

BRB No. 02-0857 BLA

NAOMI SHORT)
(Widow of SAM SHORT, JR.))

Claimant-Respondent)

v.)

DATE ISSUED: 09/16/2003

ARCH OF WEST VIRGINIA/APOGEE)
COAL COMPANY)

Employer-Petitioner)

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

Party-In-Interest)

DECISION and ORDER

Appeal of the Decision and Order--Awarding Benefits of Richard A. Morgan,
Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer.

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S.
Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;
Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice),
Washington, D.C., for the Director, Office of Workers' Compensation
Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order--Awarding Benefits (2001-BLA-0579) of
Administrative Law Judge Richard A. Morgan rendered on a survivor's claim filed pursuant

to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. ' 901 *et seq.* (the Act).¹ The miner died on February 22, 2000, and claimant filed her application for survivor=s benefits on March 24, 2000. Director's Exhibits 1, 7.

At the time of the miner=s death, he was receiving federal black lung benefits pursuant to a final award on his lifetime claim filed in 1991. Director's Exhibits 23-1, 23-44, 23-55. At the hearing on the miner=s claim, employer conceded the existence of pneumoconiosis. Director's Exhibit 23-39 at 33. In a Decision and Order--Awarding Benefits issued on January 6, 1993, Administrative Law Judge Frederick D. Neusner accepted employer=s concession, and found that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ' ' 718.203(b), 718.204(c)(2000), and 718.204(b)(2000). Director's Exhibit 23-44. Upon consideration of employer=s appeal, the Board affirmed Judge Neusner=s Decision and Order--Awarding Benefits. Director's Exhibit 23-55; *Short v. Arch of West Va., Inc.*, BRB No. 93-1013 BLA (Aug. 18, 1994)(unpub.).

On February 22, 2000, the miner died of respiratory failure. Director's Exhibits 7, 9. No autopsy was performed. Director's Exhibit 7.

Claimant=s survivor=s claim proceeded to a hearing before Administrative Law Judge Richard A. Morgan on April 4, 2002. Employer contested all issues of entitlement. Director's Exhibit 24. In the ensuing Decision and Order--Awarding Benefits, the administrative law judge ruled that employer was collaterally estopped from relitigating the issue of the existence of pneumoconiosis Aalready decided in the miner=s claim.@ Decision and Order at 6. Consequently, the administrative law judge found that Athe existence of pneumoconiosis and its causal relationship to the miner=s 20 or more years of coal mine employment is established as a matter of law.@ Decision and Order at 6-7. Turning to the issue of death due to pneumoconiosis, the administrative law judge gave less weight to the opinions of employer=s physicians because they As[ought] to re-address the (closed) pneumoconiosis issue,@ based on reviews of lung biopsy tissue slides that were in the record of the miner=s claim. Decision and Order at 18. Based on the opinions of the miner=s

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

treating physicians, the administrative law judge found that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of pneumoconiosis in the survivor=s claim. Employer argues further that the administrative law judge erred in his analysis of the medical evidence when he found that the miner=s death was due to pneumoconiosis. Claimant has not responded to employer=s appeal. The Director, Office of Workers= Compensation Programs (the Director), responds, urging affirmance. Employer has filed a reply brief, reiterating its contentions. Employer has also filed an Advisory of New Precedent, which is hereby accepted.

The Board=s scope of review is defined by statute. The administrative law judge=s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. ' 921(b)(3), as incorporated into the Act by 30 U.S.C. ' 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor=s benefits pursuant to 20 C.F.R. ' 718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. ' ' 718.205(a)(1)-(3); 718.202(a); 718.203; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor=s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death. 20 C.F.R. ' 718.205(c)(2),(c)(4). Pneumoconiosis is a substantially contributing cause of a miner=s death if it hastens the miner=s death. 20 C.F.R. ' 718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to preclude employer from relitigating the existence of pneumoconiosis in the survivor=s claim. Employer notes that the finding of the existence of pneumoconiosis in the miner=s claim was based on employer=s stipulation. Employer's Brief at 11. Employer therefore asserts that collateral estoppel is inapplicable to this case. Employer=s argument has merit.

For collateral estoppel to apply in this case, claimant must establish that: (1) the issue

sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*). A fact established by stipulation may not be given collateral estoppel effect in a subsequent proceeding because the issue was not actually litigated. *Justice v. Newport News Shipbuilding and Dry Dock Co.*, 34 BRBS 97, 98 (2000).

As employer notes, the parties did not actually litigate the issue of the existence of pneumoconiosis in the miner's claim; employer conceded the issue and the administrative law judge accepted the concession. 1991 Decision and Order at 3 (AAs the Employer has conceded that Claimant has pneumoconiosis . . ., this fact is found without further discussion.). Because the issue of the existence of pneumoconiosis was established by concession in the miner's claim, the issue was not actually litigated, and thus, a required element of collateral estoppel is not established. *See Hughes*, 21 BLR at 1-137; *Justice*, 34 BRBS at 98; *see also Otherson v. Department of Justice*, 711 F.2d 267, 274 (D.C. Cir. 1983)(A[W]hen a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been actually litigated and thus is not a proper candidate for issue preclusion.); *Restatement (Second) of Judgments* ' 27 comment e.

The Director acknowledges that issues determined by concession or stipulation generally lack collateral estoppel effect, but argues that because the administrative law judge in the miner's claim found that the miner's total disability was due to pneumoconiosis, he in effect found that the miner's respiratory or pulmonary impairment was related to coal mine dust. Thus, the Director contends, the disability causation finding in the miner's claim was the legal equivalent to a finding of pneumoconiosis, and should be given collateral estoppel effect in the survivor's claim. Director's Brief at 6-7. The Director's argument lacks merit and is rejected because the issues of the existence of pneumoconiosis arising out of coal mine employment and the causation of total disability are separate issues of entitlement, *see* 20 C.F.R. ' 718.202(a), 718.203(b), 718.204(c), whereas, for collateral estoppel to apply, the issue sought to be precluded must be identical to [the] one previously litigated. *Hughes*, 21 BLR at 1-137.

Therefore, we reverse the administrative law judge's finding that employer is collaterally estopped from relitigating the issue of the existence of pneumoconiosis in the survivor's claim, and we vacate his attendant finding that the existence of pneumoconiosis

was established.² On remand, the administrative law judge must determine whether claimant has established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ' ' 718.202(a), 718.203(b), by a preponderance of the evidence. *See* 20 C.F.R. ' 718.205(a)(1); *Trumbo*, 17 BLR at 1-87-88.

Pursuant to 20 C.F.R. ' 718.205(c), employer contends that the administrative law judge erred in discounting the opinions of its medical experts regarding whether the miner=s death was due to pneumoconiosis because they disagreed with the prior finding that the miner had pneumoconiosis, and because they based their opinions on reviews of 1991 lung biopsy tissue slides that were submitted into the record of the miner=s lifetime claim. Employer's Brief at 40. The administrative law judge gave less weight to the opinions of all physicians who As[ought] to re-address the (closed) pneumoconiosis issue,@ and who based their opinions Aupon biopsy lung tissue obtained in 1991, as previously interpreted by Dr. Kleinerman, which was addressed in Judge Neusner=s Decision and Order Awarding Benefits@ Decision and Order at 17, 18. Because we have vacated the administrative law judge=s finding pursuant to 20 C.F.R. ' 718.202(a) and instructed him to determine whether the existence of pneumoconiosis is established, we must also vacate his finding as to whether pneumoconiosis contributed to the miner=s death and instruct him to reconsider whether the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c).

² Because we reverse the administrative law judge=s collateral estoppel finding on these grounds, we need not address employer=s additional allegations of error in the administrative law judge=s decision to apply the doctrine of collateral estoppel. Additionally, the Director=s alternative argument, that employer=s prior stipulation of the existence of pneumoconiosis should be given collateral estoppel effect, is unpersuasive because the multiple cases cited by the Director, upon review, either do not stand for the proposition asserted, or are distinguishable. Director=s Brief at 8-12.

Accordingly, the administrative law judge's Decision and Order--Awarding Benefits is reversed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge