

BRB No. 08-0337 BLA

C.B.)	
(Widow of A.B.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
UNION CARBIDE CORPORATION)	
)	DATE ISSUED: 01/16/2009
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand – Awarding Benefits of Administrative Law Judge Michael P. Lesniak rendered 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).¹ This case is before the

¹ The miner died on August 20, 2000. Director’s Exhibit 4. Prior to his death, the miner had filed a claim for benefits on February 14, 1983, and was finally awarded

Board for a third time, and the relevant procedural history is as follows: Claimant was initially awarded benefits by Administrative Law Judge Robert J. Lesnick based on her survivor's claim, which was filed on September 28, 2000. Director's Exhibit 1. In considering the survivor's claim under 20 C.F.R. Part 718, Judge Lesnick initially considered whether employer was collaterally estopped from challenging the existence of pneumoconiosis based on a prior finding in the living miner's claim that the miner suffered from the disease.² Because he found that the law for determining the existence of pneumoconiosis had changed in the interim, Judge Lesnick found that all of the requisite elements for application of the doctrine of collateral estoppel had not been established. Thus, he considered whether claimant had carried her burden of proof to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Judge Lesnick determined that the evidence was sufficient to establish that the miner suffered from complicated pneumoconiosis prior to his death. Therefore, he awarded benefits on the ground that claimant had invoked the irrebuttable presumption under 20 C.F.R. §718.304, that the miner's death was due to pneumoconiosis.

Pursuant to employer's appeal, the Board affirmed Judge Lesnick's determination not to apply the doctrine of collateral estoppel to preclude the parties from relitigating the issue of the existence of pneumoconiosis in the survivor's claim based on a prior finding of pneumoconiosis rendered in the living miner's claim. [*C.B.*] v. *Union Carbide Corp.*, BRB No. 04-0361 BLA (Jan. 27, 2005) (unpub.), slip op. at 3-5. The Board, however, vacated the award of benefits in the survivor's claim because Judge Lesnick erred in his consideration of the x-ray, computerized tomography scan, and medical opinion evidence, relevant to the existence of complicated pneumoconiosis under 20 C.F.R. §718.304. [*C.B.*], BRB No. 04-0361, slip op. at 5-12.

On remand, the case was reassigned to Judge Lesniak (the administrative law judge), who reconsidered the medical evidence and claimant's entitlement to benefits.

benefits by the district director on June 13, 1984. Director's Exhibits 23-1, 23-18. Claimant filed her survivor's claim on September 28, 2000. Director's Exhibit 1.

² Under certain circumstances, discussed below, the doctrine of collateral estoppel protects parties from the burden of relitigating an issue when the identical issue was previously decided in a prior proceeding involving the same parties. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979); *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*).

Because the administrative law judge determined that there was no medical evidence to support a finding that the miner's death was hastened by simple coal workers' pneumoconiosis under 20 C.F.R. §718.205(c), he declined to specifically address whether claimant had carried her burden of proof to establish the existence of simple coal workers' pneumoconiosis at 20 C.F.R. §718.202(a). The administrative law judge further found that the medical evidence did not establish that the miner had complicated pneumoconiosis, and thus, he concluded that claimant was unable to invoke the irrebuttable presumption at 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, in light of the intervening decision by the United States Court of Appeals for the Fourth Circuit³ in *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006), the Board revisited the issue of collateral estoppel, and held that claimant was entitled to further consideration of whether she could rely on the doctrine of collateral estoppel to establish that the miner had simple coal workers' pneumoconiosis.⁴ [*C.B.*] *v. Union Carbide Corp.*, BRB No. 06-0382 BLA (Feb. 28, 2007) (unpub.), slip op. at 4-5. The Board further noted that the issue of whether the miner suffered from simple coal workers' pneumoconiosis could bear on the administrative law judge's evaluation of the medical evidence relevant to the existence of complicated pneumoconiosis. Therefore, the Board vacated the administrative law judge's Decision and Order, and remanded the case for further consideration of whether claimant was entitled to invoke the doctrine of collateral estoppel, pursuant to the Fourth

³ The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

⁴ The Board noted that, subsequent to the Board's January 27, 2005 Decision and Order affirming Judge Lesnick's determination not to apply the doctrine of collateral estoppel to the finding of simple pneumoconiosis rendered in the miner's claim, the Fourth Circuit issued *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). The court held that the Board erred in interpreting *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), as constituting a substantial change in the law with regard to a claimant's burden of proof for establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Collins*, 468 F.3d at 219, 23 BLR at 2-404. The court thus held that the Board erred in concluding that the general requirements for application of the doctrine of collateral estoppel had not been satisfied in *Collins* to preclude employer from relitigating the issue of whether the miner suffered from pneumoconiosis relevant to the survivor's claim. *Collins*, 468 F.3d at 220, 23 BLR at 2-406.

Circuit's holding in *Collins*, and to consider whether she had established her entitlement to benefits pursuant to 20 C.F.R. §718.205(c)(3), by virtue of the irrebuttable presumption at 20 C.F.R. §718.304. [C.B.], BRB No. 06-0382 BLA, slip op. at 5.

In a Decision and Order on Second Remand – Awarding Benefits, dated March 29, 2007, the administrative law judge initially found that employer was collaterally estopped from relitigating the issue of the existence of pneumoconiosis arising out of coal mine employment, “as found by the District Director in the living miner’s claim.” Decision and Order on Second Remand at 2. The administrative law judge further determined that the district director had found the existence of complicated pneumoconiosis established in the miner’s claim. Therefore, the administrative law judge also applied the doctrine of collateral estoppel to find that claimant established the existence of complicated pneumoconiosis, and, therefore, had established her entitlement to survivor’s benefits pursuant to 20 C.F.R. §718.205(c)(3), by virtue of the irrebuttable presumption at 20 C.F.R. §718.304. Decision and Order on Second Remand at 3. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to find the existence of complicated pneumoconiosis established in the survivor’s claim. Employer specifically asserts that the administrative law judge’s application of collateral estoppel to the issue of complicated pneumoconiosis is contrary to law and to the remand instructions of the Board. Claimant responds, urging affirmance of the administrative law judge’s award of benefits. The Director, Office of Workers’ Compensation Programs, has not filed a brief in this appeal.⁵

The Board’s scope of review is defined by statute. The administrative law judge’s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 survivor’s benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors’ claims filed on or after

⁵ The administrative law judge’s application of the doctrine of collateral estoppel to find the existence of simple pneumoconiosis arising out of coal mine employment established is affirmed as unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

January 1, 1982, death will be considered to be 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 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to preclude employer from litigating the issue of complicated pneumoconiosis in this survivor's claim. Employer asserts that because the issue of complicated pneumoconiosis was not "actually determined" in the miner's claim, and employer did not have a full and fair opportunity to litigate the issue, the criteria for the application of collateral estoppel have not been met. Employer's Brief at 8, 11. Employer's argument has merit.

For collateral estoppel to apply in this case, claimant must establish that: (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*).

A review of the record indicates that on March 18, 1983, the district director notified employer that the miner had filed an application for benefits; employer controverted the claim on April 28, 1983. Director's Exhibits 23-14, 23-15. On May 14, 1984, the district director issued an initial finding of entitlement. Director's Exhibit 23-12. Subsequently, on May 24, 1984, employer signed an Agreement to Pay Benefits. Director's Exhibit 23-16. Accordingly, the district director issued an Award of Benefits on June 13, 1984. Director's Exhibit 23-18. In this Award of Benefits, the findings of fact state, in part, that "as a result of the conditions of coal mine employment, the claimant has contracted a severe chronic respiratory disease diagnosed as coal workers' pneumoconiosis, as that term is defined in the Act and the Regulations pertaining thereto." Director's Exhibit 23-18.

In finding that the doctrine of collateral estoppel barred employer from litigating the issue of complicated pneumoconiosis, the administrative law judge acknowledged

that the district director's Award of Benefits did not explicitly state that the miner had established the existence of complicated pneumoconiosis. Decision and Order on Second Remand at 3; Director's Exhibit 23-18. However, the administrative law judge found that because the only evidence relevant to the existence of pneumoconiosis contained in the record at the time of the initial award consisted of two x-ray readings positive for large opacities, consistent with complicated pneumoconiosis, it was "reasonable to infer that the [District] Director intended 'severe chronic respiratory disease' and 'coal workers' pneumoconiosis' to mean complicated pneumoconiosis." Decision and Order on Second Remand at 3.

The administrative law judge's inference, that the district director made a finding of complicated pneumoconiosis because the record before the district director contained only evidence of complicated pneumoconiosis, is not affirmable for several reasons. First, the district director's award also contains the finding that the miner's "severe chronic respiratory disease has caused a breathing impairment of sufficient degree to establish total disability" Director's Exhibit 23-18. As employer correctly contends, a separate and specific finding of total disability would not be necessary if the district director had awarded benefits based on the irrebuttable presumption of total disability contained at 20 C.F.R. §718.304. Employer's Brief at 9-10. Additionally, the miner having established the existence of simple pneumoconiosis arising out of coal mine employment, and total disability due thereto, a finding of complicated pneumoconiosis would not have been necessary to establishing the miner's entitlement to benefits.

Finally, the Fourth Circuit has specifically warned against drawing inferences about the meaning of a district director's decision, based on the evidence that was before the district director at the time of his decision. In *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), the court addressed a situation in which the district director, through a form letter, had denied the miner's claim despite uncontradicted medical evidence that the miner had complicated pneumoconiosis. *Rutter*, 86 F.3d at 1361, 20 BLR at 2-233. Noting that the district director's form denial letter neither stated that the miner had complicated pneumoconiosis, nor acknowledged that he had presented evidence of it, the court held that it was improper to infer that a finding of complicated pneumoconiosis had been made. The court reasoned that "[i]t may have been obvious to all who could and would see, but a finding that should have been made is not a finding that *was* made." *Rutter*, 86 F.3d at 1361, 20 BLR at 2-233.

Therefore, under the facts of the instant case, we conclude that, absent a clear indication as to the precise basis for the district director's award of benefits, the administrative law judge's inference that the district director found complicated pneumoconiosis established is not sufficiently supported by the record. See *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998);

Rutter, 86 F.3d at 1361, 20 BLR at 2-234. Thus, as the record does not contain sufficient evidence to establish that the issue of complicated pneumoconiosis was litigated, resolved, or was a necessary part of the judgment in the miner's claim, *see Sedlack*, 134 F.3d at 224; *Hughes*, 21 BLR at 1-137, we hold that the administrative law judge erred in finding that the doctrine of collateral estoppel precluded litigation of the issue of complicated pneumoconiosis in the survivor's claim, and we vacate this finding.

On remand, the administrative law judge must evaluate the evidence, on its merits, to determine whether claimant has established her entitlement to benefits pursuant to 20 C.F.R. §718.205(c)(3), by virtue of the irrebuttable presumption at 20 C.F.R. §718.304. If, on remand, the administrative law judge finds that the existence of complicated pneumoconiosis is not established, he must determine whether claimant has established that the miner's death was due to his simple pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (2), (5) ⁶

⁶ In light of our holding that the district director did not make a finding of complicated pneumoconiosis, we decline to address, as moot, employer's additional argument that the administrative law judge erred in finding that employer had a full and fair opportunity to litigate the issue of complicated pneumoconiosis in the miner's claim.

Accordingly, the administrative law judge's Decision and Order on Second Remand – Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge