

BRB No. 07-0379 BLA

L.S.)
(Widow of E.H.S.))
)
Claimant-Respondent)
)
v.)
)
MASON COAL COMPANY,) DATE ISSUED: 02/27/2008
INCORPORATED)
)
and)
)
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 Awarding Benefits 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/carrier.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, 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:

Employer appeals the Decision and Order Awarding Benefits (2005-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 The administrative law judge credited the miner with sixteen years and eleven and one-half months of qualifying coal mine employment, and adjudicated this claim, filed on July 7, 2003, pursuant to the provisions at 20 C.F.R. Part 718. Initially, the administrative law judge found that the miner was in payment status at the time of his death.² Decision and Order at 2; Director's Exhibit 1. Based on the findings in the miner's claim, the administrative law judge found the issue of whether the miner suffered from coal workers' pneumoconiosis "to be 'law of the case,' and it should not be relitigated." Decision and Order at 4. The administrative law judge further found that the medical evidence of record was sufficient to establish 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, commencing as of June 1, 2003.

¹ Claimant is the widow of the miner who died on June 19, 2003. Director's Exhibits 2, 8.

² The procedural history in the miner's claim is set forth in pertinent part. The miner's claim was filed 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, finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4); but that the miner failed to establish a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. Director's Exhibit 1. Following several intermediate decisions by the Office of Administrative Law Judges and the Board regarding the issues of total disability and disability causation, *see [E.H.S.] v. Mason Coal Co.*, BRB No. 98-0660 BLA (Mar. 17, 1999)(unpub.) (procedural history of the miner's 1984 claim set forth), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arose, reversed the denial of benefits and remanded the case for an award of benefits. *[E.H.S.] v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). In addition, employer contends that the administrative law judge erred in applying the doctrine of "collateral estoppel" to the issue of the existence of pneumoconiosis. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, contends that while the administrative law judge erred in finding that the doctrine of "law of the case" applies, he, nonetheless, permissibly found that employer was precluded from relitigating the issue of the existence of pneumoconiosis pursuant to the doctrine of collateral estoppel. In a reply brief, employer reiterates its contention that the administrative law judge erred in applying the doctrine of "collateral estoppel."

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer challenges the application of the doctrine of "collateral estoppel" to preclude employer from relitigating the issue of the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Employer asserts that collateral estoppel cannot be applied in this case because Administrative Law Judge Gerald Hayes's finding of the existence of pneumoconiosis in his 1988 Decision and Order was not essential to his adjudication of the living miner's claim, since he denied benefits. Employer's Brief at 19. In addition, employer contends that the burdens of proof have changed since Judge Hayes initially adjudicated the miner's claim and, therefore, relitigation of the issue of the existence of pneumoconiosis is not barred. Employer's Brief at 19-21. Employer also contends that the doctrine of collateral estoppel is an affirmative defense, and because the claimant did not raise it at any point in the proceedings, she waived it. Employer's Brief at 21. Additionally, employer argues that collateral estoppel is not applicable because the criteria for adjudicating survivor's claims differs from those relevant to a miner's claim and that because of the "fuller record available in the survivor's claim," employer cannot be precluded from contesting this issue in the survivor's claim. Employer's Brief at 22-23. In response, the Director initially notes that the administrative law judge erred in finding that the doctrine of the "law of the case" controls whether the issue of the existence of pneumoconiosis should be relitigated. Rather, the Director argues that the administrative law judge properly found that employer was collaterally estopped from arguing that the miner did not have pneumoconiosis. Director's Letter Brief at 1. In particular, the Director urges the Board to reject employer's allegations of error, arguing that these contentions lack merit. Director's Letter Brief at 2-4.

Initially, we agree with the Director that the administrative law judge erred in determining that the “law of the case” doctrine applied in this case. The doctrine of the “law of the case” is a discretionary rule of practice based on the policy that once an issue is litigated and decided, the matter should not be re-litigated. *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh’g denied*, 339 U.S. 972 (1950). Specifically, “the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Arizona v. California*, 460 U.S. 605, 618 (1983); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J. dissenting). Consequently, the doctrine of “law of the case” is not applicable herein because a living miner’s claim and a survivor’s claim are not the same case, but rather, are separate causes of action. However, a party may be precluded, or collaterally estopped, from relitigating the issue of the existence of pneumoconiosis in the survivor’s claim, where it was finally adjudicated in the miner’s claim.

Collateral estoppel, or issue preclusion, refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the initial action. *See Freeman v. United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). 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.

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 2-393 (4th Cir. 2006); *Zeigler Coal Co. v. Director, OWCP [Villain]*, 311 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*). As the administrative law judge did not properly consider whether the doctrine of collateral estoppel is applicable, we vacate his award of benefits and remand the case for the administrative law judge to determine whether employer is collaterally estopped from

relitigating the issue of the existence of pneumoconiosis pursuant to Section 718.202, under the facts of this case.³

On remand, the administrative law judge, in addressing the specific criteria concerning the applicability of the doctrine of collateral estoppel, should also consider whether the doctrine of offensive non-mutual collateral estoppel, defined as “when a plaintiff seeks to prevent a defendant from relitigating issues previously litigated and decided against the defendant in an action brought by a different plaintiff,” is applicable.⁴ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n.4 (1979); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 n.4, 23 BLR 2-393, 2-401 n.4 (4th Cir. 2006); *Lewis Coal Co. v. Director, OWCP [McCoy]*, 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004).

If, on remand, the administrative law judge finds that the doctrine of collateral estoppel does not apply in this case, he must then consider the medical evidence of record to determine whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a). Moreover, because the administrative law judge’s determination on remand concerning the existence of pneumoconiosis may affect his analysis of the medical evidence with respect to the issue of the whether the miner’s death was

³ In its most recent decision in the previously litigated living miner’s claim, the Fourth Circuit stated that “[a]s we noted in our previous decision, [E.H.S.] has established that he has pneumoconiosis arising out of his coal mine employment.” *[E.H.S.] v. Mason Coal Co.*, 289 F.3d 263, 267, 22 BLR 2-372, 2-380 (4th Cir. 2002), *citing [E.H.S.] v. Mason Coal Co.*, 60 F.3d 1138, 1140, 19 BLR 2-257, 2-261-62 (4th Cir. 1995). In the 1995 decision on that same miner’s claim, the Fourth Circuit held that:

Other issues of consequence, such as whether [E.H.S.] has pneumoconiosis and whether the pneumoconiosis arose in part out of coal mine employment, have been decided in his favor in the earlier proceedings in this case. *See [E.H.S.] v. Mason Coal Co.*, 14 B.L.R. 1-37, 1-42 n. 6 (B.R.B.1990)(*en banc*) (affirming ALJ’s findings of pneumoconiosis arising out of coal mining employment as unchallenged on appeal).

[E.H.S.], 60 F.3d at 1140, 19 BLR at 2-261-62.

⁴ As employer stated, claimant, the miner’s widow, was not a party to the miner’s claim. However, employer was a party to the prior claim and, thus, application of offensive non-mutual collateral estoppel may be applicable herein. *See Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 334, 22 BLR 2-581, 2-586 (7th Cir. 2002)(describing the same scenario as “a straightforward application of offensive nonmutual issue preclusion”).

substantially contributed to by pneumoconiosis under Section 718.205(c), we vacate this determination and the administrative law judge must reconsider this issue in light of his findings regarding the existence of pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated and the case is remanded to the administrative law judge for further consideration.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge