BRB No. 99-0364 BLA

WANDA A. ALDINE (Widow of JAMES A. ALDINE)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Robert A. Mazzoni, Scranton, Pennsylvania, for claimant.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] the miner's widow, appeals the Decision and Order (98-BLA-00290) of Administrative Law Judge Robert D. Kaplan denying benefits 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). The administrative law judge found, and the parties stipulated to, six years of qualifying coal mine employment. Decision and Order at 3; Hearing Transcript at 20. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205. Decision and Order at 5-8. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in weighing the evidence of record pursuant to Sections 718.202(a) and 718.205. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.

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

[1]Claimant is Wanda A. Aldine, the miner's widow. The miner, James A. Aldine, filed a claim for benefits on April 26, 1979, which was finally denied on November 16, 1984. Director's Exhibit 19. No further action was taken on this claim. The miner died on July 31, 1996 and claimant filed her survivor's claim, the subject of the instant appeal, on April 24, 1997, which was denied by the district director on November 24, 1997. Director's Exhibits 1, 3, 17. On December 8, 1997, claimant requested a hearing on her claim. Director's Exhibit 18.

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Third Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death.[2] *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

After considering the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Claimant initially contends that the administrative law judge erred in addressing the issue of the existence of pneumoconiosis as an administrative law judge had previously determined that pneumoconiosis was established 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 United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). To successfully invoke collateral estoppel, the party asserting it must establish the following criteria:

(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
(2) determination of the issue must have been necessary to the outcome of the prior proceeding;
(3) the prior proceeding must have resulted in a final judgment on the merits; and
(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

See Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., Ltd., 63 F. 3d 1227 (3d Cir. 1995); *O'Leary v. Liberty Mutual Insurance Co.*, 923 F.2d 1062 (3d Cir. 1991); *N.A.A.C.P., Detroit Branch v. Detroit Police Officers Association*, 821

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

F.2d 328 (6th Cir. 1989); *Virginia Hospital Association v. Baliles*, 830 F. 2d 1308 (4th Cir. 1987), *appeal after remand* 868 F.2d 653, *reh'g denied, certiorari granted in part* 110 S.Ct. 49 (1989), *aff'd Wilder v. Virginia Hospital Association*, 110 S.CT. 2510 (1990); *Forsythe, supra*; *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Applying these principles to the facts of this case, we hold that the administrative law judge properly addressed the existence of pneumoconiosis in the instant survivor's claim. In the miner's claim, Administrative Law Judge Joel R. Williams issued a Decision and Order on November 16, 1884, in which he denied benefits to the miner after finding that the miner established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Decision and Order at 2-3; Director's Exhibit 19. The miner did not appeal this denial, hence, the Director was precluded from seeking review of the finding of the existence of pneumoconiosis as there no longer existed a case or controversy sufficient to invoke appellate jurisdiction. *See* 20 C.F.R. §802.201(a); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S. Ct. 1249 (1990). Therefore, in this case the application of collateral estoppel is precluded since the existence of pneumoconiosis was not essential to the denial of benefits in the miner's claim and the Director did not have a full and fair opportunity to litigate the issue in the prior case since the miner did not appeal the denial of benefits. Thus, we affirm the administrative law judge's determination to consider the issue of the existence of pneumoconiosis pursuant to Section 718.202(a).

Claimant further contends that the administrative law judge erred in weighing the medical opinion evidence in determining that pneumoconiosis was not established. Claimant's Brief at 5-8. The administrative law judge correctly addressed the issue of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) in accordance with the holding of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), requiring that all types of evidence enumerated by the four distinct methods of Section 718.202(a) be weighed together to determine if the miner suffers from the disease. Decision and Order at 3. In the instant case, the administrative law judge considered the x-ray evidence and noted that there were sixteen readings of ten x-rays in the record and that all of the more recent x-ray evidence was negative for the existence of pneumoconiosis. Decision and Order at 5. The administrative law judge then permissibly concluded that the x-ray evidence as a whole was negative for pneumoconiosis.[3] *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990);

[3]The administrative law judge properly determined that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 5; Director's Exhibits 4-6, 10-12, 19. The administrative law judge further considered the entirety of the medical opinion evidence of record and concluded that the opinion of Dr. Spagnolo, who opined that the miner did not have coal workers' pneumoconiosis, was entitled to greater weight. Decision and Order at 7; Director's Exhibit 21. The administrative law judge then concluded that in weighing all the evidence pursuant to 20 C.F.R. §718.202(a), he found it insufficient to establish the existence of pneumoconiosis. Decision and Order at 7; *Williams, supra*.

Claimant contends that the administrative law judge erred in discrediting the medical opinions of Drs. Simpson, Levinson and Biancarelli, diagnosing pneumoconiosis, as the weight of the x-ray evidence was negative. Claimant's Brief at 7. In addressing the evidence pursuant to Section 718.202(a)(4), the administrative law judge discredited these opinions diagnosing pneumoconiosis as Drs. Simpson, Levinson and Biancarelli relied primarily on positive x-ray interpretations and the x-ray evidence as a whole is negative for pneumoconiosis. Decision and Order at 6-7. An administrative law judge, however, may not discredit a medical report based in part on a positive x-ray merely because the record contains subsequent negative x-rays or the administrative law judge finds that the preponderance of x-ray evidence is negative for the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 12 BLR 1-83 (1986); *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Casey v. Director, OWCP*, 7 BLR 1-873 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877 (1984). Inasmuch as the administrative law judge gave determinative weight to the negative x-ray evidence in his evaluation of these medical opinions pursuant to Section 718.202(a)(4), we must vacate the administrative law judge's finding thereunder.

Claimant further contends that the administrative law judge erred in according greater weight to the opinion of Dr. Spagnolo, who did not examine the miner, over the opinion of Dr. Simpson, the miner's treating physician. Claimant's Brief at 7-8. We disagree. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding

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(a)(3) as there is no autopsy or biopsy evidence of record and the presumptions set forth at Section 718.202(a)(3) are not applicable as this claim was filed after January 1, 1982, there is no evidence of complicated pneumoconiosis in the record and the miner did not die before March 1, 1978. *See* 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304, 718.305, 718.306; Decision and Order at 5-6; Director's Exhibits 1, 3; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). An administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Clark, supra*; *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, claimant's contention that the diagnosis of chronic obstructive pulmonary disease (COPD) establishes the existence of pneumoconiosis lacks merit in this instance. Although, during the miner's hospitalizations, several hospital summaries stated that the miner suffered from COPD, the physicians did not relate this condition to coal dust exposure. *See* Director's Exhibit 5. Absent an affirmative opinion linking the condition to the miner's coal mine employment, a diagnosis of COPD is insufficient to establish the existence of pneumoconiosis. *See* 30 U.S.C. §902(b); 20 C.F.R. §§718.201, 725.101(a)(20); *Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986).

Although we cannot affirm the administrative law judge's findings pursuant to Section 718.202(a)(4), a remand is not required in this case as the administrative law judge rationally concluded that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis. *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-376 (1983). The relevant evidence of record concerning the cause of death consists of two medical opinions and the death certificate. Dr. Spagnolo, who reviewed the evidence of record, opined that the miner's death was unrelated to pneumoconiosis and that pneumoconiosis did not hasten or contribute to the miner's death. Director's Exhibit 21. Dr. Simpson, who signed the death certificate and treated the miner prior to his death, opined that the miner most obviously had some anthracosilicosis and secondary emphysema present at the time of death and these conditions contributed to death. Director's Exhibits 3, 16. The administrative law judge properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205 as the administrative law judge permissibly determined that the opinion of Dr. Simpson was unreasoned as the physician did not explain the basis for his conclusion. *Clark, supra*; *Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Hutchens v. Director,* OWCP, 8 BLR 1-16 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 8. Contrary to claimant's arguments, the administrative law judge correctly discussed each element of entitlement in this survivor's claim and permissibly concluded that the opinion of the treating physician, Dr. Simpson, was unreasoned as he failed to provide more than a conclusory statement before opining that the

miner's death was due to pneumoconiosis. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Trumbo, supra*; *Haduck, supra*; *Boyd, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly found the only opinion stating that the miner's death was due to pneumoconiosis unreasoned, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo, supra*; *Haduck, supra*; *Boyd, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 as it is supported by substantial evidence and is in accordance with law. *Lukosevicz, supra.*

Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Lukosevicz, supra; Trumbo*, *supra*; *Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge