

BRB No. 06-0815 BLA

PEGGY J. HOWERTON	)	
(Widow of ROOSEVELT HOWERTON)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL	)	DATE ISSUED: 07/20/2007
COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (05-BLA-23) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits on modification 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).<sup>1</sup> The

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<sup>1</sup> The miner filed his first claim for benefits on July 3, 1980. Although the U.S. Department of Labor determined that the miner was qualified for black lung disability benefits, it denied benefits because the miner failed to stop working in coal mine

parties stipulated to, and the administrative law judge found, at least twenty-four years of qualifying coal mine employment and that employer was the responsible operator. Decision and Order at 4; Hearing Transcript at 8-9, 23. The administrative law judge found that, based on the evidence of record, claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000),<sup>2</sup> as the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 6-24. Benefits on modification were, accordingly, denied.

On appeal, claimant contends that the administrative law judge erred in not finding that the x-ray evidence established the existence of pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in the instant appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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employment within a year of the determination that he qualified for benefits. The claim was denied by the district director on July 16, 1982, as the miner was still working in the mines. Director's Exhibit 1. The miner filed a second claim on August 11, 1986. Benefits were awarded on that claim by the district director on January 15, 1987, as the elements of entitlement were established. Employer agreed to pay benefits. Director's Exhibit 2. The miner died on May 27, 1999. On June 14, 1999, claimant filed a survivor's claim, which was finally denied by the Benefits Review Board on January 30, 2004 because claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibits 3, 10, 40. Claimant requested modification of that denial on May 4, 2004. The district director denied claimant's modification request on September 14, 2004, because a preponderance of the evidence indicated that the miner's death was not due to pneumoconiosis. Director's Exhibits 42, 47. Claimant requested a hearing. Director's Exhibit 48. The case was referred to the Office of Administrative Law Judges on December 13, 2004. Director's Exhibit 51.

<sup>2</sup> Because this is a request for modification on a survivor's claim, the administrative law judge correctly noted that claimant cannot establish modification by showing a change in the miner's condition. Decision and Order at 4.

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).<sup>3</sup>

At the outset, we note that the administrative law judge's Decision and Order was issued prior to the decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 1-393 (4th Cir. 2006), *rev'g Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), regarding the application of collateral estoppel.<sup>4</sup> In that case, the court held that the doctrine of collateral estoppel applied to preclude relitigation of the issue of pneumoconiosis in a survivor's claim where the issue had been previously adjudicated in a successful miner's claim decided prior to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).<sup>5</sup> We, therefore, decline to consider claimant's argument, and the administrative law judge's finding, concerning the existence of

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<sup>3</sup> The record indicates that the miner was last employed in the coal mine industry in West Virginia. Director's Exhibits 1, 2, 4; Decision and Order at 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup> In the first decision on the survivor's claim, by Administrative Law Judge Michael P. Lesniak, dated April 2, 2003, Judge Lesniak noted that while it would appear that employer would be collaterally estopped from relitigating the issues of the existence of pneumoconiosis and causal relationship, a specific ruling on collateral estoppel was unnecessary since the medical evidence failed to establish death due to pneumoconiosis. Judge Lesniak therefore, denied the survivor's claim because claimant failed to establish death due to pneumoconiosis.

<sup>5</sup> In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) the court held that all evidence regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) must be weighed together before a determination of pneumoconiosis can be made.

pneumoconiosis. Instead, we vacate the administrative law judge's denial of benefits and remand the case for the administrative law judge to consider whether the doctrine of collateral estoppel applies in this case.<sup>6</sup> If reached, the administrative law judge must consider whether the evidence establishes death due to pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order denying benefits on modification is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>6</sup> For collateral estoppel to apply, the court held that 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 judgement in the prior proceeding;
- (4) the prior judgment is final and valid; and
- (5) the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum.

*See Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.3d 332 (4th Cir. 1992); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999).