

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

WESTMORELAND COAL COMPANY,

Petitioner

v.

MAEANN SHARPE

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

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT OF JURISDICTION

This case involves a lifetime claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, filed by William A. Sharpe, and a claim for survivor's benefits filed by his widow, Maeann Sharpe.¹ On July 17, 2007, the Court vacated the prior decisions on these claims by a Department of Labor (DOL) administrative law judge (ALJ) and the Benefits Review Board, and remanded the case for further consideration. *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007).

On remand, the ALJ granted Westmoreland Coal Company's request for modification of Mr. Sharpe's lifetime claim (terminating the award on that claim), and denied Mrs. Sharpe's survivor's claim on March 24, 2008.² Mrs. Sharpe timely appealed the ALJ's

¹ Section 1556 of the Affordable Care Act amended the BLBA, revising the entitlement criteria for certain claims. Pub. L. No. 111-148, § 1556(a), (b) (2010). These amendments, however, apply only to claims filed after January 1, 2005. Pub. L. No. 111-148, § 1556(c) (2010). Since the claims here were filed in, respectively, 1989 and 2000, the amendments do not impact this case.

² Westmoreland does not contest that it is the party liable for paying benefits on both claims. See 20 C.F.R. § 725.495 (1999).

decision to the Board on April 22, 2008. *See* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (thirty-day period for appealing ALJ decisions). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3).

On June 17, 2009, the Board reversed the ALJ's decision, denied Westmoreland's request for modification of the lifetime claim, and awarded the survivor's claim. Westmoreland timely moved for reconsideration on July 16, 2009. *See* 20 C.F.R. § 802.407(a) (thirty-day period for seeking reconsideration of Board decision). The Board denied the motion on October 27, 2010.

Westmoreland timely petitioned this Court to review the Board's decision on November 24, 2010. *See* 33 U.S.C. § 921(c) (sixty-day period for seeking review after final Board decision); 20 C.F.R. § 802.406 (sixty-day appeal period runs from issuance of decision on reconsideration); *Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215, 219 (7th Cir. 1986) (same). The Court has jurisdiction over Westmoreland's petition under 33 U.S.C. § 921(c), as the "injury" in this case occurred in Virginia.

STATEMENT OF THE ISSUES

1. Westmoreland cannot recover any payments made on Mr. Sharpe's claim from Mr. Sharpe's estate, his widow or DOL. Moreover, relief in Mrs. Sharpe's claim from the collateral-estoppel effect of factual findings made in Mr. Sharpe's claim is not a remedy available through modification. Did the Board, therefore, correctly hold that Westmoreland's attempt to modify the award on Mr. Sharpe's claim is futile?

2. Westmoreland did not appeal the 1994 Board decision upholding the award of benefits on Mr. Sharpe's claim. Hence, that decision became final under DOL's regulations. Did the Board correctly hold that the 1994 decision was final for purposes of the collateral-estoppel rule?

STATEMENT OF THE FACTS

The issues we address are procedural in nature. Thus, we will summarize the relevant procedural history, but not the medical evidence in the record.

A. Statutory and Regulatory Background

Westmoreland's appeal involves a request for modification of a previously denied claim. Section 22 of the Longshore and Harbor

Workers' Compensation Act (LHWCA), 33 U.S.C. § 922, as incorporated into the BLBA by 30 U.S.C. § 932(a), provides that a party may request modification of a compensation order "at any time prior to one year after the date of the last payment of compensation, or . . . after the rejection of a claim." 33 U.S.C. § 922. The statute also identifies the remedies available on modification: when modification is granted, "a new compensation order . . . may terminate, continue, reinstate, increase, or decrease . . . compensation, or award compensation." *Id.* Section 22 is implemented in black lung claims by 20 C.F.R. § 725.310 (1999).³

B. Prior Proceedings

1. Proceedings prior to the Court's 2004 decision.

a. Mr. Sharpe's Claim

The Court's previous decision sets out in detail the procedural

³ The black lung program regulations were revised effective January 19, 2001. See 65 Fed. Reg. 79920-80107 (Dec. 20, 2000). Some of the revised regulations, such as the revised version of Section 725.310 apply only to claims filed on or after that date. See 20 C.F.R. § 725.2(c). Thus, the prior (1999) version of section 725.310 applies here, as Mr. Sharpe's claim was filed in 1989. Except where noted, regulatory citations in this brief refer to the current version of the regulations.

history of this case up until it was appealed to the Court. *Sharpe*, 495 F.3d at 128-130. In brief, Mr. Sharpe filed his claim in 1989. An ALJ ultimately awarded that claim in 1993 on the ground that Mr. Sharpe had “complicated” pneumoconiosis.⁴ See 30 U.S.C. § 921(c)(3); *Double B Min., Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999). The Board affirmed the award in 1994. Westmoreland did not appeal the Board’s decision, and paid benefits until his death in 2000.

Although the district director had awarded benefits on Mr. Sharpe’s claim in 1989, Westmoreland declined to begin paying benefits. As a result, the Black Lung Disability Trust Fund paid both compensation and medical benefits to Mr. Sharpe on an interim basis for various periods between December 1989 and

⁴ If a miner had complicated pneumoconiosis, then there are irrebuttable presumptions both that he was totally disabled due to pneumoconiosis and that his death was due to pneumoconiosis. See 30 U.S.C. § 921(c)(3). As a result, a finding of complicated pneumoconiosis will support an award of benefits in both a miner’s claim and a survivor’s claim. See *Eastern Assoc. Coal Corp. v. Director, OWCP*, 220 F.3d 250, 255 (4th Cir. 2000); *Double B. Min., Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999).

December 1994. Breeskin Affidavit (BA) at 3;⁵ see 20 C.F.R. § 725.522. The Trust Fund eventually paid \$17,083.20 in interim compensation benefits. BA at 3. Westmoreland reimbursed the Trust Fund for the interim compensation payments made on Mr. Sharpe's claim on January 25, 1995. *Id.*

On February 1, 1995, DOL requested that Westmoreland reimburse an additional \$602.70, for medical diagnostic and treatment costs incurred by the Trust Fund. Joint Appendix, Volume II (JA-II) at 148; BA at 3. DOL received payment of this amount from Westmoreland on March 15, 1995. BA at 3.

On April 11, 1995, a DOL district director assessed interest charges against Westmoreland, requiring the company to pay \$4,094.54 in interest on the interim compensation benefits paid by the Trust Fund, and \$291.06 in interest on the diagnostic and treatment expenses paid by the Trust Fund. BA at 3-4. On April 25, 1995, DOL received a payment of \$4,094.54 from Westmoreland

⁵ "Breeskin Affidavit" refers to the affidavit of Steven D. Breeskin, Director of the Division of Coal Mine Workers' Compensation. Concurrent with this brief, we have filed a motion to supplement the record with Mr. Breeskin's affidavit.

for interest on the interim compensation benefits. BA at 4. On May 15, 1995, DOL received a payment of \$291.06 from Westmoreland for interest on the diagnostic and treatment expenses. *Id.* With these payments, Westmoreland fully discharged its liability to the Trust Fund on Mr. Sharpe's claim. *Id.*

b. Mrs. Sharpe's Claim

After Mr. Sharpe's death, Mrs. Sharpe applied for survivor's benefits. Westmoreland then filed a request for modification, seeking to terminate the award on Mr. Sharpe's claim. *See* 33 U.S.C. § 922, as incorporated by 30 U.S.C. § 932(a). ALJ Robert D. Kaplan ultimately terminated the award on Mr. Sharpe's claim in 2004. He found that Westmoreland established that Mr. Sharpe did not have complicated pneumoconiosis. ALJ Kaplan also denied Mrs. Sharpe's survivor's claim, finding that she failed to prove her husband died due to pneumoconiosis. *See* 20 C.F.R. § 718.205. Mrs. Sharpe appealed, but the Board affirmed ALJ Kaplan's decision in 2005. Mrs. Sharpe then requested review by this Court.

2. The Court's 2004 decision.

In its previous decision, the Court vacated both the Board's 2005 decision and ALJ Kaplan's 2004 decision, and remanded the

case.⁶ 495 F.3d 125. The Court held that ALJ Kaplan and the Board had been guided by “erroneous legal principles” in terminating the award on Mr. Sharpe’s lifetime claim. 495 F.3d at 134. While the grant or denial of a modification request is within an ALJ’s discretion, ALJ Kaplan failed to properly exercise his discretion. See 495 F.3d at 130-32. ALJ Kaplan erroneously focused his inquiry solely on the accuracy of the prior award on Mr. Sharpe’s claim, and did not address whether granting Westmoreland’s request to terminate benefits would “render justice under the Act.” *Id.*

The Court thus vacated ALJ Kaplan’s granting of modification on Mr. Sharpe’s claim (and his ensuing denial of Mrs. Sharpe’s survivor’s claim) and remanded the case for him to determine whether terminating the lifetime award would “render justice.” 495 F.3d at 134. In so doing, the Court instructed ALJ Kaplan to consider several specific factors:

⁶ Following oral argument, the Court requested supplemental briefing from all parties, addressing the remedies available on modification, and the collateral-estoppel effect of the complicated-pneumoconiosis finding. See 495 F.3d at 130 & n. 12.

—whether Westmoreland was diligent in pursuing modification;

—whether the company’s motive was to thwart Mrs. Sharpe’s “good faith [survivor’s] claim;”

—whether the attempt to modify Mr. Sharpe’s claim was “futile” because no relief could be obtained on that claim;

—and whether “finality interests” weighed in favor of or against modification.

495 F.3d at 132-33 & n. 15. With respect to “futility,” the Court noted that Westmoreland was precluded from recovering any overpayment from Mrs. Sharpe, and that the company “is only entitled to seek recovery of overpayments . . . , if any is to be had, from Mr. Sharpe’s estate.” 495 F.3d at 132.

3. The ALJ’s decision on remand.

On remand, ALJ Kaplan held a new hearing. JA-II at 14. At the hearing, Mrs. Sharpe testified that her husband’s will was never probated, no estate was created, and that all of his property passed to her as the survivor of a joint tenancy. JA-II at 23-24, 26.

Westmoreland’s counsel conceded that the company could not recoup any benefits from Mr. Sharpe’s estate, should the award on his claim be terminated. JA-II at 50.

ALJ Kaplan issued a decision granting Westmoreland’s

modification request and terminating benefits on Mr. Sharpe's claim. JA-II at 107. He concluded that "justice under the Act" did not bar Westmoreland's modification request. JA-II at 110-18. ALJ Kaplan prefaced his analysis by stating that "accuracy is the overarching goal of 'justice under the Act,'" and that modification should be barred only in the event of particularly egregious conduct by the moving party. JA at 113.

With regard to the specific factors the Court directed him to address, ALJ Kaplan found that consideration of diligence and motive did not bar modification. JA-II at 113-15. Rejecting the "insinuat[ion] that . . . defeat[ing] the survivor's claim . . . would be unfair and inequitable" and noting that upholding an erroneous award on Mr. Shape's claim "could result in the unjust enrichment of his wife," ALJ Kaplan found that avoidance of payment of Mrs. Sharpe's claim was not an improper motive for modification. JA-II at 114, 115. He also found that any lack of diligence by Westmoreland in seeking to modify Mr. Sharpe's award did not harm the Sharpes, but "did harm Westmoreland." JA-II at 114.

He also considered Mrs. Sharpe's claim together with her husband's lifetime claim in determining whether Westmoreland's

modification request was futile, noting that:

[the Court's] creation in *Pond Creek Mining* of the right of a survivor to take a favorable determination in a miner's claim and apply it to the survivor's claim . . . provides rebuttal to the implication of the Court[] . . . that the modification request is now a futility.

JA-II at 115. Since modification of Mr. Sharpe's claim would preclude application of the complicated-pneumoconiosis finding in Mrs. Sharpe's claim, ALJ Kaplan concluded that modification was not futile. *Id.*

Turning to the merits of Mr. Sharpe's claim, ALJ Kaplan concluded that Westmoreland had established a mistake in fact in the prior award of that claim, essentially reiterating his 2004 finding that Mr. Sharpe did not have complicated pneumoconiosis. JA-II at 118-22. He further found that Mr. Sharpe was not otherwise entitled to benefits, as he was not totally disabled prior to his death and, accordingly, terminated the award on his claim. JA-II at 122-24; *see* 20 C.F.R. § 718.204(b). Finally, ALJ Kaplan denied Mrs. Sharpe's survivor's claim because she failed to prove that her husband's death was due to pneumoconiosis. JA-II at 124; *see* 20 C.F.R. § 718.205.

4. *The Board's decision on remand.*

Mrs. Sharpe appealed, and a divided panel of the Board reversed ALJ Kaplan's decision. JA-II at 127. The majority held that ALJ Kaplan failed to properly consider whether modification would render "justice under the Act" as directed by this Court. JA-II at 132-38. Upon review of the record, the majority determined that Westmoreland sought modification of Mr. Sharpe's claim to "circumvent the law"—specifically, to evade the application of the collateral-estoppel rule in Mrs. Sharpe's claim. JA-II at 133-34. The Board majority concluded that permitting modification in this circumstance would not render justice, as Westmoreland's modification request was simply an attempt to thwart Mrs. Sharpe's good-faith claim for benefits. *Id.*

With respect to futility, the majority held that ALJ Kaplan erred in considering the two claims together. JA-II at 134. Rather, Westmoreland was required to establish that it had a remedy on the claim it sought to modify—Mr. Sharpe's lifetime claim. *Id.* Since the company admitted it could not recoup any benefits paid on that claim, its modification request was futile. *Id.* The majority also concluded that consideration of "accuracy" did not support

modification, holding that ALJ Kaplan erred in finding a mistake in fact on the question of complicated pneumoconiosis. Thus, the panel majority reversed ALJ Kaplan's termination of the award of benefits on Mr. Sharpe's lifetime claim. *Id.*

The majority also held that the complicated-pneumoconiosis finding from Mr. Sharpe's claim was binding in Mrs. Sharpe's survivor's claim under the collateral-estoppel rule. JA-II at 138-42. In so doing, it rejected Westmoreland's arguments that the award of benefits on Mr. Sharpe's claim was not final, that the company had not had a "full and fair opportunity" to litigate the issue in Mr. Sharpe's claim, and that it was unfair to apply the collateral-estoppel rule in Mrs. Sharpe's claim. JA-II at 140-41. Thus, the majority reversed the denial of Mrs. Sharpe's claim. JA-II at 142. The dissenting judge would have affirmed ALJ Kaplan's decision. JA-II at 143-146.

Westmoreland sought reconsideration, but the Board, sitting *en banc*, denied the company's request. JA-II at 148.

Westmoreland then petitioned this Court for review. JA-II at 151.

SUMMARY OF THE ARGUMENT

The Court should affirm the Board's holding that Westmoreland's request for modification of the award on Mr. Sharpe's lifetime claim is futile. The company cannot recover any benefits paid from either Mr. Sharpe's estate or from Mrs. Sharpe. In addition, there is no on-going dispute between DOL and Westmoreland with respect to Mr. Sharpe's claim: Westmoreland fully paid everything it owed to DOL in 1995, and has no legal basis to seek recovery of any of those payments from DOL. Finally, relief from the collateral-estoppel effect of the complicated-pneumoconiosis finding in Mr. Sharpe's claim is not a valid basis for modification. As the Court indicated in its prior decision, the party seeking modification must show that it can obtain relief on the claim on which modification is sought.

The Court should also affirm the Board's holding that the award of benefits on Mr. Sharpe's claim was "final" for collateral-estoppel purposes. That award became final under DOL's regulations when Westmoreland opted not to appeal the Board's 1994 decision on Mr. Sharpe's claim. Since Westmoreland does not genuinely contest that any other element of the collateral-estoppel

rule is not satisfied, the finding of complicated pneumoconiosis in Mr. Sharpe's claim is binding in Mrs. Sharpe's survivor's claim.⁷

ARGUMENT

A. The Board correctly determined that Westmoreland's request for modification on Mr. Sharpe's claim is futile.

In its prior decision, the Court remanded the case, in part, for ALJ Kaplan to determine whether Westmoreland's request for modification of Mr. Sharpe's lifetime claim was futile—*i.e.*, whether it could obtain any relief on that claim. On remand, ALJ Kaplan determined that the modification request, when viewed in conjunction with Mrs. Sharpe's survivor's claim, was not futile. The Board properly overturned this determination, as the company cannot obtain any relief on Mr. Sharpe's claim. As a result, the

⁷ Due to the length limitation for the combined respondents' briefs, we take no position on the issues of "diligence," "motive," or "accuracy" raised by Westmoreland. It is our understanding that Mrs. Sharpe is likely to address these issues. Moreover, in our view, if the request for relief is futile, modification must be denied on that basis alone. *See Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 547 (7th Cir. 2002) (remedial purpose of BLBA "would be thwarted if an ALJ were required to reopen proceedings if it were clear from the moving party's submission that reopening could not alter the substantive award").

Board properly reversed Judge Kaplan’s grant of modification.

1. Standard of Review

The grant or denial of a modification request is reviewed under an abuse-of-discretion standard. *Sharpe*, 495 F.3d at 130-32.

When the Court reviews the grant or denial of modification, it is “obliged to assess the full record and the reasons assigned, and

. . . will reverse if the decision was ‘guided by erroneous legal principles,’ or if the adjudicator ‘committed a clear error of

judgment in the conclusion it reached upon a weighing of the

relevant factors.” *Sharpe*, 495 F.3d at 130 (quoting *Westberry v.*

Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999)).

2. Background

The party seeking modification bears the burden of proof.

Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 139 (1997).

Part of the moving party’s burden includes establishing—when the question arises—that it can obtain a legally cognizable remedy on

modification. *Cf. Marshall v. Meadows*, 105 F.3d 904, 906 (4th

Cir.1997) (“The party invoking the jurisdiction of a federal tribunal

bears the burden of establishing standing.”). If no such remedy is

available, then the modification request is futile or moot. *See Equal*

Rights Ctr. v. Niles Bolton Associates, 602 F.3d 597, 604 (4th Cir. 2010); *White Tail Park, Inc., v. Stroube*, 413 F.3d 451, 457-58 (4th Cir. 2005). The issue in this appeal then is whether there remains any active dispute on Mr. Sharpe's claim that could be resolved through modification.

3. *Westmoreland cannot recoup any benefits from Mr. Sharpe's estate or from Mrs. Sharpe.*

Westmoreland has no remedy against Mr. Sharpe's estate or his widow. The remedy available to an operator under the applicable version of Section 725.310 when an award of benefits is terminated is recoupment of the resulting overpayment from the benefits claimant.⁸ See 20 C.F.R. § 725.310(d) (1999); see generally *Napier v. Director, OWCP*, 999 F.2d 1032, 1035 (6th Cir. 1993).

That is not possible here. Mr. Sharpe is deceased. At the hearing on remand, Mrs. Sharpe testified that he had no estate, and

⁸ The revised Section 725.310 (which is not applicable to Mr. Sharpe's claim) precludes recovery of any payments prior to the date that modification is requested. 20 C.F.R. § 725.310(d) (2010); cf. *Lennon v. Waterfront Transport*, 20 F.3d 658, 661 (5th Cir. 1994) (under LHWCA, no recoupment of previously paid compensation where no future compensation due).

that all of his property passed to her through joint tenancy. JA-II at 23-26. Westmoreland's counsel conceded that there was no estate from which to recover. JA-II at 50. ALJ Kaplan, thus, concluded that Westmoreland could not recover any overpayment from Mr. Sharpe's estate. Westmoreland does not now challenge that conclusion and has waived the issue. *See IGEN Int'l, Inc., v. Roche Diagnostics GmbH*, 335 F.3d 303, 308 (4th Cir. 2003) (citations omitted) ("Failure to present or argue assignments of error in opening appellate briefs constitutes a waiver of those issues.").

Moreover, as the Court noted in its prior decision, Westmoreland cannot seek repayment from Mrs. Sharpe in her own right. *Sharpe*, 495 F.3d at 132; *see* 20 C.F.R. § 725.540(d) (where beneficiary deceased, recovery of overpayment is from estate). Thus, there is no opposing party on Mr. Sharpe's claim from whom Westmoreland can obtain relief. As a result, the Board correctly held that the company's modification request on that claim is futile. *See Sharpe*, 495 F.3d at 133; *cf. Equal Rights Ctr.*, 602 F.3d at 604 (claim on which relief is precluded is futile). On that basis, the Court should affirm the Board's rejection of Westmoreland's modification request.

4. *There is no dispute between Westmoreland and DOL that would justify relief under Section 22.*

Because it cannot recover from Mr. Sharpe's estate or his widow, Westmoreland attempts to avoid the futility problem by positing an on-going financial dispute between the company and DOL. *Cf. Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 538 n. 4 (7th Cir. 2002) (adversity between operator and DOL sufficient to sustain jurisdiction over appeal). The company's entire argument consists of two sentences: "When an operator and DOL differed on who was ultimately responsible for payments, there was a live case and 'controversy.' [Citation omitted.] As illustrated at JA 156-62,^[9] expenses and interest payable in the [Mr. Sharpe's] claim presents sufficient controversy." Pet. Br. at 37.

Westmoreland's argument is ambiguous. If the company is asserting that DOL is still trying to obtain reimbursement for benefits the Trust Fund paid to or on behalf of Mr. Sharpe, that

⁹ "JA 156-162" refers to the district director's request for reimbursement of diagnostic costs and treatment expenses incurred in Mr. Sharpe's claim, and his assessment of interest charges against Westmoreland.

assertion is factually wrong. Although the documentation Westmoreland added to the joint appendix was incomplete on this point, the Breeskin Affidavit demonstrates beyond any question that the company paid everything it owed to DOL nearly sixteen years ago. DOL has no on-going claim against Westmoreland with respect to Mr. Sharpe's claim.

On the other hand, if Westmoreland's contention is that it has a claim against DOL (more specifically, the Trust Fund) to recover any of the amounts it reimbursed the Trust Fund, that contention is legally incorrect. No such recovery is permitted by the BLBA, Section 22 of the LHWCA, or the relevant section of the Internal Revenue Code. Simply put, Westmoreland cannot establish (and does not cite) any legal basis for a claim against the Trust Fund. *See Metropolitan Stevedore*, 521 U.S. at 139 (moving party has burden to establish entitlement to modification).

Expenditure of Trust Fund monies is limited by clear and express statutory provisions. *See* 26 U.S.C. § 9501(d). There are only two circumstances in which the Trust Fund is authorized to

make payments to coal-mine operators, and neither is applicable to this case.¹⁰ There is no provision for the Trust Fund to reimburse operators for any payments—whether for compensation, medical benefits, diagnostic costs, or interest—when an award is terminated on modification.

Moreover, even apart from the statutory limitations on Trust Fund payments, Westmoreland cannot assert any cognizable claim against the Fund. Any recovery of compensation or medical benefits would have to be from Mr. Sharpe's estate, as he was the recipient or beneficiary of the payments. *See* 20 C.F.R. § 725.540(d). The same is true as to the cost of the diagnostic evaluation performed under 20 C.F.R. § 725.406. The cost of that evaluation is also a "benefit." 20 C.F.R. § 725.101(a)(6). And, as noted above, Westmoreland cannot obtain any recovery from Mr.

¹⁰ The Trust Fund reimbursed operators for benefit payments made prior to April 1, 1978, with respect to miners whose employment ended before 1970. 26 U.S.C. § 9501(d)(6). Likewise, the Trust Fund reimbursed operators for benefit payments made on previously-denied claims which were reopened and awarded under the 1978 Amendments to the BLBA. 26 U.S.C. § 9501(d)(7); *see generally Director, OWCP v. Bethlehem Mines Corp.*, 699 F.2d 187, 189-91 (4th Cir. 1982).

Sharpe's estate.

As for the interest paid by Westmoreland to the Trust Fund, it “merely . . . reimburse[d] the Fund for time-value of money expended by the Fund [in paying benefits in the operator's stead].” *Bethenergy Mines, Inc., v. Director, OWCP*, 32 F.3d 843, 848 (3d Cir. 1994). Even where an award is terminated on modification, benefits are payable until the award is modified. And when the Trust Fund pays interim benefits under 20 C.F.R. § 725.522 for which an operator was ultimately liable, it is entitled to compensation for the time-value of its expenditures, even if the award is later terminated. *See* 20 C.F.R. § 725.608(b) (operator liable to the Trust Fund for interest on all payments made by the Trust Fund pursuant to an award for which the operator is found liable); *cf.* 26 U.S.C. § 9501(d)(6), (7) (excepting interest where Trust Fund reimbursed operators on certain claims).

Thus, there is no on-going dispute between Westmoreland and DOL. As a matter of incontrovertible fact, DOL has no claim against the company. And—as a matter of law—the company has no cognizable claim against DOL. For this reason, as well, Westmoreland's modification request is futile or moot.

5. Avoidance of the collateral-estoppel rule is not a type of relief provided by Section 22.

Westmoreland also asserts that its modification request is not futile for the reason identified by ALJ Kaplan. Pet. Br. at 37-38. Judge Kaplan found that, in considering Westmoreland's modification request on Mr. Sharpe's claim in conjunction with Mrs. Sharpe's survivor's claim, the company could obtain relief in the survivor's claim from the collateral-estoppel effect of the complicated-pneumoconiosis finding made in the lifetime claim.

According to Judge Kaplan,

an employer's objective to thwart a survivor's claim . . . is sufficient basis for finding that modification of a miner's claim is not a futile act regardless of whether the employer could recoup the payment of benefits it made to the miner.

JA-II at 117 (footnote omitted). Otherwise, a survivor such as Mrs. Sharpe would be "unjustly enrich[ed]." JA-II 115. Judge Kaplan's theory (as adopted on appeal by Westmoreland) is without merit.

The Court's prior decision in this case strongly—and correctly—suggests that relief from a factual finding is not a proper remedy under modification. *Sharpe*, 495 F.3d at 131, 133. The statute and regulations spell out the relief available to

Westmoreland on modification in plain and unambiguous terms: it can terminate or decrease the compensation payable to Mr. Sharpe. 33 U.S.C. § 922; 20 C.F.R. § 725.310(d) (1999); *see Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (“the beginning point must be the language of the statute, and 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”). Relief from the collateral-estoppel effect of a factual finding, however, is not an available statutory remedy. Rather, the party seeking modification must show that it can obtain one of the statutory remedies *in the claim it seeks to modify*—in this case, in Mr. Sharpe’s lifetime claim. *See Old Ben Coal Co.*, 292 F.3d at 547 (modification not proper if “reopening could not alter the substantive award”). As demonstrated herein, Westmoreland cannot obtain any relief on Mr. Sharpe’s claim, as it cannot recover any of the payments made on that claim. Thus, the company’s modification request is futile or moot.¹¹ *Sharpe*, 495 F.3d at 133;

¹¹ In support of its argument, Westmoreland cites the Supreme Court’s decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall* (cont’d . . .)

see also Equal Rights Ctr., 602 F.3d at 604; *White Tail Park*, 413 F.3d at 457-58.

Since Westmoreland can obtain no relief through modification on Mr. Sharpe's claim, the Board properly reversed ALJ Kaplan's termination of the award on that claim. As a result, the award remains in force, and factual determinations made in Mr. Sharpe's claim may have preclusive effect in Mrs. Sharpe's survivor's claim under the collateral-estoppel rule. *See Collins v. Pond Creek Coal Co.*, 468 F.3d 213, 217 (4th Cir. 2006).

B. The decision on Mr. Sharpe's claim was "final" for purposes of the collateral-estoppel rule.

Westmoreland contends that even if the award of benefits on

(. . . cont'd)

Partnership, 513 U.S. 18 (1994). Pet. Br. at 38-40. That decision, however, is inapposite. *Bonner Mall* involved the question of appellate *vacatur* where the merits of the case were settled. In contrast, Westmoreland is not seeking to vacate the decision on Mr. Sharpe's claim (which found that he had complicated pneumoconiosis), but to reverse that decision and establish that Mr. Sharpe did *not* have complicated pneumoconiosis. The issue in this appeal is not whether the prior decision should be vacated, but whether Westmoreland has any remedy available under modification. *Cf.* FED. R. CIV. P. 12(b)(6) (complaint can be dismissed where it fails to state claim on which relief can be granted).

Mr. Sharpe's claim was not terminated, the finding of complicated pneumoconiosis in his claim would not be binding in Mrs. Sharpe's claim. According to the company, the collateral-estoppel rule would not apply because the decision in Mr. Sharpe's claim was not final. Westmoreland is wrong. The decision on Mr. Sharpe's claim was final and, as a result, the complicated-pneumoconiosis finding would apply to Mrs. Sharpe's survivor's claim.¹²

1. Standard of Review

Whether the award on Mr. Sharpe's claim is final is a question of law, on which the Court's review is *de novo*. *Sewell Coal Co. v. Director, OWCP*, 523 F.3d 257, 259 (4th Cir. 2008).

¹² Westmoreland also contends that Mrs. Sharpe waived the "affirmative defense" of collateral estoppel by not raising it when she filed her claim. Since Mrs. Sharpe is the "plaintiff" in her claim, collateral estoppel is a theory of recovery, not an affirmative defense. Moreover, to the extent that Mrs. Sharpe might have waived the use of collateral estoppel, Westmoreland, in turn, waived its defense of waiver. *See, e.g., Freeman United Coal Min. Co. v. OWCP*, 957 F.2d 302, 304 (7th Cir. 1992) ("waiver . . . is itself waivable"). The Court raised the possible application of collateral estoppel at the argument in the prior appeal, and gave all parties an opportunity to address the issue. Westmoreland, however, did not raise the waiver issue in its supplemental brief, and should be deemed to have waived the issue on that basis.

2. *The award on Mr. Sharpe’s claim became final because Westmoreland did not appeal it.*

The collateral-estoppel rule provides that “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits on a different cause of action involving a party to the prior litigation.” *Collins*, 468 F.3d at 217 (citation omitted). The rule applies in administrative litigation. *Id.* As set forth by this Court, the elements of the collateral-estoppel rule are:

1) that “the issue sought to be precluded is identical to one previously litigated” (“element one”); (2) that the issue was actually determined in the prior proceeding (“element two”); (3) that the issue’s determination was “a critical and necessary part of the decision in the prior proceeding” (“element three”); (4) that the prior judgment is final and valid (“element four”); and (5) that the party against whom collateral estoppel is asserted “had a full and fair opportunity to litigate the issue in the previous forum” (“element five”).

Id. (citation omitted).

Westmoreland contends that “element four”—“the prior judgment is final and valid”—is not met here.¹³ With respect to

¹³ Westmoreland also states that “element five”—“full and fair opportunity” is not met here, referring to “procedural opportunities (cont’d . . .)

finality, the company's theory is that because it could request modification on Mr. Sharpe's claim up until one year after its last payment of benefits on the claim, the award on that claim never became "final." See 33 U.S.C. § 922; 20 C.F.R. § 725.310(1999). This theory is incorrect.

DOL's regulations define when ALJ and Board decisions become final. An ALJ decision "shall become final at the expiration of the 30th day after [it is filed by the district director]," unless one of the parties moves for reconsideration or appeals. 20 C.F.R. § 725.479(a). Similarly, a Board decision becomes final sixty days after issuance, unless a party timely requests reconsideration or petitions a circuit court for review. 20 C.F.R. § 802.406.

Here, an ALJ awarded Mr. Sharpe's claim on August 26, 1993. That decision did not become final because Westmoreland timely appealed to the Board. See 20 C.F.R. § 725.479(a). The Board's

(. . . cont'd)

unavailable in the first action that could readily cause a different result." Pet. Br. at 44. Other than quoting an inapposite passage from *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), Westmoreland does not identify any "procedural opportunities" lacking in Mr. Sharpe's claim or otherwise develop this argument.

September 28, 1994, decision affirming the award, however, did become final because Westmoreland neither requested reconsideration nor petitioned the Court for review. *See* 20 C.F.R. § 802.406. Indeed, Westmoreland’s own brief acknowledges that “[w]hen further appellate review [of Mr. Sharpe’s claim] was not sought, *the decision became final.*” Pet. Br. at 5 (emphasis added). In other words, the litigation of Mr. Sharpe’s claim was over at that point. The mere possibility that Westmoreland might later seek to modify that award in no way affected the award’s finality for collateral-estoppel purposes. *See, e.g., Zdonak v. Glidden Co.*, 327 F.2d 944, 955 (2d Cir. 1964) (decision “final” for purposes of collateral estoppel where prior action was “fully litigated”). Hence, “element four” of the collateral-estoppel rule has been met. Since Westmoreland does not genuinely contest any of the other elements, the finding of complicated pneumoconiosis in Mr. Sharpe’s claim is binding in his widow’s survivor’s claim. And she is entitled to benefits on that basis. *See* 30 U.S.C. § 921(c)(3); *Eastern Assoc. Coal*, 220 F.3d at 255.

CONCLUSION

The Director requests that the Court affirm the Board's reversal of ALJ Kaplan's termination of the award on Mr. Sharpe's claim, and the Board's award of benefits on Mrs. Sharpe's claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B), as implemented by the Court's order of March 3, 2011. That order required that the briefs of the Director and Maeann Sharpe, in combination, comply with the limitations of FED. R. APP. P. 32(a)(7)(B). This brief contains 5,771 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and it is our understanding that Mrs. Sharpe's brief will contain no more than 8,229 words. I also certify that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in fourteen-point Bookman Old Style font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2011, an electronic copy of the Director's brief was served through the CM/ECF system, and paper copies were served by mail, postage prepaid, on the following:

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ADDENDUM

Black Lung Disability Trust Fund

(a) Creation of Trust Fund

(1) In general

There is established in the Treasury of the United States a trust fund to be known as the “Black Lung Disability Trust Fund”, consisting of such amounts as may be appropriated or credited to the Black Lung Disability Trust Fund.

(2) Trustees

The trustees of the Black Lung Disability Trust Fund shall be the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services.

(b) Transfer of certain taxes; other receipts

(1) Transfer to Black Lung Disability Trust Fund of amounts equivalent to certain taxes

There are hereby appropriated to the Black Lung Disability Trust Fund amounts equivalent to the taxes received in the Treasury under section 4121 or subchapter B of chapter 42.

(2) Certain repaid amounts, etc.

The following amounts shall be credited to the Black Lung Disability Trust Fund:

(A) Amounts repaid or recovered under subsection (b) of section 424 of the Black Lung Benefits Act (including interest thereon).

(B) Amounts paid as fines or penalties, or interest thereon, under section 423, 431, or 432 of the Black Lung Benefits Act.

(C) Amounts paid into the Black Lung Disability Trust Fund by a trust described in section 501 (c)(21).

(c) Repayable advances

(1) Authorization

There are authorized to be appropriated to the Black Lung Disability Trust Fund, as repayable advances, such sums as may from time to time be necessary to make the expenditures described in subsection (d).

(2) Repayment with interest

Repayable advances made to the Black Lung Disability Trust Fund shall be repaid, and interest on such advances shall be paid, to the general fund of the Treasury when the Secretary of the Treasury determines that moneys are available in the Black Lung Disability Trust Fund for such purposes.

(3) Rate of interest

Interest on advances made pursuant to this subsection shall be at a rate determined by the Secretary of the Treasury (as of the close of the calendar month preceding the month in which the advance is made) to be equal to the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the anticipated period during which the advance will be outstanding.

(d) Expenditures from Trust Fund

Amounts in the Black Lung Disability Trust Fund shall be available, as provided by appropriation Acts, for—

(1) the payment of benefits under section 422 of the Black Lung Benefits Act in any case in which the Secretary of Labor determines that—

(A) the operator liable for the payment of such benefits—

(i) has no commenced payment of such benefits within 30 days after the date of an initial

determination of eligibility by the Secretary of Labor, or

(ii) has not made a payment within 30 days after that payment is due, except that, in the case of a claim filed on or after the date of the enactment of the Black Lung Benefits Revenue Act of 1981, amounts will be available under this subparagraph only for benefits accruing after the date of such initial determination, or

(B) there is no operator who is liable for the payment of such benefits,

(2) the payment of obligations incurred by the Secretary of Labor with respect to all claims of miners of their survivors in which the miner's last coal mine employment was before January 1, 1970,

(3) the repayment into the Treasury of the United States of an amount equal to the sum of the amounts expended by the Secretary of Labor for claims under part C of the Black Lung Benefits Act which were paid before April 1, 1978, except that the Black Lung Disability Trust Fund shall not be obligated to pay or reimburse any such amounts which are attributable to periods of eligibility before January 1, 1974,

(4) the repayment of, and the payment of interest on, repayable advances to the Black Lung Disability Trust Fund,

(5) the payment of all expenses of administration on or after March 1, 1978—

(A) incurred by the Department of Labor or the Department of Health and Human Services under part C of the Black Lung Benefits Act (other than under section 427 (a) or 433), or

(B) incurred by the Department of the Treasury in administering subchapter B of chapter 32 and in carrying

out its responsibilities with respect to the Black Lung Disability Trust Fund,

(6) the reimbursement of operators for amounts paid by such operators (other than as penalties or interest) before April 1, 1978, in satisfaction (in whole or in part) of claims of miners whose last employment in coal mines was terminated before January 1, 1970, and

(7) the reimbursement of operators and insurers for amounts paid by such operators and insurers (other than amounts paid as penalties, interest, or attorney fees) at any time in satisfaction (in whole or in part) of any claim denied (within the meaning of section 402(i) of the Black Lung Benefits Act) before March 1, 1978, and which is or has been approved in accordance with the provisions of section 435 of the Black Lung Benefits Act.

For purposes of the preceding sentence, any reference to section 402(i), 422, or 435 of the Black Lung Benefits Act shall be treated as a reference to such section as in effect immediately after the enactment of this section.

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.