BRB No. 04-0737 BLA

ELAINE POLLY (Widow of DOUGLAS POLLY) Claimant-Respondent v. D & K COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/27/2005 DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2003-BLA-5477) of Administrative Law Judge Stuart A. Levin (the administrative law judge) awarding 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). Initially,

the administrative law judge found that the miner was in payment status at the time of his death.[1] Decision and Order at 2; Director's Exhibit 1. At the hearing and again in his decision, the administrative law judge stated that the issue of whether or not the miner had pneumoconiosis arising out of coal mine employment had been conclusively resolved by Administrative Law Judge Daniel Lee Stewart's decision in the miner's claim and, thus, that employer was collaterally estopped from relitigating these issues.[2] Decision and Order at 2; Hearing Transcript at 11-16. In addition, the administrative law judge found that the presence of total disability due to pneumoconiosis had been established and, therefore, the only issue to be resolved was whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 2. Addressing the merits of the survivor's claim,[3] the administrative law judge found that all of the physicians agreed that the miner's pulmonary condition and pulmonary deterioration caused his death. Decision and Order at 7. Weighing the conflicting medical opinions, the administrative law judge credited the opinion of Dr. Breeding, the miner's treating physician, that pneumoconiosis and coal dust exposure was at least one factor in the miner's compromised pulmonary condition and its deterioration, over the contrary opinions of Drs. Rosenberg and Jarboe. *Id*. Consequently, the administrative

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[1] The miner's claim was filed on July 20, 1983 and benefits were awarded by Administrative Law Judge Daniel Lee Stewart on September 16, 1987. Director's Exhibit 1. Employer appealed the award of benefits to the Board, but by motion dated December 7, 1987, withdrew the appeal. *Id*. In an Order issued January 29, 1988, the Board dismissed employer's appeal, with prejudice. *Polly v. D & K Coal Co.*, BRB No. 87-2991 BLA (Jan. 29, 1988)(unpub.)(Order).

[2] As a result of the administrative law judge's ruling regarding collateral estoppel, employer was afforded the opportunity to submit additional medical evidence post hearing. Decision and Order at 2; Hearing Transcript at 18-19. Employer submitted the medical reports of Dr. Rosenberg, Employer's Exhibit 6, and Dr. Jarboe, Employer's Exhibit 7, which the administrative law judge accepted into the record. Decision and Order at 2. The administrative law judge then excluded employer's prior submissions, Director's Exhibits 17, 18, as well as that evidence found at Employer's Exhibits 1-5. Decision and Order at 2. In addition, the administrative law judge excluded the report of Dr. Younes, Claimant's Exhibit 3, as untimely submitted, and Dr. van Breeding's post-hearing report, Claimant's Exhibit 2, as cumulative of Director's Exhibit 15. Decision and Order at 2.

[3] Claimant is the widow of the miner, Douglas Polly, who died on January 30, 2001. Director's Exhibits 3, 12. Claimant filed her survivor's claim on March 1, 2001. Director's Exhibit 3.

law judge found that the medical evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id*. Accordingly, the administrative law judge awarded benefits in this survivor's claim.

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 arising out of coal mine employment in the survivor's claim. Employer further contends that, if the case is remanded to the administrative law judge, the record must be reopened to allow employer the opportunity to submit additional evidence and that the regulatory limitations on the admission of evidence must be waived. In addition, employer argues 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 of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to remand the case for the administrative law judge to determine whether, under the facts of this case, employer had a financial incentive to vigorously litigate the miner's claim and therefore whether it would be proper to apply the doctrine of collateral estoppel. In addition, the Director urges the Board to reject employer's request to suspend application of the evidentiary limitations in 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 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, employer contends initially that the administrative law judge erred in applying the doctrine of collateral estoppel to the prior findings of the existence of pneumoconiosis arising out of coal mine employment because there had been no financial incentive for employer to vigorously litigate the miner's claim. Employer's Brief at 11-12. Specifically, employer contends that the award of benefits in the miner's federal black lung claim was completely offset by an award of benefits from the miner's 1984 state award of benefits. Employer therefore argues that it had no financial incentive to vigorously litigate or appeal the award in the miner's claim because it would be under no obligation to pay additional benefits. *Id*. Consequently, employer contends that it would not be fair to rely on the findings from the miner's claim in this survivor's claim. The Director agrees with employer that application of the doctrine of collateral estoppel may not be appropriate in this case, as the lack of a financial incentive to vigorously litigate a claim can defeat application of collateral estoppel. Director's Brief at 4. However, the Director argues that the case must be remanded to the administrative law judge for a determination as to whether employer had a financial interest in fully litigating the

miner's claim. *Id*. These contentions have merit.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that for collateral estoppel to apply, four elements must be met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) 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.

Nat'l Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 908 (6th Cir. 2001); *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir. 1997)(*en banc*) (quoting *Detroit Police Officers Ass'n v. Young*, 842 F.2d 512, 515 (6th Cir. 1987)); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*); *see also Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998). Moreover the court stated that "even when these criteria are met, collateral estoppel may not be invoked where controlling facts or legal principles have changed significantly, or where the circumstances of the case justify an exception to general estoppel principles." *Detroit Police Officers Ass'n*, 824 F.2d at 515. In this case, the issue is whether the doctrine of offensive collateral estoppel, defined as when a plaintiff seeks to prevent a defendant from relitigating issues previously litigated and decided against the defendant in an action brought by a different plaintiff, is applicable.[4] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n.4 (1979); *Lewis Coal Co. v. Director, OWCP [McCoy]*, 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004).

Herein, employer does not allege that any of the four main elements of collateral estoppel has not been met. Rather, employer argues that it did not have a financial incentive to vigorously defend the miner's claim because any benefits awarded therein would be fully offset by the 1984 award of benefits in the miner's state claim and, thus,

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[4] We note that the fact that claimant, the miner's widow, was not a party to the miner's claim does not preclude the application of collateral estoppel to employer. Employer was a party to the prior claim and, thus, application of offensive non-mutual collateral estoppel is herein appropriate. *Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 334, 22 BLR 2-581, 2-586 (7th Cir. 2002)(describing the same scenario as "a straightforward application of offensive nonmutual issue preclusion").

the use of collateral estoppel would be unfair.[5] Particularly, employer contends that it is entitled to an exception to the doctrine of collateral estoppel under *Parklane Hosiery*.

In *Parklane Hosiery*, the United States Supreme Court found that the use of offensive non-mutual collateral estoppel may be unfair in certain circumstances. One such example is where a defendant may have little incentive to defend vigorously a claim in which the amount in controversy is nominal, and future suits are not foreseeable. *Parklane Hosiery*, 439 U.S. at 330; *Firsdon v. United States*, 95 F.3d 444, 448 (6th Cir. 1996). Thus, application of offensive collateral estoppel under those circumstances may not be fair to the defendant, even though the technical requirements of collateral estoppel may have been met. However, the Court held that the "preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." *Parklane Hosiery*, 439 U.S. at 331; *United States v. Sandoz Pharmaceuticals Corp.*, 894 F.2d 825, 829 (6th Cir. 1990). Thus, the question of whether offensive collateral estoppel should be applied is committed to the "broad discretion" of trial courts.

As employer and the Director correctly contend, the precise issue herein is not whether offensive collateral estoppel is available, but rather, whether application of the doctrine is fair under the facts of this case. The administrative law judge has not rendered the requisite findings in this case. Rather, he foreclosed discussion of the issue at the hearing, finding that the technical requirements of collateral estoppel had been met, as employer had had the opportunity to fully litigate the relevant issues in the miner's claim. Hearing Transcript at 12-15. Therefore, since the administrative law judge has not adequately considered whether use of offensive collateral estoppel would be fair in this case, we vacate his Decision and Order and remand the case to the administrative law judge for further consideration. *Parklane Hosiery*, 439 U.S. at 331; *Sandoz Pharmaceuticals*, 894 F.2d at 829; *see also Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 334, 22 BLR 2-581, 2-586 (7th Cir. 2002).

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[5] The miner was awarded state benefits on July 2, 1984 by the Kentucky Workers' Compensation Board, based on its finding that the miner had met his burden of establishing total and permanent occupational disability resulting from his contracting the occupational disease of coal workers' pneumoconiosis and/or silicosis. Director's Exhibit 1 at Exhibit 3. In particular, the state board awarded the miner benefits in the approximate amount of $250.00 per week "from August 26, 1982 and for as long as he is so disabled." *Id*.

On remand, the administrative law judge must address employer's argument that application of offensive collateral estoppel is unfair in this case because employer lacked the financial incentive to litigate vigorously the miner's claim. Specifically, the administrative law judge must determine whether the offset created by the miner's 1984 state award obviated employer's incentive to vigorously litigate the living miner's claim, since employer argues it would have been under no greater financial burden to the miner. Employer's Brief at 11-12. In considering employer's argument, the administrative law judge must be mindful of the entirety of the issues involved. The example noted in *Parklane Hosiery*, involves not only a consideration that the amount in the first action is small or nominal that may cause a defendant to have little incentive to defend vigorously the initial action, but also whether future actions are foreseeable. *Parklane Hosiery*, 439 U.S. at 330. Moreover, as the Director correctly notes, not all claims that a party lacked a financial incentive to vigorously defend a prior claim are meritorious. Director's Brief at 5-6; *see McCoy*, 373 F.3d at 578, 23 BLR at 2-199 (rejecting employer's argument that it had no interest in litigating the original claim when the Trust Fund would be liable for benefits, but the record showed that employer was aware that the settlement could become the basis for an award of medical benefits). Thus, the administrative law judge must determine whether the offset of federal benefits awarded in the miner's claim removed the financial incentive from employer to vigorously litigate the miner's claim, such that it would be unfair to apply collateral estoppel to preclude relitigation of the issues of the existence of pneumoconiosis arising out of coal mine employment.

Employer contends that, in the event the administrative law judge determines that the doctrine of collateral estoppel does not apply, the record must be reopened to allow employer to submit evidence regarding the issue of pneumoconiosis. That contention is properly addressed to the administrative law judge. 20 C.F.R. §725.455. We reject employer's argument that the regulations limiting the admission of evidence should not be applied in this case; as this survivor's claim was filed after January 19, 2001, the admission of evidence is governed by the regulations concerning evidentiary limitations set forth at Sections 725.414 and 725.456(b)(1). 20 C.F.R. §§725.414, 725.456(b)(1); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*); *Smith v. Martin County Coal Corp.*, BLR , BRB No. 04-0126 BLA (Oct. 27, 2004). Moreover, the regulations make clear that these limitations are not mere guidelines: "Medical evidence in excess of the limitations contained in §725.414 shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

Accordingly, the administrative law judge's Decision and Order awarding survivor's benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge