

**In the Supreme Court of the United States**

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WESTMORELAND COAL COMPANY, PETITIONER

*v.*

MAE ANN SHARPE, ON BEHALF OF AND AS WIDOW OF  
WILLIAM A. SHARPE, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION**

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## QUESTIONS PRESENTED

A coal mine operator may seek modification of an award of benefits to a miner under the Black Lung Benefits Act “on the ground of a change in condition or because of a mistake in a determination of fact.” 33 U.S.C. 922. The questions presented are:

1. Whether denying a coal mine operator’s request to modify a miner’s disability benefits award “render[s] justice under the act,” *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (per curiam) (citation omitted), when the coal mine operator seeks modification only after the miner has died, the coal mine operator cannot recover any benefits paid, and the only purpose of the modification request is to avoid the application of a statutory irrebuttable presumption that would entitle the miner’s widow to survivor’s benefits.

2. Whether the court of appeals correctly applied the applicable standard of review in evaluating the Benefits Review Board’s reversal of an administrative law judge’s decision.

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-60) is reported at 692 F.3d 317. The decisions and orders of the Benefits Review Board (Pet. App. 64-94) and of the administrative law judge (Pet. App. 101-139) are unreported. A prior opinion of the court of appeals (Pet. App. 140-158) is reported at 495 F.3d 125. Prior decisions and orders of the Benefits Review Board (Pet. App. 159-169, 213-225) and of the administrative law judge (Pet. App. 170-212, 226-251) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 20, 2012. A petition for rehearing was denied on October 17, 2012 (Pet. App. 252). The petition for a writ of certiorari was filed on January 11,

2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. The Black Lung Benefits Act (the Act) provides 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); see *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 683-685 (1991); see also 30 U.S.C. 902(b) (“The term ‘pneumoconiosis’ means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.”). Coal mine operators are liable for the payment of black lung benefits under regulations promulgated by the Department of Labor. 30 U.S.C. 932(a) and (b), 933; see 20 C.F.R. Pt. 718.<sup>1</sup>

The Act provides for the payment of benefits to the survivors of a miner whose death was caused by pneumoconiosis. 30 U.S.C. 922(a)(2) and (3). To establish eligibility for benefits, a survivor generally must prove that the miner had pneumoconiosis; that the miner’s pneumoconiosis arose out of coal mine employment; and that the miner’s death was caused by pneumoconiosis. 20 C.F.R. 718.205(a). A survivor may establish that the miner’s death was caused by pneumoconiosis either by competent medical evidence

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<sup>1</sup> Claims for black lung benefits must be filed under state law in any State whose workers’ compensation law the Secretary has determined provides adequate coverage for pneumoconiosis. 30 U.S.C. 931. The Secretary has determined that no State’s workers’ compensation law provides adequate coverage. 20 C.F.R. 722.4(b); see 65 Fed. Reg. 79,953 (Dec. 20, 2000) (“[N]o state has applied for certification in the 27 years that the Department has administered the program.”).

(such as an autopsy report) or by application of a statutory irrebuttable presumption that follows from a prior diagnosis of complicated pneumoconiosis. 20 C.F.R. 718.205(c); see 30 U.S.C. 921(c)(3); 20 C.F.R. 718.304; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976).<sup>2</sup>

The Act incorporates a provision of the Longshore and Harbor Workers' Compensation Act that authorizes "any party in interest" to seek modification of an award "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. 922; see 30 U.S.C. 932(a); see also *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (per curiam) (holding that the statute provides "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted"). Upon reconsideration, the agency may "issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation." 33 U.S.C. 922. If an award on a claim filed before January 19, 2001 is terminated or decreased, benefits pre-

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<sup>2</sup> Congress amended the provisions governing survivor's benefits in 2010. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556(c), 124 Stat. 260. Under that amendment, if a survivor seeks benefits after January 1, 2005, the survivor is not "required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner," if the miner was determined to be eligible for benefits at the time of the miner's death. 30 U.S.C. 932(l) (Supp. V 2011); see § 1556(c), 124 Stat. 260.

viously paid can be recovered as overpayments. 20 C.F.R. 725.540 to 20 C.F.R. 725.548.<sup>3</sup>

2. William Sharpe mined coal in Virginia and West Virginia for 39 years. Pet. App. 3. Before retiring in 1988, he worked as a miner for eight years for petitioner. Sharpe filed a claim for black lung benefits in 1989. An administrative law judge (ALJ) denied Sharpe's claim, but the Benefits Review Board (Board) vacated that decision. On remand, in 1993 Sharpe was awarded benefits, retroactive to 1989, based on a determination that he suffered from complicated pneumoconiosis. Petitioner appealed that decision to the Board, which affirmed the award of benefits. Petitioner did not seek judicial review of that decision pursuant to 33 U.S.C. 921(c), and it paid Sharpe disability benefits from 1989 until his death in 2000. Pet. App. 4-5.

3. a. After Sharpe's death, respondent Mae Ann Sharpe filed a claim for survivor's benefits, as a widow of a miner who died from pneumoconiosis. Pet. App. 5; see 30 U.S.C. 922(a)(2). Petitioner opposed respondent's claim and also filed a modification request, seeking to terminate the award of benefits on Sharpe's living miner's claim and arguing that Sharpe had never suffered from complicated pneumoconiosis. Pet. App. 5-6. An ALJ denied petitioner's modification request and granted respondent's request for survivor's benefits. *Id.* at 226-251. The Board vacated that decision, concluding that the ALJ had failed to undertake *de novo* consideration of all the record evidence. *Id.* at 216.

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<sup>3</sup> If an award on a claim filed after January 19, 2001 is terminated or decreased, benefits paid before modification was requested cannot be recovered. 20 C.F.R. 725.310(d); see 20 C.F.R. 725.2(c).



On remand, the ALJ granted petitioner's modification request and terminated Sharpe's living miner benefits, concluding that Sharpe did not have complicated pneumoconiosis and was not totally disabled by the simple pneumoconiosis from which he suffered. Pet. App. 176-208. Because he concluded that Sharpe had not suffered from complicated pneumoconiosis, the ALJ determined that respondent was not entitled to rely on the statutory irrebuttable presumption that Sharpe had died from pneumoconiosis. *Id.* at 209; see 20 C.F.R. 718.304. The ALJ further concluded that respondent had failed to establish that pneumoconiosis caused Sharpe's death, and he denied her claim for survivor's benefits. Pet. App. 209-211. The Board affirmed the ALJ's denial of survivor's benefits and modification of the living miner's award. *Id.* at 159-169.

b. The court of appeals granted respondent's petition for review and vacated the Board's order. Pet. App. 140-158. The court explained that an ALJ's discretionary decision whether to grant modification of an award "does not automatically flow from a mistake in an earlier determination of fact," *id.* at 152, but must be grounded in a determination that modification would "render justice under the act," *id.* at 153 (quoting *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968)). Whether modification would render justice under the Act, the court explained, requires consideration not only of the "accuracy" of the prior decision awarding benefits, but also "the requesting party's diligence and motive, and the potential futility of a favorable modification award." *Id.* at 143; see *id.* at 154 (deriving diligence factor from *Old Ben Coal Co. v. Director, Office of Workers' Com-*

*pensation Programs*, 292 F.3d 533, 547 (7th Cir. 2002) and *McCord v. Cephas*, 532 F.2d 1377, 1378 (D.C. Cir. 1976), and deriving motive factor from *Old Ben Coal Co.*, 292 F.3d at 546).

Because the ALJ and the Board “only assessed the factual accuracy of the complicated pneumoconiosis finding and failed to evaluate the other pertinent factors,” the court of appeals vacated and remanded for reconsideration. Pet. App. 146. The court instructed the ALJ on remand to consider accuracy, diligence, motive, futility, “and other factors that may bear on whether approval of the Modification Request will ‘render justice under the Act.’” *Id.* at 157.

4. a. The ALJ again granted petitioner’s modification request and denied respondent’s claim for survivor’s benefits. Pet. App. 101-139. The ALJ understood the court of appeals to have instructed him to determine whether petitioner “should be barred from seeking modification of the award,” *id.* at 104; if not, whether the award was mistaken, *id.* at 106; and if so, whether respondent is entitled to survivor’s benefits, *ibid.* The ALJ determined that any lack of diligence on petitioner’s part should not bar modification because “the seven-year delay did not harm or prejudice the miner or Claimant.” *Id.* at 117. He concluded that petitioner’s modification request would not be futile because it would allow petitioner to prevent respondent from relying on offensive, non-mutual collateral estoppel to establish that Shape had complicated pneumoconiosis, which, in turn, would have given rise to the statutory irrebuttable presumption that Sharpe had died of pneumoconiosis. *Id.* at 119-120. The ALJ further determined that petitioner’s motive was not improper because it “simply used the available legal

means to attempt to protect and obtain justice for itself.” *Id.* at 120. Finding no bar to the reconsideration request, the ALJ again concluded that the original award of living miner’s benefits was based on a mistake of fact. *Id.* at 124-134. And because the ALJ determined that respondent failed to establish that Sharpe had died from pneumoconiosis, he denied her claim for survivor’s benefits. *Id.* at 137-138.

b. The Board reversed. Pet. App. 64-95; cf. *id.* at 95-100 (Smith, Admin. App. J., dissenting). The Board noted that petitioner did not seek modification of the living miner’s claim until after a claims examiner informed petitioner that, based on Sharpe’s benefits award, respondent would be entitled to an irrebuttable presumption that Sharpe had died from pneumoconiosis. *Id.* at 76. The Board explained that the purpose of collateral estoppel and the statutory irrebuttable presumption is to prevent an “employer from defending against the survivor’s claim by showing that the miner did not have complicated pneumoconiosis.” *Id.* at 77. The Board therefore determined that petitioner was “attempting to circumvent the law.” *Ibid.*

The Board also determined that the ALJ had focused on the wrong claim in considering whether petitioner’s modification request was futile. Pet. App. 78-79. Petitioner’s modification request sought reconsideration of the living miner’s award. But petitioner conceded that it could not recoup any living miner benefits previously paid because Sharpe left no estate, and the time to seek recovery of overpayments had elapsed. *Id.* at 78. The ALJ further erred, the Board concluded, in determining that the award of living miner’s benefits was based on a mistake in a determi-

nation of fact. The ALJ's reevaluation of the evidence was "neither rational nor supported by substantial evidence." *Id.* at 80; see *id.* at 79-86.

Turning to the survivor's claim, the Board concluded that, under Fourth Circuit precedent, respondent could rely on offensive, non-mutual collateral estoppel to prevent petitioner from relitigating whether Sharpe had complicated pneumoconiosis. Pet. App. 87-94. Accordingly, the Board held that respondent could rely on the statutory irrebuttable presumption that Sharpe had died of pneumoconiosis, and it awarded respondent survivor's benefits. *Id.* at 90-91, 94.

c. The court of appeals affirmed the Board's decision. Pet. App. 1-32. The court explained that it reviews Board decisions "for errors of law and to ensure that the [Board's] decision adhered to its statutory standard of review." *Id.* at 20 (citation omitted); see 33 U.S.C. 921(b)(3) (ALJ's findings of fact "shall be conclusive if supported by substantial evidence"). While recognizing the ALJ's "wide discretion in deciding whether to modify a benefits award," the court explained that the ALJ must act within applicable legal standards, and it agreed with the Board that the ALJ had erred in granting petitioner's modification request. Pet. App. 23.

The court of appeals noted the "possible futility" of petitioner's modification request, in light of petitioner's inability to recover any living miner benefits it paid to Mr. Sharpe before his death, a factor the Director of the Office of Workers' Compensation Programs argued was dispositive. Pet. App. 25. But the court found decisive the fact that petitioner, by seeking modification, sought to thwart respondent's reliance on collateral estoppel and the statutory irrebut-

table presumption, which the court described as “entrenched legal principles,” in support of her survivor’s claim. *Id.* at 26. The court recognized that the statutory modification provision embodies a “general ‘preference for accuracy over finality in the substantive award.’” *Id.* at 27 (quoting *Old Ben Coal Co.*, 292 F.3d at 541). But the court concluded that “where, as here, a modification request is belatedly made with an improper motive and without compelling new evidence, the interest in finality rightly carries a great deal of weight.” *Ibid.* Accordingly, it affirmed the Board’s conclusion that “retroactively denying” Sharpe’s living miner’s benefit award “to foil” respondent’s survivor’s claim “would not render justice” under the Act. *Id.* at 28. The court further affirmed the Board’s award of survivor benefits, based on its determination that respondent had established the prerequisites for application of offensive, non-mutual collateral estoppel and so could prevent relitigation of whether Sharpe had complicated pneumoconiosis. *Id.* at 29-32.<sup>4</sup>

#### ARGUMENT

The court of appeals correctly sustained the Benefits Review Board’s decision to deny petitioner’s modification of the 1989 award of benefits to Sharpe. The court held that justice under the Act would not be served in the circumstances of this case by permitting petitioner to collaterally attack respondent’s survivor’s benefits claim by seeking modification of a relat-

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<sup>4</sup> Judge Agee dissented. He would have held that “accuracy is the primary consideration of whether modification renders ‘justice under the Act,’” Pet. App. 47, and he would have affirmed the ALJ’s finding that the living miner’s benefit should be terminated on the ground that Sharpe did not suffer from complicated pneumoconiosis, *id.* at 47-51.

ed living miner's benefits award. That ruling does not conflict with any decision of this Court or any other court of appeals, and the questions presented do not raise issues of significant importance. Further review is not warranted.

1. The Act authorizes "any party in interest" to seek "review [of] a compensation case" within "one year after the date of the last payment of compensation" "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. 922; see 30 U.S.C. 932(a). This Court has explained that the statutory modification remedy provides "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 (1971) (per curiam); see *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 465 (1968); see also *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 296 (1995) (holding that "the applicable 'conditions' [in 33 U.S.C. 922] are those that entitled the employee to benefits in the first place"). The focus of the modification remedy is on the benefits award being challenged: After review of the conditions and facts relating to a benefits award, the agency may "issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation." 33 U.S.C. 922.

In this case, petitioner sought modification of an award of living miner's benefits. But the miner had died; and although at that time an employer theoretically could seek recovery of past benefits as overpayments, see pp. 3-4 & n.3, *supra*, petitioner could not recover the benefits it paid to Sharpe because Sharpe

left no estate and the time to seek recovery for overpayments had elapsed, as petitioner conceded. Pet. App. 78. Thus, modification of the living miner's benefit award would have had no practical effect on the benefits petitioner paid to Sharpe between 1989 and 2000, and with respect to that claim, as the Director of the Office of Workers' Compensation Programs argued below, a modification would have been futile. See *id.* at 78-79 (“[I]t is undisputed that [petitioner] could not recoup any payment made pursuant to the award of benefits in the miner's claim, the decision which [petitioner] sought to modify.”).

Petitioner instead sought modification of the living miner's award as a means of challenging respondent's separate claim for survivor's benefits. See Pet. App. 120. At the time respondent filed her claim, a survivor had to establish that the miner had died of pneumoconiosis. See 20 C.F.R. 718.205(a) and (b)(3); 20 C.F.R. 718.304; but see 30 U.S.C. 932(l) (Supp. V 2011) (providing that, as of January 1, 2005, a survivor need not “refile or otherwise revalidate the claim” of the miner determined eligible for benefits at the time of the miner's death). In opposing a survivor's claim under the law that governs such claims, a coal mine operator generally may dispute the survivor's evidence and seek to establish that the miner died of other causes. See, *e.g.*, 20 C.F.R. 725.455. In this case, the ALJ found that petitioner sought modification of the living miner's award instead of proceeding solely against respondent's claim in order to avoid application of collateral estoppel, which the court of appeals previously had held permits a survivor to rely on factual determinations made in adjudication of the miner's living benefits award to establish that the

miner suffered from pneumoconiosis. Pet. App. 118-120; see *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217-223 (4th Cir. 2006).

In this case, because Sharpe’s benefit award was based on a determination that Sharpe suffered from *complicated* pneumoconiosis, application of offensive, non-mutual collateral estoppel would lead to the statutory irrebuttable presumption that Sharpe had died from that disease, which would entitle respondent to survivor’s benefits. See 20 C.F.R. 718.304. But petitioner did not argue that the Act categorically bars a claimant from relying on collateral estoppel in support of her survivor’s claim. See Pet. App. 30. Although petitioner argued that respondent had not established the conditions for application of that doctrine, see *id.* at 29-32; Pet. C.A. Br. 41-45, it did not dispute the propriety of respondent’s reliance on the doctrine to establish the statutory irrebuttable presumption that Sharpe had died of pneumoconiosis if the conditions were satisfied, see Pet. App. 30.<sup>5</sup>

The effect of the statutory irrebuttable presumption “is to grant benefits to the survivors of any miner who during his lifetime had complicated pneumoconiosis arising out of employment in the mines, regardless of whether the miner’s death was caused by pneumoconiosis.” *Usery v. Turner Elkhorn Mining Co.*, 428

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<sup>5</sup> See Pet. C.A. Br. 41-42 (arguing that petitioner’s modification request rendered the living miner’s award non-final for collateral estoppel purposes); Pet. App. 31 (rejecting that argument); see also 20 C.F.R. 725.479 (“Finality of decisions and orders”); 20 C.F.R. 725.480 (“A party who is dissatisfied with a decision and order which has become final in accordance with § 725.479 may request a modification of the decision and order if the conditions set forth in § 725.310 are met.”).



U.S. 1, 24 (1976). Because petitioner did not argue that a modification request categorically forecloses reliance by respondent, as Sharpe's widow, on collateral estoppel, given that the court of appeals determined that she satisfied the conditions for application of that doctrine, respondent was entitled to rely on the statutory irrebuttable presumption. Under these circumstances, petitioner's request to modify the living miner's award constituted an attempt to avoid the payment of benefits to a survivor who had established entitlement to an award. Accordingly, the court of appeals was correct in concluding that granting petitioner's modification request would not "render justice under the act." *O'Keeffe*, 404 U.S. at 256; see Pet. App. 28.

2. a. Petitioner argues (Pet. 11-22) that the court of appeals' decision is inconsistent with this Court's precedent and the decisions of other courts of appeals. That contention is without merit.

Relying on this Court's decisions in *Rambo*, *O'Keeffe*, and *Banks*, petitioner contends that "[t]he accuracy of the prior benefits determination is \* \* \* the paramount concern of modification." Pet. 16. In *O'Keeffe* and *Banks*, petitioner notes (Pet. 12-15), this Court reversed court of appeals decisions that had limited the types of evidence or mistakes of fact that could be considered in modification proceedings. See *O'Keeffe*, 404 U.S. at 256; *Banks*, 390 U.S. at 464-465. And in *Rambo*, the Court emphasized that the scope of modification proceedings should be based "on the language of the statute." Pet. 15 (quoting 515 U.S. at 295). The stated purpose of the Act is to provide benefits to miners totally disabled by pneumoconiosis and to survivors of miners who died of that

disease. Pet. 15-16 (citing 30 U.S.C. 901(a)). The court of appeals erred, petitioner argues, by failing to focus “on the fundamental purpose of the Act—to compensate those employees with a covered injury.” Pet. 16.

The conclusion petitioner seeks to draw from this Court’s decisions is mistaken. The court of appeals recognized that “[t]he plain import” of the modification provision is to vest the agency “with broad discretion to correct mistakes of fact.” Pet. App. 21-22 (quoting *O’Keeffe*, 404 U.S. at 256). The court also recognized, however, that granting petitioner’s modification request in the context of this case—given respondent’s reliance on offensive, non-mutual collateral estoppel—would undermine other statutory policies embodied in the irrebuttable presumption, such as the policy of granting benefits to survivors of miners who had complicated pneumoconiosis “regardless of whether the miner’s death was caused by pneumoconiosis.” *Usery*, 428 U.S. 24; see Pet. App. 25-26 (“At 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.”) (citing, *inter alia*, *Usery*, 428 U.S. at 24-26). The court of appeals’ determination that petitioner’s modification request would not render justice under the Act therefore is consistent with this Court’s precedent.

Petitioner also argues (Pet. 19-22) that the court of appeals’ decision in this case creates a circuit split. That is incorrect.<sup>6</sup> Petitioner relies primarily on *Old*

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<sup>6</sup> Petitioner’s contention (Pet. 16-19) that the court of appeals’ decision in this case is inconsistent with its own precedent does not

*Ben Coal Co. v. Director, Office of Workers' Compensation Programs*, 292 F.3d 533, 547 (7th Cir. 2002) and *McCord v. Cephas*, 532 F.2d 1377, 1378 (D.C. Cir. 1976), decisions that considered whether granting a modification request would render justice under the Act. But as petitioner concedes (Pet. 20), in both cases, the court of appeals considered whether a modification request would render justice under the Act by furthering statutory policies. Thus, for example, in *Old Ben Coal Co.*, the Seventh Circuit recognized that “the remedial purpose of the Act would be thwarted if an ALJ were required to brook sanctionable conduct” or “to reopen proceedings if it were clear from the moving party’s submissions that reopening could not alter the substantive award” or if “an employer was employing the reopening mechanism in an unreasonable effort to delay payment.” 292 F.3d at 547; see also *McCord*, 532 F.2d at 1381 (suggesting that modification of an award would not render justice under the Act where the employer refused to participate in the administrative benefits process for four years).

Petitioner objects that, in its view, the Seventh and District of Columbia Circuits “did not go as far” as the court of appeals in this case. Pet. 19. By that, petitioner apparently means that the court of appeals improperly “impinge[d] on the ALJ’s discretionary fact-finding duties.” Pet. 21. But that assertion is simply a reformulation of the second question presented, and as next explained, that narrow question does not merit this Court’s review.

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present a reason for certiorari. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) (“It is primarily the task of a Court of Appeals to reconcile its internal difficulties.”).

b. Petitioner contends that the court of appeals “exceed[ed] the scope of review” by “reweigh[ing] the factual information” considered by the ALJ. Pet. 23; see Pet. 22-31. That fact-bound contention is mistaken, and it raises no issues worthy of this Court’s consideration.

Before assessing the merits of the petition for review, the court of appeals set out the applicable standard of review. The court explained that the Board must affirm an ALJ’s benefits determination if the ALJ’s “findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.” Pet. App. 20 (citation omitted). Where, as here, the Board has reversed the ALJ’s determination, the court of appeals reviews the Board’s decision “for errors of law and to ensure the [Board’s] decision adhered to its statutory standard of review.” *Ibid.*; see 33 U.S.C. 921(b)(3) (ALJ’s findings of fact “shall be conclusive if supported by substantial evidence”); see also Pet. App. 28-29 n.11 (explaining that, in reaching its decision, the court of appeals “defer[red] to the ALJ’s finding of fact \* \* \* but not to the ALJ’s conclusions of law”).

Petitioner does not dispute that the court of appeals correctly articulated the applicable standard of review. Pet. 30 (“As the majority correctly states, a circuit court has a limited standard of review in agency cases.”). Instead, petitioner argues that the court of appeals “avoid[ed] the application of \* \* \* limited review” by describing certain of the ALJ’s findings of fact as conclusions of law. Pet. 24; see Pet. 25 (discussing court of appeal’s evaluation of the propriety of petitioner’s motive in challenging the living miner’s benefit award). However, the court affirmed the

Board's reversal of the ALJ's decision because, "[a]t bottom," the ALJ's decision would "allow[] employers to regularly use modification to evade application of collateral estoppel and the irrebuttable presumption," and so "would effectively eradicate those entrenched legal principles." Pet. App. 25-26. The court of appeals' decision thus turned on its determination that the Board correctly concluded that the ALJ's decision was premised on a legal error.

In any event, petitioner identifies no circuit split on the second question presented, and it is not of sufficient importance to merit this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of \* \* \* the misapplication of a properly stated rule of law.").

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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