BRB Nos. 07-0967 BLA
and 07-0967 BLA-A

P. G. S. (Widow of C. D. S.) Claimant-Petitioner Cross-Respondent v. ARNOLD'S WELDING AND FABRICATION, INCORPORATED and WEST VIRGINIA CWP FUND Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/28/2008 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order – Denying Benefits (06-BLA-5814) of Administrative Law Judge Richard A. Morgan on a survivor's claim[1] 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the miner worked in qualifying coal mine employment for nineteen years. Applying the doctrine of collateral estoppel[2] in light of the finding in the living miner's claim that the miner had pneumoconiosis that arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), the administrative law judge found that employer was precluded from litigating those issues in the survivor's claim. The administrative law judge found, however, that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2), (5). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find that pneumoconiosis substantially contributed to, or hastened, the miner's death pursuant to Section 718.205(c)(2), (5), based on the opinion of Dr. Rasmussen, the miner's treating physician. Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in claimant's appeal.

On cross-appeal, employer argues that, while the ultimate decision denying benefits in this case is rational and supported by substantial evidence, the administrative law judge erred in applying the doctrine of collateral estoppel to preclude the litigation of the existence of pneumoconiosis and whether it arose out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b) in this survivor's claim. Employer argues further that the administrative law judge erred in his analysis of the medical

[1] Claimant is the surviving spouse of the miner, who died on June 27, 2005. Director's Exhibit 8. Claimant filed her application for survivor's benefits on July 21, 2005. Director's Exhibit 2. The miner was awarded benefits on a claim filed on December 1, 1994, after employer withdrew its controversion of all issues in the claim and agreed to pay benefits. *See* Decision and Order at 2-3.

[2] Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have actually been 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." *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (*en banc*), *citing Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994); *see Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998).

opinions of Drs. Castle and Ghio with respect to the issue of whether the miner's death was due to pneumoconiosis under Section 718.205(c). Claimant has not filed a response brief to employer's cross-appeal. The Director has filed a letter indicating his intention not to participate in the cross-appeal.[3]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).[4]

Claimant first argues that the administrative law judge erred in discounting the opinion of Dr. Rasmussen, the miner's treating physician from February 1996 to April 2000. Claimant contends that Dr. Rasmussen's opinion, that the miner's death was hastened by coal workers' pneumoconiosis, is entitled to dispositive weight pursuant to 20 C.F.R. §718.104(d) because he was the miner's treating physician.

In considering the opinion, the administrative law judge recognized that Dr. Rasmussen had "treated the miner for several years." Decision and Order at 16. The

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[3] We affirm the administrative law judge's finding that the miner worked in qualifying coal mine employment for nineteen years because this finding is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 6.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

administrative law judge, however, found that the opinion was not entitled to determinative weight because Dr. Rasmussen ceased treating the miner more than five years before his death and lacked direct knowledge of the miner's condition at or near the time of his death. Accordingly, given that the administrative law judge properly found that Dr. Rasmussen was not the miner's treating physician for five years prior to his death, the administrative law judge permissibly found that Dr. Rasmussen's opinion was not entitled to determinative weight based on his treating physician status. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49 (6th Cir. 2003). Decision and Order at 11. We, therefore, reject claimant's argument in this regard.

However, claimant also argues that the administrative law judge mischaracterized Dr. Rasmussen's opinion concerning the primary cause of the miner's death. Specifically, claimant contends that the administrative law judge erred in finding that the 2006 and 2007 reports of Dr. Rasmussen were inconsistent in identifying the primary cause of the miner's death (*i.e.*, cardiac vs. cancer) and, therefore, undermined the doctor's overall opinion regarding the role of pneumoconiosis in the miner's death. Claimant asserts that the reports, when read in context and in their entirety, were not inconsistent as to the primary cause of the miner's death. Claimant thus argues that the doctor's overall opinion regarding the role of pneumoconiosis in the miner's death was not undermined. Claimant further contends that Dr. Rasmussen's opinion contained a detailed analysis of how pneumoconiosis substantially contributed to, or hastened, the miner's death.

In considering the medical opinion evidence at Section 718.205(c)(2), (5), the administrative law judge found that Dr. Rasmussen was the only physician to opine that pneumoconiosis substantially contributed to, or hastened, the miner's death. The administrative law judge found, however, that Dr. Rasmussen's opinion was unpersuasive on the issue because Dr. Rasmussen's 2006 and 2007 reports contained inconsistencies that the doctor failed to adequately explain. Specifically, the administrative law judge found the reports inconsistent because Dr. Rasmussen stated in his January 26, 2006 report that the primary cause of the miner's death was cardiac arrest, but then indicated in his February 15, 2007 report that the primary cause of death was cancer. The administrative law judge stated that because of this inconsistency and because the doctor failed to explain the apparent change in his opinion, his overall opinion regarding the underlying role of pneumoconiosis in the miner's death was undermined. Decision and Order at 16. In addition, the administrative law judge found that Dr. Rasmussen's opinion was entitled to less weight because he failed "to explain why he ultimately opined that the miner's cancer death was hastened by severe chronic lung disease when he had previously reported that the miner's 'severe chronic lung disease … rendered him less susceptible to the affects [sic] of his cancer'." Decision and Order at 17 [emphasis added].

In his first report, Dr. Rasmussen indicated that claimant's survivor's benefits had been erroneously denied based upon a misapprehension of the circumstances surrounding the miner's death. Dr. Rasmussen stated:

> Apparently [claimant's] application for widow's benefits were [sic] denied primarily because the death certificate indicated the cause of death was lung cancer with brain metastasis.
>
> While it was true that [the miner] had terminal cancer with metastasis to the brain, these conditions were not the immediate cause of his death. [The miner] died suddenly and certainly the most likely cause of death was cardiac arrest. [The miner] had very severe, chronic lung disease with persistent hypoxemia. It is clear that his death was hastened by his severe underlying diseases, in particular his severe chronic lung disease. Cardiac arrest and/or ventricular fibrillation is a common terminal event in individuals with severe lung disease including pulmonary hypertension and cor pulmonale. There are other potential causes of sudden death such as pulmonary embolus, for which we have no evidence and certainly the patient's severe lung disease would clearly impair his capacity to tolerate such an event.
>
> It is my opinion, therefore, to a reasonable degree of medical certainty that [the miner] died as a consequence of multiple problems including especially his severe chronic lung disease.

Director's Exhibit 10 at 4.

In his second report, Dr. Rasmussen sought to respond to the opinions of Drs. Castle and Ghio that the miner's death was caused by lung cancer or complications thereof, that lung disease did not contribute to the miner's death, and that the miner's lung disease was unrelated to coal mine employment. Dr. Ghio cited scientific studies to support his conclusions. Employer's Exhibit 3 at 3. Citing more recent studies, Dr. Rasmussen explained why the studies cited by Dr. Ghio were unreliable, and why he believed the miner's significant coal dust exposure would have contributed to the miner's obstructive lung impairment and hastened his death. Accordingly, the doctor concluded: "I further believe that [the miner's] death, albeit related to cancer, was hastened by his severe chronic lung disease." Claimant's Exhibit 1 at 3. Thus, review of Dr. Rasmussen's reports reveals that there is no inconsistency on the cause of death. In both reports he made clear that cancer was not the sole cause of death and that the miner's lung disease, due in part to coal mine employment, hastened death. In the first report the doctor discussed the immediate cause of death, cardiac arrest, in the second, he did not. This omission does not constitute an inconsistency. The record does not support the

administrative law judge's determination that Dr. Rasmussen "change[d] his opinion regarding the primary cause of death (*i.e.*, cardiac vs. cancer)…." Decision and Order at 16. There was, therefore, no support for the administrative law judge's finding that the doctor's overall opinion regarding the underlying role of pneumoconiosis was undermined. *Id.*

Moreover, Dr. Rasmussen's second report does not contain any internal inconsistencies. Dr. Rasmussen's second statement, that the miner's "cancer did not involve significant lung tissue [and]…had no effect on his respiratory function" was merely an explanation that the miner's cancer did not cause his severe chronic lung disease that was due to both smoking and coal mine employment. Rather, Dr. Rasmussen indicated in his second report that both cancer and severe chronic lung disease, due to both smoking and coal mine employment, contributed to the miner's death. In addition, Dr. Rasmussen's statement that the miner's severe lung disease rendered him less susceptible to the effects of cancer appears to be, in the context of Dr. Rasmussen's whole opinion, incorrect. Accordingly, we vacate the administrative law judge's determination that Dr. Rasmussen's opinion could not establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c)(2), (5) because the administrative law judge erred in finding it was inconsistent as to the primary cause of the miner's death. *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11, 1-14 (1991), *aff'd*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Tackett v. Director*, 7 BLR 1-703, 1-706 (1985); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12, 1-14 (1984). We, therefore, remand the case for further consideration of Dr. Rasmussen's opinion as a whole.

We turn next to the merits of employer's cross-appeal. Employer argues that the administrative law judge erred in applying the doctrine of collateral estoppel to preclude employer from litigating the issues of pneumoconiosis and whether it arose out of coal mine employment in the survivor's claim. Specifically, employer argues that, although it withdrew its request for a hearing before an administrative law judge and accepted liability on the miner's claim subsequent to the district director's award of benefits, it never stipulated to, or conceded, the existence of pneumoconiosis or that pneumoconiosis arose out of coal mine employment. Consequently, employer asserts that the issues of pneumoconiosis and the cause of pneumoconiosis were never "actually litigated," a requisite element for the application of collateral estoppel.[5] Employer further asserts that

[5] To successfully invoke the doctrine of collateral estoppel, the party asserting it must establish the following criteria:

> (1) the issue sought to be precluded is identical to the one previously litigated;
> (2) the precise issue raised in the present case must have been raised and *actually litigated* in the prior proceeding;

the administrative law judge erred in relying on *Collins v. Pond Creek Mining Co*., 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006) and *Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002) in support of his determination. Employer contends that the aforementioned cases are distinguishable from the instant case because formal hearings were held in those cases, the administrative law judges in those cases actually adjudicated the miner's claims and issued decisions, and the employers in those cases had a full and fair opportunity to litigate the issues.

Employer's argument is rejected. In *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996) the Fourth Circuit rejected a similar argument raised by the Director. He contended that because he had not contested the miner's entitlement to benefits, he had not "actually litigated" the issues of entitlement. The court held that it need not decide whether the doctrine of collateral estoppel applied because the Director was bound by his stipulation to the contents of the award of benefits in the miner's claim. Because employer withdrew its controversion of all the issues in the living miner's claim and agreed to pay benefits on the claim, the administrative law judge did not err in precluding employer from litigating the issues of pneumoconiosis and whether pneumoconiosis arose out of coal mine employment in the survivor's claim. *See Richardson*, 94 F.3d at 168 n.3, 21 BLR at 2-379 n.3.[6]

> (3) determination of the issue must have been necessary to the outcome of the prior determination;
> (4) the prior proceeding must have resulted in a final judgment on the merits; and
> (5) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Hughes, 21 BLR at 1-137; [emphasis added]; *see Sedlack*, 134 F.3d at 219; *see also Collins v. Pond Creek Mining Co*., 468 F.3d 213, 218-219, 23 BLR 2-394, 2-403-406 (4th Cir. 2006); *Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002).

[6] We note that Dr. Amjad, the miner's attending physician at the time of his death, stated on the death certificate in the instant case that the immediate cause of the miner's death was non-small cell lung cancer that metastasized to his brain. In response to direction to list sequentially the conditions leading to the immediate cause of death, the doctor listed congestive heart failure, followed by chronic obstructive pulmonary disease. The doctor identified diabetes mellitus and obesity as conditions which initiated events resulting in death. Director's Exhibit 8. The administrative law judge disregarded the death certificate when considering the issue of death due to pneumoconiosis because it was not well-reasoned nor well-documented, nor did it relate the miner's chronic obstructive pulmonary disease to coal mine employment. In *Richardson v. Director,*

Lastly, employer argues that the administrative law judge erred in summarily discrediting the opinions of Drs. Castle and Ghio, based on his determination that employer was bound by its stipulation to the existence of pneumoconiosis in the miner's claim. Decision and Order at 4 n.4. Employer's argument lacks merit, however, because, as discussed *supra*, the administrative law judge properly determined that litigation of the issue was precluded in this case. Thus, because the miner was found to have had pneumoconiosis arising out of coal mine employment in the miner's claim, the administrative law judge properly found that the opinions of Drs. Castle and Ghio as to the cause of the miner's death were entitled to diminished weight, as neither physician diagnosed the presence of either clinical pneumoconiosis or legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 268-269, 22 BLR 2-372, 2-382-383 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 17.

In conclusion, we affirm the administrative law judge's determination to preclude employer from litigating the issues of the existence of pneumoconiosis and whether pneumoconiosis arose out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b) in this survivor's claim. We affirm the administrative law judge's accordance of little weight to the opinions of Drs. Castle and Ghio on death causation because these physicians did not find the presence of clinical or legal pneumoconiosis. We also affirm the administrative law judge's finding that Dr. Rasmussen's opinion was not entitled to determinative weight in this case based on his treating physician status. However, we vacate the administrative law judge's finding that claimant failed to establish that pneumoconiosis substantially contributed to, or hastened, the miner's death pursuant to Section 718.205(c)(2), (5) and remand the case for the administrative law judge to reconsider Dr. Rasmussen's opinion in its totality. *See* 20 C.F.R. §718.205(c)(2), (5); *Shuff*, 967 F.2d at 980, 16 BLR at 2-93; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

OWCP, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), the court held that the administrative law judge had erred in failing to consider the death certificate, listing chronic obstructive pulmonary disease and cancer as causes of death, on the ground that the certificate did not link the miner's chronic obstructive pulmonary disease to coal mine employment. The court held that it was an established fact that the miner suffered from legal pneumoconiosis in the form of chronic obstructive pulmonary disease arising from coal mine employment, based on the Director's stipulation and concession. *Richardson*, 94 F.3d at 168, 21 BLR 2-380-381. The court concluded that, if credited, the death certificate would constitute relevant evidence to the determination of whether pneumoconiosis hastened death.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

_____
BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge