

BRB No. 08-0282 BLA

L.P.)
(Widow of H.P.))
)
Claimant-Respondent)
)
v.) DATE ISSUED: 11/26/2008
)
CONSOLIDATION COAL COMPANY)
)
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Debra L. Henry (The Law Offices of Debra L. Henry), Greensburg, Pennsylvania, for claimant.

William S. Mattingly (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 (06-BLA-6162) of Administrative Law Judge Daniel L. Leland (the administrative law judge) awarding benefits on a 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). This case involves a survivor's claim filed on March 24, 2005. The administrative law judge applied the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of

pneumoconiosis.¹ The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to this case. Employer also argues that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant² responds in support of the administrative law judge's award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).³ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

¹ The miner filed a claim on July 14, 1995. Director's Exhibit 1. In a Decision and Order dated January 27, 1998, Administrative Law Judge Richard A. Morgan awarded benefits. *Id.* Judge Morgan's award of benefits was subsequently affirmed by the Board and the United States Court of Appeals for the Third Circuit. See *[H.P.] v. Consolidation Coal Co.*, BRB No. 98-0697 BLA (Feb. 11, 1999) (unpub.); *Consolidation Coal Co. v. [H.P.]*, No. 99-5225 (3d Cir. May 17, 2000) (unpub.).

² Claimant is the widow of the deceased miner, who died on March 8, 2005. Director's Exhibit 14.

³ Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a

OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Employer initially contends that the administrative law judge erred in finding that employer was collaterally estopped from contesting whether the miner had pneumoconiosis. Collateral estoppel applies when five prerequisites are met:

- (1) The issue sought to be precluded is identical to one previously litigated;
- (2) the issue was actually determined in the prior proceeding;
- (3) the issue was a critical and necessary part of the judgment in the prior proceeding;
- (4) the prior judgment is final and valid; and
- (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in a previous forum.

See Jones v. United Parcel Service, 214 F.3d 402 (3d Cir. 2000); *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 126 F.3d 461 (3d Cir. 1999); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999).⁴

medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

⁴ Employer contends that the administrative law judge, in applying the doctrine of collateral estoppel, mistakenly relied upon the case law of "another circuit." Employer's Brief at 5. Although the administrative law judge, in setting forth the requirements for application of the doctrine of collateral estoppel, referenced a decision of the United

In adjudicating the previous miner's claim, Administrative Law Judge Richard A. Morgan found that the evidence established that the miner suffered from pulmonary fibrosis arising out of his coal mine employment, a finding sufficient to establish the existence of legal pneumoconiosis.⁵ In adjudicating the survivor's claim, the administrative law judge found that the doctrine of collateral estoppel was applicable and that employer was, therefore, precluded from re-litigating the issue of pneumoconiosis. Decision and Order at 5. Employer does not argue that any of the prerequisites for the application of collateral estoppel were not satisfied in this case.⁶ Consequently, we affirm the administrative law judge's finding that employer was estopped from relitigating the issue of the existence of legal pneumoconiosis.

Employer also argues that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis. The administrative law judge found that "[a]ll of the physicians agree that the miner's pulmonary fibrosis made a major contribution to [his] death." Decision and Order at 6. Drs. Perper, Rosenberg, and Basheda addressed the cause of the miner's death. All three physicians opined that the miner's death was caused by pulmonary fibrosis. *See* Claimant's Exhibit 1; Employer's Exhibits 2, 6, 8, 13 at 10. Although employer notes that Drs. Rosenberg and Basheda did not attribute the miner's pulmonary fibrosis to his coal mine employment, these doctors need not provide such a link. The necessary link between the miner's pulmonary fibrosis and his coal mine employment was provided by the administrative law judge's application of the doctrine of collateral estoppel. Thus, the determination in the miner's claim, that the miner's pulmonary fibrosis arose out of his coal mine employment and constituted legal pneumoconiosis, suffices to establish that the miner's pulmonary fibrosis, as found in the survivor's claim, also constitutes legal pneumoconiosis. Consequently, the opinions of Drs. Perper, Rosenberg, and Basheda,

States Court of Appeals for the Seventh Circuit, *see* Decision and Order at 5 (citing *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002), the elements of collateral estoppel relied upon by the administrative law judge are consistent with the elements set forth by both the Board and the United States Court of Appeals for the Third Circuit. *See* Decision and Order at 5 n.3.

⁵ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

⁶ Where a survivor's claim includes autopsy evidence which was not available and could not have been adduced at the time of the adjudication of the miner's claim, an exception to the doctrine of collateral estoppel may be warranted to allow relitigation of the issue of the existence of pneumoconiosis. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-135 (1999). However, in this case, the administrative law judge correctly noted that the record did not contain any autopsy evidence. Decision and Order at 5.

that the miner's death was due to pulmonary fibrosis, support a finding that the miner's death was due to legal pneumoconiosis (pulmonary fibrosis arising out of coal mine employment).⁷ Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

⁷ Employer notes that Dr. Perper's opinions were based in part upon inadmissible evidence, *i.e.*, evidence admitted in the miner's claim, but not in the survivor's claim. In considering Dr. Perper's opinion, the administrative law judge noted that he "factored out any reference" to evidence that exceeded the evidentiary limitations and based his opinion only upon the admissible evidence that Dr. Perper reviewed. Decision and Order at 3 n.1; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007) (*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-09 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13, 1-18 (2007) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting). Employer does not identify how Dr. Perper's reliance upon inadmissible evidence undermines his opinion that the miner's death was due to pulmonary fibrosis, an opinion shared by Drs. Rosenberg and Basheda. Moreover, even if Dr. Perper relied upon inadmissible evidence to support his finding that the miner's pulmonary fibrosis was due to coal mine employment, this would not constitute reversible error since the necessary link between the miner's pulmonary fibrosis and coal mine employment was established by collateral estoppel.

Employer also contends that the administrative law judge did not address the significance of the miner's death certificate. Dr. Reardon completed the miner's death certificate, listing the miner's immediate cause of death as pulmonary fibrosis. Director's Exhibit 14. Because the miner's death certificate supports the administrative law judge's finding regarding the cause of the miner's death, the administrative law judge's error, if any, in not considering this evidence is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order 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