BRB No. 05-0402 BLA
Case No. 04-BLA-5091

RUTH MCKEE (Widow of MARION MCKEE) Claimant-Petitioner v. PAT WHITE FUELS, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/17/2006 DECISION and ORDER on RECONSIDERATION

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Jeffrey S. Goldberg (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:

Employer has filed a timely Motion for Reconsideration requesting *en banc* review of the Board's Decision and Order of February 21, 2006, in the captioned case which arises under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). In that decision, the Board held, *inter alia*, that the administrative law judge mischaracterized the record as containing no evidence of complicated pneumoconiosis. *McKee v. Pat White Fuels, Inc.,* BRB No. 05-0402 BLA (Feb. 21, 2006) (unpublished). The Board, therefore, remanded the case to the administrative law judge to consider whether the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *Id.* The Board also vacated the administrative law judge's finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.*

On reconsideration, employer contends that the doctrine of collateral estoppel bars claimant from arguing that the miner suffered from complicated pneumoconiosis. Employer also argues that the administrative law judge erred in failing to consider evidence submitted in connection with the miner's claims. Employer, therefore, contends that the Board erred in not vacating the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer further argues that the Board erred in not affirming the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds, urging the Board to deny employer's request for reconsideration. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that employer waived its collateral estoppel argument by failing to timely raise it when the case was before the administrative law judge or the Board. The Director also argues that, contrary to employer's contention, the administrative law judge was not required to consider the evidence in the miner's claim in his adjudication of the survivor's claim. In a reply brief, employer argues, *inter alia*, that collateral estoppel should be applied to bar claimant from relitigating the issue of complicated pneumoconiosis.[1] In a brief in response to the Director's brief, claimant agrees with the Director's contention that employer waived the defense of collateral estoppel in this case.

We initially address employer's contention that the doctrine of collateral estoppel precludes claimant from establishing that the miner suffered from complicated pneumoconiosis. Employer notes that the miner filed a duplicate claim on January 21, 1998. Director's Exhibit 1. In denying the miner's 1998 duplicate claim, Administrative

---

[1]In a supplement to its reply brief, employer argues that it did not waive the collateral estoppel issue.

Law Judge Robert L. Hillyard found, *inter alia*, that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). *Id.* By Decision and Order dated August 31, 2001, the Board affirmed Judge Hillyard's denial of benefits. *McKee v. Pat White Fuels, Inc.*, BRB No. 00-0892 BLA (Aug. 31, 2001) (unpublished). In doing so, the Board affirmed Judge Hillyard's finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 (2000). *Id.* Based upon the previous determination in the miner's claim, employer contends that claimant should be collaterally estopped from relitigating the issue of complicated pneumoconiosis in her survivor's claim.

Collateral estoppel is an affirmative defense which is ordinarily deemed waived if not raised in the pleadings. *See Gilbert v. Ferry*, 413 F.3d 578 (6th Cir. 2005). In order to discern whether employer effectively raised the issue of collateral estoppel, it is necessary to review the procedural history of this case. When the instant case was before the district director, employer filed a "Response and Controversion" dated March 1, 2002, wherein employer explicitly argued that claimant's survivor's claim was "barred by the doctrines of *res judicata* and collateral estoppel." *See* Director's Exhibit 21. Although the district director, in a Proposed Decision and Order dated May 6, 2003, awarded benefits, the award was not based upon a finding of complicated pneumoconiosis. Director's Exhibit 25.

By letter dated May 15, 2003, employer requested a formal hearing. Director's Exhibit 26. In its letter, employer noted, *inter alia*, that the district director "did not take into consideration each of the affirmative defenses as raised by…employer and [erred] in failing to dismiss [the] case based upon such defenses." *Id.*

On July 30, 2003, employer submitted a "Contested Issues" form, wherein it challenged, *inter alia*, the district director's determination that the miner suffered from pneumoconiosis. *See* Director's Exhibit 30. Claimant's survivor's claim was forwarded to the Office of Administrative Law Judges on October 8, 2003. Director's Exhibit 32.

Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) held a hearing on September 15, 2004. At the hearing, the issue of complicated pneumoconiosis was not addressed. However, in its post-hearing brief, employer argued that there was "no probative evidence of complicated pneumoconiosis or progressive massive fibrosis." Employer's Post-Hearing Brief at 11.

In a Decision dated January 11, 2005, the administrative law judge found that the record contained no evidence of complicated pneumoconiosis. Decision and Order at 5. Although the administrative law judge found that the x-ray evidence was sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),

he ultimately denied benefits because he found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* at 8, 11. On appeal, claimant argued, *inter alia*, that the administrative law judge erred in finding that the record contained no evidence of complicated pneumoconiosis.[2] As previously noted, the Board held that the administrative law judge mischaracterized the record as containing no evidence of complicated pneumoconiosis. *McKee*, *supra*. Consequently, the Board remanded the case to the administrative law judge to consider whether the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *Id.*

A review of the record indicates that employer raised the defense of collateral estoppel while the case was before the district director. Moreover, while the case was before the administrative law judge and the Board, employer continued to contest the existence of complicated pneumoconiosis, citing to Judge Hillyard's finding in the miner's claim that the evidence was insufficient to establish the existence of complicated pneumoconiosis. However, when the case was before the administrative law judge, employer did not explicitly argue that claimant was collaterally estopped from establishing the existence of complicated pneumoconiosis. In light of the foregoing, we find it necessary to remand the case to the administrative law judge for his consideration of the waiver issue in the first instance. On remand, the administrative law judge is instructed to initially determine whether employer waived the issue of collateral estoppel in this case. Should the administrative law judge, on remand, determine that the issue of collateral estoppel was effectively raised, he must then determine whether the requirements for its application in this particular case have been satisfied.[3]

Employer next argues that the administrative law judge failed to consider all of the evidence submitted in connection with the miner's claims in his adjudication of the

---

[2]Employer filed a response brief when this case was previously before the Board. Although employer, in its response brief, did not explicitly refer to the doctrine of collateral estoppel, employer noted that Administrative Law Judge Robert L. Hillyard, in his adjudication of the miner's claim, found the evidence insufficient to establish the existence of complicated pneumoconiosis. Employer's Response Brief at 14 n.5.

[3]The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has adopted a four-part test to determine whether collateral estoppel bars relitigation of an issue: (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) judicial 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. *Smith v. S.E.C.*, 129 F.3d 356, 362 (6th Cir. 1997).

survivor's claim. When a living miner files a subsequent claim, all the evidence from the first miner's claim is specifically made part of the record. *See* 20 C.F.R. §725.309(d). Such an inclusion is not automatically available, however, in a survivor's claim filed pursuant to the revised regulations.

At the hearing, the administrative law judge admitted Director's Exhibits 1-34 into evidence. Transcript at 5. This evidence included all of the evidence submitted in connection with the miner's two previous claims. *See* Director's Exhibit 1. However, in his 2005 Decision and Order, the administrative law judge noted that Section 725.414[4] sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1); Decision and Order at 4. The administrative law judge, however, did not explicitly address which evidence was properly admitted into the record. Consequently, on remand, the administrative law judge is instructed to identify and admit the medical evidence that has been properly submitted by the parties as affirmative and rebuttal evidence pursuant to 20 C.F.R. §725.414.

The regulations provide that "[n]otwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or

---

[4]Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Consequently, the administrative law judge may properly admit such evidence into the record, even if it was submitted in connection with the miner's claims. On remand, the administrative law judge is instructed to address which evidence is properly admissible pursuant to 20 C.F.R. §725.414(a)(4).

Moreover, Section 725.456(b)(1) provides that medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). Thus, if a party wishes to submit evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, it is required to make a showing of "good cause" for its submission. Citing *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006), the Director argues that employer failed to timely raise the issue of "good cause" for the admission of additional medical evidence. In *Brasher*, the Board held that, if a party does not attempt to make a "good cause" showing when the case is before the administrative law judge, the "good cause" issue is waived. However, in the instant case, the administrative law judge, at the hearing, admitted all of the evidence from the miner's claims into the record. Consequently, employer had no reason to argue that "good cause" existed for the admission of this evidence. Consequently, on remand, the administrative law judge is instructed to provide the parties with an opportunity to make a showing of "good cause" for the submission of evidence previously submitted in connection with the miner's claims. 20 C.F.R. §725.456(b)(1).

Because we remand the case to the administrative law judge for a determination as to which evidence is properly admissible,[5] we must vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.304 and 718.205(c). After rendering findings as to the admissibility of the evidence, the administrative law judge is instructed to reconsider whether the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and whether it is

[5]Because the amended regulations do not contain a provision regarding the appropriate treatment of admissible evidence which contains references to evidence excluded because it exceeds the evidentiary limitations set forth at 20 C.F.R. §725.414, the disposition of this issue is committed to the administrative law judge's discretion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting) (recon. pending). If a physician references inadmissible evidence, the administrative law judge may exclude the report, redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. *Id.* Exclusion of evidence, however, is not the favored option as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id.*

sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Accordingly, we grant employer's Motion for Reconsideration and modify our Decision and Order of February 21, 2006.[6] The administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for further consideration 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

[6]In light of decision to grant employer's motion for reconsideration, we deny employer's request for *en banc* review.