BRB No. 02-0329 BLA

NORA COLLINS (Widow of JOHNNIE J. COLLINS) Claimant-Petitioner v. POND CREEK MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Mary Forrest-Doyle (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, 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:

Claimant, the miner's widow, appeals the Decision and Order (98-BLA-1295) of Administrative Law Judge Richard A. Morgan 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).[1] The administrative law judge accepted the stipulation of the parties that the miner had at least eleven years of qualifying coal mine employment, and determined that although the existence of pneumoconiosis was previously established in the living miner's claim, the doctrine of collateral estoppel did not apply to preclude employer from relitigating the issue in this survivor's claim. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and thus found that claimant could not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant maintains that the doctrine of collateral estoppel is applicable under the facts of this case, and contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (4), and in failing to weigh the conflicting evidence regarding the cause of the miner's death pursuant to Section 718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, declining to address the administrative law judge's findings on the merits, but agreeing with claimant's argument that the doctrine of collateral estoppel is applicable herein.

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]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Claimant and the Director initially contend that the administrative law judge erred in failing to invoke the doctrine of collateral estoppel to preclude employer from relitigating the issue of the existence of pneumoconiosis in this survivor's claim.[2] We disagree. The administrative law judge acknowledged that the doctrine of collateral estoppel is generally applicable in survivor's claims where, as here, there was a prior Decision and Order awarding benefits in the living miner's claim and no autopsy was performed in the survivor's claim. Decision and Order at 13-14; *see Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2- (7th Cir. 2002). The administrative law judge determined, however, that the miner herein was awarded benefits on February 25, 1988, at which time evidence sufficient to establish pneumoconiosis under one of the four methods set out at Section 718.202(a)(1)-(4) obviated the need to do so under any of the other methods. *See Dixon v. North Camp Coal Co*., 8 BLR 1-344 (1985). The administrative law judge further found that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, subsequently overruled *Dixon* and held that all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek*

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[2]For collateral estoppel to apply in this case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, claimant 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.

See Sedlack v. Braswell Services Group, Inc., 134 F.3d 219 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).

Coal Co. v. Compton, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge found that the facts of the present case were similar to those in *Howard v. Valley Camp Coal Co.*, BRB No. 00-1034 (Aug. 22, 2001)(unpublished), wherein the Board held that the doctrine of collateral estoppel was not applicable in light of the change in law enunciated by the Fourth Circuit in *Compton.* Decision and Order at 14.

It is well-settled that relitigation of an issue is not barred when there is a difference in the allocation of the burdens of proof and production, or a difference in the substantive legal standards pertaining to the two proceedings. *See generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *see also Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18, 31 BRBS 109 (CRT)(1st Cir. 1997); *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). The administrative law judge properly concluded that, in accordance with *Howard*, employer was not precluded from relitigating the issue of whether the miner had pneumoconiosis. The administrative law judge then rationally determined that he was bound to apply *Compton* in conjunction with Section 718.202. Decision and Order at 14-15. Although the Director maintains that *Howard* lacks precedential value and is not controlling, *see* Director's Brief at 3, and argues that a claimant's burden of proving the existence of pneumoconiosis by a preponderance of the evidence remains unchanged under *Compton*, *see* Director's Brief at 3-5, because the change in the law in *Compton* affects the fact-finder's weighing of the evidence, the issue is not identical to the one previously litigated. *See Sedlack v. Braswell Services Group, Inc.*, 123 F.3d 219 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). Consequently, we affirm the administrative law judge's finding that the doctrine of collateral estoppel is not applicable, as it is in accordance with law.

Turning to the merits, claimant argues that the administrative law judge failed to consider all of the relevant x-ray interpretations in finding the evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1).[3] Claimant's argument

[3]Claimant additionally maintains that because the x-rays dated September 6, 1997, September 7, 1997, and September 10, 1997 were merely copies and not original films as required by 20 C.F.R. §718.102(d), the interpretations thereof are entitled to little or no weight. Claimant's Brief at 16-18. Employer correctly notes, however, that the record does not reflect that the radiographs in question were copies, but rather reflects that they were original AP portable films in substantial compliance with the quality standards at Section 718.102. While these films were not of optimal quality, they were deemed to be of sufficient quality for interpretation by multiple B readers and Board-certified radiologists. Employer's Brief at 22-23. Further, claimant waived any objection to the admission of this evidence by her failure to raise the issue at the hearing.

has merit. The administrative law judge incorporated by reference the summary of evidence contained in the Decision and Order awarding benefits in the living miner's claim, *see* Director's Exhibit 32, and determined that 24 interpretations of four x-ray films taken between February 25, 1985 and September 10, 1997 were submitted in the present claim, all of which were negative for pneumoconiosis.[4] Decision and Order at 4, 17-18. Apparently, however, the administrative law judge overlooked the x-ray readings contained in Claimant's Exhibits 1-30, 25 of which were positive for pneumoconiosis. Also, the administrative law judge did not acknowledge the interpretations contained in Director's Exhibits 22-29. Further, the administrative law judge stated that he was not considering the six readings of the February 27, 1985 film submitted by employer because employer had an opportunity to submit those readings in the living miner's claim. Decision and Order at 17-18. Since the survivor's claim is a separate claim, however, and this evidence was admitted into the record at the hearing without objection by any party pursuant to 20 C.F.R. §725.456 (2000), it must be weighed with all other relevant evidence of record. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(1), and remand this case to the administrative law judge for his consideration and weighing of the x-ray evidence of record in accordance with *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), including *de novo* consideration of the evidence developed in the living miner's claim which was made part of the record herein at Director's Exhibits 31 and 32.[5]

Claimant next challenges the administrative law judge's weighing of the medical opinions at Section 718.202(a)(4), arguing that the administrative law judge failed to give appropriate, controlling weight to the diagnoses of pneumoconiosis by the miner's treating physicians, Drs. Younes and Mian, as supported by the opinion of Dr. Gaziano and the

[4]In Appendix A to his Decision and Order, the administrative law judge listed only 23 x-ray interpretations contained in Employer's Exhibits 2-5, 7, 12-13, and did not list all of the negative interpretations contained in Dr. Morgan's report dated December 16, 1998 , which is included in Employer's Exhibit 7. Further, contrary to the administrative law judge's findings, *see* Decision and Order at 4, 17-18, Appendix A reflects 23 interpretations of five films taken between February 27, 1985 and September 10, 1997.

[5]While the administrative law judge considered the 1997 films more probative of the miner's condition prior to death, Decision and Order at 18, he properly acknowledged that, consistent with *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), it is rational to credit more recent evidence, solely on the basis of recency, only if it shows the miner's condition has progressed or worsened; otherwise, the reliability of irreconcilable items of evidence must be evaluated without reference to their chronological sequence, because the later evidence is just as likely to be faulty as the earlier evidence. Decision and Order at 17.

Williamson Memorial Hospital records. Claimant's Brief at 20-21. While the opinion of a treating physician may be entitled to special consideration, there is neither a requirement nor a presumption in the Fourth Circuit that treating or examining physicians' opinions be given greater weight than opinions of other expert physicians. *See Consolidation Coal Co. v. Held*, 2002 WL 31845917 (4th Cir., Dec. 20, 2002); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Nevertheless, as the administrative law judge's incomplete weighing of the x-ray evidence at Section 718.202(a)(1) necessarily impacted his evaluation of the medical opinion evidence, *see* Decision and Order at 19, we vacate his findings at Section 718.202(a)(4) for a reassessment of this evidence consistent with *Compton*, including a *de novo* evaluation of the medical opinions developed in the miner's claim but made a part of the record herein at Director's Exhibits 31 and 32.

Lastly, if on remand the administrative law judge finds the existence of pneumoconiosis established at Section 718.202(a), he must determine whether the weight of the conflicting evidence establishes death due to pneumoconiosis at Section 718.205(c). 20 C.F.R. §718.205(c); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and this 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