

BRB No. 08-0248 BLA

M.L.L. )  
(Widow of R.D.L.) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
SLAB FORK COAL COMPANY )  
 )  
and )  
 )  
WEST VIRGINIA COAL WORKERS' ) DATE ISSUED: 12/23/2008  
PNEUMOCONIOSIS FUND )  
 )  
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 Awarding Benefits of Stephen L. Purcell,  
Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Pineville, West Virginia, for claimant.

Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia,  
for employer/carrier.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank  
James, Acting 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  
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-6086) of Administrative Law Judge Stephen L. Purcell on a survivor's claim<sup>1</sup> 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge determined that because the issue of the existence of pneumoconiosis was previously established pursuant to 20 C.F.R. §718.202(a) in the miner's successful claim for benefits, the doctrine of collateral estoppel<sup>2</sup> was applicable to preclude employer from relitigating that issue in this survivor's claim.<sup>3</sup> The administrative law judge found that the evidence established that pneumoconiosis was a substantially

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on May 6, 2003. Director's Exhibit 9. Claimant filed her survivor's claim for benefits on June 2, 2003. Director's Exhibit 2.

<sup>2</sup> 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); see *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); see also *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006).

<sup>3</sup> The miner filed his first application for benefits on April 10, 1981, which was finally denied by the district director on June 4, 1981. Director's Exhibit 1. Thereafter, the miner filed a second application for benefits on November 30, 1982 and, by Decision and Order dated February 10, 1988, Administrative Law Judge Edward J. Murty, Jr. denied benefits and, by Order dated March 9, 1988, denied reconsideration. Claimant appealed the denials and the Board affirmed both decisions. [*R.L.*] *v. Slab Fork Coal Co.*, BRB No. 88-1090 BLA (Nov. 21, 1991) (unpub.). Subsequently, claimant filed a petition for modification with supporting evidence on January 15, 1992. After a formal hearing, Administrative Law Judge Glenn Robert Lawrence awarded benefits on April 30, 1993, and on July 15, 1993, he denied the motion of the Director, Office Workers' Compensation Programs (the Director), requesting reconsideration. On employer's appeal, the Board vacated Judge Lawrence's decision and remanded the case for further consideration. [*R.L.*] *v. Slab Fork Coal Co.*, BRB No. 93-2088 BLA (June 24, 1994) (unpub.). On remand, the case was assigned to Administrative Law Judge James Guill, who issued a Decision and Order on Remand on May 31, 1995, awarding the miner benefits.

contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred by retroactively applying the decision of the United States Court of Appeals for the Fourth Circuit in *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006), to find that employer was collaterally estopped from relitigating the issue of the existence of pneumoconiosis. Employer also contends that the administrative law judge erred in relying on the opinion of Dr. Bird, the miner's treating physician, instead of the contrary opinions of Drs. Fino and Rosenberg, to support his finding that claimant established that the miner's death was due to pneumoconiosis at Section 718.205(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging affirmance of the administrative law judge's determination that the doctrine of collateral estoppel was applicable herein in light of *Collins*. The Director declines to take a position with regard to the administrative law judge's findings on the merits of entitlement. Employer has filed a reply brief, reiterating its previous arguments and asserting, in the alternative, that if the doctrine of collateral estoppel is applicable herein, due process requires that the Board vacate the award of benefits and remand this case to the administrative law judge with instructions to reopen the record to permit employer to develop its defense appropriately.

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 the applicable law, they are binding upon this 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). 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 Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Initially, employer argues that the administrative law judge erred in applying the decision in *Collins* to conclude that employer was collaterally estopped from relitigating the issue of the existence of pneumoconiosis in this survivor's claim. Prior to the administrative law judge's adjudication of this case, but after the formal hearing, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,<sup>4</sup> overruled the Board's decision in *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003). The Board had 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 was not applicable to preclude relitigation of the issue of the existence of pneumoconiosis, in light of the Fourth Circuit's decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), where the court held that all types of relevant evidence must be weighed together to determine whether a miner suffers from pneumoconiosis. As the miner in *Collins* was awarded benefits at a time when evidence sufficient to establish pneumoconiosis under one of the four methods set forth in Section 718.202(a)(1)-(4) obviated the need to establish pneumoconiosis under any of the other methods, the Board reasoned that *Compton* constituted a change in the law with respect to the standard for establishing the existence of pneumoconiosis, thereby creating a difference in the substantive legal standards applicable to the two proceedings. *Collins*, 22 BLR at 1-232-233.

In overruling the Board's decision, however, the Fourth Circuit court held that *Compton* did not constitute a change in law and that survivor-claimants bear the same burden to establish, by a preponderance of the evidence, the same fact that miner-claimants must establish, *i.e.*, the existence of pneumoconiosis, in the same manner through one of the four methods prescribed by the subsections set forth in Section 718.202(a). The court concluded, therefore, that the issue of the existence of pneumoconiosis in the survivor's claim was identical to the issue previously litigated in the miner's claim, and should have been given preclusive effect in the survivor's claim. *See* 20 C.F.R. §718.202(a)(1)-(4); *Collins*, 468 F.3d at 218-219, 23 BLR at 2-403-406.

In the present case, applying *Collins* in addition to the holding in *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 334, 22 BLR 2-581, 2-587 (7th Cir. 2002), the administrative law judge found that employer was collaterally estopped from relitigating the issue of the existence of pneumoconiosis, based on the award of benefits in the miner's claim, which employer did not appeal to the Board, and based on the absence of autopsy evidence in the survivor's claim. Decision and Order at 9. Employer argues that because *Collins* was issued subsequent to both the formal hearing in this case

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<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 3.

and the closure of the evidentiary record, the administrative law judge's application of *Collins*, absent proper notice to the parties, constituted a denial of employer's right to due process. Employer specifically avers that, prior to *Collins*, the parties in a survivor's claim were permitted to litigate all requisite elements of entitlement, and, in accordance with the holding in *Compton*, consideration of all relevant evidence to determine the existence of pneumoconiosis was required by the factfinder. Employer postulates that the *Collins* decision, in effect, changed the criteria and standards under which survivor's claims are adjudicated, and as such, fundamentally altered employer's preparation of its defense to this case, namely, its reliance on the medical reviews of Drs. Fino and Rosenberg, physicians who did not diagnose pneumoconiosis. While employer admits that the administrative law judge properly analyzed whether the application of collateral estoppel would be unfair to employer pursuant to the four factors articulated in *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979), employer avers that the administrative law judge failed to consider the fairness to employer in applying a post-hearing decision that effectively changed the law. Hence, employer requests that the case be remanded for a reopening of the record and the submission of new evidence.

The Director responds, arguing that the administrative law judge was obliged to apply *Collins* in this case, based on the doctrine of *stare decisis*. Further, the Director contends that, assuming *arguendo* that *Collins* constituted "a change in the legal landscape," employer's right to due process was not denied because employer was on notice of this decision for almost one year prior to the administrative law judge's issuance of his decision, and thus, had ample opportunity to request that the record be reopened in light of *Collins* prior to the administrative law judge's adjudication of the claim. We find merit in some of the arguments of both parties.

Any decisions issued while a case is pending for adjudication govern the disposition of that case, and the tribunal must apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. See *Hill v. Director, OWCP*, 9 BLR 1-126, 1-27 n.1 (1986). Thus, the administrative law judge did not err in relying on the holding in *Collins* and, within a proper exercise of his discretion, found that the prior determination that the miner suffered from pneumoconiosis rendered in the living miner's claim should be accorded preclusive effect in this survivor's claim. However, while we affirm the administrative law judge's application of the doctrine of collateral estoppel to the case at bar, we agree with employer that due process requires a reopening of the record to permit employer an opportunity to supplement its medical evidence. Even though claimant asserted, in her post-hearing brief, that the doctrine of collateral estoppel was applicable, no party raised the issue before the district director, at the formal hearing before the administrative law judge, or prior to the closing of the evidentiary record. Consequently, employer was not afforded sufficient notice that this was a relevant, pertinent issue in this case that the administrative law judge would consider. Accordingly, while we affirm the

administrative law judge's determination that the doctrine of collateral estoppel was applicable, we vacate his finding that claimant established that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c)(2), (5), and remand this case to the administrative law judge for a reopening of the record and the submission of supplemental evidence, the redesignation of evidence by the parties, and a readjudication of the issue of the cause of the miner's death thereunder.

In the interest of judicial efficiency, we will also address employer's arguments with respect to the administrative law judge's weighing of the evidence pursuant to Section 718.205(c). Employer argues that the administrative law judge erred in granting an automatic preference to the opinion of the miner's treating physician, Dr. Bird, that pneumoconiosis hastened the miner's death from a myocardial infarction by severely limiting his exercise tolerance, leading to a sedentary lifestyle which contributed to the development of the miner's cardiac problems. Employer asserts that Dr. Bird's progress notes merely reflect a history of coal workers' pneumoconiosis and chronic obstructive pulmonary disease, rather than a diagnosis of those conditions, and therefore the physician's conclusions were tenuous and speculative. Employer also contends that Dr. Bird's opinion fails to affirmatively demonstrate the causal connection between coal workers' pneumoconiosis and the miner's demise. Employer maintains that the preponderance of the evidence does not support the administrative law judge's reliance on Dr. Bird's opinion for three reasons: Dr. Bird's treatment notes do not document decreased activity levels or exertional intolerance of the miner; only two treatment records from August 1995 and May 1999 specifically mentioned breathing difficulties; and the record neither substantiates that the miner's lifestyle was sedentary nor does it conclusively establish that a coal dust-induced pulmonary disease caused any such sedentary lifestyle, as any one of the various afflictions from which the miner suffered, namely diabetes, hypertension, arthritis, and gout, could have accounted for his inactivity.

A review of Dr. Bird's reports belies employer's contentions. Dr. Bird opined that the miner's coal workers' pneumoconiosis resulted in markedly decreased activity levels causing a sedentary lifestyle, which precipitated the miner's coronary artery disease and ultimately led to his acute myocardial infarction and death. Director's Exhibits 10, 11, 31. Dr. Bird indicated that the miner's hyperlipidemia, hypertension and diabetes were also risk factors, but concluded that "in addition to these the pneumoconiosis did play a substantial role [in the development of the miner's coronary artery disease leading to his death,] since that certainly limited his ability to exercise to help control some of these other problems." Director's Exhibit 33; Decision and Order at 6. The administrative law judge did not accord controlling weight to Dr. Bird's opinion based on his status as the miner's treating physician, but rather, credited the opinion because he found that it was reasoned and supported. Decision and Order at 13; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Lane v. Union*

*Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997) (administrative law judge may weigh medical evidence and draw his own conclusions); *Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 11-12. In addition, the administrative law judge properly found that Dr. Bird's diagnoses of pneumoconiosis and chronic obstructive pulmonary disease, as reflected in his treatment notes over the course of the last eight years of the miner's life, were based not only on the miner's reported medical history, but also on x-ray interpretations and his treatment of the miner. Decision and Order at 5, 11. While the administrative law judge acknowledged that Dr. Bird's opinion described "a less direct causation [opinion] than is typically relied upon in awarding benefits in survivors' claims," the administrative law judge noted that the regulations and legal precedent do not mandate that pneumoconiosis be "the *principal* cause of death in order for benefits to be awarded." Decision and Order at 12. Furthermore, it was not erroneous for the administrative law judge to conclude that Dr. Bird's opinion, that the miner's "pneumoconiosis caused a totally disabling pulmonary impairment that severely limited his exertional tolerance and resulted in a sedentary lifestyle over a number of years [and that] increased the risk of the heart disease, [and] ultimately led to the Miner's death," was consistent with the prior administrative law judge's finding of totally disabling pneumoconiosis in the living miner's claim. Decision and Order at 11. Consequently, we reject employer's argument that the administrative law judge erred in finding that the opinion of Dr. Bird was well reasoned and sufficient to support a finding that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2), (5). See *Shuff*, 967 F.2d 977, 16 BLR 2-90.

Lastly, we reject employer's argument that the administrative law judge erred in summarily discrediting the opinions of Drs. Fino and Rosenberg, that the miner's death was due to cardiac problems that were unrelated to dust exposure in coal mine employment. As discussed *supra*, the administrative law judge permissibly found that the doctrine of collateral estoppel was applicable to preclude employer from relitigating the issue of the existence of pneumoconiosis in this survivor's claim. Thus, the administrative law judge properly found that the opinions of Drs. Fino and Rosenberg as to the cause of the miner's death were entitled to diminished weight, as neither physician diagnosed the presence of either clinical pneumoconiosis or legal pneumoconiosis. See *Collins*, 468 F.3d at 223-224, 23 BLR at 2-411-412; *Scott v. Mason Coal Co.*, 289 F.3d 263, 268-269, 22 BLR 2-372, 2-382-383 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 17.

In conclusion, we affirm the administrative law judge's determination that employer is precluded from relitigating the issue of the existence of pneumoconiosis pursuant to Section 718.202(a) in this survivor's claim. However, we vacate the administrative law judge's finding that claimant established that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c)(2), (5), and

remand the case for the administrative law judge to reopen the record and to consider the parties' newly designated evidence accordingly. *See* 20 C.F.R. §718.205(c)(2), (5); *Shuff*, 967 F.2d at 980, 16 BLR at 2-93; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

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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REGINA C. McGRANERY  
Administrative Appeals Judge