BRB No. 05-0960 BLA

MARILYN CROOK (Widow of LLOYD M. CROOK)	)	
Claimant-Respondent	)	
v.	)	
SIMCO PEABODY COMPANY	)	
	)	DATE ISSUED: 08/23/2006
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 Survivor Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Rita S. Fuchsman, Chillicothe, Ohio, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Survivor Benefits (04-BLA-6153) of Administrative Law Judge Joseph E. Kane rendered on a 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 miner filed a claim for benefits on

March 13, 1990, and benefits were awarded on his claim by Administrative Law Judge Rudolf L. Jansen on January 19, 1993. Director's Exhibit 1. Judge Jansen credited the miner with twenty-six years of coal mine employment,[1] and found that although the x-ray evidence submitted did not establish the existence of pneumoconiosis, the medical opinion evidence established the existence of legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and emphysema due partly to coal mine dust exposure. Director's Exhibit 1 at 11-13. Judge Jansen additionally found that employer did not rebut the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Director's Exhibit 1 at 13. Judge Jansen further determined that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204, and awarded benefits.

Employer appealed, but later requested that its appeal be dismissed. Accordingly, the Board dismissed employer's appeal. *Crook v. Simco-Peabody Co.*, BRB No. 93-1014 BLA (May 25, 1993)(Order)(unpub.).

The miner received benefits for total disability due to pneumoconiosis until his death from metastatic lung cancer on May 9, 2003. Director's Exhibits 1, 4. No autopsy was performed. Claimant filed her claim for survivor's benefits on June 5, 2003. Director's Exhibit 3.

Employer contested all elements of entitlement in the survivor's claim. In support of its contention that the miner did not have pneumoconiosis, employer submitted chest x-ray readings, CT-scan readings, medical treatment and hospitalization records, and medical reports by Drs. Tuteur, Zaldivar, and Weiss[2] stating that the miner had neither clinical nor legal pneumoconiosis. Employer's Exhibits 1, 3-8.

Prior to the scheduled hearing, the parties waived, in writing, their right to a hearing and requested a decision on the record, which the administrative law judge

[1] The record indicates that the miner's coal mine employment occurred in Ohio. Director's Exhibit 11 at 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The applicable provision of 20 C.F.R. §725.414 limited employer to two medical reports in its affirmative case. 20 C.F.R. §725.414(a)(3)(i). Employer informed the administrative law judge that, to the extent the administrative law judge would limit employer to two medical reports, employer chose to rely on the medical reports of Drs. Tuteur and Zaldivar. Closing Argument on Behalf of Employer, Mar. 31, 2005, at 9 n.2 and 13 n.5. The administrative law judge applied 20 C.F.R. §725.414 and excluded Dr. Weiss's report. Decision and Order at 2 n.1.

granted. Order, Jan. 5, 2005. Claimant, by counsel, argued to the administrative law judge that employer was estopped from relitigating the issue of the existence of pneumoconiosis arising out of coal mine employment determined in the miner's claim. Director's Exhibit 20; Brief of Claimant, Mar. 10, 2005, at 3-5. Employer responded that collateral estoppel did not apply because employer submitted new and more reliable evidence, specifically, CT-scans, in the survivor's claim, and because the legal standard for determining the existence of pneumoconiosis in Part 718 claims was changed by *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[3]

The administrative law judge found that the doctrine of collateral estoppel applied in the survivor's claim. He declined to find an exception to collateral estoppel based on employer's submission of CT-scans. The administrative law judge also concluded that the law for determining the existence of pneumoconiosis had not changed, because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has not adopted the *Compton* approach to determining the existence of pneumoconiosis. Consequently, the administrative law judge applied the doctrine of collateral estoppel to preclude relitigation of the existence of pneumoconiosis arising out of coal mine employment. Decision and Order at 4-5. Additionally, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer contends that the administrative law judge erred in excluding Dr. Weiss's medical report without first determining whether good cause existed for its admission in excess of the evidentiary limitations of 20 C.F.R. §725.414. Employer argues further 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. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision to apply collateral estoppel. 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

[3] In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit held that an administrative law judge must weigh together all of the evidence submitted under each of the four subsections of 20 C.F.R. §718.202(a) to determine whether a preponderance of all the evidence establishes the existence of pneumoconiosis.

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

Employer contends that the administrative law judge erred in excluding Dr. Weiss's report as in excess of the evidentiary limitations without first considering whether there was good cause to admit the report. *See* 20 C.F.R. §§725.414(a)(3)(i), 725.456(b)(1). Review of the record reflects that employer did not argue good cause for admitting Dr. Weiss's report. Consequently, the administrative law judge did not need to consider whether good cause existed. *Brasher v. Pleasant View Mining Co*., 23 BLR 1-141, 1-144-46 (2006).

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); *Brown v. Rock Creek Mining Co*., 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Employer argues that the administrative law judge erred in applying collateral estoppel to the finding of pneumoconiosis arising out of coal mine employment made in the miner's claim, because the law changed in the interim.[4] Specifically, employer

[4] For collateral estoppel to apply, the Sixth Circuit court requires that:

> (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 full and fair opportunity to litigate the issue in the prior proceeding.

Rybarczyk v. TRW, Inc., 235 F.3d 975, 982 (6th Cir. 2001); *Polly v. D&K Coal Co*., 23 BLR 1-77, 1-82 (2005).

argues that "at the time of Judge Jansen's decision, the Sixth Circuit applied a 'treating physician preference'" established by *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), which the court invalidated in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Employer's Brief at 13. Employer contends that Judge Jansen in 1993 "applied the type of 'treating physician preference' that is no longer valid in the Sixth Circuit" when he found the existence of pneumoconiosis established. Employer's Brief at 14.

Employer's contention lacks merit. The Sixth Circuit court has held that *Tussey* created no treating physician preference, but simply required administrative law judges to consider the opinions of treating physicians based on their own merits. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002). Additionally, the record reflects that Judge Jansen considered Dr. Knight's opinion in the context of his having a lengthy treatment association of some years with his patient, and that Judge Jansen also weighed Dr. Knight's opinion based on its documentation and reasoning, and in light of the other medical opinions of record, as required. Director's Exhibit 1 at 13; *see* 20 C.F.R. §718.104(d); *Williams*, 338 F.3d at 513, 22 BLR at 2-647. We therefore reject employer's contention.

We also find no merit in employer's argument that an unpublished opinion issued by the United States Court of Appeals for the Fourth Circuit in 2001 changed the law as to how Judge Jansen would have had to interpret certain language in Dr. Tuteur's opinion. Employer's Brief at 15. Unpublished opinions are not binding precedent. *See* 6th Cir. R. 206(c); 4th Cir. R. 36(c).

Finally, employer contends that the administrative law judge erred in applying collateral estoppel when the facts changed, in that employer submitted new evidence, including CT-scans and treatment records, that enabled Drs. Tuteur and Zaldivar "to draw a more accurate assessment" of the miner's respiratory condition. Employer's Brief at 17. We disagree. The administrative law judge rationally considered that Judge Jansen's finding of legal pneumoconiosis was based on the medical opinions, whereas the negative CT-scans employer submitted in the survivor's claim merely confirmed Judge Jansen's finding that the miner's x-rays were negative for pneumoconiosis.[5] We detect no abuse of discretion by the administrative law judge in concluding that the new evidence submitted by employer did not justify an exception to collateral estoppel in this case. *See*

[5] Review of the record reflects that the miner's CT-scans were read as revealing emphysema, among other conditions. Employer's Exhibit 7.

Zeigler Coal Co. v. Director, OWCP [*Villain*], 312 F.3d 332, 334-35, 22 BLR 2-581, 2-586-87 (7th Cir. 2002).

Review of employer's brief discloses no specific challenge to the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c). The finding is therefore affirmed. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711-12 (1983).

Accordingly, the administrative law judge' Decision and Order - Awarding Survivor Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge