

BRB Nos. 10-0377 BLA
and 10-0377 BLA-A

| | | |
|-------------------------------|---|-------------------------|
| NORA COLLINS |) | |
| (Widow of JOHNNIE COLLINS) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| POND CREEK MINING COMPANY |) | DATE ISSUED: 03/24/2011 |
| |) | |
| Employer-Respondent |) | |
| Cross-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Cross-Petitioner |) | DECISION and ORDER |

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

Leonard Stayton, Inez, Kentucky, for claimant.

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals,¹ and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals, the Decision and Order on Third Remand - Denying Benefits (1998-BLA-01295) of Administrative Law Judge Richard A. Morgan (the administrative law judge) with respect to a survivor's claim filed on September 29, 1997, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² This case is before the Board for the fourth time.

In his initial 2001 Decision and Order, the administrative law judge considered this case pursuant to the regulations contained in 20 C.F.R. Part 718, and accepted the parties' stipulation that the miner had at least eleven years of coal mine employment. The administrative law judge noted that the miner was receiving benefits at the time of his death pursuant to the February 25, 1988 award of benefits of Administrative Law Judge Leonard N. Lawrence. Nonetheless, the administrative law judge found that, although the existence of pneumoconiosis was previously established in the miner's successful claim, the doctrine of collateral estoppel did not apply in this survivor's claim to preclude employer from relitigating the issue of pneumoconiosis. Therefore, weighing the evidence submitted in the survivor's claim, the administrative law judge denied benefits, based on his determination that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

In response to claimant's appeal, the Board affirmed the administrative law judge's determination that the doctrine of collateral estoppel was not applicable in this survivor's claim. *Collins v. Pond Creek Mining Co.*, 22 BLR 1-228 (2003). The Board held that, in light of *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), which requires the weighing of all evidence, like and unlike, in determining the presence of pneumoconiosis at Section 718.202(a), there had been an intervening change in the law, which rendered the issue of pneumoconiosis in the survivor's claim non-identical to the issue litigated in the miner's claim prior to the issuance of *Compton*. *See Collins*, 22 BLR at 1-232-33. Accordingly, the Board vacated the administrative law judge's findings pursuant Sections 718.202(a)(1), (4), and 718.205(c), and remanded the case for further consideration of the relevant medical evidence. *Id.* at 1-233-34.

¹ Claimant is the widow of the miner, who died on September 16, 1997. Director's Exhibits 1, 12.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant filed her survivor's claim prior to the effective date of Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010).

Subsequently, the Board granted a motion filed by the Director to reconsider its holding with respect to application of the doctrine of collateral estoppel. Upon reconsideration, the Board denied the relief requested and reaffirmed its prior holding that the doctrine was not applicable in this case. *Collins*, BRB No. 02-0329 BLA (Nov. 12, 2003) (Order on Motion for Recon.) (unpub.).

On remand, the administrative law judge found that the x-ray evidence was inconclusive and that the more probative medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4). Weighing all of the evidence together, as required by *Compton*, the administrative law judge also found that claimant failed to establish that the miner had pneumoconiosis pursuant to Section 718.202(a). Additionally, the administrative law judge found that the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *Collins v. Pond Creek Mining Co.*, BRB No. 04-0899 BLA (June 14, 2005) (unpub.). Initially, the Board reaffirmed its prior holding that the doctrine of collateral estoppel was not applicable in this case. *Collins*, slip op. at 4. The Board then affirmed the administrative law judge's finding that the medical evidence was insufficient to establish pneumoconiosis pursuant to Section 718.202(a), and also, that it was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *Collins*, slip op. at 6-7.

Claimant then filed an appeal with the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises.³ The court vacated the Board's decision, concluding that the Board erred in permitting employer to relitigate the issue of whether the miner suffered from pneumoconiosis in the survivor's claim. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). Specifically, the court held that claimant established the existence of pneumoconiosis by application of the doctrine of collateral estoppel. *Collins*, 468 F.3d at 223, 23 BLR at 2-410.

Turning to the issue of death causation, the court noted that the Board's affirmance of the administrative law judge's credibility findings at Section 718.205(c) "rested squarely on the [administrative law judge's] finding of no pneumoconiosis." *Collins*, 468 F.3d at 224, 23 BLR at 2-411. Thus, because the court found that claimant had established the existence of pneumoconiosis by application of the doctrine of collateral

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because the miner's coal mine employment occurred in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

estoppel, the court noted that the Board should have assessed the administrative law judge's death causation finding under the standard outlined in *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995). *Id.* Although the court indicated that "the circumstances of Scott's case . . . seem to compare closely to those presented here" and also noted that *Scott* had been remanded with instructions to award benefits, the court nonetheless concluded:

[W]e see the appropriate course here as remand for further consideration of the causation issue . . . and [thus] the [Board] will have the first opportunity to assess whether the [administrative law judge's] causation ruling meets the rigorous standards outlined in *Scott*.

Collins, 468 F.3d at 224, 23 BLR at 2-412. By Order dated April 27, 2007, the Board vacated the administrative law judge's findings pursuant to Sections 718.202(a) and 718.205(c), in light of the Fourth Circuit's holdings, and remanded the case to the administrative law judge for further proceedings consistent with the Fourth Circuit's decision. *Collins v. Pond Creek Mining Co.*, BRB No. 04-0899 BLA (Apr. 27, 2007) (Order) (unpub.).

The administrative law judge, on remand, set forth the mandate of the Fourth Circuit and, thus, stated that claimant established the existence of pneumoconiosis arising out of coal mine employment, by application of the doctrine of collateral estoppel. The administrative law judge then found that he was "constrained to find that the miner's death was due to pneumoconiosis[.]" pursuant to Section 718.205(c). Decision and Order on Second Remand at 6. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge for further consideration. *N.C. [Collins] v. Pond Creek Mining Co.*, BRB No. 08-0739 BLA (July 29, 2009) (unpub.). The Board held that it was "unclear" whether the administrative law judge found the opinions of Drs. Younes and Gaziano, that pneumoconiosis hastened the miner's death, to be sufficiently reasoned to constitute substantial, reliable evidence supportive of claimant's burden of proof on death causation. *Collins*, slip op. at 6. Specifically, the Board held that the administrative law judge erroneously interpreted the Fourth Circuit's remand order as requiring an award of benefits, "regardless of the quality of claimant's evidence." *Collins*, slip op. at 7. Rather, the Board held that claimant still bears the burden of persuasion in establishing that the evidence is sufficient to establish that pneumoconiosis caused the miner's death pursuant to Section 718.205(c). Therefore, the Board remanded the case for the administrative law judge to specifically address whether claimant's evidence was sufficient to carry her burden of proof on the issue of death causation.

In his third remand decision, the administrative law judge stated that he again adopted his previous finding that the opinions of Drs. Gaziano and Younes were cursory and poorly documented and, therefore, insufficient to establish that the miner's pneumoconiosis either caused, or contributed, to his death. In addition, the administrative law judge found that the contrary opinions of Drs. Fino, Castle, Morgan, Jarboe, Zaldivar, Dahhan and Spagnolo, were well-reasoned and documented, because they were consistent with the objective facts and not contrary to his own "analysis." Decision and Order on Third Remand at 11. The administrative law judge further found that, even if his findings crediting the contrary opinions was not upheld, and he was required to give employer's physicians "little weight," he would still find that they outweighed the evidence supportive of claimant's burden or, at least, were "of equal quality such that the evidence of death causation [was] in equipoise." *Id.* Consequently, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant contends that the administrative law judge erred in finding that the opinions of Drs. Gaziano and Younes, that pneumoconiosis contributed to the miner's death, were entitled to no weight. Specifically, claimant contends that the administrative law judge erred in finding that the opinion of Dr. Younes, the miner's treating pulmonologist, was not well-reasoned or documented. Further, claimant contends that the administrative law judge erred in failing to provide, as instructed by the Fourth Circuit, specific and persuasive reasons why the contrary opinions of Drs. Fino, Jarboe, Castle, Morgan, Dahhan, Zaldivar and Spagnolo were reasoned and documented, as they are contrary to the established finding that legal pneumoconiosis was present.

In his appeal, the Director contends that the administrative law judge erred in his weighing of the medical opinion evidence at Section 718.205(c). Specifically, the Director contends that the administrative law judge erred in finding the opinions of Drs. Gaziano and Younes to be cursory, arguing that the administrative law judge required these physicians to provide a greater explanation of their reasoning than is required by the regulations. Director's Brief at 6. The Director further contends that, the "whole of the [administrative law judge's] opinion is tainted by his refusal to accept that he must accept, pursuant to the principle of collateral estoppel, that [the miner] suffered from a totally disabling respiratory condition due to coal mine employment prior to his death." *Id.* Additionally, the Director contends that the administrative law judge erred in failing to acknowledge that the opinions of Drs. Jarboe, Castle and Morgan, when considered in light of the finding of collateral estoppel, are supportive of the opinions of Drs. Younes and Gaziano, as they state that the miner's respiratory impairment, in the form of chronic obstructive pulmonary disease, leading to hypoxia, contributed to the miner's death. *Id.*

at 7.

Employer, in a consolidated response to claimant's appeal and the Director's appeal, urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. Employer contends that claimant and the Director are merely requesting that the Board reweigh the evidence and "take a different view of the medical evidence." Employer's Brief at 13. Employer also contends that there is no merit to claimant's and the Director's contention that the opinions of Drs. Morgan, Castle and Jarboe support the opinions of Drs. Gaziano and Younes and, thus, are supportive of a finding that the miner's death was due to pneumoconiosis. Moreover, employer contends that application of the doctrine of collateral estoppel to the issue of pneumoconiosis in this case does not preclude claimant from having to establish that the miner's death was due to pneumoconiosis in her survivor's claim.

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

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. 20 C.F.R. §718.205(c)(1)-(3). 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.*, 969 F.2d 977, 980, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

On remand, the administrative law judge again set forth the mandate of the Fourth Circuit court, holding that the doctrine of collateral estoppel is applicable under the facts of this case and, thus, precludes relitigation of the issue of pneumoconiosis in the survivor's claim. The administrative law judge further noted the discussion by the court of the medical opinion evidence relevant to the issue of death causation, in light of the holdings in *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), and *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); Decision and Order on Third Remand at 5-7. Additionally, the administrative law judge

set forth the Board's instructions remanding the case for further consideration of the medical opinion evidence, particularly the opinions of Drs. Gaziano and Younes, under Section 718.205(c).

Weighing the medical opinion evidence, the administrative law judge stated that, "I have repeatedly found that the medical opinions of Drs. Gaziano and Younes [were] both poorly reasoned and not well[-]documented." *Id.* at 8-9. The administrative law judge reiterated this finding, as well as his finding that the contrary opinions of Drs. Fino, Castle, Morgan, Jarboe, Zaldivar, Dahhan, and Spagnolo were well-reasoned and documented. *Id.* at 8-9. In reconsidering the evidence, the administrative law judge reiterated that he had previously rejected the opinion of Dr. Gaziano as insufficiently reasoned on the death causation issue. *Id.* at 10. Regarding the opinion of Dr. Younes, the administrative law judge found that it was entitled to "little weight" in comparison to the contrary evidence. The administrative law judge found that the opinion was not sufficiently reasoned to constitute substantial probative evidence that pneumoconiosis hastened the miner's death. Specifically, the administrative law judge found that Dr. Younes's statements on the miner's death certificate and his post-mortem letter, were not well-reasoned or documented, as no autopsy had been performed, and Dr. Younes did not adequately address the role of the miner's smoking history in causing the miner's severe pulmonary disability. *Id.* at 10. Consequently, the administrative law judge found that the opinions of Drs. Gaziano and Younes were insufficient to establish that the miner's death was due to pneumoconiosis. *Id.* at 11.

The administrative law judge found that, even if credited, these opinions were outweighed by the contrary opinions of Drs. Fino, Castle, Morgan, Jarboe, Zaldivar, Dahhan and Spagnolo, which were well-reasoned and documented. Specifically, the administrative law judge concluded:

[W]hile binding, it is established, by the legal doctrine of collateral estoppel, that the miner here suffered from 'legal' pneumoconiosis, *i.e.*, COPD due to his coal mine dust exposure. *I did and do not find the medical evidence proved 'legal' or clinical pneumoconiosis.* The employer's doctors' diagnoses are consistent with the objective facts and not contrary to my analysis.

Decision and Order on Third Remand at 11 [emphasis added].

Based on the facts of this case, and in light of the instructions provided by the Fourth Circuit court, we vacate the administrative law judge's denial of benefits. A review of the administrative law judge's Decision and Order on Second Remand and Decision and Order on Third Remand, indicates that the administrative law judge is not in agreement with the Fourth Circuit's holding that the existence of pneumoconiosis

arising out of coal mine employment has been established in this case, by application of the doctrine of collateral estoppel. Specifically, in his Decision and Order on Second Remand, the administrative law judge stated:

[T]he Fourth Circuit's majority opinion held that the collateral estoppel doctrine is applicable and barred the relitigation of the "pneumoconiosis" issue in the current widow's case. Therefore, the fact that the medical evidence submitted in conjunction with the widow's case failed to establish pneumoconiosis under [Section] 718.202(a) is irrelevant. Pursuant to the [c]ourt's directive, I am compelled to find that [c]laimant has established the presence of pneumoconiosis based on the prior finding of pneumoconiosis in the miner's claim, as set forth in Judge Lawrence's Decision and Order – Award of Benefits dated February 25, 1988 (DX 31) (*i.e.*, more than 9 ½ years prior to the miner's death) (DX 12), and the application of the collateral estoppel doctrine.

Decision and Order on Second Remand at 3. Similarly, in his Decision and Order on Third Remand, the administrative law judge stated that, while "legal" pneumoconiosis has been established by the doctrine of collateral estoppel, "*I did and do not find [that] the medical evidence proved 'legal' or clinical pneumoconiosis.*" Decision and Order on Third Remand at 11 [emphasis added].

It is evident from the administrative law judge's current findings, that his weighing of the medical evidence at Section 718.205(c) was influenced by his apparent disagreement with the Fourth Circuit's holding, that the existence of pneumoconiosis was established in the survivor's claim through application of the doctrine of collateral estoppel. Moreover, the administrative law judge did not adequately discuss his weighing of the opinions of Drs. Fino, Castle, Morgan, Jarboe, Zaldivar, Dahhan and Spagnolo in light of the holdings in *Toler* and *Scott*, as instructed by the Fourth Circuit. Consequently, we vacate the administrative law judge's findings at Section 718.205(c). Furthermore, as this case has been remanded to the administrative law judge on two previous occasions, and there exists a continued underlying disagreement regarding the issue of the existence of pneumoconiosis, we reluctantly conclude that proper review of this case requires a "fresh look at the evidence." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998). Thus, we direct that this case be reassigned to a different administrative law judge on remand.

On remand, the administrative law judge must determine, based on a review of all the relevant evidence, whether claimant has established that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(5). In so doing, the administrative law judge must specifically address whether the opinions of Drs. Younes and Gaziano are reasoned and documented, and sufficient to satisfy claimant's burden of establishing her

entitlement to benefits pursuant Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order on Third Remand – Denying Benefits is vacated and the case is remanded to the Office of Administrative Law Judges for reassignment to another administrative law judge.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge