BRB No. 00-0413 BLA

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

Appeal of the Decision and Order On Remand of Clement J. Kichuk, 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.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-BLA-635) of Administrative Law Judge Clement J. Kichuk denying benefits in 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] This case is before the Board for a

[1] The Department of Labor has 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.

second time. In the

earlier Decision and Order awarding benefits in the survivor's claim, Administrative Law Judge Edith Barnett applied the doctrine of collateral estoppel to the issue of the existence of pneumoconiosis arising out of coal mine employment based on the determination of Administrative Law Judge Giles J. McCarthy in the living miner's claim that the existence of pneumoconiosis arising out of coal mine employment had been established.[2] Judge Barnett also found that the new evidence developed in the survivor's claim supported Judge McCarthy's findings on the existence of pneumoconiosis arising out of coal mine employment. Thus, Judge Barnett found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(4), 718.203(b)(2000), and that claimant[3] established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2000). On appeal, the Board reversed Judge Barnett's finding that employer was collaterally estopped from relitigating the issue of the existence of occupational pneumoconiosis because the finding of pneumoconiosis was not a critical and necessary part of the judgment in the prior proceeding, *i.e.*, the finding was not critical and necessary to a denial of the miner's claim. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).[4][5] The Board vacated Judge Barnett's findings at Section 718.202(a) and on death due to pneumoconiosis at Section 718.205(c) and remanded this case for further consideration of the issues of pneumoconiosis and death due to pneumoconiosis. *See Hughes*, *supra*.

On remand, the case was reassigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge) without objection from the parties. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b)(2000) and insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2000). Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge on the presence of pneumoconiosis and at Section 718.205(c). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[6]

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[2] At claimant's request, Administrative Law Judge Edith Barnett issued a Decision and Order based on the record. *See* Judge Barnett's Order of March 11, 1996.

[3] Claimant is the widow of the deceased miner, James Hughes, who died on September 30, 1993. Claimant filed her survivor's claim for benefits on December 1, 1993. *See* Director's Exhibit 1.

[4]

[5] The Board held oral argument in this case on June 18, 1998 in order to address the issue of collateral estoppel.

[6] We affirm the findings of the administrative law judge at 20 C.F.R. §§718.202(a)(1) and (3), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis.[7] Any condition that hastens the miner's death is a substantially contributing cause of death. 20 C.F.R. §718.205(c)(5). *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *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).

Initially, claimant argues that the medical opinion of Dr. Miles Jones is sufficient to invoke the irrebuttable presumption of cor pulmonale[8] and that the medical evidence submitted by employer is insufficient to rebut this presumption.[9] Since no such presumption exists under the Act or the regulatory criteria, claimant's argument is rejected. *See* 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. Part 718. Likewise, claimant's contention that she met her burden of proving the existence of pneumoconiosis arising out of coal mine employment at Sections 718.202(a) and 718.203(b) based on the doctrine of collateral estoppel is rejected.[10] As claimant is appealing the Decision and Order of the administrative law judge which was issued pursuant to the Board's remand order, the Board's prior decision on the issue of collateral estoppel constitutes the law of the case and we will not revisit the issue. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6

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[7] Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[8] Under the regulations, cor pulmonale with right-sided congestive heart failure is a medical condition which can establish the presence of a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(iii), formerly cited as 20 C.F.R. §718.204(c)(3).

[9] We note that if a presumption is irrebuttable, rebuttal evidence is not relevant.

[10] Claimant's argument that employer's failure to appeal the finding of the existence of pneumoconiosis arising out of coal mine employment in the miner's claim constitutes *res judicata* is misplaced. The doctrine of *res judicata* concerns claim preclusion, not issue preclusion. *See generally Johnson v. Eastern Associated Coal Corp.*, 8 BLR 1-248 (1985).

BLR 1-988 (1984); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

Turning to the merits of the case, claimant argues that the administrative law judge erred in finding the evidence of record insufficient to establish the existence of pneumoconiosis at Section 718.202(a). In support of her position, claimant contends that the administrative law judge erred in admitting into the record the medical evidence from the miner's claim. As claimant did not challenge the admissibility of this evidence before Judge Barnett in 1996, however, claimant is precluded from arguing for the first time in the instant appeal that this evidence was admitted in violation of 20 C.F.R. §725.456(a), (d). *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995).

Claimant next argues that the medical opinion of Dr. Rupke is entitled to substantive weight because the physician treated the miner for more than six years prior to his death. Although an administrative law judge may give greater weight to the opinion of a treating physician, an administrative law judge is not required to do so. *See Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Thus, the administrative law judge acted within his discretion when he declined to accord determinative to the medical opinion of Dr. Rupke on the basis of his status as claimant's treating physician. *Id*. As claimant raises no other issues concerning the administrative law judge's treatment of Dr. Rupke's report, we affirm his decision to accord little weight to this medical opinion because the physician did not provide support for his diagnosis of pneumoconiosis.[11] *See Tedesco, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant further argues that the medical opinions of Drs. Branscomb and Caffrey are invalid inasmuch as they diagnose the existence of lung diseases (COPD), but do not define these diseases as a sequela of black lung as specified in the regulatory definition. Claimant, therefore, contends that their opinions are inconsistent with the Act and regulations.

The Act and regulations provide that pneumoconiosis may be established if a physician diagnoses a chronic restrictive obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). *See* 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §718.201. Contrary to claimant's contention, the medical opinions of Drs. Branscomb and Caffrey are not inconsistent with the Act as physicians are not required to opine that the presence of pulmonary disease without a link to coal mine employment meets the definition of pneumoconiosis under the Act. *Id*.

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[11] Claimant argues that the diagnosis of adenocarcinoma by Dr. Rupke indicates that the miner had pneumoconiosis as this type of cancer arises from scarring of lung tissue, a correlation to the effects of pneumoconiosis. As the record contains no medical evidence which addresses the cause of adenocarcinoma, however, this argument is not properly before the Board. *See Burks v. Hawley Coal Mining Corp.*, 2 BLR 1-323 (1979).

In addition, the Board does not find persuasive claimant's argument that the medical opinions of Drs. Branscomb and Caffrey should be rejected in light of the decision of the United States Court of Appeals in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Unlike the physicians in *Warth*, neither Dr. Caffrey nor Dr. Branscomb make erroneous assumptions about causation and pulmonary disorders which would be contrary to the Act and regulations. *See Warth, supra*; 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §718.201; Director's Exhibit 30; Employer's Exhibit 1A; *see also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-248 (4th Cir. 1996). Rather, Dr. Caffrey declines to diagnose a respiratory impairment, although he diagnoses chronic bronchitis and emphysema which he states were caused by smoking. *Id*. Dr. Caffrey makes no statement regarding the impact of coal dust exposure on these conditions. *Id*. Dr. Branscomb concludes that the medical records do not support a diagnosis of coal workers' pneumoconiosis, an illness caused or exacerbated by coal dust exposure, or occupationally related impairments. *See* Employer's Exhibit 2. Although Dr. Branscomb diagnoses chronic bronchitis, he does not attribute it to coal dust exposure, or opine that it caused the miner to be disabled from coal mine employment. *Id*. Furthermore, claimant's argument that the physicians are required to offer a reasonable alternative for the causes of the miner's lung diseases is rejected inasmuch as it is claimant's burden to prove that the miner has pneumoconiosis as defined in the Act and regulations. *Perry*, *supra*.

Claimant next asserts that the autopsy report of Dr. Stefanini and the pathology report of Dr. Jones support a finding that the miner had pneumoconiosis as defined in Section 718.201. We disagree. The record reflects that Dr. Stefanini did not make a conclusive determination on the absence or presence of coal workers' pneumoconiosis, nor did he diagnose any respiratory disease related to coal mine employment. Thus, the administrative law judge properly found his report insufficient to meet claimant's burden of proof at Section 718.202(a)(4). *See Perry, supra*; *Neeley*, *supra*; Director's Exhibit 8. Moreover, as claimant makes no arguments regarding the administrative law judge's basis for finding the medical opinion of Dr. Jones unreasoned, we affirm the administrative law judge's decision not to credit this report. *See Skrack*, *supra*. We, therefore, affirm the finding of the administrative law judge that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2) and (4) as it is supported by substantial evidence.

At Section 718.205(c), claimant generally argues that the medical reports of Drs. Stefanini and Jones are sufficient to meet her burden of proving that the miner's death was due to pneumoconiosis. However, as we affirm the determination of the administrative law judge that the evidence of record is insufficient to establish the existence of pneumoconiosis, claimant has not established the threshold element of entitlement in the survivor's claim, *Trumbo*, *supra*, and we need not consider the findings of the administrative law judge at Section 718.205(c). *See Trumbo, supra*; *Neeley, supra*.

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge