BRB Nos. 10-0294 BLA-A,
10-0320 BLA and 10-0320 BLA-A

PHYLLIS A. CRAWFORD, o/b/o and Widow of PAUL CRAWFORD	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/25/2011
and	)	
CONSOL ENERGY INCORPORATED	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

James M. Kennedy and Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant and employer appeal, and employer cross-appeals,[1] the Decision and Order (07-BLA-6040 and 07-BLA-6042) of Administrative Law Judge Donald W. Mosser awarding benefits on a miner's subsequent claim[2] and denying benefits on a

[1] While the Board originally assigned four case numbers to this consolidated appeal, the Board dismissed the appeal of the miner's claim, BRB No. 10-0294 BLA, from the Board's docket by Order issued on March 16, 2010.

[2] The miner, Paul Crawford, filed his first application for benefits on June 6, 1983. On December 31, 1986, Administrative Law Judge Joel R. Williams denied benefits, based on the miner's failure to establish total respiratory disability. On appeal, the Board affirmed Judge Williams's denial of benefits, *Crawford v. Shamrock Coal Co.*, BRB No. 87-0351 BLA (Aug. 30, 1988) (unpub.), and the United States Court of Appeals for the Sixth Circuit affirmed the Board's decision. *Crawford v. Shamrock Coal Co.*, No. 88-3883 (6th Cir. Aug. 7, 1989) (unpub.). The miner filed a second claim for benefits on August 23, 1989, which was treated as a request for modification. The case was ultimately assigned to Administrative Law Judge Donald W. Mosser, who granted modification and awarded benefits on January 22, 1993. On appeal, the Board affirmed in part and vacated in part Judge Mosser's 1993 decision, and remanded the case for further consideration. *Crawford v. Shamrock Coal Co.*, BRB No. 93-1028 BLA (Sept. 29, 1994) (unpub.). On remand, Judge Mosser again awarded benefits on May 12, 1995. Upon employer's appeal, the Board affirmed in part and vacated in part Judge Mosser's 1995 decision, and remanded the case for further consideration of the issue of total respiratory disability. *Crawford v. Shamrock Coal Co.*, BRB No. 95-1562 BLA (Oct. 24, 1996) (unpub.). By Decision and Order dated August 19, 1997, Judge Mosser reversed his prior finding of total disability, and denied benefits on remand. On appeal, the Board affirmed Judge Mosser's denial of benefits, *Crawford v. Shamrock Coal Co.*, BRB No. 97-1721 BLA (Aug. 25, 1998) (unpub.), and the Sixth Circuit subsequently denied the miner's petition for review. *Crawford v. Shamrock Coal Co.*, No. 98-4269 (6th Cir. Sept. 3, 1999) (unpub.).

The miner took no further action until the filing of his current claim on July 21, 2003, which is pending on appeal herein. Director's Exhibit 3. The miner's widow, claimant herein, continues to pursue the miner's claim on behalf of his estate.

survivor's claim[3] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act). The administrative law judge credited the miner with at least nineteen years of qualifying coal mine employment based on employer's concession, and adjudicated both claims pursuant to the regulatory provisions at 20 C.F.R. Part 718. With respect to the miner's subsequent claim, the administrative law judge found that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[4] Considering the merits of entitlement, the administrative law judge found the weight of the evidence sufficient to establish the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits in the miner's claim. With respect to the survivor's claim, the administrative law judge found that, while claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b), she failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

In the present consolidated appeal, claimant urges affirmance of the award of benefits in the miner's claim and challenges the denial of benefits in the survivor's claim, contending that the administrative law judge erred in finding that the evidence was insufficient to establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c).[5] Employer responds to claimant's appeal, urging affirmance of the denial of benefits in the survivor's claim, and cross-appeals, challenging the administrative law judge's finding of pneumoconiosis pursuant to Section 718.202(a).

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[3] Claimant, Phyllis A. Crawford, is the widow of the miner, who died on March 27, 2006. Director's Exhibit 56. Claimant filed a survivor's claim for benefits on October 20, 2006. Director's Exhibit 55. The survivor's claim was consolidated with the miner's claim for adjudication and decision by the administrative law judge.

[4] In the denial of the miner's prior claim on August 19, 1997, Judge Mosser found that the miner established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), but failed to establish total disability or disability causation at 20 C.F.R. §718.204(b), (c). Director's Exhibit 1-252.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Employer also appeals the award of benefits in the miner's claim, contending that the administrative law judge erred in finding the x-ray evidence sufficient to establish clinical pneumoconiosis at Section 718.202(a)(1). Claimant responds, urging affirmance of the administrative law judge's findings, and argues, in the alternative, that because the administrative law judge previously found pneumoconiosis established by the medical opinion evidence at Section 718.202(a)(4) in the miner's original claim, the doctrine of collateral estoppel[6] is applicable to preclude employer from relitigating that issue in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a Consolidated Response to Claimant's and Employer's Petitions for Review and Briefs that is limited to addressing the impact of Section 1556 of Public Law No. 111-148 on these claims. This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending on March 23, 2010, the effective date of the amendments. The Director states, and employer agrees, that the recent amendments to the Act are not applicable to the miner's claim, as it was filed prior to January 1, 2005. However, the Director asserts that the amendments are applicable to the survivor's claim, as it was filed after January 1, 2005, and remained pending on March 23, 2010. Thus, the Director maintains that the denial of benefits in the survivor's claim must be vacated and the case remanded to the administrative law judge for consideration of claimant's entitlement to the rebuttable presumption of death due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[7] The Director further states that, because the

[6] 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); *see also Collins v. Pond Creek Mining Co*., 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006). In the present case, we reject claimant's argument that the doctrine of collateral estoppel is applicable to preclude relitigation of the issue of the existence of pneumoconiosis in the survivor's claim, as this issue was not necessary to the judgment denying benefits in the miner's earlier claim. *See Hughes*, 21 BLR at 1-138.

[7] Section 411(c)(4) provides, *inter alia*, that "if a miner was employed for fifteen years or more in one or more underground coal mines, and … if other evidence demonstrates the existence of a totally disabling respiratory impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4). In the present case, claimant may be eligible for the Section 411(c)(4) presumption, as the miner was credited

presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to proffer additional, relevant evidence, in compliance with the evidentiary limitations at 20 C.F.R. §725.414. The Director notes, however, that if the Board affirms the award of benefits in the miner's claim and the award becomes final, claimant may be derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), *amended by* Pub. L. No. 111-148, §1556(b) (2010).[8] Claimant also maintains that the recent amendment to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), mandates an automatic award of survivor's benefits, based on the deceased miner's entitlement. Hence, claimant requests that the case be remanded for the payment of benefits. Employer disagrees with the positions of both the Director and claimant with respect to the survivor's claim. Because, under Section 422(*l*) of the Act, claimant's automatic entitlement is derived from the miner's claim, obviating the need for claimant to file a survivor's claim, employer asserts that the date when the miner filed his claim is controlling, not the date of filing in the survivor's claim. Citing to *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989), where the Board construed the pre-amendment Section 422(*l*) provisions and held that a survivor's automatic entitlement was available provided that the miner's claim was filed before January 1, 1982, and notwithstanding the date when the survivor's claim was filed, employer maintains that the date when the miner filed his claim must govern in this case. Consequently, employer avers that since the miner's subsequent claim was filed on July 21, 2003, claimant is not derivatively entitled to benefits herein. In addition, employer contends that invocation of the presumption of death due to pneumoconiosis is precluded under Section 411(c)(4), 30 U.S.C. §921(c)(4), because retroactive application of these provisions denies employer its right to due process and constitutes an unconstitutional taking of private property.[9]

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with at least nineteen years of coal mine employment, which was performed both underground and on the surface, and the administrative law judge's finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b) is unchallenged on appeal. Decision and Order at 4, 14-15.

[8] Under Section 422(*l*) of the Act, as amended, a qualified survivor of a miner who filed a successful claim for benefits is automatically entitled to survivor's benefits without the burden of reestablishing entitlement.

[9] For the reasons set forth in the Board's Decision and Order in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010)(recon. pending), and in *Stacy v. Olga Coal Co.*, ___ BLR 1-___, BRB No. 10-0113 BLA (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011), we reject employer's arguments concerning the constitutionality and applicability of the recent amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

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

We will first address the merits of employer's appeal of the administrative law judge's finding of entitlement in the miner's claim. Employer's sole argument on appeal is that the administrative law judge erred in finding that the x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1). Specifically, employer maintains that, after finding the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309, the administrative law judge erred in failing to consider all the x-ray evidence of record, as a whole, in determining whether the preponderance of the x-ray evidence affirmatively established the existence of clinical pneumoconiosis. Employer's Brief at 13. Contrary to employer's arguments, however, the administrative law judge acknowledged that, after finding a change in an applicable condition of entitlement established at Section 725.309, he "must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits." Decision and Order at 4-5. In considering the evidence of record on the merits, the administrative law judge rationally concluded that "the more recently developed evidence" submitted in support of the miner's subsequent claim was more probative, as it was "more indicative of the miner's medical condition at the time his most recent claim was adjudicated." Decision and Order at 16 n.6. Hence, the administrative law judge reasonably found that the medical evidence dating from 1983 to 1992, submitted in support of the miner's prior claim filed on June 6, 1983, was less persuasive on this basis than more recent evidence dating from 2000 to 2005. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *see also Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987).[10] In assessing the most recent x-ray evidence, the administrative law judge considered eleven interpretations of four x-rays, dated March 21, 2000, September 11, 2003, December 11, 2003 and May 17, 2005. Decision and Order at 5-6. Within a rational exercise of his discretion, the administrative law judge found that the March 21,

[10] We note that, because Judge Mosser not only adjudicated the miner's current 2003 claim, but also adjudicated the miner's request for modification of the original 1983 claim in previous Decisions and Orders dated January 22, 1993, May 12, 1995, and August 19, 1997, he has, in fact, considered and weighed all the evidence of record in this case. Director's Exhibits 1-252, 1-447, 1-582.

2000 x-ray was inconclusive as to the presence of pneumoconiosis because Drs. Alexander and Wiot, physicians who possessed equal radiological qualifications as dually qualified Board-certified radiologists and B readers, rendered conflicting, but equally probative, x-ray interpretations. Decision and Order at 12; Director's Exhibit 47; Claimant's Exhibit 2. Regarding the September 11, 2003 x-ray, the administrative law judge permissibly found that the positive readings by Dr. Alexander, a dually qualified reader, and by Dr. Baker, a B reader, outweighed the negative interpretation of Dr. Wiot, a dually qualified reader. Decision and Order at 12; Director's Exhibits 11-1, 14; Claimant's Exhibit 3. While the December 11, 2003 x-ray was interpreted twice by Dr. Rosenberg, a B reader, as negative for pneumoconiosis, and Dr. Alexander, a dually qualified reader, indicated that the film quality was unreadable for the presence of pneumoconiosis, Decision and Order at 6, 12; Director's Exhibit 47; Claimant's Exhibit 5; Employer's Exhibits 3, 4, the administrative law judge found that the May 17, 2005 x-ray was the most probative evidence at Section 718.202(a)(1), as it was the most recent film by eighteen months. The administrative law judge determined that Dr. Alexander's positive interpretation of the May 17, 2005 x-ray outweighed the negative interpretations of Dr. Broudy, a B reader. Decision and Order at 12; Claimant's Exhibit 4; Employer's Exhibits 1, 2. Thus, the administrative law judge concluded that Dr. Alexander's positive interpretation of the most recent x-ray, as supported by the two positive readings of the September 11, 2003 x-ray, was the best evidence under Section 718.202(a)(1), and that the weight of the evidence was sufficient to establish clinical pneumoconiosis thereunder. Decision and Order at 13. Because the administrative law judge properly conducted a qualitative and quantitative analysis of the evidence, and relied on the weight of the positive x-ray interpretations rendered by physicians with superior radiological qualifications, we affirm his finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

As employer does not challenge the administrative law judge's determinations that the evidence was sufficient to establish a change in an applicable condition of entitlement under Section 725.309, that the miner's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b), and that he was totally disabled due to pneumoconiosis pursuant to Section 718.204(b), (c), we affirm the administrative law judge's findings thereunder and affirm his award of benefits in the miner's claim. *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 13-16.

Turning to the survivor's claim, we reverse the administrative law judge's denial of benefits, as claimant is derivatively entitled to benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), because she filed her claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner has been determined eligible to

receive benefits at the time of his death. *See Stacy v. Olga Coal Co.*, ___ BLR 1-___, BRB No. 10-0113 BLA (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner's claim is affirmed, the denial of benefits in the survivor's claim is reversed, and this case is remanded to the district director for the entry of an award of survivor's benefits.

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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BETTY JEAN HALL
Administrative Appeals Judge