BRB Nos. 05-0765 BLA
and 05-0765 BLA-A

ELLA M. LOYD (Widow of MOUNTIE LOYD) Claimant-Respondent Cross-Petitioner v. RAINBOW MINING COMPANY, INCORPORATED Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/21/2006 DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Thomas M. Cole (Arnett, Draper & Hagood), Knoxville, Tennessee, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, 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:

Rainbow Mining Company, Incorporated (Rainbow Mining), appeals and claimant[1] cross-appeals the Decision and Order (03-BLA-5713) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) awarding 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 credited Mr. Loyd with twenty-four years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence establishes the presence of complicated pneumoconiosis and thereby establishes invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, Rainbow Mining challenges the administrative law judge's determination that it was properly designated as the responsible operator in this case. Rainbow Mining also challenges the administrative law judge's finding that the evidence establishes the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds to Rainbow Mining's first brief, urging the Board to reject Rainbow Mining's contention that neither it, nor its insurer, is liable for the payment of benefits in this case. On cross-appeal, claimant contends that the administrative law judge mischaracterized Dr. Baker's x-ray reading. Claimant also contends that the administrative law judge erred in finding the x-ray evidence to be in equipoise. Lastly, claimant contends that the administrative law judge erred in admitting Dr. Fino's report and deposition into the record. Rainbow Mining responds to claimant's brief on cross-appeal, urging the Board to reject claimant's identifications of error by the administrative law judge. Claimant filed a brief in reply to the response brief filed by Rainbow Mining, which

[1]Claimant is the widow of Mountie Loyd, who filed his first claim with the Social Security Administration (SSA) on June 26, 1972. This claim was denied by the SSA on April 27, 1973, November 7, 1973, and February 28, 1974. On June 18, 1978, Mr. Loyd elected to have his claim reviewed by the Department of Labor. The district director denied benefits in this claim on January 27, 1982 and November 9, 1984. A second claim was filed on November 19, 1986. This claim was denied by the district director on May 11, 1987. A third claim was filed on May 14, 1997. The district director denied this claim on August 12, 1997 and December 9, 1997. Mr. Loyd filed a request for a hearing on December 16, 1997. On August 20, 1998, Administrative Law Judge Jeffrey Tureck issued an Order Compelling Discovery and Continuing Hearing. Further, on November 18, 1998, Judge Tureck issued an Order of Dismissal on the basis that Mr. Loyd failed to comply with his August 20, 1998 Order, which the Board affirmed. *Loyd v. Rainbow Mining Co.*, BRB No. 99-0375 BLA (Dec. 27, 1999)(unpub.). Mr. Loyd died on March 16, 2001. Director's Exhibits 3, 4. Claimant filed a survivor's claim on September 6, 2001. Director's Exhibit 3.

reiterates claimant's prior contentions on cross-appeal.[2]

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).

Initially, we address Rainbow Mining's contention that the administrative law judge erred in determining that it was properly designated as the responsible operator in this case. In a Notice of Claim dated November 5, 2001, the district director identified Rainbow Mining as the potentially liable operator and Old Republic Insurance Company (Old Republic) as the insurance carrier. Director's Exhibit 10. The district director advised Rainbow Mining that it had thirty days from the receipt of the Notice of Claim to contest its status as the potentially liable operator by accepting or rejecting each of the five assertions in Section B of an Operator Response to Notice of Claim form. *Id*. Further, the district director advised Rainbow Mining that it had ninety days from the receipt of the Notice of Claim to submit documentary evidence in support of its response, if it denied any of the five operator assertions listed in Section B of an Operator Response to Notice of Claim. *Id*.

In Section B (Controversion of Liability) of an Operator Response to Notice of Claim dated November 21, 2001, Rainbow Mining *denied* the following operator assertions: 1) that it was an operator for any period after June 30, 1973; 2) that it employed the miner as a miner for a cumulative period of not less than one year; 3) that the miner was exposed to coal dust while working for it; 4) that the miner's employment with it included at least one working day after December 31, 1969; and 5) that it or its insurer is financially capable of assuming liability for the payment of benefits. Director's Exhibit 11. Further, under question five of the Additional Information section, Rainbow Mining stated, "All other defenses reserved." *Id*. In addition, in an Operator Controversion dated December 18, 2001, Rainbow Mining and Old Republic *denied* liability for the payment of benefits in this case for the following reasons: 1) the evidence failed to prove that the operator most recently employed the alleged miner for a cumulative period of one year; 2) the evidence failed to prove that the alleged miner was employed in any mine when it was owned or operated by the operator; 3) the evidence failed to prove that the alleged miner suffered from and/or was disabled by any medically identifiable condition which arose in whole or in part out of the alleged miner's employment with the operator; and 4) liability for the payment of benefits to the alleged miner, if there is any, is the sole responsibility of the Black Lung Disability Trust Fund.

[2]Since the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Director's Exhibit 12.

Subsequently, in Section B (Controversion of Liability) of a revised Operator Response to Notice of Claim dated January 25, 2002,[3] Rainbow Mining *accepted* the following operator assertions: 1) that it was an operator for any period after June 30, 1973; 2) that it employed the miner as a miner for a cumulative period of not less than one year; 3) that the miner's employment with it included at least one working day after December 31, 1969; and 4) that it or its insurer is financially capable of assuming liability for the payment of benefits. Director's Exhibit 13. However, Rainbow Mining *denied* that Mr. Loyd was last exposed to coal dust while working for it. *Id*. Further, under question five of the Additional Information section, Rainbow Mining stated, "Employer hereby contests the responsible operator issue. The record is unclear at this time as to the correct responsible operator in this claim." *Id*.

The district director, in a Schedule for the Submission of Additional Evidence dated February 14, 2002, made a preliminary designation of Rainbow Mining as the responsible operator liable for the payment of benefits in this case.[4] Director's Exhibit 14. Rainbow Mining, in an Operator Response to Schedule for Submission of Additional Evidence dated February 27, 2002, disagreed with its designation as the responsible operator liable for the payment of benefits in this case. Director's Exhibit 15.

In a Proposed Decision and Order dated February 18, 2003, the district director awarded benefits as of September 1, 2001, and designated Rainbow Mining as the responsible operator liable for the payment of benefits in this case.[5] Director's Exhibit 32.

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[3]The record does not indicate that the district director advised Rainbow Mining Company, Incorporated (Rainbow Mining), to submit another Operator Response to Notice of Claim.

[4]In considering the bases for designating Rainbow Mining as the responsible operator liable for the payment of benefits, the district director stated:

> [Rainbow Mining] was known as [Dan Branch Coal] prior to 1/8/79. Social Security Earnings records show that [Mr. Loyd] was employed by [Dan Branch Coal] from 1977 to 1980 and was employed by [Rainbow Mining] from 1980 to 1981. The employment with both companies was combined and Rainbow Mining was named as Responsible Operator.

Director's Exhibit 14.

[5]The district director stated that "[r]ecords maintained by the [United States] Department of Labor show that [Rainbow Mining] was a successor operator to the operation

Rainbow Mining filed a request for a hearing on February 21, 2003. Director's Exhibit 33. Claimant filed a Request for Revision of Proposed Decision and Order and/or for Formal Hearing to show that benefits payable to claimant should begin on March 1, 2001, the month of Mr. Loyd's death, rather than September 1, 2001, the month that the survivor's claim was filed. Director's Exhibit 35. In a Revised Proposed Decision and Order dated March 21, 2003, the district director awarded benefits as of March 1, 2001, and again designated Rainbow Mining as the responsible operator liable for the payment of benefits in this case. Director's Exhibit 36. Rainbow Mining filed a request for a hearing on March 25, 2003. Director's Exhibit 37. In a Form CM-1025 dated April 7, 2003, the district director noted that Rainbow Mining contested the responsible operator issue. Director's Exhibit 39.

In his Decision and Order dated May 26, 2005, which is the subject of this appeal, the administrative law judge concluded that Rainbow Mining is the properly designated responsible operator in this case. The administrative law judge stated:

> On August 22, 2003, the Director filed a Motion for Summary Decision on the responsible operator issue. The Director noted that, in a revised *Operator Response to Notice of Claim*, [Rainbow Mining] effectively conceded all pertinent issues except the assertion that [Mr. Loyd] was last exposed to coal mine dust while working for [it]. (D-13). The District Director established that [Mr. Loyd] worked for [Dan Branch Coal], a predecessor of Rainbow Mining. (D-9). [Mr. Loyd] worked as a night watchman with [Rainbow Mining], having previously worked at the belt. Dan Branch Coal, where [Mr. Loyd] worked between 1977 and 1979[,] employed [him] on the belt. *See* §§725.493(b)(1), 725.495(a)(2)(ii). Thus, [Mr. Loyd] was last exposed to coal mine dust while working for Rainbow Mining and Rainbow Mining is the properly designated responsible operator.

Decision and Order at 5.

On appeal, Rainbow Mining initially contends that the administrative law judge erred in finding that it is the successor operator of Dan Branch Coal because, Rainbow Mining argues, its employment of Mr. Loyd as a night watchman does not qualify as coal mine employment under the Act. Rainbow Mining also asserts that there is no proof to support the Department of Labor's theory that it was a successor to Dan Branch Coal. Claimant, in his response brief, notes that "[Rainbow Mining]…conceded all matters relevant to the issue of its designation as responsible operator except it did not admit Mr. Loyd was last exposed to coal mine dust while employed by Rainbow Mining (ALJ D&O p.5)." Claimant's Response

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previously known as [Dan Branch Coal]." Director's Exhibit 32. Consequently, the district director determined that Mr. Loyd's earnings reported by both companies must be combined. *Id*.

Brief at 14. Claimant further notes that "neither [Rainbow Mining] nor…[Old Republic] have (sic) submitted evidence of any kind bearing on the responsible operator issue." *Id*. The Director argues that Rainbow Mining's assertions that the administrative law judge erred in determining that it was properly designated as the responsible operator in this case are without merit. The Director's argument is based on the premise that Rainbow Mining conceded its liability to pay benefits in this case. Specifically, the Director states:

> [Rainbow Mining's] pleading fails to acknowledge the company's concessions and the ALJ's acceptance of them. These concessions, however, render meaningless the company's arguments. First, since [Rainbow Mining] agreed that Mr. Loyd worked as a miner for [Rainbow Mining] for a year, it cannot now argue to the contrary. Second, since it is undisputed that Mr. Loyd's employment with [Rainbow Mining] alone occurred for less than a year, the only way there is a year of coal mine work with [Rainbow Mining] is if succession is, in fact, conceded. And third, since [Rainbow Mining] effectively conceded liability, it cannot now argue that due process prevents imposition of that liability.

Director's Response Brief at 2.

Section 725.495(b) addresses the burden of proof of the parties with regard to the criteria for determining the responsible operator. The pertinent regulation specifically states that "[e]xcept as provided in this section and §725.408(a)(3),[6] with respect to the adjudication of the identity of a responsible operator, the Director shall bear the burden of proving that the responsible operator initially found liable for the payment of benefits pursuant to §725.410 (the 'designated responsible operator') is a potentially liable operator." 20 C.F.R. §725.495(b). Section 725.408 provides a deadline for coal mine operators to submit evidence if they disagree with their designation as potentially liable responsible operators. 20 C.F.R. §725.408. Further, Section 725.495(c) provides that once an operator has been proved responsible for a claim, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability or that another operator that more recently employed the miner is financially capable of doing so. 20 C.F.R. §725.495(c). The United States Court of Appeals for the District of Columbia Circuit has upheld 20 C.F.R. §§725.408 and 725.495(c) as valid regulations.[7] *Nat'l Mining Ass'n v. Dep. of Labor*, 292

[6]Section 725.408(a)(3) provides that "[a]n operator which receives notification under §725.407, and which fails to file a response within the time limit provided by this section, shall not be allowed to contest its liability for the payment of benefits on any of the grounds set forth in paragraph (a)(2)." 20 C.F.R. §725.408(a)(3).

[7]In *Nat'l Mining Ass'n v. Dep. of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), the United States Court of Appeals for the District of Columbia Circuit rejected

F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002).

As discussed *supra*, in a January 25, 2002 Operator Response to Notice of Claim, Rainbow Mining accepted all of the operator assertions *except* the assertion that Mr. Loyd was last exposed to coal dust while working for Rainbow Mining. Significantly, Rainbow Mining accepted the operator assertion that it employed Mr. Loyd as a miner for a cumulative period of not less than one year. Thus, we hold that Rainbow Mining effectively conceded its liability as the responsible operator, as it conceded that it employed Mr. Loyd as a miner for a cumulative period of not less than one year. Consequently, since Rainbow Mining is bound by its concession, we reject Rainbow Mining's assertion that the administrative law judge erred in finding that it is the successor operator of Dan Branch Coal on the basis that its employment of Mr. Loyd as a night watchman does not qualify as coal mine employment under the Act. *Bucshon v. Peabody Coal Co.*, 4 BLR 1-608 (1982).

Further, as argued by the Director, "since it is undisputed that Mr. Loyd's employment with [Rainbow Mining] alone occurred for less than a year, the only way there is a year of coal mine work with [Rainbow Mining] is if succession is, in fact, conceded." Director's Response Brief at 2. No party contests the Director's assertion that, without counting Dan Branch Coal's employment of Mr. Loyd, Rainbow Mining actually employed him for a period of less than one year. Thus, since Rainbow Mining is bound by its concession that it employed Mr. Loyd as a miner for a cumulative period of not less than one year, which, in effect, is a concession of Rainbow Mining's status as a successor operator, we decline to address Rainbow Mining's assertion that there is no proof to support the Department of Labor's theory that it was a successor to Dan Branch Coal.

Rainbow Mining also asserts that the administrative law judge erred in finding that Old Republic is the insurer in this case. Specifically, Rainbow Mining asserts that its insurance policy with Old Republic only applies to employees it actually employed as miners. Rainbow Mining's assertion is based on the premise that Mr. Loyd's work as a night watchman for Rainbow Mining did not qualify as coal mine employment. Although he named Old Republic as the insurer of Rainbow Mining in the November 5, 2001 Notice of Claim and the February 14, 2002 Schedule for the Submission of Additional Evidence, Director's Exhibits 10, 14, the district director did not specifically name Old Republic as the insurer of Rainbow Mining in the February 18, 2003 Proposed Decision and Order awarding benefits, Director's Exhibit 32. Rather, the district director merely indicated that Old Republic was sent a copy of the Proposed Decision and Order by certified mail. *Id.* Further,

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National Mining Association's assertion that 20 C.F.R. §§725.408 and 725.495(c) violate the Administrative Procedure Act on the grounds that Section 725.408 only shifts the burden of production, and not the burden of proof, and Section 725.495(c) only applies to the extent that claimant has met the burden of proving that the operator is liable for the payment of benefits.

contrary to Rainbow Mining's assertion, the administrative law judge did not discuss Old Republic's liability for the payment of benefits in this case. Like the district director, the administrative law judge merely indicated that Old Republic was sent a copy of his Decision and Order by certified mail. Thus, since the administrative law judge did not address Old Republic's liability as the insurer of Rainbow Mining, we decline to address Rainbow Mining's contentions with respect to Old Republic's liability in this case. Moreover, we note that Old Republic's liability for the payment of benefits in this case as an insurance carrier is a contractual issue between Rainbow Mining and Old Republic.

Rainbow Mining additionally asserts that it was deprived of the opportunity to obtain evidence to refute its designation as the responsible operator by Mr. Loyd's death. The Department of Labor must resolve the responsible operator issue alone in a preliminary proceeding, 20 C.F.R. §725.412(d), and/or proceed against all potential putative responsible operators at every stage of the claims adjudication prior to fully litigating the claim, *Crabtree v. Bethlehem Steel Corp.*, 9 BLR 1-354, 1-357 (1984); *see also England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993). In the instant case, Rainbow Mining was notified that it had been designated as the responsible operator, based on its status as a successor operator, prior to any formal hearing on the merits and/or any award of benefits. Further, as argued by the Director, although Mr. Loyd refused to attend a deposition requested by Rainbow Mining, there is no evidence that he had a better understanding of the business relationship between Rainbow Mining and Dan Branch Coal than the employees of those companies. Consequently, as it was able to develop evidence to defend against the claim, Mr. Loyd's death did not deprive Rainbow Mining of a fair opportunity to mount a meaningful defense. *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *Director, OWCP v. Oglebay Norton Co.* [*Goddard*], 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989); *Lewis Consolidation Coal Co.*, 15 BLR 1-37 (1991); *Beckett v. Raven Smokeless Coal Co.*, 14 BLR 1-43 (1990). Thus, we reject Rainbow Mining's assertion that it was deprived of the opportunity to obtain evidence to refute its designation as the responsible operator by Mr. Loyd's death.

Next, we address Rainbow Mining's contentions with regard to the merits of this claim. Rainbow Mining contends that the administrative law judge erred in finding that the evidence establishes invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.[8]

[8]Section 718.304 provides in relevant part that:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ..., if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray ... yields one or more

In order to establish entitlement to benefits in a survivor's claim pursuant to 20 C.F.R. Part 718, 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. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Section 718.304 provides an irrebuttable presumption that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.304(a)-(c); 30 U.S.C. §921(c)(3); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *see also Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). The administrative law judge must weigh together the evidence at subsections 718.304(a), (b) and (c) before determining whether invocation of the irrebuttable presumption has been established. *Gray*, 176 F.3d at 389, 21 BLR at 2-629; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Based on his consideration of the relevant evidence at 20 C.F.R. §718.304(a)-(c), the administrative law judge found that the evidence establishes the presence of complicated pneumoconiosis. The administrative law judge specifically stated:

> Upon review of *all* relevant evidence under §718.304, I find that complicated pneumoconiosis has been established. …I have found that the x-ray evidence alone did not undermine and, indeed, is not inconsistent with, the

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> large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
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> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
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> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original].

> proof of the disease on the basis of the CT scan. The x-rays demonstrate the existence of a mass greater than one centimeter in the right lung. Although the chest x-ray evidence does not establish the presence of complicated pneumoconiosis, that evidence, considered in concert with the CT-scan interpretations, supports a finding of complicated pneumoconiosis because of the substantial and convincing evidence of opacities greater than one centimeter, consistent with the x-ray evidence.

Decision and Order at 17.

Rainbow Mining asserts that the principles of collateral estoppel bar any finding of complicated pneumoconiosis at 20 C.F.R. §718.304. Rainbow Mining's assertion is based on the premise that the administrative law judge erroneously relied on medical evidence from Mr. Loyd's failed claim to find the presence of complicated pneumoconiosis established at Section 718.304 in the survivor's claim. The doctrine of collateral estoppel refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that actually has been litigated and decided in the initial action. *Freeman v. United Coal Mining Co. v. Director, OWCP* [*Forsythe*], 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). To successfully invoke the doctrine of 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 determination;
> (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.

N.A.A.C.P., Detroit Branch v. Detroit Police Officers Association, 821 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. 49 (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 Rainbow Mining's assertion that the principle of collateral estoppel bars any finding of complicated pneumoconiosis at Section 718.304 is without merit. In the instant case, as discussed *supra*, the administrative law judge found that the evidence establishes the presence of complicated pneumoconiosis and therefore the evidence establishes invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 718.304.

Consequently, the administrative law judge awarded survivor's benefits. However, in the prior miner's claim, Administrative Law Judge Jeffrey Tureck did not address the issue of complicated pneumoconiosis at Section 718.304. Director's Exhibit 1. Rather, Judge Tureck dismissed the miner's claim because Mr. Loyd failed to comply with Judge Tureck's prior order to attend a medical examination scheduled by Rainbow Mining. *Id*. Thus, since the requirements for invoking the doctrine of collateral estoppel were not met because the prior miner's claim was not finally decided on the merits of entitlement, we reject Rainbow Mining's assertion that the principles of collateral estoppel bar any finding of complicated pneumoconiosis at 20 C.F.R. §718.304 in this case.

Rainbow Mining alternatively asserts that the administrative law judge's weighing of the evidence at 20 C.F.R. §718.304 is internally inconsistent and irrational. With regard to 20 C.F.R. §718.304(a), the administrative law judge considered the eight interpretations of four x-rays dated March 22, 1996, March 6, 1997, April 15, 1997, and October 27, 2000. Although he found that Dr. Alexander indicated that three of the four x-rays demonstrated the presence of complicated pneumoconiosis, the administrative law judge found that Dr. Wiot indicated that all four x-rays demonstrated the presence of complicated pneumoconiosis. Further, the administrative law judge found that Dr. Baker read the April 15, 1997 x-ray as positive for simple pneumoconiosis. Taking all of the conflicting x-ray interpretations into consideration, the administrative law judge found that the x-ray evidence is in equipoise and, thus, the x-ray evidence is insufficient to establish the presence of complicated pneumoconiosis at Section 718.304(a).[9]

Turning to 20 C.F.R. §718.304(c), the administrative law judge considered the treatment records of Drs. Cohen and Perret, the medical reports and depositions of Drs. Fino and Rosenberg, and the CT scan interpretations of Drs. Cox, Alexander and Wiot. Of all the various types of medical evidence considered by the administrative law judge, he found that the CT scan interpretations are the most probative evidence. In a CT scan report dated March 19, 2003, Dr. Cox noted that the April 29, 1997 CT scan demonstrated a 2.5 to 3 cm soft tissue density mass with rather marked speculated margins in the right infrahilar area. Claimant's Exhibit 4. Although he noted that this mass could represent a conglomerate area of fibrosis, Dr. Cox also noted that a neoplastic process will give the same radiographic appearance. *Id*. In addition, Dr. Cox recommended further evaluation of this speculated mass. *Id*.

In a report dated March 26, 2002, Dr. Wiot opined that Mr. Loyd showed no evidence of coal workers' pneumoconiosis, based on a review of x-rays and a CT scan. Director's Exhibit 7. Dr. Wiot also opined that the large perihilar mass on the right within the posterior segment of the right upper lobe was malignant. *Id*. Further, Dr. Wiot opined that the mass

[9]The administrative law judge correctly found that there is no autopsy or biopsy evidence at 20 C.F.R. §718.304(b).

on the left was probably a secondary malignancy. *Id*. In contrast, in an August 1, 2003 report, Dr. Alexander reviewed x-rays, the April 29, 1997 CT scan, and medical records and opined that Mr. Loyd had complicated pneumoconiosis. Claimant's Exhibit 1. The administrative law judge reasonably found that Dr. Cox did not render a conclusive diagnosis, based on the April 29, 1997 CT scan.[10] Decision and Order at 16. Further, the administrative law judge found that Dr. Alexander's CT scan diagnosis of complicated pneumoconiosis outweighed Dr. Wiot's contrary CT scan diagnosis, on the basis that Dr. Alexander's opinion is better reasoned. *Id*. at 17.

Rainbow Mining asserts that the administrative law judge erred in finding that Dr. Alexander's CT scan interpretation outweighed Dr. Wiot's contrary CT scan interpretation. Rainbow Mining's assertion is based on the premise that, like conflicts in x-ray interpretations, conflicts in CT scan interpretations should be resolved based only on the CT scan interpretation, rather than on a physician's opinion developed, in part, on a CT scan interpretation. Contrary to Rainbow Mining's assertion, neither Dr. Wiot nor Dr. Alexander rendered an opinion based solely on the April 29, 1997 CT scan. As discussed *supra*, Dr. Wiot's diagnosis was based on x-rays and the CT scan and Dr. Alexander's diagnosis was based on x-rays, the CT scan and medical records. Consequently, the administrative law judge properly accorded greater weight to Dr. Alexander's interpretation of the April 29, 1997 CT scan than to Dr. Wiot's contrary interpretation of this CT scan because he found that "the extensive explanation accompanying [Dr. Alexander's] findings, as well as his recognition of the stable nature of the mass and of the eggshell calcifications, is persuasive evidence of complicated pneumoconiosis and not of cancer or sarcoidosis."[11] Decision and Order at 17; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291

[10]In a CT scan report dated March 19, 2003, Dr. Cox noted that the April 29, 1997 CT scan demonstrated a 2.5 to 3 cm soft tissue density mass with rather marked speculated margins in the right infrahilar area. Claimant's Exhibit 4. Although he noted that this mass could represent a conglomerate area of fibrosis, Dr. Cox also noted that a neoplastic process will give the same radiographic appearance. *Id*. In addition, Dr. Cox recommended further evaluation of this speculated mass. *Id*.

[11]In considering the CT scan evidence, the administrative law judge noted that "Dr. Wiot read the results of this scan and opined that the mass in the upper right lung was an obvious malignancy, with a "questionable mass" in the left portion of the lung that was probably a secondary malignancy. (D-7)." Decision and Order at 16-17. In contrast, the administrative law judge stated, "I am most persuaded by the opinions of Dr. Alexander, who identified the mass as complicated pneumoconiosis rather than a malignant lesion." *Id*. at 17. The administrative law judge noted that "Dr. Alexander identified eggshell type silicosis and noted a conglomerate density in the left lobe." *Id*.

(1984). Thus, we reject Rainbow Mining's assertion that the administrative law judge's weighing of the evidence at 20 C.F.R. §718.304 is internally inconsistent and irrational.

Furthermore, since Rainbow Mining raises no other contentions of error, we affirm the administrative law judge's finding that the evidence establishes complicated pneumoconiosis at 20 C.F.R. §718.304. Moreover, we affirm the administrative law judge's finding that the evidence therefore establishes invocation of the irrebuttable presumption that Mr. Loyd's death was due to pneumoconiosis at 20 C.F.R. §718.304.[12]

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

[12]In view of our disposition of this case on the merits at 20 C.F.R. §718.304, we decline to address claimant's contentions on cross-appeal. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge