

BRB No. 07-0340 BLA

S.H. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 RB COAL COMPANY )  
 )  
 and )  
 )  
 MANALAPAN MINING COMPANY, ) DATE ISSUED: 12/21/2007  
 INCORPORATED )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 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 Joseph E. Kane,  
Administrative Law Judge, United States Department of Labor.

John Crockett Carter, Harlan, Kentucky, for claimant.

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 appeals the Decision and Order Denying Benefits (05-BLA-5810) of Administrative Law Judge Joseph E. Kane rendered on a subsequent 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 claimant with twenty-five years of coal mine employment pursuant to the parties' stipulation, and adjudicated this subsequent claim, filed on November 28, 2001, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that claimant's previous claim had been denied on the ground that the evidence was insufficient to establish that claimant was totally disabled from pneumoconiosis arising out of coal mine employment.<sup>1</sup> The administrative law judge found that the new evidence submitted in support of this subsequent claim was sufficient to establish total respiratory disability, and therefore, claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found, however, that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant contends that the doctrine of collateral estoppel is applicable to preclude relitigation of the issue of the existence of pneumoconiosis. Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation, as required pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), 20 C.F.R. §725.406(a). Employer responds, arguing that claimant has waived the issue of collateral estoppel by failing to raise it before the administrative law judge, and alternatively, that the doctrine does not apply under the facts of the case. The Director has filed a limited response, arguing that he met his obligation to provide claimant with a pulmonary evaluation that complies with the requirements of Section 413(b) of the Act. The Director also agrees with employer's arguments that claimant has waived the issue of collateral estoppel, and that the facts of this case do not permit application of the doctrine in any event.

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.<sup>2</sup> 33 U.S.C. §921(b)(3), as incorporated by 30

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<sup>1</sup> Claimant's original claim for benefits, filed on December 20, 1999, was administratively denied on April 15, 2000. Director's Exhibit 1.

<sup>2</sup> The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant first contends that, because he was previously awarded benefits on his state workers’ compensation claim based upon x-ray evidence of occupational pneumoconiosis, the doctrine of collateral estoppel should be applied in the present case “to prohibit relitigation of facts necessarily decided in a prior litigation that may produce inconsistent findings.” Claimant’s Brief at 3. Claimant’s argument is rejected. We note initially that claimant may not raise this issue for the first time on appeal. *See generally Taylor v. 3D Coal Co.*, 3 BLR 1-350, 1-355 (1981). The doctrine of collateral estoppel is inapplicable under the facts of this case in any event, as 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. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006). The Board has consistently held that the findings of state workers’ compensation boards are not binding on the administrative law judge. *See Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744, 1-748 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984). Because the criteria necessary to prove entitlement under the Kentucky statute differ significantly from the federal standards, the administrative law judge properly adjudicated the contested issue of the existence of pneumoconiosis. As claimant has not otherwise challenged the administrative law judge’s finding that claimant failed to establish the existence of pneumoconiosis, nor identified any substantive error of law or fact in the administrative law judge’s weighing of the medical evidence at Section 718.202(a)(1)-(4), we affirm the administrative law judge’s findings thereunder, as unchallenged on appeal. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, claimant is precluded from entitlement to benefits. *See Anderson*, 12 BLR at 1-114.

Lastly, claimant argues that the Director violated his duty under Section 413(b) of the Act, 30 U.S.C. §923(b), 20 C.F.R. §725.406(a), to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim, as Dr. Wicker’s report “fails to credibly address the issue of [p]ulmonary [i]mpairment where test results

clearly show impairment.”<sup>3</sup> Claimant’s Brief at 4. Contrary to claimant’s argument, however, Dr. Wicker diagnosed a totally disabling respiratory impairment, and the administrative law judge found that total disability was established in the present case because all the physicians agreed that claimant was unable to perform his usual coal mine employment due to his lung pneumonectomy. Decision and Order at 8; Director’s Exhibits 10, 23. While the administrative law judge discounted Dr. Wicker’s diagnosis of pneumoconiosis and credited contrary medical evidence in finding that claimant failed to establish the existence of pneumoconiosis, Dr. Wicker performed all necessary testing and addressed the essential elements of entitlement. Director’s Exhibits 10, 23. In these circumstances, where the physician’s opinion is documented and inherently credible, the Director’s statutory obligation is discharged, as the Director is required to provide miners with a complete evaluation, not a dispositive one. *See Newman v. Director, OWCP*, 745 F.2d 1162, 1168 (8th Cir. 1984).

Accordingly, the administrative law judge’s Decision and Order - Denial of Benefits is affirmed.

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>3</sup> The record reflects that, on its face, Dr. Wicker’s opinion is complete. Dr. Wicker conducted a physical examination, recorded claimant’s symptoms as well as his employment, medical and social histories, obtained an x-ray, pulmonary function and arterial blood gas studies, and addressed every element of entitlement. *See Director’s Exhibits 10, 23.*