BRB No. 02-0874 BLA

MARGARET E. STURGILL (Widow of HENRY E. STURGILL)	)	
Claimant-Respondent	)	
v.	)	
	)	DATE ISSUED: 08/28/2003
OLD BEN 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--Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Susan D. Oglebay, Castlewood, Virginia, for claimant.

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

Jeffrey S. Goldberg (Howard M. 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order--Awarding Benefits (2001-BLA-1094) of Administrative Law Judge Joseph E. Kane rendered 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 miner died on November 29, 1995 and claimant filed her application for survivor=s benefits on January 12, 1996. Director's Exhibits 1, 4. The miner=s death certificate listed the cause of death as respiratory failure due to black lung. Director's Exhibit 4. No autopsy was performed.

At the time of the miner=s death, he was receiving federal black lung benefits pursuant to a final award on his lifetime claim filed in 1983. Director's Exhibit 28 at 2, 96. The administrative law judge who awarded benefits to the miner in a June 15, 1993 Decision and Order applied the true doubt rule to find the existence of pneumoconiosis established based solely on the x-ray evidence pursuant to 20 C.F.R. ' 718.202(a)(1). Director's Exhibit 28 at 97-98. Subsequent to the issuance of the administrative law judge=s decision, the United States Supreme Court invalidated the true doubt rule. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Also relevant to the issues raised in this appeal, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,

[2] later held that an administrative law judge must weigh together the different types of evidence submitted pursuant to 20 C.F.R. ' 718.202(a)(1)-(4) to determine whether a preponderance of all the evidence establishes the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000).

Claimant=s survivor=s claim proceeded to a hearing before Administrative Law Judge Alfred Lindeman on June 26, 1997. Employer contested all issues of entitlement. Director's Exhibits 14-16, 29. Judge Lindeman rejected claimant=s contention that employer was barred from relitigating the issue of the existence of pneumoconiosis in the survivor=s claim. Director's Exhibits 32 at 9-10, 46 at 3. Judge Lindeman nevertheless found that the existence of pneumoconiosis was established in the survivor=s claim based on the weight of the medical opinion evidence of record. Director's Exhibit 46 at 14-17. Judge Lindeman further found that the relevant evidence established that pneumoconiosis hastened the miner=s death. Accordingly, he awarded benefits.

Upon consideration of employer=s appeal, the Board reversed the administrative law judge=s Decision and Order because the record as weighed by the administrative law judge contained no credible evidence that pneumoconiosis hastened the miner=s death. *Sturgill v.*

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[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.

[2] The record indicates that the miner=s last coal mine employment occurred in Virginia. Director's Exhibit 27 at 34, 39; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Old Ben Coal Co., BRB No. 98-0276 BLA (Nov. 5, 1998)(unpub.); Director's Exhibit 53. Consequently, the Board did not address employer=s arguments on appeal challenging the finding of the existence of pneumoconiosis.

Thereafter, claimant timely requested modification. Director's Exhibits 57, 58; *see* 33 U.S.C. ' 922, implemented by 20 C.F.R. ' 725.310(2000). Following the development of additional evidence by claimant and employer, the district director denied modification and claimant requested a hearing. Director's Exhibits 77, 79. Employer again contested all issues of entitlement, including the existence of pneumoconiosis. Director's Exhibit 81. Prior to the scheduled hearing, the parties waived their right to a hearing and requested a decision on the record. Order Submitting Case For Decision, March 20, 2002; 20 C.F.R. ' 725.461(a); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). By the time the case was submitted for decision, the record contained extensive x-ray evidence, medical opinion evidence, and physician deposition testimony that conflicted regarding whether the miner had clinical pneumoconiosis, whether he had legal pneumoconiosis in the form of chronic obstructive lung disease related to coal mine dust exposure, and whether pneumoconiosis caused or hastened his death. In claimant=s brief to the administrative law judge, she argued that employer was collaterally estopped from relitigating the issue of the existence of pneumoconiosis. Claimant=s Brief at 2-4, May 31, 2002.

In the ensuing Decision and Order--Awarding Benefits, the administrative law judge found that Judge Lindeman made a mistake in a determination of fact when he failed to give preclusive effect to the finding of the existence of pneumoconiosis made in the 1993 Decision and Order awarding benefits in the miner=s claim. The administrative law judge noted that the Supreme Court had subsequently invalidated the true doubt rule, but determined that collateral estoppel still applied because the 1993 finding of pneumoconiosis in the miner=s claim, although based on the true doubt rule, was correct at the time it was made. He therefore ruled that employer was precluded from relitigating the issue of the existence of pneumoconiosis, and found that Athe existence of pneumoconiosis and its etiology ha[ve] been established as a matter of law.@ Decision and Order at 10. Turning to the issue of death due to pneumoconiosis, the administrative law judge discredited the opinions of all physicians who did not diagnose pneumoconiosis. Decision and Order at 11. Based on the opinion of the miner=s treating physician, Dr. Fleenor, and the death certificate completed by Dr. Fleenor, the administrative law judge then found that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of pneumoconiosis in the survivor=s claim. Employer argues further that the administrative law judge erred in his analysis of the medical evidence when he found that the miner=s death was due to pneumoconiosis. Claimant responds, urging affirmance. The Director, Office of Workers= Compensation Programs (the Director), responds, agreeing with employer that the

administrative law judge erred by applying the doctrine of collateral estoppel on the facts of this case. Employer has filed a reply brief, reiterating its contentions.

The Board=s scope of review is defined by statute. The administrative law judge=s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

To establish entitlement to survivor=s benefits pursuant to 20 C.F.R. '718.205(c), 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. ''718.205(a)(1)-(3); 718.202(a); 718.203; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor=s 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),(c)(4). 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); *Bill Branch Coal Corp. 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, 979-80, 16 BLR 2-90, 2-92-93 (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).

Employer and the Director contend that the administrative law judge erred in applying the doctrine of collateral estoppel to preclude employer from relitigating the existence of pneumoconiosis in the survivor=s claim. Both employer and the Director note that the finding of the existence of pneumoconiosis in the miner=s claim was based on the true doubt rule, which is no longer valid. Employer's Brief at 25; Director=s Brief at 6. Employer additionally argues that *Compton* subsequently changed the law in the Fourth Circuit regarding the method of determining the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a). Employer's Brief at 25. Employer and the Director therefore assert that the doctrine of collateral estoppel is inapplicable to this case. The arguments of employer and the Director have merit.

For collateral estoppel to apply in this case, 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 judgement 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. *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*). As the Board recently held, A[i]t 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.@ *Collins v. Pond Creek Mining Co*., 22 BLR 1-229, 1-232 (2003)(citations omitted).

Here, as employer and the Director note, there is a difference in both the allocation of the burden of proof and in the substantive legal standards governing the miner=s claim and the survivor=s claim. When the administrative law judge found the existence of pneumoconiosis established in the miner=s claim in 1993 based on the true doubt rule, the true doubt rule placed the risk of nonpersuasion on the party opposing the claim. That is, if the evidence on an issue was conflicting and equally probative, as the administrative law judge in 1993 found the x-ray readings to be, the evidentiary conflict was resolved in favor of claimant. *See, e.g., Wilt v. Wolverine Mining Co*., 14 BLR 1-70, 1-76 (1990). However, in 1994 the Supreme Court held the true doubt rule invalid. *Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12. Thus, claimant now bears the burden of establishing each element of entitlement by a preponderance of the evidence. *Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9; 5 U.S.C. ' 556(d); 20 C.F.R. ' 725.103. Additionally, at the time the administrative law judge found the existence of pneumoconiosis established based solely on the x-ray evidence in the miner=s claim, a finding that the existence of pneumoconiosis was established under one of the four methods of proof set forth at 20 C.F.R. ' 718.202(a)(1)-(4) obviated the need to consider whether the evidence under any of the other subsections supported a finding of the existence of pneumoconiosis. *See Dixon v. North Camp Coal Co*., 8 BLR 1-344, 1-345 (1985). As noted above, the Fourth Circuit court subsequently held that all types of relevant evidence under 20 C.F.R. ' 718.202(a)(1)-(4) must be weighed together to determine whether a preponderance of the evidence establishes the existence of pneumoconiosis. *Compton*, 211 F.3d at 208-11, 22 BLR at 2-169-74. The Board has recognized that Athe change in the law in *Compton* affects the fact-finder=s weighing of the evidence,@ and has thus held, Athe issue [of the existence of pneumoconiosis] is not identical to the one previously litigated@ in a pre-*Compton* claim where, as here, the previous finding of pneumoconiosis was based on consideration of only one subsection of 20 C.F.R. ' 718.202(a). *Collins*, 22 BLR at 1-233. Therefore, we reverse the administrative law judge=s finding that employer is collaterally estopped from relitigating the issue of the existence of pneumoconiosis in the survivor=s claim, and we vacate his attendant finding that the existence of pneumoconiosis was established.[3] On remand, the administrative law judge must determine whether claimant has established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ' ' 718.202(a), 718.203(b), by a preponderance of the evidence. *See* 20 C.F.R. ' 718.205(a)(1); *Trumbo*, 17 BLR at 1-87-88.

Pursuant to 20 C.F.R. ' 718.205(c), employer contends that the administrative law judge erred in his analysis of the medical evidence when he found that the miner=s death was due to pneumoconiosis. Employer's Brief at 27-30. Review of the administrative law

[3] Because we reverse the administrative law judge=s collateral estoppel finding on these grounds, we need not address employer=s additional allegations of error in the administrative law judge=s decision to apply the doctrine of collateral estoppel.

judge=s Decision and Order reflects that he discredited the death causation opinions of all physicians who did not diagnose pneumoconiosis. Decision and Order at 11. Because we have vacated the administrative law judge=s finding pursuant to 20 C.F.R. ' 718.202(a) and instructed him to determine whether the existence of pneumoconiosis is established, we must also vacate his finding as to death causation and instruct him to reconsider whether the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c). On remand, the administrative law judge should evaluate the June 11, 2001 deposition testimony of the miner=s treating physician under the criteria of 20 C.F.R. ' 718.104(d). *See* 20 C.F.R. ' 718.101(b).

Accordingly, the administrative law judge=s Decision and Order--Awarding Benefits is reversed in part and vacated in part, 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

PETER A. GABAUER, JR.
Administrative Appeals Judge