No. _____

In The
Supreme Court of the United States

WESTMORELAND COAL COMPANY,

Petitioner,

v.

MAE ANN SHARPE, on behalf of and as widow of WILLIAM A. SHARPE and DIRECTOR, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Westmoreland Coal Company, a coal mine operator, petitioned the United States Department of Labor, Office of Workers' Compensation Programs, to modify a lifetime award of disability benefits to William A. Sharpe made pursuant to the applicable provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921 (2012), as incorporated by the Black Lung Benefits Act ("BLBA"), 30 U.S.C. § 901 (2012), *et seq*. The following questions are presented for review regarding a modification request:

1. The Fourth Circuit vacated the grant of modification and required the agency fact-finder to reassess the modification request using equitable factors contained in neither the enabling statute nor implementing regulations. In so doing, did the Fourth Circuit violate the precedent of this Court, ignored its own precedent, and created a split in the circuits by limiting the broad modification remedy?

2. After ordering the agency fact-finder to consider factors of motive, diligence, and futility in association with the modification petition, the fact-finder judged the modification petition rendered "justice under the Act." The factual findings were reversed by the Benefits Review Board which held the fact-finder abused his discretion in finding modification was in the interests of justice. By affirming the reversal of the factual findings, did the Fourth Circuit nullify congressional intent to defer to the agency fact-finder's factual determinations, exceed its limited standard of review, and impede on the authority afforded to agency fact-finders?

PARTIES TO THE PROCEEDINGS AND DISCLOSURE OF CORPORATE AFFILIATIONS

Petitioner, who was also the Petitioner below, is Westmoreland Coal Company ("Westmoreland"), a Delaware corporation, publicly traded on the New York Stock Exchange.

Respondent, who was also the Respondent below, is Mae Ann Sharpe, the widow of coal miner William A. Sharpe.

Director, Office of Workers' Compensation Programs, United States Department of Labor, is designated by statute as a party in all claims litigated under the Black Lung Benefits Act. 30 U.S.C. § 932(k) (2006 & Supp. V 2011).

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PETITION FOR WRIT OF CERTIORARI

Westmoreland Coal Company, the operator ordered to pay disability benefits, respectfully petitions the Court to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in this matter.

OPINIONS BELOW

The Fourth Circuit's opinion which gives rise to this petition is reported at *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012) ("*Sharpe II*") and is reprinted in the Appendix ("App.") at 1. The Fourth Circuit's order denying Westmoreland Coal Company's ("Westmoreland") Petition for Rehearing and Rehearing *En Banc* on October 17, 2012 is unreported and reprinted in the Appendix at 252. The agency decisions by the Benefits Review Board ("Board") (App. 64), and the administrative law judge ("ALJ") (App. 101) on remand from the Fourth Circuit are unreported and reprinted in the Appendix. The Fourth Circuit's initial decision remanding the case to the ALJ is reported at *Sharpe v. Dir., OWCP*, 495 F.3d 125 (4th Cir. 2007) ("*Sharpe I*"), and is reprinted in the Appendix at 140. The prior Board (App. 159, 213) and ALJ decisions (App. 170, 226) are unreported and reprinted in the Appendix.

JURISDICTION

The Fourth Circuit had jurisdiction over the appeal from a final order of the Board pursuant to § 21(c) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), *see* 33 U.S.C. § 921(c) (2006 & Supp. V 2011), as incorporated into the Black Lung Benefits Act ("BLBA") by 30 U.S.C. § 932(a) (2006 & Supp. V 2011). The Fourth Circuit issued its decision on August 20, 2012 (App. 1), and denied a timely Petition for Rehearing and Rehearing *En Banc* on October 17, 2012 (App. 252). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2006 & Supp. V 2011).

STATUTES AND REGULATIONS INVOLVED

30 U.S.C. § 901 (2006 & Supp. V 2011) Congressional findings and declaration of purpose; short title:

> (a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the

> surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.
>
> (b) This subchapter may be cited as the "Black Lung Benefits Act".

33 U.S.C. § 922 (2006 & Supp. V 2011) Modification of awards:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), 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, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the

> compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

20 C.F.R. § 725.310(a) (2012) Modification of awards and denials:

> (a) Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

STATEMENT OF THE CASE

A. Proceedings before the Agency

This matter involves two distinct claims for benefits under the provisions of the Black Lung Benefits Act ("BLBA"). *See* 30 U.S.C. §§ 901-45 (2006 & Supp. V 2011). William A. Sharpe, a retired coal miner,

sought black lung benefits in 1989, claiming to be totally disabled due to coal workers' pneumoconiosis. *See* App. 229. Mr. Sharpe died on April 18, 2000. *Id.* After his death, his widow, Mae Ann Sharpe, filed a claim for survivor's benefits on April 26, 2000. *Id.*

Following his retirement after nearly 40 years of coal mine employment, Mr. Sharpe sought lifetime disability benefits under the BLBA. *See* App. 3-4. On May 14, 1991, an ALJ, assigned by the Department of Labor ("agency") to consider the claim, denied benefits. *See* App. 4. While Mr. Sharpe could establish simple coal workers' pneumoconiosis, he could not establish total disability due to pneumoconiosis. App. 143. On appeal, the Benefits Review Board ("Board") vacated the ALJ's decision finding the consideration of complicated coal workers' pneumoconiosis[1] was flawed and remanded the case for proper reconsideration. App. 4.

On remand, an ALJ awarded benefits, finding the evidence established the existence of complicated coal workers' pneumoconiosis. *Id.* In the 1993 decision, the ALJ relied on a minority of four x-ray interpretations

[1] Complicated coal workers' pneumoconiosis, an advanced form of pneumoconiosis, when established as described in 30 U.S.C. § 921(c)(3) (2006 & Supp. V 2011), entitles the benefits claimant to an irrebuttable presumption of total disability and benefits. *See also* 20 C.F.R. § 718.304 (2012). According to the Surgeon General, complicated pneumoconiosis usually produces significant pulmonary impairment and increased mortality. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976).

suggesting the presence of complicated coal workers' pneumoconiosis rather than the 17 x-ray interpretations failing to diagnose complicated coal workers' pneumoconiosis. App. 182. As a result of the finding of complicated coal workers' pneumoconiosis, Mr. Sharpe was entitled to the irrebuttable presumption that his pneumoconiosis was totally disabling. On the operator's appeal to the Board, the decision was affirmed. App. 4. When further appellate review was not sought, the award became final. *Id.* The miner, as augmented by his dependent spouse, was then paid benefits on a monthly basis by Westmoreland until his death in April 2000. App. 5.

Following the miner's death, Mae Ann Sharpe filed her survivor's claim with the Office of Workers' Compensation Programs ("OWCP") on April 26, 2000. *Id.* Based on evidence obtained in the survivor's claim, on June 15, 2000, Westmoreland requested modification of the miner's claim, within one year of cessation of the payment of benefits, as per the regulatory guidance of 20 C.F.R. § 725.310 (2012).[2] *See* App. 5-6. Westmoreland maintained that the miner never had complicated coal workers' pneumoconiosis,

[2] In pertinent part, 20 C.F.R. § 725.310 (2012) provides "upon the request of any party on grounds of a change in condition or because of a mistake in a determination of fact, the district director may, at any time before one year from the date of the last payment of benefits . . . reconsider the terms of an award or denial of benefits."

and that in awarding benefits, the agency had made a mistake in a determination of fact. *See* App. 6.

On modification, the ALJ initially considered the new evidence, found it was insufficient to prove the prior determination of complicated coal workers' pneumoconiosis was mistaken, and confirmed the award of benefits. App. 226. The Board vacated the award and remanded to the fact-finder for further consideration. App. 213. The Board agreed the ALJ had failed to conduct a *de novo* review of the previously submitted evidence, in conjunction with the newly submitted evidence, to determine if the agency had mistakenly found the presence of complicated pneumoconiosis and remanded the claim. App. 216-24.

On remand, the ALJ conducted an independent review of all the relevant evidence, both the previously submitted and newly submitted evidence, granted modification, and issued a denial of benefits to both the miner and survivor. App. 170. The prior decision had mischaracterized Dr. Fino's medical opinion (omitting his diagnosis of simple coal workers' pneumoconiosis) and the fact-finder concluded this mistake of fact warranted modification of the award of benefits. App. 195. In conducting a *de novo* review of the entire record, the ALJ concluded that the preponderance of the medical evidence established that the miner had simple, but not complicated, coal workers' pneumoconiosis. App. 198. Both the lifetime miner's claim and the survivor's claim were denied as the ALJ found pneumoconiosis contributed to neither

lifetime disability nor death, which was caused by a ruptured abdominal aortic aneurysm.

Unsatisfied with the decision on remand denying benefits in both claims, Mrs. Sharpe sought review before the Board. App. 159. Mrs. Sharpe raised four issues before the Board, but did not assert Westmoreland was estopped from challenging the finding of complicated coal workers' pneumoconiosis. App. 159. In a *per curiam* decision, the Board unanimously rejected the arguments raised and affirmed the decision denying benefits. *Id.*

B. Proceedings before the Fourth Circuit

Aggrieved by the Board's decision, Mrs. Sharpe petitioned the Fourth Circuit for review. After oral argument and additional briefing, the Fourth Circuit vacated the denial of benefits and remanded the case to the ALJ, reported as *Sharpe v. Dir., OWCP*, 495 F.3d 125 (4th Cir. 2007) ("*Sharpe I*"). App. 140-58. On remand, the ALJ was instructed to determine if approval of the modification request would render "justice under the Act." App. 157. He was charged to consider several factors – diligence, motive, and futility – and was cautioned that, notwithstanding the need for accuracy, modification was not an automatic right. App. 155-57.

C. Additional Proceedings before the Agency

To address the Fourth Circuit's concerns, the ALJ convened a hearing in 2008 and asked the parties to present arguments addressing the specific questions raised. App. 105. The ALJ considered not only the accuracy of the prior benefits award, but whether the modification request should be approved considering the new factors of diligence, motive, and futility. App. 106, 116-24. The ALJ resolved it rendered justice under the BLBA to proceed with the modification request. App. 124. The fact-finder then considered the new evidence (obtained sometime after the initial 1991 hearing), including Mr. Sharpe's terminal hospitalization records, and resolved that as a whole the evidence did not convince him this record established the existence of complicated coal workers' pneumoconiosis. App. 131. As a result, the award of benefits was vacated in the miner's claim and benefits were denied. App. 134, 137. The survivor's claim was also denied as death was not due to pneumoconiosis, but resulted from a ruptured abdominal aneurysm. App. 137-38.

Unsatisfied with the denial of benefits, Mrs. Sharpe again sought review before the agency. App. 64. The same panel that had considered the previous appeal, considered the subsequent appeal, and issued a split decision. Two Administrative Appeals Judges ("AAJ") agreed with Mrs. Sharpe that the ALJ had abused his discretion in finding Westmoreland's modification request rendered justice under the Act and reversed the denial of benefits. App. 95. Premised on

a finding of complicated coal workers' pneumoconiosis in the miner's claim, the panel majority reinstituted the award in the miner's and survivor's claims. App. 94. One AAJ dissented, explaining that the ALJ had not abused his discretion and had rationally considered the factors presented by the Fourth Circuit for reconsideration on remand. App. 95. Unlike the majority, this AAJ would affirm the ALJ's determination as rational, supported by substantial evidence, and consistent with law. App. 100.

Westmoreland timely sought reconsideration and rehearing before the Board sitting *en banc*. App. 61. More than a year later, on October 27, 2010, a split Board summarily denied the Petition for Modification and Rehearing *En Banc*. *Id.*

D. Additional Proceedings before the Fourth Circuit

Aggrieved with the Board's reversal of the ALJ's findings, Westmoreland sought review by the Fourth Circuit asking that the ALJ's decision be reinstated. App. 3. After oral argument, the Fourth Circuit affirmed the award of benefits instituted by the Board as reported in *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012). App. 1. Like the Board, the circuit panel was also split. The dissent explained the majority erred in reweighing the evidence and exceeded its standard of review by substituting its factual determinations for those made by the agency fact-finder. App. 32. Aggrieved by the

decision, Westmoreland sought reconsideration, which the Fourth Circuit denied. App. 252. Westmoreland now files its Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit contradicted this Court's precedent, ignored prior Fourth Circuit precedent, and created a split in the circuits by imposing limitations on the broad scope of modification.

The agency fact-finder is given the discretion to review and reevaluate a previous compensation order in two circumstances: 1) where there is a change in conditions; or 2) where there has been a mistake in a determination of fact. *See* 33 U.S.C. § 922 (2006 & Supp. V 2011), as incorporated by 30 U.S.C. § 932(a) (2006 & Supp. V 2011).[3] Except for a one year

[3] Via negative incorporation as per 30 U.S.C. § 932(a), the BLBA adopts the modification of awards provision of the LHWCA, 33 U.S.C. § 922, which provides, in pertinent part:

> Upon his own initiative, or upon the application of any party . . . 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, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

(Continued on following page)

limitation, the agency fact-finder's consideration of the merits of a modification request are not otherwise encumbered.[4] The Fourth Circuit now cabins the agency's discretion by inserting new factors, not included by Congress in the statute, as a prerequisite to granting a modification request. The Fourth Circuit's lack of fidelity to the Congressional choice of a broad, accuracy focused modification remedy conflicts with this Court's precedent and prior Fourth Circuit precedent, and creates a circuit split, which combine to require this Court to resolve the conflict.

A. Limiting modification is contrary to this Court's precedent.

Grounds by which a 33 U.S.C. § 922 ("§ 22") modification can proceed are not limited to factual errors, cases involving new evidence, or changed circumstances. Section 22 provides the agency discretion to reconsider prior awards in the interest of accuracy. In *O'Keeffe v. Aerojet-General Shipyards, Inc.*, this Court reversed the D.C. Circuit, explaining that modification could be instituted to reconsider the ultimate

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> Such new order shall not affect any compensation previously paid. . . .

33 U.S.C. § 922 (2012). 20 C.F.R. § 725.310 implements modification in BLBA cases.

[4] The agency fact-finder may be either a district director or an ALJ. *Betty B Coal Co. v. Dir., OWCP*, 194 F.3d 491, 497 n.1 (4th Cir. 1999).

question of fact even *without new evidence*. 404 U.S. 254, 256 (1971). The D.C. Circuit had held in the absence of changed conditions or new evidence clearly demonstrating mistake in the initial determination, the statute, 33 U.S.C. § 922, simply does not confer authority upon the Deputy Commissioner to receive additional but cumulative evidence and change his mind. *Id.* at 255. This Court reversed, explaining "[n]either the wording of the statute nor its legislative history supports this 'narrowly technical and impractical construction.'" *Id.*

Modification is not limited to particular factual errors, or to cases involving new evidence or changed conditions. *Id.* at 256. The Act was amended in 1934 expressly to broaden the grounds to modify an award when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the Act. *Id.* at 255-56 (citing S. Rep. No. 588, 73d Cong., 2d Sess., 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934)). The plain import of this amendment 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. *Id.* at 256. The accuracy of prior benefits determinations was a primary concern in § 22 actions. Like the D.C. Circuit in *O'Keeffe v. Aerojet-General*, the Fourth Circuit impermissibly imposes limitations on the scope of modification by requiring the agency fact-finder to

consider quasi-equitable factors divorced from the prior benefits determination.

Just three years prior to *O'Keeffe v. Aerojet-General*, this Court had previously addressed the scope of a modification request. *See Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968). After an initial claim for benefits under the LHWCA was denied, the widow Banks discovered an eyewitness to her husband's work-connected injury and sought modification. *Id.* at 460-61. This Court reversed the Seventh Circuit's holding that the widow's modification action was barred by *res judicata*.

Interpreting the scope of § 22 modification, this Court explained there was "nothing in this legislative history to support the respondent's argument that a 'determination of fact' means only some determinations of fact and not others." *Id.* at 465. A mistake in a determination of fact as contained in § 22 is not limited to clerical errors or matters concerning a benefits claimant's disability. *Id.* The Fourth Circuit limits the scope of modification by imposing new "significant factual issues" for the agency to consider. Similar to claim preclusion, these new factual issues act as a bar to modification, notwithstanding the inaccuracy of the prior benefits decision.

The Court again considered the scope of § 22 modification under the LHWCA in *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291 (1995). Here, the Court explained, "[o]n two occasions we have construed the phrase 'mistake in a determination of fact'

and observed that nothing in the statutory language supports attempts to limit it to particular kinds of factual errors or to cases involving new evidence or state changed circumstances." *Rambo*, 515 U.S. at 295-96 (citing *O'Keeffe v. Aerojet-General* and *Banks*). The Ninth Circuit erred in *Rambo* by not basing its analysis "on the language of the statute, where analysis in a statutory construction case ought to begin, for 'when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished'." *Id.* at 295 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)).

The language of § 22 provides no support for a narrow construction of the phrase "change in conditions." *Id.* at 296. Congress did not intend to limit the bases for modifying awards to a single condition. *Id.* The applicable "conditions" are those that entitle the claimant to benefits in the first place, the same conditions on which continuing entitlement is predicated. *Id.* The fundamental purpose of the LHWCA is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury; where that wage-earning capacity has been reduced, restored, or improved, the basis for compensation changes and the statutory scheme allows for modification. *Id*. at 297. Similarly, the stated purpose of the BLBA is to provide benefits to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was

due to such disease. 30 U.S.C. § 901(a) (2006 & Supp. V 2011). The accuracy of the prior benefits determination is thus the paramount concern of modification. There is no basis to impose factors of motive, diligence, or futility on the agency prior to considering a § 22 modification request. The statute grants the agency the discretion to consider the circumstances of each request and act on the request accordingly. Like the Ninth Circuit, the Fourth Circuit erred by not restraining its analysis to the language of the statute and in setting aside the agency determination that focused on the fundamental purpose of the Act – to compensate those employees with a covered injury.

The Fourth Circuit erred in mandating the ALJ consider these factors in *Sharpe I* and again erred when it reversed the ALJ's factual findings in *Sharpe II*. The Fourth Circuit failed to restrain its analysis to whether the agency fact-finder's decision was supported by substantial evidence in the record, whether the decision was consistent with the unambiguous and broad language of the statute, and this Court's precedent explaining the discretion afforded agency fact-finding under a § 22 modification proceeding.

B. The Fourth Circuit ignored its own precedent.

Prior to *Sharpe I*, the Fourth Circuit correctly acknowledged the extraordinary discretion accorded to the agency fact-finder:

> This modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings. Section 22 "vest[s] 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*." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256, 92 S.Ct. 405, 30 L.Ed.2d 424 (1971) (emphasis added); *Jessee v. Dir., OWCP*, 5 F.3d 723, 725 (4th Cir. 1993) (concluding that the deputy commissioner may "simply rethink" a prior finding). Congress intended that this discretion be exercised whenever "desirable in order to render justice under the act." *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 464, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968). Moreover, *any* mistake of fact may be corrected, including the ultimate issue of benefits eligibility. *Jessee*, 5 F.3d at 725.

Betty B Coal Co. v. Dir., OWCP, 194 F.3d 491, 497 (4th Cir. 1999). As the Fourth Circuit explained only months prior to *Sharpe II*:

> As in all agency cases, *we must be careful not to substitute our judgment for that of the ALJ. Hays v. Sullivan,* 907 F.2d 1453, 1456 (4th Cir. 1990) ("Ultimately, it is the duty of the administrative law judge reviewing a case, and not the responsibility of the courts, to make findings of fact and to resolve conflicts in the evidence."). Because the ALJ is the trier of fact, we "defer to the ALJ's evaluation

> of the proper weight to accord conflicting medical opinions." *Stiltner v. Island Creek Coal Co.,* 86 F.3d 337, 342 (4th Cir. 1996). As long as substantial evidence supports an ALJ's findings, "[w]e must sustain the ALJ's decision, even if we disagree with it." *Smith v. Chater,* 99 F.3d 635, 637-38 (4th Cir. 1996). We review the legal conclusions of the Board and the ALJ de novo. *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 208 (4th Cir. 2000).

Harman Mining Co. v. Dir., OWCP, 678 F.3d 305, 310 (4th Cir. 2012) (emphasis added).

As the dissent points out in *Sharpe II*, a conflict now exists within the Fourth Circuit as to the proper scope of review. Other longstanding and even recently published cases arising under the BLBA from the Fourth Circuit state that on review a court must be careful not to substitute its judgment for that of the ALJ. App. 34 (Agee, J., dissenting) (citing *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 240 (4th Cir. 2011) and *Hays*, 907 F.2d at 1456). Here, the agency fact-finder's findings are improperly jettisoned for having reached an undesired conclusion. The proper standard of review prohibits such an unfettered reweighing of the facts on appeal. The reviewing court is required to restrain its desire for its own favored outcome in deference to the ALJ's factual ruling. "If we flunk that test – if we fail to exercise restraint – then we forsake the rule of law, embody only our own preferences and prejudices, and deal the people and their institutions a staggering blow."

J. Harvie Wilkinson III, *Cosmic Constitutional Theory* 7 (2012). *Sharpe II* now leaves the proper standard of review in doubt.

First, in *Sharpe I*, and now in *Sharpe II*, the Fourth Circuit imposes new limitations on the statutory language and on considering particular types of factual errors, new evidence, or changes in circumstances. In so doing, the limitations of § 22 modification as redefined by the Fourth Circuit decisions now directly conflict with the statutory language of § 22 and this Court's interpretation of modification under § 22 in *Banks*, *O'Keeffe v. Aerojet-General*, and *Rambo*. The Fourth Circuit abandoned the highly circumscribed and deferential standard of review in an unrestrained reweighing of the § 22 modification request. This lack of restraint is evidenced by its second guessing of the agency fact-finder and is contrary to the scope of review for § 22 modification actions.

C. *Sharpe* creates a conflict among the circuits.

The other circuit courts of appeals to remand § 22 modification requests based on a party's conduct did not go as far as the majority in *Sharpe II*. For example, the D.C. Circuit suggested that an employer's abuse of the adjudicatory system could justify opting not to allow modification but remanded the case to the Board with instruction that "it is within the discretion of the administrative law judge, subject to review by the Board, to determine whether reopening

would render justice under the Act." *McCord v. Cephas*, 532 F.2d 1377, 1381 (D.C. Cir. 1976) (Party's abuse of the adjudicatory system by failing to meaningfully participate can be found to prohibit modification request). The Seventh Circuit vacated the denial of modification as the ALJ had not grounded the decision to reopen in the language and policies of the BLBA. *Old Ben Coal Co. v. Dir., OWCP*, 292 F.3d 533, 548 (7th Cir. 2002); *see also Keating v. Dir., OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995) (The BLBA modification provision should be broadly construed to allow "an ALJ to reconsider the evidence in determining whether there was a mistake of fact, even the ultimate fact of entitlement."); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825 (6th Cir. 2001) (Section 22 "is a broad reopening provision that is available to employers and employees alike.").

Explaining that the ALJ is in a unique position to assess the motivations of a party, the merits of the motion, and the agency's concerns, the Seventh Circuit refused to unnecessarily cabin the ALJ's ability to address the complexities of a motion to reopen. *Id.* at 547. The ALJ was cautioned that while the diligence of the parties may be considered as well as the number of times a party has sought reopening, a particular case ought to be weighed not under an amorphous "interest of justice" standard, but under the oft-articulated "justice under the Act" standard which grounds a § 22 modification request in the primary concern with accuracy in benefits determinations. *Id.* at 547 (citing *O'Keeffe v. Aerojet-General*, 404 U.S. at

255). While these other circuit courts refused to impinge on the ALJ's discretionary fact-finding duties, the Fourth Circuit impinges on the agency's discretion.

The fear voiced by both the employer and the DOL before the Seventh Circuit in *Old Ben Coal Co.* has now come to fruition following the *Sharpe* decisions. As discussed by the dissent in *Old Ben Coal Co.*:

> Old Ben and the DOL raise the specter of a world in which employers can never win modifications, should the ALJ's decision here be upheld. With all due respect, there is a Chicken Little-like quality to that argument. There is no reason to believe that an interpretation of § 22 that adopts an "interest of justice" rule to govern exercises of discretion would lead to such a result.

292 F.3d at 554 (Wood, J., dissenting). But the sky has now fallen.

The ALJ found, after considering the very factors the Fourth Circuit directed him to consider in *Sharpe I*, that Westmoreland had presented a valid request for modification. Consistent with the precedent of this Court and the Fourth Circuit, neither new evidence nor a "smoking gun" is necessary to request the adjudicator reconsider the terms of an award. In this case, a "smoking gun," consisting of new x-rays and CT scans, was produced. By imposing its will on the agency fact-finder, *Sharpe II* provided an

interpretation of § 22 that prohibits this employer from correcting a mistake that occurred in the prior claim – by prohibiting proof that Mr. Sharpe was not afflicted with complicated coal workers' pneumoconiosis and that neither he nor his survivor are entitled to benefits. By prohibiting modification in this case, the Fourth Circuit defeats the purpose of the BLBA that only worthy beneficiaries be found entitled to benefits under the Act. *See* 30 U.S.C. § 901(a) (2006 & Supp. V 2011). "Justice under the Act" is not served under the *Sharpe* decisions.

II. The Fourth Circuit exceeds its limited standard of review of agency decisions.

In *Sharpe I*, the Fourth Circuit demanded the ALJ reevaluate his grant of modification and denial of benefits (even though it was affirmed by the Board as consistent with law and based on substantial evidence) to determine: 1) why the modification request was filed years after the award of benefits in the miner's claim had become final; 2) whether the motive in seeking modification was deemed suspect; 3) whether the modification request was part and parcel of a defense to a subsequent survivor's claim; 4) whether the modification request was futile or moot; and 5) whether the request was akin to seeking an advisory opinion. App. 155-56. On reconsideration, the ALJ considered the diligence, motive, and futility as requested, and found modification rendered justice under the BLBA. App. 101. The 1993 ALJ's decision conferring lifetime benefits to the miner premised on

a mistaken finding of complicated coal workers' pneumoconiosis was wrong and should be corrected to accomplish the purpose of the BLBA, which is to confer benefits on only those disabled due to chronic dust disease arising from coal mine employment.[5] App. 124. Reconsideration of the prior evidence, along with new evidence, proved the miner did not have complicated coal workers' pneumoconiosis. *Id.* Given this reality, the fundamental purpose of the BLBA – to compensate only those disabled due to pneumoconiosis – was no longer served. Westmoreland's request was neither futile, nor made with improper diligence, nor suspect to an improper motive. App. 120-21. In its *Sharpe II* decision, the majority cavalierly sweeps the 2008 ALJ fact-based decision aside. Even if justified in imposing new considerations on modification, the reasons for setting aside the 2008 ALJ decision are untenable.

Sharpe II exceeds the scope of review afforded circuit courts of administrative decisions. In failing to restrain its review, the Fourth Circuit again fails to abide by the precedent of this Court. As explained, the role of the circuit court is not to reweigh the factual information in cases arising from agencies:

> "It matters not that the basic facts from which the Deputy Commissioner

[5] Mrs. Sharpe, as the widow whose rights could be prejudiced, was made a party to, and as represented by counsel, fully participated in the modification action concerning her husband's lifetime claim. *See* 20 C.F.R. § 725.360(b) (2012).

> draws this inference are undisputed rather than controverted. . . . is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. . . . Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. . . ." *Cardillo v. Liberty Mutual Ins. Co.*, supra, 330 U.S. at 478.
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> The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner are to be accepted unless they are irrational or 'unsupported by substantial evidence on the record . . . as a whole.' *O'Leary v. Brown-Pacific-Maxon, Inc.*, supra, 340 U.S. at 508.

O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc., 380 U.S. 359, 361-62 (1965).

To avoid the application of this Court's precedent and a limited review, the majority describes the ALJ's actions on remand as having "concocted a new test for modification requests, under which modification must automatically be granted if the adjudicator finds: 1) a prior mistake of fact; and 2) an absence of so-called

'bad conduct' by the requesting party." App. 23. The modification request is held to have been "belatedly made with an improper motive and without compelling new evidence, [so as] the interest in finality rightly carries a great deal of weight." App. 27. Such an unsupported factual finding inserted on appeal by the Fourth Circuit ignores the extraordinary discretion accorded the ALJ by the language of the statute and its implementing regulations and its scope of review under the Administrative Procedure Act. *See O'Keeffe v. Smith*, 380 U.S. at 362. By determining that the § 22 modification request was made with *inter alia*, an "improper motive," the Fourth Circuit fails to abide by the restraints of its statutory limitations on its scope of review.

The belief that the modification request was belatedly made, that modification was premised on an improper motive, and that modification was sought without compelling new evidence are all untenable in the eyes of the agency fact-finder. As long as the agency's decision is supported by substantial evidence, it must be affirmed. *Id*. at 361-62. A request for modification is timely made if made within one year of the date of the last payment of benefits. 20 C.F.R. § 725.310(a) (2012). The request was timely. *See* App. 5-6. Modification requests under the statute and implementing regulation do not require a determination of proper or improper motive. 33 U.S.C. § 922 (2006 & Supp. V 2011); 20 C.F.R. § 725.310(a) (2012). Rather the statute and implementing regulation provide the agency the discretion to reconsider

either factual errors or new evidence to determine if the prior award is flawed. Westmoreland's motive was to pay benefits as mandated by the BLBA and not pay those unentitled to BLBA benefits. The notion the request was made without compelling new evidence is devoid of merit. Modification does not always require a smoking-gun factual error, changed conditions, or startling new evidence. *Jessee*, 5 F.3d at 725. But here, critical new evidence was presented. As explained by the agency fact-finder, there was compelling new evidence, *additional x-ray interpretations and CT scan interpretations,* showing the diagnosis of granulomatous disease was indeed correct and that the prior finding of complicated coal workers' pneumoconiosis could no longer be sustained. App. 128, 200. It is the ALJ, as fact-finder, that must discern whether the prior result cannot stand because of "compelling" new evidence or even upon further reflection on a case without new evidence.

As explained by the dissent:

> Thus, our search for "justice under the Act" should be guided, first and foremost, by the need to ensure accurate benefit distribution. *See, e.g., O'Keeffe* . . . (modification statute provides the deputy commissioner with "broad discretion . . . *to review factual errors* in an effort 'to render justice under the act' ") (emphasis added); *Banks v. Chicago Grain Trimmers Ass'n* . . . (noting that the purpose of the modification statute was to "allow [ ] modification *where a mistake in a determination of fact makes such modification desirable* in

order to render justice under the act") (emphasis added) . . . *Old Ben Coal Co.* ("justice under the Act . . . *cabins the discretion* of the ALJ to keep in mind the basic determination of Congress that *accuracy of determination* is to be given great weight in all determinations under the Act") (emphasis added). . . .

Thus, precedent directs that accuracy must be, at the very least, the jumping off point for any discussion of "justice under the act." As the Seventh Circuit recognized in *Old Ben Coal Co. v. Dir., OWCP,* however, "justice under the act" is not the same as "the interest of justice" – a standard the court described as "amorphous." 292 F.3d 533, 547 (7th Cir. 2002). Therefore, to the extent that factors other than accuracy are relevant to the ALJ's decision, they should be considered in light of the stated preference for accuracy in the award of benefits. *See id.* ("This distinction is not simply one of semantics. The ['justice under the Act'] formulation cabins the discretion of the ALJ to keep in mind the basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act."). . . .

The ALJ began by setting forth the applicable legal standard for review of Westmoreland's modification request. The ALJ carefully recited the holdings of *Sharpe I* and *Old Ben Coal Co.,* placing appropriate emphasis on the latter's pronouncement that the ALJ must "'keep in mind the basic determination that accuracy of determination

is to be given great weight in all determinations under the Act.'" 2008 ALJ Decision at 5 (quoting *Old Ben Coal Co.*, 292 F.3d at 547).

After discussing several cases on point, the ALJ arrived at the following legal conclusions:

> (1) accuracy is the overarching goal of "justice under the Act," and (2) modification should be barred only where the party seeking it has engaged in the type of conduct that occurred in *McCord* (refusal to participate in the prior administrative proceedings, or in *Kinlaw* [*v. Stevens Shipping and Terminal Co.,* 33 BRBS 68 (1999)]) (attempting to overcome earlier litigation mistakes by "retrying" the case).

2008 ALJ Decision at 7.

The majority mischaracterizes this holding, accusing the ALJ of crafting a formulation wherein "modification must automatically be granted if the adjudicator finds (1) a prior mistake of fact and (2) an absence of so-called 'bad conduct' by the requesting party." *Ante* at 328. But, as the foregoing quote proves, the ALJ did not hold that modification is automatic in those circumstances. Rather, the ALJ simply explained an established point of law: because accuracy is the overarching purpose of the modification statute, modification should be granted where the party requesting modification demonstrates that the ruling sought to be modified

> was factually incorrect, unless there is a very compelling reason not to grant modification (i.e., to set accuracy aside). The ALJ gave two nonexclusive examples from the caselaw, but at no point did the ALJ state a *per se* rule or limit the scope of analysis in future cases with different facts. Tellingly, the ALJ gave several additional examples of factors that might weigh against modification in an appropriate case (serial petitions, etc.). *See* 2008 ALJ Decision at 11 n.16. A fair reading of the full text of the ALJ's opinion shows the majority opinion mischaracterizes its actual holding.
>
> The ALJ's formulation of "justice under the act" was not guided by erroneous legal principles. To the contrary, it was based on the unassailable legal principle that accuracy is of paramount importance in rendering modification decisions. In this case, it is the majority that arbitrarily alters the "justice under the act" standard to something far removed from the purposes of the Black Lung Benefits Act. The majority's approach is counterintuitive, asking first whether the party requesting modification has engaged in some manner of egregious conduct (or, as is in the case at bar, benign conduct deemed suspect by the majority), and, only upon answering that question in the negative deems the accuracy of the benefits award to be relevant. Such an approach does not render "justice under the Act."

Sharpe II, 692 F.3d at 335-38 (Agee, J., dissenting) (App. 40-47).

As the majority correctly states, a circuit court has a limited standard of review in agency cases. App. 20. The majority does not restrain itself to its limited standard of review. App. 33-34 (Agee, J., dissenting) (citing *Harman Mining Co.*, 678 F.3d at 310). The correct standard mandates a circuit court affirm the ALJ's decision if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law. *Id.*

Circumventing the discretion afforded by law to the ALJ, the majority cloaks its analysis in the false veil of *de novo* review stating that the Board properly concluded the ALJ's analysis was "guided by erroneous legal principles." App. 36 (Agee, J., dissenting). Neither this administrative record nor the ALJ's decision can support such a legal conclusion.

The agency's fact-finder granted modification after thoughtful consideration of the factors identified in *Sharpe I*, factors then described as factual in nature. "[T]he majority, apparently dissatisfied with the answers provided by the ALJ, now undertakes *de novo* review to revisit those answers and provide substitute factual answers it would have preferred had it been sitting as the ALJ." *Id.* This a reviewing court may not do.

The reformation of what the agency can consider impacts all § 22 modification requests under the LHWCA and BLBA. The Fourth Circuit's departure from its highly circumscribed standard of review is an important legal issue this Court should address

in the context of this § 22 modification request. The use of unrestrained *de novo* review is no more permissible under the BLBA and the LHWCA than any other administrative review statute or the APA.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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