BRB No. 97-0492 BLA

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| CLARA SUE HUGHES<br>(Widow of JAMES HUGHES) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| CLINCHFIELD COAL COMPANY | ) | |
| Employer-Petitioner | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: |
| Party-in-Interest | ) | DECISION AND ORDER<br>*EN BANC* |

Appeal of the Decision and Order Awarding Benefits of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer.

Jill M. Otte (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-0635) of Administrative Law Judge Edith Barnett 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). The administrative law judge determined that because Administrative Law Judge Giles J. McCarthy previously found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b) in the living miner's claim, employer and the Director, Office of Workers' Compensation Programs (the Director), were collaterally estopped from relitigating these issues in the survivor's claim. The administrative law judge additionally found that new evidence developed in support of the survivor's claim fully supported Administrative Law Judge McCarthy's finding of occupational pneumoconiosis pursuant to Section 718.202(a)(4), and that claimant[1] established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's invocation of the doctrine of collateral estoppel, and her weighing of the evidence on the issues of the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) and death due to pneumoconiosis pursuant to Section 718.205(c). Claimant responds, urging affirmance. The Director has filed a limited response, agreeing with employer's argument that the doctrine of collateral estoppel is inapplicable under the facts of this case. Pursuant to the Board's Order dated May 6, 1998, oral argument was held in this case on June 18, 1998, in Charleston, West Virginia.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer and the Director initially contend that the administrative law judge erred in finding that all of the criteria for application of the doctrine of collateral estoppel were met so as to preclude them from relitigating the issue of occupational pneumoconiosis in the survivor's claim. Employer and the Director note that benefits were ultimately denied in the miner's claim for failure to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), and they assert that principles of judicial economy would be violated by

[1] Claimant is Clara Sue Hughes, the widow of the deceased miner, James Hughes, who died on September 30, 1993. Claimant filed a survivor's claim for benefits herein on December 1, 1993. Director's Exhibit 1.

requiring a party to appeal or seek modification in order to challenge adverse findings within a favorable judgment. Additionally, autopsy evidence introduced into the record in the survivor's claim, which is generally considered to be the most precise method of establishing the presence or absence of pneumoconiosis, *see Terlip v. Director, OWCP*, 8 BLR 1-363 (1985), could not have been adduced at the time of adjudication of the miner's claim. The arguments of employer and the Director have merit.

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." *Ramsay v. INS*, 14 F.3d 206 (4th Cir. 1994); *see Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308 (4th Cir. 1987). For collateral estoppel to apply in the present 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); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992); *Ramsey, supra*. Inasmuch as benefits were ultimately denied in the miner's claim, we agree with the arguments of

employer and the Director that the third element has not been satisfied.[2]

"A factual issue is 'necessarily decided' for issue preclusion purposes if its determination was necessary to support the judgment entered in the prior proceeding." *N.L.R.B v. Master Slack and/or Master Trousers*, 773 F.2d 77, 81 (6th Cir. 1985); *see Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 332, 326 (1979). The requirement that an issue be necessary to a judgment "prevent[s] the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation." *Sandberg*, 979 F.2d at 346, citing *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1571 (Fed.Cir. 1983). While claimant correctly notes that the existence of occupational pneumoconiosis is an essential element of entitlement in a living miner's claim, the establishment of that element does not support, and thus is not "essential" to, a judgment denying benefits. *See generally Levine v. McLeskey*,

[2] Under the facts of this case, the fifth element is also implicated. Although newly discovered evidence is generally not accepted as a sufficient ground to preclude the doctrine of collateral estoppel, an exception may be warranted when the evidence was either fraudulently concealed or could not have been discovered previously with due diligence. *See Guerrero v. Katzen*, 774 F.2d 506 (D.C. Cir. 1985); *Constantini v. Trans World Airlines*, 681 F.2d 1199 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087 (1982); *Saud v. Bank of New York*, 929 F.2d 916 (2d Cir. 1991). In cases such as this, where autopsy evidence was not available and could not have been adduced at the time of adjudication of the miner's claim, fairness considerations may warrant such an exception to allow relitigation of the issue of the existence of pneumoconiosis in the survivor's claim. *See generally Island Creek Coal Co. v. Alexander*, No. 88-3863, slip op. at 2-3 (6th Cir. Aug. 29, 1989)(unpub.), *aff'g Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988).

164 F.3d 210 (4th Cir. 1998); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1457-1458 (2d Cir. 1995); *Myer v. Rigdon*, 36 F.3d 1375, 1379 (7th Cir. 1994); *McDuffie v. Estelle*, 935 F.2d 682, 685 (5th Cir. 1991); *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 994 (4th Cir. 1987), *reh'g denied* (May 28, 1987); *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987); *S.E.L. Maduro v. M/V Antonio De Gastaneta*, 833 F.2d 1477, 1483 (11th Cir. 1987); *N.L.R.B. v. Babad*, 785 F.2d 46, 49 n. 4 (2d Cir. 1986, *cert. denied*, 479 U.S. 830 (1986); *Balcom v. Lynn Ladder & Scaffolding Co.*, 806 F.2d 1127 (1st Cir. 1986); *Restatement (Second) of Judgments* §27 cmt. h (1982); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* §4421 (1981). Consequently, under the facts of this case, we reverse the administrative law judge's finding that employer is collaterally estopped from relitigating the issue of occupational pneumoconiosis. Claimant must therefore establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(1)-(4), 718.203(b), by a preponderance of the evidence.

Turning to the merits, in order to be entitled to benefits in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis, and that the miner had pneumoconiosis which arose out of coal mine employment. *See* 20 C.F.R. §§718.205(c), 718.202(a), 718.203; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

Employer accurately maintains that the administrative law judge failed to evaluate all relevant evidence under each subsection at Section 718.202(a), but merely found that the weight of the new evidence in the survivor's claim fully supported Judge McCarthy's prior finding of pneumoconiosis based on medical opinion evidence. Employer further argues that the administrative law judge selectively analyzed the evidence and may have misallocated the burden of proof. Employer's arguments have merit. In evaluating the conflicting medical opinions, the administrative law judge appeared to consider any diagnosis of a pulmonary impairment which could fall within the regulatory definition of pneumoconiosis at 20 C.F.R. §718.201 as evidence supportive of claimant's burden. *See* Decision and Order at 18-19. The administrative law judge noted that although the autopsy prosector, Dr. Stefanini, "may have ruled out coal workers' pneumoconiosis because he did not observe maculae or nodules, he did not specifically so state," and the administrative law judge concluded that other findings on autopsy were consistent with the broad statutory definition of the disease. Decision and Order at 18; Director's Exhibit 8. Inasmuch as Dr. Stefanini did not link any diagnosed condition with dust exposure in coal mine employment, however, his report does

not satisfy claimant's burden of establishing the existence of pneumoconiosis.[3] *See generally Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 1-31 (4th Cir. 1988); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Similarly, the administrative law judge gave limited weight to the opinions of Drs. Naeye, Hansbarger, Tomashefski, Caffrey and Branscomb, that the miner did not have pneumoconiosis, after determining that they diagnosed emphysema and/or chronic bronchitis, which fall within the regulatory definition of pneumoconiosis if related to dust exposure in coal mine employment. The administrative law judge discounted the reasons provided by Drs. Naeye, Tomashefski, Hansbarger and Caffrey for ruling out a connection between the diagnosed conditions and dust exposure in coal mine employment as unsupported by any authority and/or inadequately explained. Decision and Order at 18-19. Employer maintains, however, that the physicians' conclusions were based on their medical training as reflected in their qualifications, and employer correctly asserts that the administrative law judge did not subject the contrary opinions of Drs. Rupke and Jones, that the miner had pneumoconiosis, to the same scrutiny. The administrative law judge also discounted Dr. Branscomb's opinion, that the miner had no disease caused or exacerbated by coal mine employment, because she concluded that Dr. Branscomb interpreted the definition of pneumoconiosis too narrowly, as evidenced by his statement that anthracosis is not a disease, which she found contrary to the regulatory definition of pneumoconiosis at Section 718.201. Decision and Order at 19. The administrative law judge, however, took Dr. Branscomb's statement out of context. A review of Dr. Branscomb's report in its entirety reveals that the physician merely provided his personal definition of anthracosis, which he equated with anthracotic pigmentation, during his explanation of the significance of Dr. Stefanini's finding of "anthracotic dusting of lungs" among the final anatomical diagnoses in the autopsy report. *See* Employer's Exhibit 2 at 5. Dr. Stefanini's autopsy report itself does not include any finding of "anthracosis," Director's Exhibit 8, and the terms "anthracotic pigmentation" and "anthracotic dusting" are not included within the definition of pneumoconiosis at Section 718.201. Inasmuch as the administrative law judge's finding that the doctrine of collateral estoppel was applicable may have affected her weighing of the evidence, and in view of her uncritical acceptance of the opinions of Drs. Rupke and Jones in contrast with her treatment of the contrary opinions, we vacate the administrative law judge's findings pursuant to Section 718.202(a), and remand this case for consideration and reevaluation of all relevant evidence under each subsection thereof. *See generally Sterling Smokeless Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

[3] The administrative law judge additionally determined that Drs. Naeye and Jones diagnosed cor pulmonale, an established indicator of the existence of pneumoconiosis. Decision and Order at 18. While Dr. Jones affirmatively diagnosed pneumoconiosis, Claimant's Exhibit 1, Dr. Naeye did not attribute the miner's cor pulmonale to dust exposure in coal mine employment, Director's Exhibit 9.

Lastly, employer challenges the administrative law judge's weighing of the evidence at Section 718.205(c). In finding that pneumoconiosis was a substantially contributing cause of the miner's death, notwithstanding his lung cancer, the administrative law judge gave particular weight to the opinion of the autopsy prosector, which she determined attributed the miner's death to "acute bronchopneumonia due to a long standing and steadily worsening inability of expectorating respiratory secretions associated with severe obstructive pulmonary disease," a diagnosis "fully compatible with a finding of pneumoconiosis under the Act." Decision and Order at 21. Again, however, because Dr. Stefanini did not affirmatively link any of the miner's pulmonary conditions to dust exposure in coal mine employment, *see* Director's Exhibit 8, his opinion is insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c). Additionally, because the administrative law judge gave limited weight to the opinions of Drs. Naeye, Tomashefski, Caffrey, Hansbarger and Branscomb on the ground that they did not diagnose pneumoconiosis, and her findings pursuant to Section 718.202 have been vacated, we also vacate her findings at Section 718.205(c) for reevaluation of all relevant evidence thereunder on remand.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

**Deskbook Sections: Part X.A - Introduction (above case listings on pg. A6-305 and under digests on pg. A6-306 before B - Derivative Entitlement)**

**& also**

**Part X.I - Survivors' Claims Under 20 C.F.R. Parts 410 and 718 (above case listings on pg. A6-328 and under digest on pg. A6-329)**

1. In a survivor's claim, the doctrine of collateral estoppel is not applicable to preclude employer or the Director from relitigating the issue of occupational pneumoconiosis previously established in the living miner's claim if benefits were ultimately denied in the miner's claim, because the issue was not necessary to the judgment. Additionally, where a survivor's claim includes autopsy evidence which was not available and could not have been adduced at the time of adjudication of the miner's claim, an exception to application of the doctrine of collateral estoppel may be warranted to allow relitigation of the issue of occupational pneumoconiosis. ***Hughes v. Clinchfield Coal Co.***, 21 BLR 1-134 (1999)(*en banc*).