

BRB No. 08-0448 BLA

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| L.L. |) | |
| (Widow of L.L.) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| ROYALTY SMOKELESS COAL |) | DATE ISSUED: 02/27/2009 |
| COMPANY/A.T. MASSEY |) | |
| |) | |
| 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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits (2004-BLA-05700) of Administrative Law Judge Pamela Lakes Wood (the administrative law judge) 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.* This

claim was previously before the Board.¹ Pursuant to an appeal by claimant, the Board noted that, subsequent to the administrative law judge's Decision and Order denying benefits on the claim, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, issued its decision in *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). In that decision, the Fourth Circuit held that the Board erred in interpreting the Fourth Circuit's decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), as constituting a substantial change in the law regarding claimant's burden of proof for establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In light of the Fourth Circuit's decision in *Collins*, the Board held that claimant was entitled to further consideration of whether she could rely on the doctrine of collateral estoppel² to preclude employer from relitigating the issue of pneumoconiosis. Accordingly, the Board vacated the administrative law judge's finding that collateral estoppel did not preclude employer

¹ Claimant is the widow of the miner, who died on September 30, 2001. The miner filed a claim for benefits on March 12, 1984. He was awarded benefits on August 31, 1990. Employer did not appeal the award of benefits in the miner's claim. Claimant filed a claim for survivors' benefits on October 9, 2001.

² 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 invoke the doctrine of collateral estoppel, 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.

Sedlack v. Braswell Services Group, Inc., 134 F.3d 219 (4th Cir. 1998).

from relitigating the issue of pneumoconiosis, and remanded the case for further consideration of the issue. The Board held that if the administrative law judge determined that employer was collaterally estopped from relitigating the issue of pneumoconiosis, then claimant would be entitled to a finding of pneumoconiosis at Section 718.202(a), based on the finding in the miner's claim, and the administrative law judge must consider whether the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). [*L.L.*] v. *Royalty Smokeless Coal Co.*, BRB Nos. 06-0640 BLA/A (Mar. 27, 2007)(unpub.).

On remand, the administrative law judge found that application of the doctrine of collateral estoppel was appropriate in this case pursuant to the Fourth Circuit's holding in *Collins*. Consequently, she held that the finding of pneumoconiosis in the miner's claim precluded employer from relitigating the issue in the survivor's claim. Turning to the merits of the claim, the administrative law judge found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b), based on the parties' stipulation that the miner had at least fifteen years of coal mine employment and the fact that employer offered no countervailing evidence to rebut the presumption. Next, the administrative law judge found that a preponderance of the evidence established that the miner's death was "caused or hastened" by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge erred in finding that pneumoconiosis caused or hastened the miner's death pursuant to Section 718.205(c). Claimant responds, urging affirmance of the decision awarding benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.³

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,

³ Employer does not challenge the administrative law judge's finding on collateral estoppel, *i.e.*, that employer is precluded from relitigating the issue of pneumoconiosis, pursuant to 20 C.F.R. 718.202(a) in the survivor's claim because it was established in the miner's claim. Also, employer does not challenge the administrative law judge's finding that claimant is entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment, in light of his fifteen years of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Because these findings are unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.⁴ 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).

In order to establish entitlement to survivors’ benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis, that it arose out of coal mine employment and that the miner’s death was due to pneumoconiosis. Death will be considered to be due to pneumoconiosis if pneumoconiosis caused the miner’s death, pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, the miner’s death was caused by complications of pneumoconiosis, or the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Pneumoconiosis is a “substantially contributing cause” of the miner’s death if it hastened the miner’s death. 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Coal Co.*, 969 F.2d 977-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert denied*, 506 U.S. 1050 (1993).

The record shows that Dr. Cohen, after review of the miner’s medical records, opined that the miner’s chronic obstructive pulmonary disease, which he determined was due to both his lengthy smoking and coal mine employment histories, hastened his death. Claimant’s Exhibit 2. Dr. Rasmussen, after review of the miner’s medical records, opined that both smoking and coal mine employment were significant causes of the miner’s chronic obstructive pulmonary disease and that “coal mine dust exposure was a major contributing cause of [the miner’s] death.” Claimant’s Exhibit 1. Dr. Fino, after review of the miner’s medical records, opined that the miner’s chronic obstructive pulmonary disease was due to smoking and that even if coal mine employment played some role in the disease, it was of no clinical significance. Dr. Fino also concluded that the miner’s coal mine employment did not contribute to his death. Employer’s Exhibit 2. Finally, Dr. Dahhan, after review of the miner’s medical records, opined that the miner had chronic obstructive pulmonary disease due to both smoking and coal mine employment, but that the miner’s death was not caused by, related to, contributed to, brought on, or hastened by coal mine employment. Employer’s Exhibit 5.

In considering the relevant evidence, the administrative law judge concluded that all of the medical opinions of record found that the miner’s death was due, at least in significant part, to his chronic obstructive pulmonary disease, although they disagreed as

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 1.

to the cause of the chronic obstructive pulmonary disease. The administrative law judge also found that the miner's death certificate, listing respiratory failure due to coronary artery disease as the cause of death, also listed "occupational pneumoconiosis" as a contributing factor. Director's Exhibit 9. Consequently, the administrative law judge determined that the miner's death was caused or hastened by his pneumoconiosis at Section 718.205(c) because 1) the doctors agreed that the miner's death was due, at least in significant part, to chronic obstructive pulmonary disease, and 2) it was determined that the miner's chronic obstructive pulmonary disease was due, in part, to coal mine employment.

The administrative law judge failed, however, to discuss and independently evaluate the credibility of the doctors' findings on the issue of death causation. Instead, the administrative law judge appears to have found that because pneumoconiosis was established, the miner's death must be due to pneumoconiosis. These are separate elements of entitlement, however, and the administrative law judge must consider each one independently in determining whether entitlement is established. *See Trumbo*, 17 BLR at 1-88; *Neeley*, 11 BLR at 1-86. The administrative law judge's decision awarding benefits is, therefore, vacated and the case is remanded for the administrative law judge to independently evaluate the medical opinions on the issue of death causation at Section 718.205(c) and to provide the basis for her findings on the evidence. *See The Administrative Procedure Act*, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The administrative law judge must evaluate the credibility of the medical opinions and the death certificate on the issue of death causation, and weigh all of the relevant evidence on the issue. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). In so doing, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 532; 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-75-76; *Trumbo*, 17 BLR at 1-87; *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Consequently, the administrative law judge's finding that the evidence established that the miner's death was caused or hastened by pneumoconiosis pursuant to Section 718.205(c) is vacated and the case is remanded for further consideration of the issue.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Benefits is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge