BRB No. 00-0710 BLA

DOROTHY EVANS (Widow of JOHN EVANS) Claimant-Respondent v. CANNELTON INDUSTRIES, INCORPORATED Employer-Petitioner 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 of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes),Bluefield,West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Timothy S. Williams (Judith E. Kramer, Acting 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-1005) of Administrative Law Judge Fletcher E. Campbell, Jr. 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).[1] The administrative law judge noted that employer Aadmitted@ that the miner had simple coal workers= pneumoconiosis. Decision and Order at 4. Applying the regulations at 20 C.F.R. Part 718, the administrative law judge found that claimant[2] established the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c) (2000). Decision and Order at 6. Accordingly, benefits were awarded, commencing October 1998. *Id.*

On appeal, employer contends that the administrative law judge erred in weighing the medical opinions and in finding that the miner=s death was due to pneumoconiosis. Employer=s Brief at 5-17. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, (the Director), responds also urging affirmance of the award of benefits.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass=n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which the Director, claimant, and employer have responded.[3] Based on the briefs submitted by the parties, and our review, we

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[1]The Department of Labor 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant is Dorothy Evans, widow of John Evans, who filed her claim for benefits on November 2, 1998. Director's Exhibit 1. The miner=s first claim for benefits filed on March 3, 1980 was finally denied by the Benefits Review Board on January 27, 1988. Director=s Exhibit 19. The miner filed a second claim for benefits on March 29, 1989. Director=s Exhibit 18. On April 29, 1991, Administrative Law Judge Lawrence Brenner awarded benefits on the miner=s second claim. Director=s Exhibit 19.

The parties agreed to have the survivor=s claim decided on the record. Decision and Order at 2.

[3]The Director asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Director=s Letter at 2. Claimant asserts that the administrative law judge=s

hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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).

Pursuant to 20 C.F.R. '718.205(c) (2000), the administrative law judge found that claimant established that coal workers= pneumoconiosis substantially contributed to the miner=s death based on the opinion of Dr. Gaziano, which the administrative law judge found to be Acredible@ and deserving of more weight. Decision and Order at 5, 6. Regarding the other opinions in the record, the administrative law judge stated:

> I do not credit any of the opinions of Employer=s consulting physicians, well qualified though they may be from a formal point of view. As to claimant=s physicians, I find that Dr. Piracha, a board-certified internist and cardiologist, is adequately qualified and best positioned to testify as to pneumonia as a cause of death, but his lack of specialty credentials as a pulmonologist renders his views less valuable when he opines on the subject of the nexus between CWP and Decedent=s pneumonia.

Decision and Order at 5.

Employer=s assertions regarding the administrative law judge=s crediting of Dr. Gaziano and discrediting of Drs. Castle, Hippensteel, Dahhan, and Jarboe have merit. *See* discussion, *infra*. Therefore, we vacate the administrative law judge=s Section 718.205(c) (2000) finding and instruct the administrative law judge to reconsider the relevant medical evidence on remand in accordance with the following discussion.

Employer first asserts that the administrative law judge erred in crediting Dr. Gaziano=s opinion. Employer=s Brief at 6-11. The administrative law judge credited Dr.

Adetermination as rendered would not necessarily be impacted by any of the provisions contained in the new regulations.@ Claimant=s Letter at 2. Employer asserts that the new amended regulatory provisions at 20 C.F.R. ''718.104(d), 718.201(a)(2), and 718.205(c)(5) will not affect the outcome of this case. Employer=s Brief at 4-6. Employer also asserts that the amended regulatory provisions at 20 C.F.R. ''718.201(c), 718.204(a) could possibly affect the outcome of this case. Employer=s Brief at 6-10.

Gaziano=s opinion for several reasons. First, the administrative law judge found that Dr. Gaziano Ahas formal qualifications equal or superior to those of any other testifying witness.@ Decision and Order at 5. Second, the administrative law judge noted that Dr. Gaziano Areviewed the record twice and, having at first forgotten that he had reviewed the record before, independently came to the same conclusion that he had the first time.@ *Id.* Third, the administrative law judge found that Dr. Gaziano did not make any assumptions contrary to previous judicial findings, other evidence, or medical literature.[4] *Id.* In a footnote, the administrative law judge stated that he is Aresisting the temptation partly to credit Dr. Gaziano because of his status as a Department of Labor consultant@ and noted his disagreement with the Board=s holding in *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).[5] Decision and Order at 5 n.2.

Employer specifically asserts that the administrative law judge erred in according more weight to Dr. Gaziano=s opinion over the opinions of Drs. Castle, Hippensteel, Dahhan, and Jarboe because Dr. Gaziano=s qualifications are equal to and not superior to those of the latter physicians. Employer=s Brief at 6. Dr. Gaziano is Board-certified in internal medicine, pulmonary disease, and critical care medicine. Claimant=s Exhibit 2 at 4. Dr. Hippensteel is also Board-certified in internal medicine, pulmonary disease, and critical care medicine, Employer=s Exhibit 2, and Drs. Castle, Dahhan, and Jarboe are B-readers[6]

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[4]The administrative law judge discredited Drs. Castle, Hippensteel, and Jarboe, whose opinions were submitted by employer, because these physicians rendered assumptions contrary to previous judicial findings, other evidence, or medical literature. *See* discussion, *infra*. Employer asserts that the administrative law judge erred in crediting Dr. Gaziano=s opinion, in part, on this basis and in discrediting the opinions of Drs. Castle, Hippensteel, and Jarboe, in part, on this basis. Employer=s Brief at 9, 11, 14-17.

[5]Employer asserts that the administrative law judge=s statements regarding Dr. Gaziano=s opinion and *Melnick* are not Amerely rhetorical@ and that the presence of these comments within his Decision and Order indicates that he likely credited Dr. Gaziano=s opinion simply because he was the Department of Labor [DOL] consultant. Employer=s Brief at 10-11. Contrary to employer=s assertion, while the administrative law judge noted his disagreement with *Melnick*, there is no evidence that the administrative law judge erroneously accorded greater weight to Dr. Gaziano=s opinion because he was the DOL consultant. Rather, the administrative law judge expressly stated that he was Aresisting the temptation partly to credit Dr. Gaziano because of his status as a [DOL] consultant.@ Decision and Order at 5 n.2.

[6]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established

and Board-certified in internal medicine and pulmonary disease, Employer=s Exhibits 1, 5, 6. Thus, Dr. Hippensteel=s qualifications are equal to those of Dr. Gaziano and the qualifications of Drs. Castle, Dahhan, and Jarboe are similar to those of Dr. Gaziano.

Inasmuch as Dr. Hippensteel=s qualifications are equal to those of Dr. Gaziano, it was error for the administrative law judge to accord Dr. Gaziano=s opinion greater weight over Dr. Hippensteel=s on the basis of Dr. Gaziano=s credentials. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, because the administrative law judge does not specify why he finds that Dr. Gaziano=s qualifications might be superior to the credentials of Drs. Castle, Dahhan, and Jarboe, the Board is unable to determine whether the administrative law judge permissibly accorded more weight to Dr. Gaziano=s opinion on this basis. *See Hicks*, *supra*; *Akers*, *supra*; *Dillon*, *supra*; *Wetzel*, *supra*. Therefore, we instruct the administrative law judge to reconsider on remand the qualifications of Drs. Gaziano, Castle, Dahhan, and Jarboe in weighing the medical reports of record.

Employer also asserts that the administrative law judge made irrational assumptions regarding Dr. Gaziano which are unsupported by the record. Employer=s Brief at 6-9. The administrative law judge stated that because Dr. Gaziano Areviewed Decedent=s records twice, there is a high probability that he actually reviewed as much or more than Employer=s consulting physicians did.@ Decision and Order at 5. The record contains a handwritten response from Dr. Gaziano dated February 15, 1999 on a memo from the Department of Labor [DOL] to AMedical Consultant,@ requesting an opinion regarding the cause of the miner=s death. Director=s Exhibit 7. The memo also indicates that the death certificate and all the medical evidence of record is being submitted for his review, but Dr. Gaziano does not indicate what specific medical evidence he reviewed in rendering his opinion. *Id.* At Dr. Gaziano=s deposition, when he was asked whether the medical records he reviewed in preparation for his deposition were the same as those records he reviewed earlier, he responded: AIt=s possible I could -- I certainly would have read some of them. Because I didn=t list them, I=m not sure which ones I -- all of which I reviewed.@ Claimant=s Exhibit 2 at 5. Dr. Gaziano later testified that he had no independent memory of anything he looked at for DOL in February of 1999. Claimant=s Exhibit 2 at 12-13. While

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by the National Institute of Safety and Health. *See* 20 C.F.R. '718.202(a)(1)(ii)(E); 42 C.F.R. '37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

the administrative law judge could rationally be persuaded by Dr. Gaziano=s opinion because this physician came to the same conclusion twice, his statement that Athere is a high probability that [Dr. Gaziano] actually reviewed as much or more than Employer=s consulting physicians did@ is without support from the record.

Employer next asserts that the administrative law judge erred in discrediting the opinions of Drs. Castle, Hippensteel, and Jarboe. Employer=s Brief at 11, 14, 16-17. The administrative law judge discredited the opinions of Drs. Castle, Hippensteel, and Jarboe because these physicians found that the miner was not totally disabled due to pneumoconiosis and Administrative Law Judge Lawrence Brenner found the miner totally disabled due to pneumoconiosis when he awarded benefits on the miner=s second claim in 1991, Director=s Exhibit 19. Decision and Order at 4, 5. The administrative law judge found that because Drs. Castle, Hippensteel, and Jarboe rendered a finding which was contrary to a previous judicial finding, their opinions should be discredited.[7] Decision and Order at 4, 5. Specifically, with regard to this issue employer contends that the 1991 decision by Judge Brenner is not binding in this separate widow=s claim. Employer=s Brief at 16. Employer also asserts that additional evidence regarding the extent and cause of the miner=s disability is now available which was not available in 1991 and asserts that the issue of disability is not an element of entitlement in the survivor=s claim. *Id.*

For an issue which was decided in a prior case to be binding on a present case, *i.e.*, Judge Brenner=s finding regarding total disability due to pneumoconiosis, collateral estoppel must be applicable. Collateral estoppel forecloses Athe 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.@ *Ramsey v. INS*, 14 F.3d 206, 210 (4th Cir. 1994); *Virginia Hosp. Ass=n v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987); *Hughes v. Clinchfield*

[7]The administrative law judge cites to *Osborne v. Clinchfield Coal Co.*, BRB No. 95-1523 BLA as support for his discrediting of the opinions of Drs. Castle, Hippensteel, and Jarboe. Decision and Order at 4, 5. However, *Osborne* does not discuss the specific issue raised in this case. *See Osborne v. Clinchfield Coal Co.*, BRB No. 96-1523 BLA (Sept. 26, 1997)(unpublished). In *Osborne*, the Board held that the administrative law judge properly discredited several physicians= opinions regarding the cause of the miner=s disability on the basis that these physicians did not diagnose pneumoconiosis and the administrative law judge had found the existence of pneumoconiosis established. In the Board=s decision on reconsideration in *Osborne*, it declined to alter its previous holding on this issue. *See Osborne v. Clinchfield Coal Co.*, BRB No. 96-1523 BLA (Apr. 30, 1998)(order on recon. *en banc*)(unpublished).

Coal Co., 21 BLR 1-134, 1-137 (1999)(*en banc*). 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, a party 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); *Ramsey, supra*; *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992); *Hughes, supra*.

Based on the above criteria, the doctrine of collateral estoppel is inapplicable in this case inasmuch as the first element has not been established. Presumably, for the first element of collateral estoppel to be satisfied, the issue sought to be precluded must be a necessary element of entitlement in both cases. While the issue of total disability due to pneumoconiosis was actually litigated in the prior proceeding on the miner=s claim, it is not an issue to establishing entitlement in this survivor=s claim. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Accordingly, the doctrine of collateral estoppel is inapplicable to this case. Therefore, the administrative law judge erred in discrediting the opinions of Drs. Castle, Hippensteel, and Jarboe because these physicians rendered a finding which was contrary to a previous judicial finding. *See* discussion, *supra*.

Employer also asserts that the administrative law judge erred in discrediting the opinions of Drs. Castle, Hippensteel, Dahhan, and Jarboe because the administrative law judge found that these physicians did not fully address whether chronic obstructive pulmonary disease predisposes a person to pneumonia.[8] Employer=s Brief at 14-16. The administrative law judge stated that he could not credit the opinion of Dr. Castle because this physician rejected Apneumonia as a cause or facilitator of Decedent=s death,@ which the administrative law judge noted was contrary to a judicial finding.[9] Decision and Order at 4.

[8]The death certificate indicates that the miner died from pneumonia due to chronic obstructive pulmonary disease. Director=s Exhibit 6.

[9]The administrative law judge again cites to *Osborne v. Clinchfield Coal Co.*, BRB No. 95-1523 BLA, in which the Board holds that an administrative law judge may properly

The administrative law judge additionally stated that he could not credit Dr. Castle=s opinion because Dr. Castle found Athat chronic obstructive pulmonary disease does not predispose a person to pneumonia.@ *Id.* The administrative law judge, citing 16 *Merck Manual of Diagnosis and Therapy* at 681 (1982), found that Dr. Castle=s statement Ais contrary to the medical literature.@[10] *Id.* The administrative law judge found the opinions of Drs. Hippensteel, Dahhan, and Jarboe to be Ainadequately reasoned@ because these physicians did not discuss the impact coal workers= pneumoconiosis= has on a person=s predisposition toward pneumonia or one=s ability to fight it off. Decision and Order at 4-5.

Dr. Castle found that chronic obstructive pulmonary disease or coal workers= pneumoconiosis would not have caused pneumonia or have retarded the removal of that pneumonia. Employer=s Exhibit 8 at 20-22. Dr. Hippensteel opined that A[i]t is not expected that simple coal workers= pneumoconiosis would make for any precipitation of pneumonia of an aspiration type or other type.@ Employer=s Exhibit 2. Dr. Dahhan stated that the miner=s Apneumonia was due to aspiration...[which is] not caused by, related to or aggravated by the inhalation of coal dust or coal workers= pneumoconiosis.@ Employer=s Exhibit 6. Dr. Jarboe found that the miner died from congestive heart failure and pneumonia which are conditions Aof the general population and were not caused by or contributed to by the presence of pneumoconiosis.@ Employer=s Exhibit 5. All four physicians concluded that the miner=s death was in no way caused or hastened by pneumoconiosis. Employer=s Exhibits 1, 2, 5, 6.

Given the above-referenced statements of Drs. Castle, Hippensteel, Dahhan, and Jarboe, the administrative law judge=s bases for discrediting these opinions appear to be irrational. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). While the administrative law judge may discredit a medical opinion that he finds is not adequately supported by its underlying documentation, *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), or well reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*), the administrative law judge's reasons for discrediting the opinions of Drs. Castle, Hippensteel, Dahhan, and Jarboe raise questions as to whether he impermissibly substituted his judgment for that of the physicians, *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *see generally Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985). Therefore, we hold that the administrative law judge erred in discrediting the opinions of Drs. Castle, Hippensteel, Dahhan, and Jarboe, *see* discussion, *supra*, and remand this case for him to reconsider the relevant medical opinion

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discredit a physician=s opinion regarding the cause of total disability because the physician found the miner had no pneumoconiosis and the administrative law judge found the existence of pneumoconiosis established. *See* n.7, *supra*.

[00]The administrative law judge noted that he was taking official notice of the *Merck Manual of Diagnosis and Therapy*. Decision and Order at 4.

evidence pursuant to Section 718.205(c). *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated, and the 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge