

BRB Nos. 05-0576 BLA
and 05-0576 BLA-A

LOIS PRESTON)	
(Widow of CLARENCE PRESTON))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
AMHERST COAL COMPANY, C/O)	DATE ISSUED: 01/30/2006
ACORDIA EMPLOYERS SERVICE)	
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; 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:

Claimant appeals, and employer cross-appeals, the Decision and Order (2002-BLA-5238) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on 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). The administrative law judge credited the miner with thirty-two years of qualifying coal mine employment, as stipulated by employer and supported by the record, and adjudicated this claim, filed on March 26, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, the administrative law judge denied benefits without reaching the issue of the cause of the miner's death pursuant to 20 C.F.R. §718.205(c).

On appeal, claimant challenges the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis, arguing that because the miner was awarded lifetime benefits under the Act and was required to establish the existence of pneumoconiosis by the same method as claimant herein, the doctrine of collateral estoppel is applicable to preclude employer from relitigating the issue in this survivor's claim. Alternatively, claimant contends that the administrative law judge erred in failing to consider all of the medical evidence in the living miner's claim contained at Director's Exhibit 1, which was admitted into the record at the hearing without objection; in discounting the opinion of the miner's treating physician; and in failing to adjudicate the issue of the cause of the miner's death. Employer responds, urging affirmance of the denial of benefits, and cross-appeals, arguing that good cause exists under 20 C.F.R. §725.456(b)(1) for the admission of evidence in excess of the limitations contained at 20 C.F.R. §725.414. Employer also contends that the administrative law judge erred in not considering the medical opinions of Drs. Hippensteel and Repsher in their entirety. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to vacate the denial of benefits and remand the case for the administrative law judge to determine whether the doctrine of collateral estoppel is applicable. The Director takes no position regarding whether the administrative law judge erroneously excluded entire reports that were based in part on inadmissible medical evidence, but the Director urges the Board to reject employer's remaining arguments on cross-appeal.

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

Claimant and the Director initially contend that the doctrine of collateral estoppel may be applicable under the facts of this case to bar employer from litigating the issue of

the existence of pneumoconiosis. We agree. Collateral estoppel, or issue preclusion, refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the initial action. *See Freeman v. United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). To successfully invoke collateral estoppel in the present case, which arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit,¹ claimant must establish the following criteria:

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

See N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass'n, 821 F.2d 328 (6th Cir. 1987); *see also Zeigler Coal Co. v. Director, OWCP [Villain]*, 311 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Collins v. Pond Creek Mining Co.*, 22 BLR 1-129 (2003); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). As the administrative law judge did not consider the issue, we vacate his denial of benefits and remand the case for the administrative law judge to determine whether employer is estopped from relitigating the issue of the existence of pneumoconiosis pursuant to Section 718.202 under the facts of this case. If so, the administrative law judge must reevaluate the medical opinions of record and determine whether the weight of the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Claimant and employer also challenge the administrative law judge's application of the evidentiary limitations at Section 725.414. At the hearing, the administrative law judge admitted Director's Exhibits 1 through 36 into the record without objection. Hearing Transcript at 6. This evidence included the entire record in the living miner's

¹ The administrative law judge determined that this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. Decision and Order at 3; Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

claim, contained at Director's Exhibit 1, as well as evidence submitted by claimant in the survivor's claim. Claimant did not introduce any additional exhibits into the record at the hearing or file an evidence summary form, Hearing Transcript at 7, Decision and Order at 4, while employer submitted Employer's Exhibits 1-20 and acknowledged that, except for two x-ray interpretations at Employer's Exhibit 14 which were submitted as rebuttal evidence pursuant to Section 725.414(a)(3)(ii), the evidence at Employer's Exhibits 12-19 exceeded the limitations at Section 725.414 and was being introduced for appellate purposes.² Hearing Transcript at 7-11. The administrative law judge admitted all of employer's exhibits into the record "contingently" at the hearing, Hearing Transcript at 11, but ultimately admitted only that evidence which employer designated in its evidence summary form at Employer's Exhibit 20, finding that it complied with the requisite quality standards at 20 C.F.R. §§718.102-107 and the limitations at Section 725.414(a)(2). Decision and Order at 4. As claimant had not designated any evidence, the administrative law judge admitted into the record that evidence which claimant had submitted to the district director for inclusion in her survivor's claim, finding that Director's Exhibits 11, 14-17 and 29 complied with the requisite quality standards and evidentiary limitations. *Id.* In adjudicating this claim, the administrative law judge did not consider the medical evidence of record in the miner's claim, and he assigned no weight to the reports of Drs. Hippensteel and Repsher, who reviewed the miner's evidence at Director's Exhibit 1 and/or other evidence which exceeded the evidentiary limitations, as he was unable to distinguish which of the physicians' conclusions were based on inadmissible evidence.³ Decision and Order at 11-12. On appeal, claimant maintains that the medical evidence of record in the miner's claim must be considered in

² Employer objected, and continues to object, to the applicability of the evidentiary limitations set forth at 20 C.F.R. §725.414, arguing that the Act requires consideration of all relevant evidence; that employer has the right to a full and fair hearing; and that the evidence submitted by employer was considered necessary to its defense of the claim. Employer's Brief at 20-24. The Board addressed and rejected employer's arguments challenging the applicability of Section 725.414 in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*), and we decline to revisit our decision. The administrative law judge may, however, admit evidence in excess of the limitations upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1). See *Webber v. Peabody Coal Co.*, BRB No. 05-0335 BLA (Jan. 27, 2006)(*en banc*)(Boggs, J., concurring); *Harris v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (Jan. 27, 2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting).

³ Similarly, the administrative law judge gave no weight to Dr. Repsher's deposition testimony, with the exception of his criticisms of Dr. Sundaram's opinion, because the deposition did not clarify which evidence Dr. Repsher relied upon to reach his conclusions. Decision and Order at 12.

determining whether the existence of pneumoconiosis is established if employer is allowed to relitigate the issue, while employer asserts that the administrative law judge improperly excluded relevant evidence which exceeded the regulatory limitations and failed to consider the opinions of Drs. Hippensteel and Repsher in their entirety.

The regulations as amended do not provide for all evidence submitted in connection with a living miner's claim to automatically be made a part of the record in a survivor's claim, exempt from the limitations at Section 725.414. *See* 20 C.F.R. §§725.405, 725.456. A party, however, may designate any such evidence in support of its affirmative case or as rebuttal or rehabilitative evidence pursuant to Section 725.414, or the administrative law judge may admit evidence in excess of the regulatory limitations upon a finding that good cause exists, pursuant to Section 725.456(b)(1), for its admission. As the administrative law judge's findings on the issue of collateral estoppel may impact the parties' designation of evidence pursuant to Section 725.456, the administrative law judge has discretion to take such action as he deems appropriate on remand, including but not limited to determining whether good cause exists for the admission of any evidence submitted in excess of the regulatory limitations, or reopening the record for the development and admission of additional evidence.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge