

BRB No. 04-0230 BLA

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| BETTY J. SMITH |) | |
| (Widow of HASSEL SMITH) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| SEA B MINING COMPANY |) | DATE ISSUED: 11/30/2004 |
| |) | |
| 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 Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (Howard M. Radzely, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (2002BLA-05255) of Administrative Law Judge Pamela Lakes Wood denying benefits 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). The administrative law judge credited the miner with thirty-seven years of qualifying coal mine employment and adjudicated this claim, filed on July 17, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that although the miner was receiving federal black lung benefits at the time of his death pursuant to a final award on his lifetime claim, the doctrine of collateral estoppel did not apply to preclude litigation of the issue of the existence of pneumoconiosis in this survivor's claim. The administrative law judge then found that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant contends that collateral estoppel is applicable to preclude employer from relitigating the issue of the existence of pneumoconiosis, and asserts that because pneumoconiosis is established as a matter of law, the opinions of physicians who did not diagnose pneumoconiosis are entitled to little weight on the issue of the cause of the miner's death. Employer responds, urging affirmance of the denial of benefits. The Director, Officer of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's finding that collateral estoppel is inapplicable under the facts of this case.¹

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant maintains that the administrative law judge erred in failing to give preclusive effect to Administrative Law Judge Henry W. Sayrs's finding of the existence of pneumoconiosis made in the March 16, 1989 Decision and Order awarding benefits in the miner's claim. We disagree. For collateral estoppel to apply in this case, claimant must

¹This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 4, 5.

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 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). Additionally, it is well-settled that relitigation of an issue is not barred when there is a difference in the allocation of the burdens of proof and production, or a difference in the substantive legal standards pertaining to the two proceedings. *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229, 1-232 (2003).

In the present case, the administrative law judge accurately determined that Judge Sayrs's finding of pneumoconiosis in the miner's claim was based on the true doubt rule, which was subsequently invalidated by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). Consequently, the administrative law judge properly found that the doctrine of collateral estoppel does not apply to preclude litigation of the issue of pneumoconiosis in this survivor's claim because the allocation of the burden of proof differed in the two proceedings. Decision and Order at 3; *see Sturgill v. Old Ben Coal Co.*, 22 BLR 1-314 (2003). Further, Judge Sayrs's previous finding of pneumoconiosis was based solely on the medical opinion evidence in the miner's claim, whereas the subsequent holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), requires that the different types of evidence submitted pursuant to 20 C.F.R. §718.202(a)(1)-(4) be weighed together to determine whether a preponderance of all the evidence establishes the existence of pneumoconiosis. Thus, the difference in the substantive legal standards governing the miner's claim and the survivor's claim also precludes application of the doctrine of collateral estoppel because the issue was not identical in both claims. *Sturgill*, 22 BLR at 1-318, 1-319; *Collins*, 22 BLR 1-229. We therefore reject claimant's arguments.

Turning to the merits, in order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see 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). 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); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

In this case, since we have rejected claimant's contention that the existence of pneumoconiosis was established as a matter of law, there is no merit to claimant's argument that the opinions of those physicians who did not diagnose pneumoconiosis are entitled to little weight pursuant to *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002). Claimant's Brief at 10. Claimant also asserts generally that the opinion of Dr. Iosif, the miner's treating physician, is sufficient to establish entitlement to benefits. Claimant's Brief at 11. Contrary to claimant's arguments, however, the administrative law judge reasonably determined that Dr. Iosif's opinion was of no probative value and thus was insufficient to establish the existence of pneumoconiosis because the physician admitted in his deposition that he had merely accepted a previous diagnosis of pneumoconiosis but had no objective basis for that diagnosis. Decision and Order at 5-6; Employer's Exhibit 52 at 7, 17-19, 24-25; see generally *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). As claimant has not identified any other specific legal or factual errors in the administrative law judge's weighing of the evidence pursuant to Section 718.202(a)(1)-(4), we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis. Decision and Order at 7; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge