

BRB No. 08-0867 BLA

P.J.H.)	
(Widow of R.H.))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 09/29/2009
)	
EASTERN ASSOCIATED COAL)	
CORPORATION)	
)	
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 of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2006-BLA-00023) of Administrative Law Judge Richard T. Stansell-Gamm, awarding benefits on claimant's request for modification of 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).¹ This is the second time that this case has been before the Board. In its prior Decision and Order, the Board vacated the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and his denial of claimant's request for modification pursuant to 20 C.F.R. §725.310. The Board remanded the case to the administrative law judge for consideration of whether the doctrine of collateral estoppel precluded employer from relitigating the issue of the existence of pneumoconiosis in the survivor's claim. [*P.J.H.*] *v. Eastern Associated Coal Corp.*, BRB No. 06-0815 BLA, slip op. at 3-4 (July 20, 2007) (unpub.). The Board also instructed the administrative law judge that if he determined that collateral estoppel applied, he must render a finding as to whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.*, slip op. at 4. The Board summarily denied employer's subsequent motion for reconsideration. [*P.J.H.*] *v. Eastern Associated Coal Corp.*, BRB No. 06-0815 BLA (Dec. 17, 2007) (unpub. Order).

In his Decision and Order on Remand, the administrative law judge determined that the doctrine of collateral estoppel applied and, therefore, claimant established the existence of both clinical and legal pneumoconiosis in the survivor's claim. The administrative law judge further determined that the opinion in which Dr. Rasmussen stated that chronic obstructive lung disease related, in

¹ The miner first filed a claim for benefits on July 3, 1980. Director's Exhibit 1. The district director found that the miner established that he had pneumoconiosis arising out of coal mine employment and was totally disabled due to pneumoconiosis, but ultimately denied benefits because the miner did not cease coal mine employment within a year of the determination of entitlement. *Id.* The miner filed a second claim on August 11, 1986. Director's Exhibit 2. A finding of entitlement was issued by the district director on January 15, 1987, and employer agreed to pay benefits. *Id.* The miner died on May 27, 1999. Director's Exhibit 3. Claimant, the miner's surviving spouse, filed a survivor's claim on June 14, 1999, which was denied by Administrative Law Judge Michael P. Lesniak, as claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibits 3, 10, 40. The Board affirmed the denial of benefits. [*P.H.*] *v. Eastern Associated Coal Corp.*, BRB No. 03-0491 BLA (Jan. 30, 2004) (unpub.). Claimant requested modification on May 4, 2004. The district director denied claimant's modification request, because a preponderance of the evidence indicated that the miner's death was not due to pneumoconiosis. Director's Exhibits 42, 47. Claimant requested a hearing. Director's Exhibit 48. The case was referred to the Office of Administrative Law Judges on December 13, 2004 and assigned to Administrative Law Judge Richard T. Stansell-Gamm. Director's Exhibit 51.

part, to coal dust exposure, was a major contributing factor in the miner's death was sufficient to carry claimant's burden under Section 718.205(c). Based upon this finding, the administrative law judge also determined that claimant established a mistake of fact pursuant to Section 725.310 and entitlement to benefits on the merits. Accordingly, benefits were awarded.

Employer argues on appeal that the administrative law judge erred in applying collateral estoppel to find the existence of pneumoconiosis established. Employer also alleges that the administrative law judge did not properly weigh the evidence relevant to Section 718.205(c). Claimant has responded and urges affirmance of the award of benefits. In a reply brief, employer reiterates its allegations of error. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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.² 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 establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered 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), (4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

I. Collateral Estoppel

² The record indicates that the miner was last employed in the coal mine industry in West Virginia. Director's Exhibits 1, 2, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

We will first address employer's allegation that the administrative law judge's application of collateral estoppel was inappropriate. The administrative law judge acknowledged the Board's instruction that he reconsider his finding that employer was not precluded from relitigating the issue of the existence of pneumoconiosis in the survivor's claim in light of the decision of the United States Court of Appeals for the Fourth Circuit in *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006), which was issued subsequent to the administrative law judge's first Decision and Order.³ The administrative law judge rejected employer's contentions on remand that claimant waived her right to invoke collateral estoppel, that the Board did not have the authority to raise the issue *sua sponte* and that the doctrine cannot be applied in the context of a request for modification because it relates to a mistake of law, rather than fact. Decision and Order at 5. The administrative law judge also determined that, contrary to employer's assertion, the district director's finding of pneumoconiosis in the miner's claim encompassed both clinical and legal pneumoconiosis. *Id.* at 6. Lastly, the administrative law judge found no merit in employer's argument that the development of new evidence in the survivor's claim prevented the application of collateral estoppel. *Id.* The administrative law judge concluded, therefore, that employer was barred by collateral estoppel from relitigating the issue of pneumoconiosis arising out of coal mine employment in the survivor's claim. *Id.* Based upon this finding, the administrative law judge determined that the existence of pneumoconiosis was established in the survivor's claim and, therefore, claimant established a mistake in a determination of fact in Administrative Law Judge Michael P. Lesniak's Decision and Order denying benefits.

On appeal, employer largely reiterates the arguments raised before the administrative law judge on remand. Employer maintains that the administrative law judge erred in finding that both clinical and legal pneumoconiosis were established in the miner's claim. Employer also alleges that because there is "superior evidence" in the survivor's claim, in the form of CT scans and more recent x-ray evidence, collateral estoppel cannot fairly be applied in this case. Finally, employer contends that the administrative law judge could not grant modification pursuant to Section 725.310 based upon the application of collateral estoppel, as the mistake that he corrected is one of law, rather than fact.

In the award of benefits in the miner's claim, dated February 18, 1987, the district director found:

³ In *Collins*, the court held that the doctrine of collateral estoppel precluded relitigation of the issue of pneumoconiosis in a survivor's claim where the issue had been previously adjudicated in a successful miner's claim decided prior to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

That as a result of the conditions of coal mine employment, the [miner] has contracted a severe chronic respiratory disease diagnosed as coal workers' pneumoconiosis, as that term is defined in the Act and the [r]egulations pertaining thereto;

That such severe chronic respiratory disease has caused a breathing impairment of sufficient degree to establish total disability within the meaning of the Act and the [r]egulations pertaining thereto.

Director's Exhibit 2. The administrative law judge considered this document and concluded, "since the [d]istrict [d]irector based his award determination on the presence of a severe, totally disabling, chronic respiratory disease caused by [the miner's] coal mine employment, I find his findings and the [e]mployer's acceptance of those findings encompassed both clinical and legal pneumoconiosis." Decision and Order on Remand at 6. Based upon this determination, the administrative law judge found that the existence of both clinical and legal pneumoconiosis was established in the survivor's claim and weighed the opinions relevant to the cause of the miner's death in light of this finding.

Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." See *Ramsay v. INS*, 14 F.3d 206 (4th Cir. 1994); *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308 (4th Cir. 1987). Collateral estoppel is "offensive" when the plaintiff seeks to foreclose the defendant from litigating an issue that the defendant did not litigate successfully in the prior adjudication. *Collins*, 468 F.3d at 217 n.4, 23 BLR at 2-396 n.4. Application of the doctrine is "non-mutual" when the party seeking to rely on the prior disposition of an issue was not a party in the earlier proceeding. *Id.* In cases involving the potential application of offensive non-mutual collateral estoppel, the Fourth Circuit has held that the party seeking to invoke the doctrine must establish that:

- (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 the previous forum.

Collins, 468 F.3d at 217, 23 BLR at 2-396; *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992).

In the present case, in determining that the district director's finding of pneumoconiosis in the miner's claim encompassed both clinical and legal pneumoconiosis, the administrative law judge essentially found that the first and second conditions had been met. Employer is correct, however, in maintaining that the administrative law judge's finding is not supported by substantial evidence. The district director explicitly determined in the award of benefits in the miner's claim that the miner had "a severe chronic respiratory disease diagnosed as *coal workers' pneumoconiosis*, as that term is defined in the Act and the [r]egulations pertaining thereto." Director's Exhibit 2 (emphasis added). The definition of clinical pneumoconiosis set forth in 20 C.F.R. §718.201(a)(1) provides:

"Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, *coal workers' pneumoconiosis*, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1) (emphasis added). Because the district director specifically described the severe respiratory disease from which the miner suffered as "coal workers' pneumoconiosis," the findings set forth in the award of benefits in the miner's claim, standing alone, do not establish that the miner had both clinical and legal pneumoconiosis.⁴ Director's Exhibit 2. Moreover, it is not apparent that the medical evidence upon which the district director relied in awarding benefits to the miner included diagnoses of conditions that meet the

⁴ Pursuant to 20 C.F.R. §718.201(a)(2), "legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

definition of legal pneumoconiosis.⁵ It is also not apparent, therefore, that “the issue sought to be precluded is identical to one previously litigated” and “the issue was actually determined in the prior proceeding.” *Collins*, 468 F.3d at 217, 23 BLR at 2-396.

Accordingly, we must vacate the administrative law judge’s finding that claimant can rely upon collateral estoppel to bar employer from relitigating the issue of the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and remand the case to the administrative law judge. Decision and Order on Remand at 24. On remand, the administrative law judge must reconsider whether the first and second conditions necessary to the proper application of collateral estoppel have been met while being mindful of the distinction between clinical and legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000). In setting forth his findings, the administrative law judge is required to comply with the Administrative Procedure Act (APA), 5 U.S.C. §554 *et seq.*, as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of “findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented[.]” 5 U.S.C. §557(C)(3)(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Contrary to employer’s contention, however, the administrative law judge need not reconsider his finding that the presence in the record of interpretations of CT scans and more recent x-rays does not implicate the fifth condition - the party against whom estoppel is asserted had a full and fair opportunity to litigate the

⁵ The record before the district director consisted of Dr. Walker’s report to the West Virginia Workmen’s Compensation Fund, a letter from the Mine Safety and Health Administration (MSHA), reports from Dr. Rasmussen, and x-ray readings. Director’s Exhibit 2. Dr. Walker noted that claimant’s x-ray was positive for occupational pneumoconiosis and claimant had a forty percent pulmonary functional impairment. *Id.* The letter from MSHA indicated that claimant had a sufficient degree of pneumoconiosis to be eligible to opt to work in a low dust area. *Id.* In a report dated August 25, 1986, Dr. Rasmussen diagnosed coal workers’ pneumoconiosis and stated that claimant was totally disabled “for any significant gainful employment as a result of his respiratory disease.” *Id.* In subsequent reports, Dr. Rasmussen indicated that claimant’s objective studies show that he had a totally disabling pulmonary impairment and hypoxemia. *Id.* Dr. Rasmussen did not identify the source of the impairment in these subsequent reports, however, Drs. Bassali, Gaziano and Sargent interpreted claimant’s x-rays as positive for simple pneumoconiosis. *Id.* Dr. Bassali also read an x-ray as positive for complicated pneumoconiosis. *Id.*

issue in the previous forum. *Collins*, 468 F.3d at 217, 23 BLR at 2-396. With respect to the CT scan evidence, the administrative law judge acknowledged that CT scans may be more sensitive than x-rays, but rationally determined that employer did not establish that CT scans are “highly reliable evidence” in light of the fact that there are no standards for interpreting CT scans for pneumoconiosis. Decision and Order on Remand at 6, citing *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 890, 22 BLR 2-409, 2-417-18 (7th Cir. 2002). The administrative law judge also acted within his discretion as fact-finder in determining that the presence in the record of much more recent x-ray evidence barred the application of collateral estoppel in this case, as this evidence is cumulative. See *Polly v. D&K Coal Co.*, 23 BLR 1-77, 1-83 (2005); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999) (*en banc*); Decision and Order on Remand at 6.

Accordingly, we affirm the administrative law judge’s finding that collateral estoppel precludes employer from relitigating the issue of the existence of clinical pneumoconiosis, but remand the case to the administrative law judge for reconsideration of whether employer is precluded from relitigating the issue of the existence of legal pneumoconiosis. *Collins*, 468 F.3d at 217, 23 BLR at 2-396.

II. Claimant’s Request for Modification

Employer further argues that the administrative law judge erred in finding that claimant established a mistake in a determination of fact in Judge Lesniak’s 2003 denial of the survivor’s claim. Employer maintains that the administrative law judge essentially found that Judge Lesniak committed an error of law by failing to apply collateral estoppel to determine that claimant established death due to pneumoconiosis under Section 718.205(c). Employer contends that a request for modification filed pursuant to Section 725.310 is not the proper vehicle for correcting an error of law. Employer’s allegation of error is without merit.

The Fourth Circuit held in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), that if a claimant avers generally that the ultimate fact was mistakenly decided, an administrative law judge has the authority, without more, to modify the denial of benefits. In setting forth its ruling, the court rejected any attempt to draw a distinction between errors of law and fact, holding that such a distinction is unpersuasive on modification, where the district director has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Jesse*, 5 F.3d at 726, 18 BLR at 2-28. Moreover, because Judge Lesniak assumed *arguendo*, that the miner had pneumoconiosis when weighing the evidence relevant to the cause of the miner’s death, it is not apparent that Judge Lesniak’s finding that claimant did not satisfy her burden of proof at Section 718.205(c) would have changed if he had applied collateral estoppel. 2003 Decision and

Order at 13. On remand, therefore, if the administrative law judge determines that collateral estoppel is available to claimant on the issue of the existence of pneumoconiosis, he is not barred from addressing claimant's request for modification.

III. The Merits of Entitlement

Turning to the merits of the survivor's claim, in light of the administrative law judge's reliance upon collateral estoppel to discredit the opinions of Drs. Renn and Fino on the issue of death causation because they found that the miner did not have clinical or legal pneumoconiosis, we must also vacate the administrative law judge's determination that claimant established death due to pneumoconiosis at Section 718.205(c). To avoid the possible repetition of error on remand, we will address employer's allegations of error regarding the administrative law judge's weighing of the medical opinion evidence under Section 718.205(c).⁶

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Branscomb, Renn and Fino, that there was no link between pneumoconiosis, or any other dust related lung disease, and the miner's death, on the ground that they did not diagnose clinical pneumoconiosis. As indicated above, we have vacated the administrative law judge's finding because he based it upon the application of collateral estoppel. Regardless of the administrative law judge's determination on remand as to whether claimant can rely upon collateral estoppel to establish the existence of legal pneumoconiosis, the administrative law judge must reconsider the opinions of Drs. Rasmussen, Branscomb, Renn and Fino under Section 718.205(c). When setting forth his determination that the medical opinion of Dr. Rasmussen was sufficient to establish death due to pneumoconiosis, the administrative law judge did not indicate clearly whether it was his finding that Dr. Rasmussen's opinion established that the miner's death was caused by clinical

⁶ We affirm the administrative law judge's decision to discredit the opinion in which Dr. Ranavaya indicated that pneumoconiosis was a substantially contributing cause of the miner's death, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 23.

pneumoconiosis, legal pneumoconiosis, or both.⁷ See Decision and Order on Remand at 24-25. If the administrative law judge determined that the miner's death was due to legal pneumoconiosis alone, his decision to discredit the opinions of Drs. Branscomb, Renn and Fino because they did not diagnose clinical pneumoconiosis is not rational. See *Wojtowicz*, 12 BLR at 1-165.

On remand, therefore, the administrative law judge must reconsider the opinions of Drs. Rasmussen, Branscomb, Renn and Fino under Section 718.205(c) in light of his findings on remand concerning whether the existence of pneumoconiosis has been demonstrated under Section 718.202(a)(1)-(4), whether by operation of collateral estoppel or by a preponderance of the evidence. In so doing, the administrative law judge must be mindful of the distinction between clinical and legal pneumoconiosis and must render his conclusions regarding the probative value of the opinions relevant to death causation in a manner consistent with this distinction. See *Compton*, 211 F.3d at 212, 22 BLR at 2-176.

⁷ Dr. Rasmussen reviewed the miner's medical record and the opinions of Drs. Branscomb, Fino, Renn and Ranavaya. Dr. Rasmussen stated that the miner had coal workers' pneumoconiosis, "with its related chronic dust disease of the lung." Claimant's Exhibit 1. Dr. Rasmussen also indicated that, towards the end of his life, the miner suffered "progressive impairment of his pulmonary function" and pulmonary emboli. Director's Exhibit 46. Dr. Rasmussen opined that the miner died due to respiratory failure, "probably" caused by pulmonary emboli superimposed on his severe disabling chronic lung disease. Director's Exhibit 46; see also Claimant's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further proceedings 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