

BRB No. 09-0371 BLA

VERNA LOFTIS)
(Widow of MILLARD LOFTIS))
)
Claimant-Respondent)
)
v.)
)
WESTMORELAND COAL COMPANY)
) DATE ISSUED: 02/16/2010
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 Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, 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 – Awarding Benefits (2004-BLA-5302) of Administrative Law Judge Michael P. Lesniak rendered 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). This case is before the Board for the second time. In his original Decision and Order, issued on August 10, 2006, the administrative law judge credited employer's concession that the miner worked

¹ Claimant is the widow of the miner, who died on March 6, 2002. Claimant filed her application for survivor's benefits on March 25, 2002. Director's Exhibits 3, 7.

in qualifying coal mine employment for thirty-four years, and noted that the miner was awarded benefits on his lifetime claim.² Based on the Board's decision in *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), however, the administrative law judge determined that the doctrine of collateral estoppel was not applicable in the survivor's claim to preclude employer from relitigating the issue of the existence of pneumoconiosis arising out of coal mine employment, previously established in the miner's claim.³ The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that pneumoconiosis substantially contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, the Board vacated the denial of benefits and the administrative law judge's findings at Section 718.202(a), in light of the newly issued decision by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,⁴ in *Collins v. Pond Creek Mining Co. (Collins II)*, 468 F.3d 213, 23 BLR 2-393 (4th Cir.

² The miner filed his first application for benefits on July 25, 1979, which was finally denied by the district director on December 29, 1980. The miner filed a subsequent claim on October 21, 1987 and, by Decision and Order dated January 17, 1990, Administrative Law Judge Glenn Robert Lawrence awarded benefits. Director's Exhibits 1, 2.

³ In *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), the Board determined that the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that all types of relevant evidence must be weighed together in determining whether the existence of pneumoconiosis has been established pursuant to 20 C.F.R. §718.202(a), had an effect on the adjudicator's weighing of the evidence, because the miner could previously have established the existence of pneumoconiosis pursuant to any single subsection thereunder. Thus, in survivor's claims arising within the jurisdiction of the Fourth Circuit, where the miner was awarded lifetime benefits prior to the issuance of *Compton*, and no autopsy was performed, the Board held that the doctrine of collateral estoppel was not applicable to bar relitigation of the issue of the existence of pneumoconiosis. *Collins*, 22 BLR at 1-233.

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, 1-202 (1989)(*en banc*); Director's Exhibit 3.

2006).⁵ The Board remanded the case for the administrative law judge to reconsider whether employer was collaterally estopped from relitigating the issue of the existence of pneumoconiosis in this survivor's claim, where the miner was awarded lifetime benefits and no autopsy evidence was presented. *See Collins II*, 468 F.3d at 218-223, 23 BLR at 2-403-410; *see also Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002). Because the administrative law judge's determination on remand could affect his weighing of the evidence with respect to the issues of the existence of complicated pneumoconiosis under Section 718.304 and the cause of the miner's death at Section 718.205(c), the Board vacated the administrative law judge's findings thereunder, and instructed him to readjudicate these issues. *V.L. [Loftis] v. Westmoreland Coal Co.*, BRB No. 06-0945 BLA (Sept. 25, 2007)(unpub.).⁶

On remand, pursuant to the Board's instructions, the administrative law judge determined that applying the doctrine of offensive non-mutual collateral estoppel would not be unfair to employer, pursuant to the criteria set forth in *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979), and that its application was appropriate under the facts of this case to preclude relitigation of the issue of the existence of pneumoconiosis. The administrative law judge found that the weight of the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, but was sufficient to establish that the miner's death was due to pneumoconiosis under Section 718.205(c). Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer contends that the administrative law judge erred in finding that the doctrine of collateral estoppel was applicable to preclude relitigation of the issue of the existence of pneumoconiosis in this survivor's claim. Neither claimant

⁵ The Fourth Circuit explained in *Collins v. Pond Creek Mining Co. (Collins II)*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006) that, although *Compton* invalidated the practice of allowing administrative law judges to find the existence of pneumoconiosis established by looking exclusively at evidence within one of the four subsections at 20 C.F.R. §718.202(a), it left unaltered the legal definition of pneumoconiosis, the methods by which a claimant may establish the existence of pneumoconiosis, and the burden of proving the existence of pneumoconiosis by a preponderance of the evidence. The Court thus concluded that the issue sought to be precluded in the survivor's claim was identical to that previously adjudicated in the successful miner's claim decided prior to *Compton*, and that therefore, collateral estoppel was applicable to preclude relitigation of the issue of the existence of pneumoconiosis. *Collins II*, 468 F.3d at 219, 23 BLR at 2-403.

⁶ On March 27, 2008, the Board denied employer's request for reconsideration of its Decision and Order dated September 25, 2007.

nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this case.⁷

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).

To successfully invoke the doctrine of collateral estoppel, a party must establish: (1) that the issue sought to be precluded is identical to the one previously litigated; (2) that the issue was actually determined in the prior proceeding; (3) that the issue's determination was a critical and necessary part of the decision in the prior proceeding; (4) that the prior judgment is final and valid; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *See Collins II*, 468 F.3d at 217, 23 BLR at 2-401; *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*). The doctrine does not bar the relitigation of factual issues where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first. *See Collins II*, 468 F.3d at 217-218, 23 BLR at 2-401.

Employer contends that application of the doctrine of collateral estoppel was not appropriate in this case to bar relitigation of the issue of the existence of pneumoconiosis. In this regard, employer argues that Administrative Law Judge Glenn Robert Lawrence applied the true doubt rule in the miner's claim to find that the x-ray evidence established the existence of pneumoconiosis at Section 718.202(a)(1),⁸ which affected his weighing

⁷ We affirm, as unchallenged on appeal, the administrative law judge's finding that the weight of the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and his determination that applying the doctrine of collateral estoppel in the present case would not be unfair to employer, pursuant to the criteria set forth in *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁸ By applying the true doubt rule in weighing the evidence, the adjudicator resolved all conflicts in favor of the claimant. "True doubt" was said to arise only when equally probative but contradictory evidence was presented in the record, where selection of one set of facts would resolve the case against the claimant, but selection of the contradictory set of facts would resolve the case for claimant. The United States Supreme Court invalidated the true doubt rule, and held that claimants have the burden of

of the medical opinions of record at Section 718.202(a)(4), specifically Dr. Zaldivar's opinion. Employer maintains that the invalidation of the true doubt rule by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), constitutes a change in the law sufficient to preclude application of the doctrine of collateral estoppel under the facts of this case. Employer's Brief at 4-9. Employer's arguments are without merit.

In the present case, the administrative law judge agreed that the invalidation of the true doubt rule constituted a change in law with respect to Judge Lawrence's finding that the x-ray evidence of record was in equipoise and thus established the existence of pneumoconiosis at Section 718.202(a)(1), but he rationally determined that Judge Lawrence found the existence of legal pneumoconiosis established at Section 718.202(a)(4) by a preponderance of the medical opinion evidence. In so finding, the administrative law judge accurately reviewed Judge Lawrence's analysis of the medical opinion evidence of record in the miner's claim, noting that Drs. Gaziano and Tampoya diagnosed legal pneumoconiosis,⁹ while Drs. Zaldivar and Fino attributed the miner's pulmonary problems solely to smoking. Decision and Order on Remand at 3-4. We find no error in the administrative law judge's determination that, while Judge Lawrence discredited Dr. Zaldivar's opinion, in part, because the doctor relied on the absence of radiographic findings of pneumoconiosis, when the record contained positive interpretations by highly qualified readers, Judge Lawrence ultimately found that the opinions of Drs. Zaldivar and Fino were outweighed by the contrary opinions of Drs. Gaziano and Tampoya, which Judge Lawrence concluded were more persuasive, as bolstered by the miner's treatment notes and objective test results. Decision and Order on Remand at 4-5. The administrative law judge permissibly determined, therefore, that

establishing all requisite elements of entitlement under 20 C.F.R. Part 718 by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

⁹ Judge Lawrence credited the opinion of Dr. Gaziano, a pulmonary specialist, who diagnosed legal pneumoconiosis based on the miner's pulmonary function study and blood gas study results. Judge Lawrence found that Dr. Gaziano's diagnosis was supported by 1987 findings of Dr. Tampoya, that the miner had mild to moderate chronic obstructive pulmonary disease (COPD) due to coal dust exposure and cigarette smoking, based on objective testing, as well as by the 1984 and 1985 treatment records of Dr. Kesari, the miner's treating physician, noting treatment for shortness of breath and COPD. Director's Exhibit 2.

Judge Lawrence's finding of legal pneumoconiosis in the miner's claim was a discretionary weighing of the credibility of the medical opinion evidence of record, and a finding regarding the reasonableness and documentation of the doctors' reports, with the burden on the miner to establish the existence of legal pneumoconiosis by a preponderance of the evidence. *Id.* Because the administrative law judge's evaluation of Judge Lawrence's analysis is supported by substantial evidence, we affirm his finding that employer is collaterally estopped from relitigating the issue of the existence of pneumoconiosis in this survivor's claim. Decision and Order at 6; *see Collins*, 468 F.3d at 213, 23 BLR at 2-393; *Villain*, 312 F.3d at 334, 22 BLR at 2-587.

As employer has not identified any specific legal or factual errors in the administrative law judge's finding that the weight of the evidence was sufficient to establish that the miner's death was due to legal pneumoconiosis pursuant to Section 718.205(c), we affirm the administrative law judge's findings thereunder, and his award of survivor's benefits. *See Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge