

BRB No. 03-0552 BLA

IRENE ENGLAND)	
(Widow of LEONARD ENGLAND))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ROBINSON-PHILLIPS COAL COMPANY)	DATE ISSUED: 04/29/2004
)	
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 on Second Remand Awarding Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Irene England, Princeton, West Virginia, *pro se*.

Douglas A. Smoot and Dorothea A. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Awarding Benefits

(98-BLA-1214) of Administrative Law Judge Jeffrey Tureck on a survivor's claim¹ 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).² This case is before the Board for the third time. The procedural history of this case is contained in the Board's most recent decision. *England v. Robinson-Phillips Coal Co.*, BRB No. 99-1205 BLA (Aug. 29, 2000) (unpub.); Director's Exhibit 68. In that decision pursuant to employer's appeal, the Board vacated Administrative Law Judge Edward Terhune Miller's Decision and Order awarding benefits and, consistent with its prior decision in *England v. Robinson-Phillips Coal Co.*, BRB No. 96-1429 BLA (Apr. 30, 1997), the Board remanded the case to Administrative Law Judge Jeffrey Tureck, struck from the record all of the evidence developed by the district director following the Board's 1997 remand order to Judge Tureck, *England v. Robinson-Phillips Coal Co.*, BRB No. 96-1429 BLA (Apr. 30, 1997)(unpub.), and instructed Judge Tureck to base his decision upon the evidence before him in his initial decision and the evidence and exhibits related solely to the accuracy of the CT scan evidence as compared to x-ray evidence.³ *England v. Robinson-Phillips Coal Co.*, BRB No. 99-1205 BLA (Aug. 29, 2000)(unpub.); Director's Exhibit 68. Additionally, the Board noted that Judge Tureck should analyze the case in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), to determine whether the evidence is sufficient to establish the existence of

¹ Claimant, Irene England, is the widow of Leonard England, the miner, who died on July 2, 1994. Director's Exhibit 22. Claimant filed her application for benefits on August 9, 1994. Director's Exhibit 1.

² 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.

³ In his initial Decision and Order, Judge Tureck found that the CT scan evidence was entitled to greater weight than the x-ray evidence of record because a CT scan shows the lungs with greater detail and precision than an x-ray. Judge Tureck's 1996 Decision and Order at 3. The Board vacated this determination *inter alia* because Judge Tureck failed to provide a basis for this observation and the record contained no evidence indicating whether CT scans show the lungs with greater detail and precision than x-rays. *England v. Robinson-Phillips Coal Co.*, BRB No. 96-1429 BLA, *slip op.* at 4 (Apr. 30, 1997)(unpub.). Pursuant to the Board's remand order, Judge Tureck remanded the case to the district director to obtain expert medical evidence comparing the relative value of CT scan evidence and conventional x-ray evidence in diagnosing the existence of pneumoconiosis and he requested that the case be returned to him thereafter. After the district director obtained evidence, however, the case was referred back to the Office of Administrative Law Judges and reassigned to Administrative Law Judge Edward Terhune Miller, who adjudicated the claim *de novo*. The record did not indicate that Judge Tureck was unavailable at that time.

pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

On remand, Judge Tureck (the administrative law judge) found that, subsequent to his initial 1996 decision, the United States Court of Appeals for the Seventh Circuit and the Board had held that if the five requisite elements of collateral estoppel are satisfied and there is no autopsy evidence filed with the survivor's claim, the issue of whether a miner had pneumoconiosis cannot be relitigated in the survivor's claim, if it had been determined in the miner's claim, *citing Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Young v. Sewell Coal Co.*, BRB No. 98-1000 BLA (Aug. 26, 1999) (unpub.). Consequently, the administrative law judge determined that employer had stipulated to the presence of pneumoconiosis in the miner's claim and that all the requisite elements of issue preclusion were established; therefore, Administrative Law Judge Richard H. Beddow, Jr.'s finding that the miner had pneumoconiosis was binding⁴ and barred the relitigation of the existence of pneumoconiosis in this survivor's claim. The administrative law judge found further that, because the Board had affirmed his prior determination that the miner's death was due to pneumoconiosis, claimant was entitled to benefits commencing in July 1994, the month of the miner's death. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that the existence of pneumoconiosis was established, arguing that collateral estoppel does not bar relitigation of the issue of the existence of pneumoconiosis because employer had previously stipulated to the existence of pneumoconiosis in the miner's claim, this issue was never actually litigated, which is a requirement for application of the doctrine. Accordingly, employer argues that the administrative law judge erred in finding that Judge Beddow's previous finding of the existence of pneumoconiosis in the miner's claim was binding on the survivor's claim. Furthermore, employer contends that the administrative law judge improperly applied Seventh Circuit precedent to this case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Claimant, without the assistance of counsel, has not filed a reply brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a limited response letter, agreeing with employer's contention regarding the administrative law judge's application of collateral estoppel.

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 the 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).

⁴ By Decision and Order dated September 22, 1987, Administrative Law Judge Richard H. Beddow, Jr. awarded benefits to the miner, Leonard England, based on a finding of entitlement on an application filed on September 15, 1983.

Employer first argues that the administrative law judge's decision is inconsistent with applicable law because the administrative law judge erroneously found that Judge Beddow's pneumoconiosis determination in the miner's claim was binding in this survivor's claim. *Citing* to the RESTATEMENT (SECOND) ON JUDGMENTS §27e (1982), employer contends that the existence of pneumoconiosis was established by stipulation in the miner's claim, and therefore, this issue was not "actually litigated"; hence, a requisite element of collateral estoppel⁵ was not satisfied.

Relying on a slightly different rationale from that of employer, the Director responds, agreeing with employer that collateral estoppel is inapplicable to the instant case. The Director asserts that while the miner's claim was pending before the district director, employer filed a controversion contesting all elements of entitlement; however, employer subsequently submitted x-ray and medical opinion evidence sufficient to establish that the miner suffered from pneumoconiosis. Consequently, employer informed the district director that it no longer contested the issue of the existence of pneumoconiosis and accordingly, the only contested issue listed on the CM-1025 form was the existence of a totally disabling respiratory impairment. Director's Exhibit 38. Furthermore, the Director asserts that during

⁵ Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have actually been determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*), *citing Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994).

To successfully invoke the doctrine of collateral estoppel, in this case which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the party asserting it must establish the following criteria:

- (1) the issue sought to be precluded is identical to the one previously litigated;
- (2) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
- (3) determination of the issue must have been necessary to the outcome of the prior determination;
- (4) the prior proceeding must have resulted in a final judgment on the merits; 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.

See Sedlack v. Braswell Services Group, Inc., 134 F.3d 219 (4th Cir. 1998); *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229, 1-232-233 n.2 (2003); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).

the formal hearing, employer indicated that the only contested issue for adjudication was whether the miner had a totally disabling respiratory disability. Therefore, because employer did not “actually litigate” the issue of the existence of pneumoconiosis in the miner’s claim, the doctrine of collateral estoppel does not apply.

We agree with employer and the Director that the finding of pneumoconiosis in the miner’s claim cannot be accorded preclusive effect in the survivor’s claim because the issue was never actually litigated in the miner’s claim and the doctrine of collateral estoppel is, therefore, inapplicable. *See Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992); *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 137 (1999)(*en banc*). The administrative law judge erred, therefore, in applying the doctrine of collateral estoppel in the survivor’s claim.

Additionally, in *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), the Board held that, in a survivor’s claim where no autopsy evidence was obtained and entitlement to benefits was established in the living miner’s claim, the doctrine of collateral estoppel is not applicable to preclude litigation of the issue of the existence of pneumoconiosis because the Fourth Circuit court’s decision in *Compton*, 211 F.3d 203, 22 BLR 2-162, constituted a change in the law with respect to the standard for establishing the existence of pneumoconiosis under Section 718.202(a), and created a difference in the substantive legal standards applicable to the two proceedings. *Collins*, 22 BLR at 1-232-233; *accord Howard v. Valley Camp Coal Co.*, No. 03-1706 (4th Cir. Apr. 14, 2003)(unpub.). We hold, therefore, that the change in law established by *Compton* provides another reason that the doctrine of collateral estoppel cannot apply to the instant case.⁶

Because we find that the doctrine of collateral estoppel is inapplicable to the instant case, we vacate the administrative law judge’s finding and remand the case for the administrative law judge to determine whether claimant affirmatively established the existence of pneumoconiosis pursuant to Section 718.202(a) in accordance with *Compton*, 211 F.3d 203, 22 BLR at 2-162; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Collins*, 22 BLR at 1-229.

Accordingly, the Decision and Order on Second Remand Awarding Benefits of the administrative law judge is vacated and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

⁶ Our holding that the doctrine of collateral estoppel is inapplicable to the instant case precludes the need to address employer’s argument that the new evidence exception to issue preclusion is applicable.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge