

BRB No. 09-0258 BLA

ARNOLD SCOTT)
(Executor of the Estate of LILLIE SCOTT,)
Widow of ERNEST SCOTT))
)
Claimant-Respondent)
)
v.)
)
MASON COAL COMPANY)
)
and) DATE ISSUED: 11/24/2009
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of William S. Colwell,
Administrative Law Judge, United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for claimant.

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

Jeffrey S. Goldberg (Deborah Greenfield, Acting Deputy Solicitor; Rae
Ellen Frank 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:

Employer appeals the Decision and Order on Remand (05-BLA-5334) of Administrative Law Judge William S. Colwell (the administrative law judge) 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 This case is before the Board for the second time. Initially, the administrative law judge credited the miner with sixteen years, eleven and one-half months of coal mine employment and found that, under the law of the case doctrine, because the existence of pneumoconiosis was established in the miner's claim for benefits,² the issue should not be relitigated, and that therefore, claimant established pneumoconiosis in the survivor's claim. The administrative law judge further found that the medical evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in finding the law of the case doctrine to be applicable. Further, because the administrative law judge did not consider whether the doctrine of collateral estoppel was applicable, the Board vacated the award of benefits and remanded the case for further

¹ Claimant is Arnold Scott, Executor of the Estate of Lillie Scott, widow of the miner, Ernest Scott. At the time of his death on June 19, 2003, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Director's Exhibits 1, 2, 8.

² The procedural history in the miner's claim is set forth in pertinent part. The miner filed his claim on January 3, 1984, and benefits were initially denied by Administrative Law Judge Gerald T. Hayes in a Decision and Order issued on May 2, 1988, because he found that, although the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1),(4), the miner failed to establish a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. Director's Exhibit 1. Following several decisions by the Board and the Office of Administrative Law Judges, the United States Court of Appeals for the Fourth Circuit remanded the case for further consideration. *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995)(vacating denial of benefits and remanding for further consideration of whether the miner was totally disabled, and if so, whether the total disability was caused at least in part by pneumoconiosis). Ultimately, on remand, an administrative law judge denied benefits, and the Board affirmed. *Scott v. Mason Coal Co.*, BRB No. 98-0660 BLA (Mar. 17, 1999)(unpub.). Pursuant to the miner's appeal, the Fourth Circuit reversed the denial and remanded the case with an order to award benefits to the miner. *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

consideration. The Board instructed the administrative law judge to address the specific criteria concerning the applicability of the doctrine of collateral estoppel, and to determine whether the doctrine of offensive non-mutual collateral estoppel is applicable. *L.S. [Scott] v. Mason Coal Co.*, BRB No. 07-0379 BLA, slip op. at 4-5 (Feb. 27, 2008)(unpub.). Because the administrative law judge's determination on remand concerning the existence of pneumoconiosis could affect his analysis as to death causation, the Board vacated his finding at 20 C.F.R. §718.205(c), and directed the administrative law judge to reconsider that issue, if reached, on remand. *Id.* at 5-6.

On remand, the administrative law judge found that the doctrine of offensive non-mutual collateral estoppel barred employer from relitigating the existence of pneumoconiosis, and that therefore, claimant established this element of entitlement. The administrative law judge found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding it collaterally estopped from contesting the existence of pneumoconiosis. In addition, employer contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge permissibly found that employer was collaterally estopped from relitigating the existence of pneumoconiosis. Employer has filed a reply brief reiterating its contentions.

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 pursuant to 20 C.F.R. Part 718, 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(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(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). 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).

We first address employer's contention that the administrative law judge erred in applying the doctrine of offensive non-mutual collateral estoppel. To successfully invoke collateral estoppel in the present case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, claimant must establish the following criteria:

- (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 sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Collins v. Pond Creek Mining Co., 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006); *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *see also Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*). Additionally, because claimant was not a party in the miner's claim, application of the doctrine of collateral estoppel must not be unfair to employer. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). There are four nonexclusive factors in that regard:

- (1) whether claimant could easily have joined in the earlier proceeding;
- (2) whether employer "had an incentive in the prior action to have defended the action fully and vigorously;"
- (3) whether employer has ever obtained a ruling that the miner did not suffer from pneumoconiosis; and
- (4) whether procedural opportunities are available to employer in the survivor's claim that were unavailable to it in the miner's claim.

Collins, 468 F.3d at 221, 23 BLR at 2- 407, *quoting Parklane Hosiery*, 439 U.S. at 331-32.

The administrative law judge determined that the criteria for the application of the doctrine of collateral estoppel were met. The administrative law judge noted that the Fourth Circuit, in directing that an award of benefits be entered on the miner's claim, "consider[ed] it finally determined that [the miner] has pneumoconiosis as a direct result of his coal mine employment." Decision and Order on Remand at 3, *quoting Scott v.*

Mason Coal Co., 289 F.3d 263, 265 n.1, 22 BLR 2-372, 2-376 n.1 (4th Cir. 2002). The administrative law judge further found:

Employer in this survivor's claim was the same Employer in the miner's claim. Throughout pendency of the miner's claim, Employer was represented by counsel. Employer had ample opportunity to challenge the finding of coal workers' pneumoconiosis in the miner's claim, but failed to do so.

Decision and Order on Remand at 3. Additionally, the administrative law judge noted that no autopsy evidence was submitted in the survivor's claim.

Further, the administrative law judge found that the application of collateral estoppel would not be unfair to employer because (1) the miner's widow could not have joined in the miner's claim for lifetime benefits, as spouses of living miners with pneumoconiosis are not entitled to seek benefits under the Act; (2) employer vigorously litigated the miner's claim, appealing twice to the Fourth Circuit; (3) employer presented no subsequent finding that the miner did not suffer from pneumoconiosis; and (4) employer had the same procedural opportunities in the survivor's claim as it did in the miner's claim. *Id.* at 3-4.

Employer raises several challenges to the administrative law judge's findings. Initially, employer argues that the issue of whether the miner had pneumoconiosis was not essential to the decision in his claim because although Administrative Law Judge Gerald T. Hayes found that the miner established pneumoconiosis, he denied benefits because the miner was not totally disabled. As the Director notes, however, the Fourth Circuit awarded the miner benefits, and Judge Hayes' finding that the miner had pneumoconiosis was essential to that award. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Employer next argues that the burden of proof has changed since the award of benefits in the miner's claim because the true doubt rule, upon which Judge Hayes relied to find the x-ray evidence supportive of a finding of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1), 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). As the Director asserts, however, the pneumoconiosis finding in the miner's claim was not based solely on Judge Hayes's weighing of the x-ray evidence. Judge Hayes also found that the medical opinions of Drs. Smiddy and Taylor established pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), a finding that was affirmed by the

Fourth Circuit. Employer did not challenge the Fourth Circuit's holding. We therefore reject employer's argument.³

Further, employer contends that *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), requiring that all types of evidence presented pursuant to 20 C.F.R. §718.202(a)(1)-(4) be weighed together, represents a change in the law preventing the application of collateral estoppel to the pneumoconiosis finding made in the miner's claim. The Fourth Circuit has rejected the contention that *Compton* bars the application of collateral estoppel to a pre-*Compton* finding of pneumoconiosis made in a miner's claim. *Collins*, 468 F.3d at 219, 23 BLR at 2-403-04; *see also V.M. [Matney] v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-69 (2008). We therefore reject employer's contention.

Moreover, no other change in a legal standard or burden of proof affects this case. Contrary to employer's assertion, there was never a rule that any obstructive lung disease constitutes legal pneumoconiosis. Except where aided by regulatory presumption, claimants have always had the burden of proving that a miner's obstructive lung disease was related to his coal mine employment. *See* 20 C.F.R. §§718.202(a)(4)(2000); 718.403 (2000). Nor was any rule in effect during the miner's claim "that the presence of two medical opinions is sufficient to establish 'legal' pneumoconiosis" regardless of contrary evidence. Employer's Brief at 12.

Employer also contends that the miner's resumption of smoking in 1999 should now call into question whether the finding of pneumoconiosis in the miner's claim was correct. We disagree. As the Director asserts, the miner was smoking when he established pneumoconiosis in 1988, and did not quit until 1995. Employer's Exhibits 3 at 82-99, 4 at 19. The fact that the miner resumed smoking in 1999 has no relevance to whether his coal mine employment contributed to his respiratory impairment prior to his quitting and resuming smoking.

Employer further asserts that because claimant did not raise the collateral estoppel defense, the administrative law judge erred in applying it. We disagree. Although

³ Although employer asserts that Judge Hayes erred in finding pneumoconiosis established by the medical opinion evidence, and that the Fourth Circuit erred in holding that employer did not challenge Judge Hayes's finding of pneumoconiosis, whether Judge Hayes or the Fourth Circuit erred is irrelevant, as the Fourth Circuit's decision is now final. *See United States v. Real Property Located in El Dorado County*, 59 F.3d 974, 979-80 (9th Cir. 1995)(affirming district court's application of collateral estoppel based on final state court ruling "even if 'the state court's decision may have been erroneous'") quoting *Allen v. McCurry*, 449 U.S. 90, 101 (1980).

collateral estoppel is an affirmative defense that is generally waived unless it is raised before the factfinder, there are exceptions to that rule. Courts have discussed the circumstances under which a court can consider an affirmative defense *sua sponte*:

[I]f a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised. This result is fully consistent with the policies underlying *res judicata*; it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste.

Arizona v. California, 530 U.S. 392, 412 (2000); *see also Todd v. Baskerville*, 712 F.2d 70, 74 (4th Cir. 1983)(affirming district court's *sua sponte* application of collateral estoppel where "the claims of the plaintiff . . . were manifestly barred because it appeared on the face of the complaint and the court records that the issues posed by the complaint had been raised and determined judicially against the plaintiff"). The administrative law judge in the survivor's claim, aware that the miner had established pneumoconiosis in his successful claim, acted within his discretion in *sua sponte* finding employer precluded from arguing that the miner did not have pneumoconiosis. *See Todd*, 712 F.2d at 74.

Employer argues that it was unfairly surprised by the administrative law judge's finding that it was precluded from relitigating the existence of pneumoconiosis. As the Director points out, however, employer does not explain how it would have revised its strategy of presenting evidence that pneumoconiosis did not contribute to the miner's death, where employer's medical experts attributed the miner's death to heart disease, and concluded that pneumoconiosis, even if present, played no role in his death. Employer's Exhibits 5, 6. Because employer's litigation strategy appears to have anticipated the possibility that the existence of pneumoconiosis would be resolved against it, we reject employer's unexplained allegation of prejudice.

In light of the foregoing, we affirm the administrative law judge's finding that collateral estoppel precludes employer from relitigating whether the miner had pneumoconiosis. We now address employer's challenges to the administrative law judge's findings on the merits of entitlement.

Relevant to 20 C.F.R. §718.205(c), the administrative law judge considered the opinions of Drs. Molony, Dahhan, and Castle. Dr. Molony opined that pneumoconiosis contributed to the miner's COPD and death. Director's Exhibit 18. By contrast, Drs. Dahhan and Castle opined that the miner's death was due entirely to his cardiac disease and that it was not hastened by pneumoconiosis or coal dust exposure. Employer's Exhibits 5, 6. Considering this evidence, the administrative law judge determined that the opinions of Drs. Castle and Dahhan held little probative value because neither

physician diagnosed the miner with coal workers' pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order on Remand at 5. Further, the administrative law judge found Dr. Molony's opinion "sufficiently reasoned to sustain claimant's burden" because:

Dr. Molony conducted "hands-on" treatment of the miner for lung and cardiac problems over a four year period of time. He also followed treatment of the miner during his hospitalizations. . . . Dr. Molony conducted physical examinations, tested the miner, and reviewed consulting physicians' opinions on the miner[']s conditions. Examinations of the miner's lungs over the years by Dr. Molony revealed abnormal findings such as rales, wheezing, or ronchi.

Decision and Order on Remand at 7.

Employer asserts that the administrative law judge erred in crediting Dr. Molony's opinion because Dr. Molony did not explain his opinion that pneumoconiosis "attributed to [the miner's] COPD and cardiac status and then his death on 6/19/03." Employer's Brief at 17 *quoting* Director's Exhibit 18. We disagree.

The Fourth Circuit has held that an administrative law judge may, but need not, discredit an opinion because it lacks a thorough explanation, as the detail of a doctor's analysis is but one of several factors an administrative law judge should consider in determining the weight to accord a medical opinion. *Compton*, 211 F.3d at 212, 22 BLR at 2-176. As noted by the administrative law judge, Dr. Molony treated the miner for respiratory and cardiac problems over a four-year period and was the attending physician at the time of the miner's death, and he listed cardiac failure as the immediate cause of the miner's death, and congestive heart failure, ASCOD, COPD, and CWP as underlying causes that initiated the events resulting in death. Director's Exhibit 8. Further, Dr. Molony's discharge summary of the miner's final hospitalization indicates that he treated the miner for cardio-respiratory problems shortly before the miner's death and also lists COPD and CWP in the discharge diagnosis. Director's Exhibit 17. In addressing the cause of the miner's death, Dr. Molony noted that the miner "had a long history of lung disease," was "hospitalized numerous times with respiratory failure," and was "constantly on O2. . . ." Director's Exhibit 18. Dr. Molony's opinion was that the miner's "death was due to multiple causes with heart and lung disease primary. . . . Most certainly CWP attributed [sic] to his COPD and cardiac status and then his death on 6/19/03." *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Molony "reached a reasoned medical opinion," *Compton*, 211 F.3d at 212, 22 BLR at 2-176, given Dr. Molony's first-hand knowledge of the miner's respiratory condition over the previous four years and at the time of his death.

Further, we reject employer's assertion that "[a]pplication of a preference for the miner's treating doctor in a survivor's claim effectively deprives an employer of any right to present and rebut evidence at a meaningful time." Employer's Brief at 19. Contrary to employer's assertion, the administrative law judge did not credit Dr. Molony's opinion in light of his treating physician status only. Rather, the administrative law judge found Dr. Molony's opinion to be "sufficiently reasoned" in light of the record as a whole. Decision and Order on Remand at 7. Moreover, employer fails to explain how it was deprived of the opportunity to mount a meaningful defense, given its submission of two expert opinions addressing both the existence of pneumoconiosis and the cause of the miner's death.

We additionally reject employer's assertion that the administrative law judge erred in "summarily discrediting" the opinions of Drs. Dahhan and Castle, that pneumoconiosis played no role in the heart disease that caused the miner's death, because they did not diagnose pneumoconiosis. Employer's Brief at 20. The administrative law judge's decision is consistent with the Fourth Circuit's holding in the miner's lifetime claim that, because the opinions of Drs. Dahhan and Castle were in direct conflict with Administrative Law Judge Gerald T. Hayes's finding that the miner had pneumoconiosis, their opinions could carry little weight, at the most, as to disability causation. *Scott*, 289 F.3d at 269, 22 BLR at 2-384. Likewise, therefore, the administrative law judge rationally concluded that the opinions of Drs. Dahhan and Castle were entitled to little weight as to death causation. *See Collins*, 468 F.3d at 223-24, 23 BLR at 2-412. We therefore affirm the administrative law judge's finding at 20 C.F.R. §718.205(c).

Because claimant has established each element of entitlement, we affirm the administrative law judge's award of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge