BRB No. 08-0360 BLA

J.M.M. (Widow of D.B.M.) Claimant-Petitioner v. CLINCHFIELD COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/29/2009 DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

J.M.M., Pound, Virginia, *pro se*.[1]

Timothy W. Gresham (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (07-BLA-5042) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative

[1] Mr. Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

law judge) denying benefits on a survivor's claim[2] 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). Adjudicating the survivor's claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that the miner[3] worked in qualifying coal mine employment for "at least" twenty-one years. Addressing the issue of whether the doctrine of collateral estoppel precluded reconsideration of the issue of pneumoconiosis, which was found in the miner's claim, the administrative law judge concluded that it did not preclude employer from relitigating the issue because Administrative Law Judge Robert J. Shea had relied on the "true doubt"[4] rule to find pneumoconiosis established pursuant to 20 C.F.R. §718.202(a). The administrative law judge noted that that rule was invalidated by the Supreme Court, subsequent to the issuance of Judge Shea's decision, because it impermissibly lessened claimant's burden of proving his case. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Accordingly, considering the issue of pneumoconiosis in the survivor's claim, the administrative law judge concluded that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4) and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits in her survivor's claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal unless requested to do so by the Board.[5]

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[2] Claimant is the surviving spouse of the miner, who died on November 8, 2005. Director's Exhibit 10. Claimant filed her application for survivor's benefits on November 25, 2005. Director's Exhibit 2.

[3] The miner filed an application for benefits on October 7, 1982. The miner was awarded benefits on May 16, 1989 by Administrative Law Judge Robert J. Shea. Employer did not appeal the award.

[4] "True doubt" was said to exist if equally probative, but contradictory medical documents and testimony are presented in the record, and the selection of one set of facts would resolve the case against the claimant but the selection of the contradictory set of facts would resolve the case for the claimant. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 n.4 (1989) (*en banc*). In such cases, claimant was entitled to the benefit of the "doubt" in establishing entitlement to benefits.

[5] We affirm the administrative law judge's finding that the miner worked in qualifying coal mine employment for "at least" twenty-one years. *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 3.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).[6]

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered 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 Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

We first address the administrative law judge's finding on collateral estoppel. The doctrine of collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have been actually 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). However, in *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 1-393 (4th Cir. 2006), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, emphasized that the doctrine of collateral estoppel does not apply to a legal ruling if there has been a major change in the governing law since the prior adjudication that could render the previous determination inconsistent with prevailing doctrine. Further, the court addressed whether its holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that invalidated the practice of permitting administrative law judges to find the existence of pneumoconiosis established by exclusively examining evidence within one of the four subsections at Section 718.202(a), while ignoring contrary evidence under one

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 2, 3.

of the other three subsections, constituted a major change in governing law. The court held that this change was not a major change in the governing law because it left unaltered: (1) the legal definition of pneumoconiosis; (2) the methods by which a claimant could establish the existence of pneumoconiosis; and (3) the burden of proving the existence of pneumoconiosis by a preponderance of the evidence.

In the instant case, the administrative law judge found that collateral estoppel did not preclude the relitigation of the issue of pneumoconiosis in this survivor's claim because Judge Shea relied on the subsequently invalidated "true doubt" rule to find the existence of pneumoconiosis in the miner's claim,[7] instead of requiring claimant to carry the burden of establishing pneumoconiosis by a preponderance of the evidence. Because the invalidation of the "true doubt" rule altered the burden of proving pneumoconiosis, the administrative law judge did not err in reconsidering the issue in the survivor's claim.[8] Accordingly, we affirm the administrative law judge's finding that the doctrine of collateral estoppel did not preclude him from reconsidering the issue of pneumoconiosis in this survivor's claim. *See Collins*, 468 F.3d at 218; 23 BLR at 2-401-402.

We next address the administrative law judge's findings on the issue of pneumoconiosis pursuant to Section 718.202(a)(1)-(4).[9] Relevant to Section

[7] In finding pneumoconiosis established at 20 C.F.R. §718.202(a)(1), Judge Shea did not require the miner to bear the burden of proving the existence of pneumoconiosis. Instead, he accorded the benefit of the doubt to the miner because he found the positive and negative x-ray evidence to be evenly balanced. Judge Shea found pneumoconiosis established at 20 C.F.R. §718.202(a)(4) because, although noting that the medical opinions found pneumoconiosis, "[o]n the whole … after considering both the x-ray evidence and medical opinions … the evidence is sufficient to establish the existence of pneumoconiosis pursuant to [Section] 718.202(a)(1) and (a)(4)." *[D. M.] v. Clinchfield Coal Co.*, Case No. 84-BLA-3278, *slip. op*. at 8 (May 12, 1989).

[8] In *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 218, 23 BLR 2-393, 2-406 (4th Cir. 2006), the court held, "The doctrine of collateral estoppel does not bar the relitigation of factual issues 'where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first'." *Collins*, 468 F.3d 213, 218, 23 BLR 2-393, 2-401 (4th Cir. 2006), *citing Newport News Shipbldg, & Dry Dock Co. v. Director, OWCP*, 583 F.2d 1273, 1279 (4th Cir. 1978).

[9] The administrative law judge noted that the miner's claim was not part of the record in the survivor's claim, and was attached to the survivor's claim for reference only.

718.202(a)(1), the administrative law judge noted that the x-ray evidence submitted in the miner's claim had been found to be in equipoise. Addressing the x-ray evidence submitted in the survivor's claim, the administrative law judge noted that none of these more recent x-rays showed the presence of pneumoconiosis.[10] Consequently, the administrative law judge properly concluded that, because the preponderance of the x-ray evidence was negative, claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §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 v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 7-8. Accordingly, the administrative law judge's finding that pneumoconiosis was not established pursuant to Section 718.202(a)(1) is affirmed.

Relevant to Section 718.202(a)(2) the administrative law judge properly found that the biopsy evidence in the record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2).[11] Decision and Order at 8. Accordingly, the administrative law judge's finding pursuant to Section 718.202(a)(2) is affirmed.

Further, while the administrative law judge did not address whether pneumoconiosis was established under Section 718.202(a)(3), a review of the record reveals that none of the presumptions set forth in Section 718.202(a)(3) is applicable. The record contains no evidence establishing that the miner had complicated pneumoconiosis, *see* 20 C.F.R. §718.304; the instant claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305; and the miner's death occurred after March 1, 1978, *see* 20 C.F.R. §718.306.

Finally, considering the most recent medical opinion evidence, the administrative law judge properly found that it failed to establish pneumoconiosis pursuant to Section

[10] All of the x-rays taken between June 26, 2005 and November 8, 2005, submitted with the survivor's claim, were read as negative for pneumoconiosis.

[11] The record contains the following reports of pathologists who reviewed pathological tissue samples: in a report dated July 6, 2005, Dr. Emory noted that extracted fluid from the miner's lungs revealed "inconclusive, atypical cells present," and that the possibility of a mesothelial neoplasm could not be ruled out, Director's Exhibit 12A; Dr. Ferguson interpreted a biopsy of the miner's left lung on July 8, 2005 and diagnosed "poorly differentiated large cell carcinoma, with focal adenocarcinomatous differentiation," Director's Exhibit 12A; and on August 19, 2005, Dr. Helms conducted a fine needle aspiration of a mass from the miner's left lung and diagnosed the presence of malignant non-small cell carcinoma, Director's Exhibit 12A.

718.202(a)(4). Drs. DaSilva, Beyers, Baron, Barongan, and McSharry all diagnosed the presence of pneumoconiosis, while Dr. Castle concluded that the miner did not suffer from pneumoconiosis.[12] In considering these opinions, the administrative law judge properly found the opinions of Drs. DaSilva and Beyers, who treated the miner during his hospitalizations, had little probative value because both physicians referenced a diagnosis of pneumoconiosis in the miner's history, but failed to provide an independent diagnosis, express an opinion as to the accuracy of the miner's history, or provide any independent reasoning or documentation for their opinions. Accordingly, the administrative law judge properly concluded that the opinions were of little probative value. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 (1984); Decision and Order at 15; Employer's Exhibit 1.

Similarly, the administrative law judge properly found the opinion of Dr. Baron, diagnosing pneumoconiosis, rendered while the miner was hospitalized in July 2005, of little probative value because Dr. Baron did not provide any reasoning for his diagnosis or identify any objective medical evidence that supported his conclusion. The administrative law judge further noted that the x-rays and biopsies performed during the miner's July 2005 hospitalization, when Dr. Baron provided his opinion, failed to show the presence of pneumoconiosis. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); Director's Exhibit 12A; Employer's Exhibit 2.

Turning to the opinion of Dr. Barongan, who treated the miner for thirty-three years, the administrative law judge also found his opinion entitled to diminished probative value, despite his lengthy treatment of the miner, because he failed to identify the objective medical evidence that supported his finding or to explain the basis for it. Further, the administrative law judge specifically noted that Dr. Barongan did not explain his finding, in light of the more recent x-ray and CT scan evidence that was negative for the presence of pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88-89; *Clark*, 12 BLR at 1-155; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 15; Director's Exhibits 10-12. Regarding the opinion of Dr. McSharry, the administrative law judge properly found that its lack of specificity and definitive findings diminished its probative value.[13] *See Trumbo*, 17 BLR at 1-88-89; *Clark*, 12 BLR 1-155.

[12] Dr. Jaynal did not express an opinion concerning the presence or absence of pneumoconiosis. Director's Exhibit 12A.

[13] The administrative law judge determined that even though Dr. McSharry conducted an extensive review of the medical evidence, he did not reconcile his original diagnosis of pneumoconiosis with his subsequent finding that the CT scan evidence did

Conversely, the administrative law judge properly found the contrary opinion of Dr. Castle worthy of dispositive weight because Dr. Castle clearly explained in great detail how the miner's lack of symptomotology, negative chest x-ray interpretations, normal CT scans, non-qualifying arterial blood gas tests, and hospital records supported his conclusion that the miner did not suffer from pneumoconiosis. Hence, the administrative law judge properly found that Dr. Castle's opinion was better documented and reasoned than the other opinions and was, therefore, entitled to determinative weight. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985); Decision and Order at 16; Director's Exhibit 12A; Employer's Exhibits 5, 7. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm his weighing of the medical opinion evidence, and accordingly, his finding that claimant failed to establish the existence of pneumoconiosis by medical opinion evidence pursuant to Section 718.202(a)(4). Consequently, we affirm his determination that claimant failed to satisfy her burden of establishing the existence of pneumoconiosis, a requisite element of entitlement under Part 718. *See* 20 C.F.R. §718.202(a); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Hence, we affirm the administrative law judge's determination that entitlement to benefits in the survivor's claim is precluded. *See Trumbo*, 17 BLR at 1-88-89.

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not demonstrate the existence of pneumoconiosis. Director's Exhibit 12a; Employer's Exhibits 3, 4, 6.

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

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