BRB No. 99-0424 BLA

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| HATTIE McCROSKEY (Widow of WILLIAM McCROSKEY) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| CONSOLIDATION 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 of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (97-BLA-1137) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

[1]Claimant is the surviving spouse of the deceased miner who died on January 30, 1996. Director's Exhibit 7.

amended, 30 U.S.C. §901 *et seq*. (the Act). The instant case involves a survivor's claim filed on May 20, 1996.[2] The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends, *inter alia*, that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of

[2]The miner filed a claim for benefits on February 8, 1990. Director's Exhibit 23. By Decision and Order dated March 11, 1992, Administrative Law Judge David A. Clarke, Jr. denied benefits. *Id.* Judge Clarke subsequently denied the miner's motion for reconsideration on April 30, 1992. *Id.* There is no evidence that the miner took any further action in regard to his 1990 claim.

[3]Inasmuch as no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis. Claimant notes that Administrative Law Judge David A. Clarke, in his adjudication of the miner's 1990 claim, found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis. Claimant's Brief at 2. Under the principle of collateral estoppel, relitigation of an issue necessarily and actually litigated in a prior adjudication is only precluded in a subsequent case where the parties or their privies had a full and fair opportunity to litigate the issue. *See generally Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988). Because the miner did not appeal Judge Clarke's denial of benefits, neither employer nor the Director had the opportunity (or incentive) to contest Judge Clarke's finding pursuant to 20 C.F.R. §718.202(a)(1). Because the issue of the existence of pneumoconiosis was never fully litigated, the doctrine of collateral estoppel does not apply to that issue in this case.[4] *Id.*

Claimant contends that the autopsy evidence is sufficient to establish the existence of pneumoconiosis. In his consideration of whether the autopsy evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge judge noted that Dr. Pullins, the autopsy prosector, diagnosed, *inter alia*, pulmonary anthracosis. Decision and Order at 11; Director's Exhibits 8,11. The administrative law judge, however, further noted that while Dr. Pullins acknowledged the presence of "foci of anthracotic deposition in the lung tissue," the doctor determined that the findings did not support a diagnosis of pneumoconiosis. *Id.* The administrative law judge, therefore, concluded that Dr. Pullin's autopsy report did not

[4]Judge Clarke, in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis, gave the miner "the benefit of the doubt." *See* Director's Exhibit 23. Subsequent to the issuance of Judge Clarke's Decision and Order, the United States Supreme Court held that the "true doubt" rule is invalid because it is contrary to the requirements of the Administrative Procedure Act. *See* 5 U.S.C. §556(d); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct 2251, 18 BLR 2A-1 (1994).

support a finding of pneumoconiosis. *Id.* Inasmuch as no party challenges this determination, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant, however, argues that Dr. Hansbarger's opinion supports a finding of pneumoconiosis. Claimant notes that, based upon his review of the miner's autopsy slides and the medical evidence, Dr. Hansbarger diagnosed, *inter alia*, anthracosilicosis of the bronchial lymph nodes. Director's Exhibit 17. Whether anthracosilicosis of the lymph nodes is pneumoconiosis within the meaning of the Act is a finding of fact to be made by the administrative law judge based on the evidence before him. *See generally Bueno v. Director, OWCP*, 7 BLR 1-337 (1984). Although the administrative law judge noted that Dr. Hansbarger diagnosed anthracosilicosis of the bronchial lymph nodes, the administrative law judge further noted that Dr. Hansbarger, without explanation, also opined that the miner did not suffer from pneumoconiosis. Decision and Order at 13. The administrative law judge, therefore, found that Dr. Hansbarger's opinion was ambiguous and of little probative value. *Id.* Because Dr. Hansbarger indicated that the miner did not suffer from pneumoconiosis, the administrative law judge acted within his discretion in finding that Dr. Hansbarger's opinion was insufficient to support a finding of pneumoconiosis.

Moreover, the administrative law judge properly found that a majority of the remaining reviewing pathologists found that the miner did not suffer from pneumoconiosis. Decision and Order at 13. While Dr. Jones found that the miner's autopsy slides revealed extensive pulmonary anthracosis and simple coal workers' pneumoconiosis, Director's Exhibit 9, Drs. Kleinerman and Bush indicated that the miner's autopsy slides did not reveal the presence of pneumoconiosis. Employer's Exhibits 1-3. The administrative law judge noted that, even had he found Dr. Hansbarger's opinion supportive of a finding of pneumoconiosis, claimant would still have failed to establish by a preponderance of the evidence that the autopsy evidence was sufficient to establish the existence of pneumoconiosis. Decision and Order at 13. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis. We disagree. In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly credited the opinions of Drs. Jones, Palte, Kleinerman, Fino, Zaldivar and Hansbarger because he found that they were based upon the most comprehensive documentation. *See Sabett v. Director,*

*OWCP*, 7 BLR 1-299 (1984); Decision and Order at 23; Director's Exhibits 9, 17; Employer's Exhibits 1, 2, 4-8. The administrative law judge noted that while Dr. Jones diagnosed pneumoconiosis, Drs. Palte, Kleinerman, Fino, Zaldivar and Hansbarger did not. Decision and Order at 23. The administrative law judge also noted that Dr. Palte's opinion was entitled to additional weight because, in addition to reviewing the evidence of record, he examined the miner in 1991. *Id.*; *see* Director's Exhibit 23. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trumbo*, *supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge