim. There is no need for a smoking-gun factual error, changed conditions, or startling new evidence." 5 F.3d at 724-725.

Island Creek's attempts to distinguish this precedent fall short. It asserts that the Supreme Court's interpretation of the mistake of fact requirement in *O'Keeffe* is inapplicable because that case arose under the Longshore Act, not the BLBA.[9] OB 7-8, 17. Island Creek, however, does not explain why this fact mandates a different interpretation of identical statutory language. Indeed, this Court has been

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[8] The other courts of appeals have done so as well, under both the Longshore Act and the BLBA. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276-277 (2d Cir. 2003); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 546 (7th Cir. 2002); *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 227 (1st Cir. 2001); *Keating v. Director, OWCP*, 71 F.3d 118, 1123 (3d Cir. 1995); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1347 n.1 (9th Cir. 1993).

[9] Island Creek also incorrectly asserts that *Consolidation Coal Co. v. Latusek*, 717 F. App'x 207 (4th Cir. 2018) arose under "a different federal act[]" and a "completely different set[] of regulations." OB 8. *Latusek*, however, is a black lung case that was adjudicated, like the case here, under 20 C.F.R. § 725.310. 717 F. App'x at 209-10.

untroubled by the different programmatic settings. In any event, even if there were a meaningful basis on which to distinguish *O'Keeffe*, DOL has promulgated binding regulations adopting the decision. 20 C.F.R. §§ 725.310(a) (district director may "reconsider the terms of an award or denial of benefits."); 725.310(c) (administrative law judge must consider "regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact."); 65 Fed. Reg. 79975 (Dec. 20, 2000) (explaining that Section 22 and *O'Keeffe* provide the legal authority for "the revised regulation [to] allow an adjudicator simply to reweigh the evidence of record and reach a conclusion different from the one reached before").

Island Creek further argues that *Jessee* differs from the instant case because the ALJ there committed a true mistake of fact by overlooking two pieces of evidence. OB 17-18. But *Jessee* itself rejected this limitation, characterizing the overlooked evidence as "irrelevant" and "not an essential underpinning of [Jessee's] right to seek modification." 5 F.3d at 725. Instead, the Court restated its fundamental holding that "[i]f a claimant avers generally that the ALJ improperly found the ultimate fact and thus erroneously denied the claim, the deputy commissioner (including his ALJ incarnation) has the authority, without more, to modify the denial of benefits." 5 F.3d at 725-26.

Island Creek's allegation that the modification proceedings here violated its

due process rights is likewise without foundation. It asserts that the "process made available to it was inadequate," and that ALJ Swank ordered it to pay benefits "years" after ALJ Morgan found that benefits were not due. OB 9, 13. The test for due process is whether an employer has been deprived of the opportunity to mount a meaningful defense. *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 808 (4th Cir. 1998). Here, Mr. Malcomb promptly filed his modification request within six months after ALJ Morgan's initial decision. A. 244. Island Creek was immediately notified of the request and was involved at every stage of the ensuing administrative proceedings. Specifically, Island Creek was able to assert its preferred defenses, was apprised of the disputed issues, and submitted evidence defending against Mr. Malcomb's modification request. A. 70, 107, 132-163, respectively. Indeed, Island Creek never protested to ALJ Swank that it was surprised by the issues or could not defend itself. *E.g.* A. 102-30 (hearing transcript). Finally, the entire modification proceeding was completed less than two years after ALJ Morgan's initial decision. Accordingly, there has been no deprivation of due process here. *See Betty B Coal Co.*, 194 F.3d at 161 (if the course of the administrative proceedings is fair and the outcome reliable then due process is achieved).

Island Creek's equal protection claim is also utterly unfounded.[10] Island Creek asserts that "if it was the individual and not the corporation who had pursued a claim for benefits, won, then had the benefits stolen away on modification simply by having a new judge review the same evidence, the outcome would most likely be different. The decision would be reversed." OB 18-19. Not surprisingly, Island Creek cites no support for this cynical contention. That is because there is none. "Any party in interest" may request modification, and the standards for establishing modification apply equally to all parties. 33 U.S.C. § 922; *see* 20 C.F.R § 725.310(a) (modification permitted "upon the request of any party"); *McCord v. Cephas*, 532 F.2d 1377, 1380 (D.C. Cir. 1976) ("Although *Banks* and *O'Keeffe* dealt only with reopening under section 22 for the benefit of claimants, there is nothing in the Court's language or the legislative history to suggest that the ambit of section 22 is narrower for employers seeking to 'decrease' or 'terminate' a prior award."); *see also Branham v. BethEnergy Mines, Inc.*, 20 Black Lung Rep. (MB) 1-25, 1-34, 1996 WL 33469465 at *4 (Ben. Rev. Bd. 1996) (ALJ's ruling

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[10] The Equal Protection Clause of the Constitution "directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe,* 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)). The Due Process Clause of the Fifth Amendment to the Constitution applies to the federal government the same guarantee of equal protection under law that the Fourteenth Amendment applies to the states. *Bolling v. Sharpe,* 347 U.S. 497, 499-500 (1954).

that the employer was precluded from modification contravenes express language of Section 22 and implementing regulations); 65 Fed. Reg. 79976 (Dec. 20, 2000) (explaining that 20 C.F.R. § 725.310's evidentiary limitation ensures that the claimant and the responsible operator have equal opportunity to present evidence to the fact-finder on modification). Accordingly, Island Creek's baseless equal protection argument must be rejected.

Moreover, even if Island Creek's alleged constitutional deprivations had any substance, its proffered solutions have no merit. It urges that the Court (1) require the party moving for modification to specifically allege whether a change in conditions or mistake of fact exists; (2) for a mistake of fact, require the movant to identify and demonstrate the mistake that occurred; and (3) for a change in conditions, require submission of "truly new evidence." As explained above, *supra* at 7, 13-16, these first two constraints on modification already have been soundly rejected by the Supreme Court and this Court. *See O'Keeffe*, 404 U.S. at 456 ("The plain import of [the modification statute] was to vest a deputy commissioner 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."); *Banks*, 390 U.S. at 465 n.8 ("irrelevant" that modification request was labeled a new claim for compensation); *Jessee*, 5 F.3d at 725 ("A claimant may simply allege that the ultimate fact-disability due to pneumoconiosis-

was mistakenly decided….There is no need for a smoking-gun factual error, changed conditions, or startling new evidence."); *Worrell*, 27 F.3d at 230 ("The fact that Mr. Worrell did not specifically plead mistake of fact or change in condition in his second claim is irrelevant.").

Island Creek's third demand, that the Court require the submission of "truly new evidence"—evidence developed after the previous denial demonstrating a worsening of a miner's conditions over time, OB 14-15—for a change in conditions is overstated and misguided. New evidence developed after the prior denial is indeed necessary to establish a change in conditions, and this newly-developed evidence must address the miner's condition as it exists following the prior denial. 20 C.F.R. § 725.310(c); *see Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996).[11] *Accord*; *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 617 (4th Cir. 2006). Where Island Creek goes astray, however, is in suggesting that the new evidence must demonstrate with particularity the

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[11] In addition to modification, miners can refile for benefits more than one year after the denial of a claim (variously known as "duplicate," "subsequent" or "additional" claims) and establish entitlement upon proof, *inter alia*, that a previously-denied element of entitlement has changed. 20 C.F.R. § 725.309(c). *Lisa Lee* addressed the predecessor to current Section 725.309, which required proof of a "*material change in conditions*." 86 F.3d at 1360 (emphasis added); *id.* at 1362. Given the textual similarity between a "material change in conditions" and a "change in conditions," the case law involving subsequent claims largely applies to modification proceedings.

worsening of the miner's condition over time, presumably by comparing old and new evidence. OB 14-15. Rather, a change in conditions is more simply established when the new evidence demonstrates a previously-denied element of entitlement. *Kingery,*1994 WL at 2497 *2 ("[I]n considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. § 725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered 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 which defeated entitlement in the prior decision."); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993) (same); *see also Eastern Assoc. Coal Co. v. Toler*, 805 F.3d 502, 513 (4th Cir. 2015) ("*Lisa Lee Mines* forecloses Eastern's suggestion that Toler should be compelled to prove that the etiology of his condition has changed by comparing the evidence pertaining to Toler's second claim with the evidence underlying the denial of his first claim."); *Cumberland River Coal Co. v. Banks*, 690 F.3d 486, 490 (6th Cir. 2012) (construing "change" to mean the "disproof of the continuing validity" of the original denial, not "the actual difference between the bodies of evidence presented at different times.").[12]

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[12] Mr. Malcomb indisputably submitted new evidence addressing his medical

C. ALJ Swank acted within his discretion in finding that granting Mr. Malcomb's modification petition would render justice under the BLBA.

A modification petition can be denied if it does not "render justice under the [A]ct." *Banks*, 390 U.S. at 464; *Sharpe I*, 495 F.3d at 131-32. ALJ Swank determined that reopening Mr. Malcomb's claim would render justice because he submitted new evidence establishing his entitlement to benefits. A. 71-72. Island Creek argues that ALJ Swank failed to address all the relevant "interest of justice" factors, and therefore asks that the case be remanded to ALJ Swank for reconsideration of whether reopening this claim serves justice. OB 31-33.

As an initial matter, ALJ Swank was not required to conduct a more thorough analysis in his "interest of justice" inquiry. ALJ Swank identified the same relevant factors that this Court delineated in *Sharpe I*, 495 F.3d at 133-34, namely, diligence, motive (*e.g.* number of times reopening sought), futility, and accuracy (quality of the new evidence submitted) as the relevant factors in his assessment. A. 71-72. And, as discussed below, he reasonably found accuracy to

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condition after ALJ Morgan denied his claim in July 2017, namely, Dr. Nader's December 2017 complete pulmonary evaluation with associated testing (A. 246-71); treatment notes from Dr. Durham (to the extent they address Mr. Malcomb's condition after the prior denial in July 2017) (A. 175-80); and a reading of a December 12, 2018 PET-CT scan by Dr. Rose (A. 181-82). Dr. Crum's re-reading of a July 29, 2014 CT scan (A. 189), also submitted on modification, although sufficient to establish a mistake of fact, cannot establish a change in conditions because it addresses Mr. Malcomb's condition before the July 2017 denial.

be the most significant and thus favored reopening. *Id*. Nothing more was required from the ALJ. There is no duty of long-windedness or verbosity, and the ALJ's reasoning here is easy to discern. *Harman Mining Co. v. Director, OWCP*, 678 F.3d 305, 316 (4th Cir. 2012).

Turning to the *Sharpe I* factor of accuracy, there is no question that reopening was warranted because Mr. Malcomb submitted new evidence that not only warranted reconsideration but also, as the ALJ found, established entitlement. For modification, the possibility of an incorrect determination *is precisely* a reason for granting the request. *See O'Keeffe*, 404 U.S. at 255 The need for accuracy here—determining whether Judge Morgan had committed a mistake in a determination of fact or a change in conditions occurred—outweighed the need for finality, especially since ALJ Morgan's decision was less than six months old when modification was requested. *Westmoreland Coal, Inc. v. Sharpe (Sharpe II)*, 692 F.3d 317, 330 (4th Cir. 2012) (noting "the modification statute's general 'preference for accuracy over finality in the substantive award'").

In regard to the other factors, Mr. Malcomb acted diligently because, as noted, he filed for modification within six months of the earlier denial, well within one year of the prior denial, and his motive for filing his one and only modification request—establishing his entitlement to black lung benefits—was entirely permissible. Finally, a favorable ruling would not have been futile since Mr.

Malcomb could collect benefits once awarded.

This case is easily distinguished from those rare cases denying modification on the ground that justice would not be rendered. In *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982), the employer filed for modification in order to assert a new argument based on existing law regarding the limits of its liability. The court held that granting modification would not render justice under the Longshore Act: "Parties should not be permitted to invoke s[ection] 22 to correct errors or misjudgments of counsel, nor to present a new theory of the case when they discover a subsequent decision arguably favorable to their position." *Id*. at 26. Mr. Malcomb, by contrast, is not blaming his attorney for the previous denial, relying on recently discovered precedent, or presenting a new argument. He is simply alleging that he has developed evidence proving that he is entitled to benefits.

In *Sharpe II*, the operator filed a petition for modification of the award in a miner's claim seven years after he was awarded benefits and, not coincidentally, less than two months after his widow filed for survivor's benefits. 692 F.3d 317. The court affirmed the Board's decision that the ALJ had erred in granting modification (and in denying the miner's claim), holding that the operator's motive in filing for modification was "patently improper." *Id*. at 329. The operator was using modification to attack the complicated pneumoconiosis finding from the

miner's claim which, if allowed to stand, would guarantee the widow's entitlement because the operator would have been collaterally estopped from contending that the miner had not suffered from the disease in the widow's claim. The court explained, "[a]t bottom, allowing employers to regularly use modification to evade application of the collateral estoppel doctrine and the irrebuttable presumption of death due to pneumoconiosis would effectively eradicate those entrenched legal principles." *Id*. The court further noted "the modification statute's general 'preference for accuracy over finality in the substantive award,'" and that "modification does not always require 'a smoking gun factual error, changed conditions, or startling new evidence.'" *Id*. at 330. Here, Mr. Malcomb was not attempting to indirectly circumvent entrenched principles; he was simply using a tool that Congress made available to him in the way that Congress provided.

In *McCord*, 532 F.2d 1377, the employer refused to participate in a claim under the Longshore Act. When benefits were awarded against him, the employer filed a modification petition. The ALJ granted the petition and reversed the award, but the Board found the modification petition untimely. Although the court found the petition timely and accordingly remanded to the Board, it instructed the Board to consider whether granting modification would render justice under the Longshore Act based on the employer's "history of great[] reluctance, of great[] recalcitrance, of great[] callousness towards the process of justice, and of great[]

self-serving ignorance[.]" *Id,* at 1381. If the D.C. Circuit could not hold as a matter of law that the employer's complete disregard of legal process defeated his modification petition, then there should be no question that ALJ Swank acted within his discretion in finding that Mr. Malcomb pursued his claim in a diligent and timely fashion.

And in *Old Ben Coal Co.*, 292 F.3d 533, the court held that an ALJ had erred in concluding that an *operator's* modification petition would not render justice under the BLBA. The court found that the ALJ had improperly denied modification merely because the operator's new evidence had been available to the operator prior to the modification petition. It explained that "finality simply is not a paramount concern of the Act" and that "the ALJ gave no credence to the statute's preference for accuracy over finality[.]" *Id*. at 546. Here, ALJ Swank likewise correctly favored accuracy over finality.

In short, ALJ Swank's conclusion that modification of ALJ Morgan's prior denial would render justice under the BLBA is unassailable.

CONCLUSION

The Court should reject Island Creek's arguments that the well-established rules for adjudicating and granting a modification petition violate due process and equal protection. The Court should affirm ALJ Swank's determination that granting modification would be in the interest of justice.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director does not object to Island Creek's request for oral argument, but believes it is unnecessary.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 6,042 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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