BRB No. 13-0245 BLA

IVA L. WEST (Widow of MONROE WEST) Claimant-Respondent v. CLINCHFIELD COAL COMPANY and PITTSTON COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/13/2014 DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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:

Employer/carrier (employer) appeals the Decision and Order (11-BLA-5666) of Administrative Law Judge Adele Higgins Odegard awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a survivor's claim filed on May 24, 2010.

After crediting the miner with at least twenty years of qualifying coal mine employment,[1] the administrative law judge found that the medical evidence established that the miner was totally disabled by a pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013). The administrative law judge, therefore, determined that claimant[2] invoked the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[3] 30 U.S.C.

[1] The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[2] Claimant is the surviving spouse of the miner, who died on July 1, 2005. Director's Exhibit 11. The miner filed a subsequent claim for federal black lung benefits on June 19, 2001. Administrative Law Judge Thomas F. Phalen, Jr. found that the evidence established the existence of a totally disabling pulmonary impairment, but did not establish the existence of pneumoconiosis, or total disability due to pneumoconiosis. Judge Phalen, therefore, denied benefits. Pursuant to the miner's *pro se* appeal, the Board affirmed Judge Phalen's finding that the evidence did not establish the existence of pneumoconiosis, and affirmed the denial of benefits. *West v. Clinchfield Coal Co.*, BRB No. 06-0190 BLA (Dec. 29, 2006) (unpub.).

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

§921(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge's finding of invocation of the Section 411(c)(4) presumption, and her finding that rebuttal of the presumption was not established, violate principles of issue preclusion. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge's findings run afoul of principles of issue preclusion. In a reply brief, employer reiterates its previous contentions.

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).

Invocation of the Section 411(c)(4) Presumption

Employer contends that the administrative law judge erred in relying upon evidence that was previously submitted in the miner's claim to support her finding of a totally disabling pulmonary impairment in the survivor's claim. Employer asserts that claimant was required to submit new evidence of a totally disabling respiratory impairment in order to prevail in her survivor's claim. Employer's argument is rejected. As previously noted, when Administrative Law Judge Thomas F. Phalen, Jr. adjudicated the miner's claim, he found that the evidence established the existence of a totally disabling pulmonary impairment. Employer has not explained how Judge Phalen's favorable total disability determination in the miner's claim would preclude the current administrative law judge from relying upon evidence submitted in the miner's claim, and which was also designated as evidence in the survivor's claim, to find the existence of a totally disabling pulmonary impairment. Moreover, the administrative law judge did not rely exclusively on previously submitted evidence to support her finding of total disability in the survivor's claim. In finding that the miner was totally disabled, the administrative law judge also relied upon Dr. Rosenberg's May 18, 2012 opinion that the miner was totally disabled from a pulmonary standpoint at the time of his death. Decision and Order at 11-12; Claimant's Exhibit 12.

Because employer does not otherwise challenge the administrative law judge's finding that the evidence established the existence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983). We similarly affirm the administrative law judge's finding that the miner had over fifteen years of qualifying coal mine employment, as it is unchallenged on appeal. *Id.* In light of our affirmance of the

administrative law judge's findings that claimant established over fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[4] or by establishing that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer argues that, because Judge Phalen denied benefits in the miner's claim based on the miner's failure to establish the existence of clinical or legal pneumoconiosis, the administrative law judge was bound by that determination in the survivor's claim. We disagree. For collateral estoppel to apply in this case, employer 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. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-394, 2-401 (4th Cir. 2006); *Sedlack v. Braswell Serv. Group, Inc*., 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-137 (1999) (en banc). However, even if these elements are met, 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 at 218, 23 BLR at 2-401, *quoting Newport News Shipbldg. & Dry Dock Co. v. Director, OWCP*, 583 F.2d 1273, 1279 (4th Cir. 1978).

[4] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1) (2013). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2) (2013).

Collateral estoppel does not bar litigation of the existence of pneumoconiosis in this survivor's claim, because the burden of proof has changed. In the miner's claim, the miner had the burden of proof to establish the existence of pneumoconiosis. In the survivor's claim, because claimant has invoked the Section 411(c)(4) presumption, employer bears the burden to disprove the existence of both clinical and legal pneumoconiosis. The fact that the miner was unable to establish the existence of pneumoconiosis in his claim does not eliminate employer's burden to disprove the existence of pneumoconiosis in the survivor's claim. Because of the change in the law since the denial of the miner's claim that reinstated the Section 411(c)(4) presumption, and shifted the burden of persuasion to employer, collateral estoppel does not apply with respect to the issue of pneumoconiosis in the survivor's claim.[5]

In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Rosenberg and Vuskovich. Dr. Rosenberg opined that the miner suffered from an obstructive pulmonary impairment due to smoking, Employer's Exhibit 1, while Dr. Vuskovich attributed the miner's obstructive pulmonary impairment to smoking and the effects of a cancerous lung tumor. Employer's Exhibits 3, 4. Drs. Rosenberg and Vuskovich each opined that the miner's obstructive pulmonary impairment was not due to his coal mine dust exposure. Employer's Exhibits 1, 3, 4.

The administrative law judge determined that Dr. Rosenberg's opinion, that the miner's obstructive impairment was unrelated to coal mine dust exposure, was based on reasoning that was inconsistent with scientific studies approved by the Department of Labor (DOL) in the preamble to the 2000 revisions to the regulations. Specifically, Dr. Rosenberg eliminated coal dust exposure as a source of the miner's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in the miner's FEV1 value compared to his FVC value. The administrative law judge, however, noted that scientific evidence endorsed by the DOL recognizes that "coal miners have an increased risk of developing [chronic obstructive pulmonary disease]. [Chronic obstructive pulmonary disease] may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC." Decision and Order at 26, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). The administrative law judge accorded less weight to Dr. Vuskovich's opinion regarding the cause of the miner's obstructive pulmonary impairment because he found that the doctor relied upon an inaccurate smoking history. Decision and Order at 27. The administrative law judge also found that Dr. Vuskovich's opinion, that the miner's obstructive pulmonary impairment

[5] The issue of whether claimant would be collaterally estopped from relitigating the existence of pneumoconiosis in the absence of invocation of the Section 411(c)(4) presumption is not before the Board, and therefore, we do not address it.

was due to a cancerous lung tumor, was not supported by the evidence. *Id.* The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis. *Id.*

Employer generally asserts that the opinions of Drs. Rosenberg and Vuskovich are uncontradicted and are sufficient to disprove the existence of legal pneumoconiosis, but employer does not specifically challenge the administrative law judge's bases for discrediting the opinions. Because employer provides the Board with no basis upon which to review the administrative law judge's findings, we affirm the administrative law judge's determination that employer did not disprove the existence of legal pneumoconiosis.[6] *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack*, 7 BLR at 1-711.

In addressing whether employer rebutted the Section 411(c)(4) presumption by establishing that no part of the miner's death was caused by pneumoconiosis, the administrative law judge considered the opinions of Drs. Rosenberg and Vuskovich. Drs. Rosenberg and Vuskovich each opined that the miner's death was due to lung cancer. Employer's Exhibits 1, 3, 4. Dr. Rosenberg and Vuskovich further opined that the miner's death was unrelated to his coal mine dust exposure. *Id.* The administrative law judge discounted the opinions of Drs. Rosenberg and Vuskovich because he found that they were speculative, and because he found that the doctors failed to adequately address whether the miner's respiratory disability contributed to acute conditions that may have been the immediate cause of death. Decision and Order at 30. Because employer does not challenge the administrative law judge's specific bases for discrediting the opinions of Drs. Rosenberg and Vuskovich, we affirm her finding that employer failed to establish that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446-47, 9 BLR at 2-47-48; *Sarf*, 10 BLR at 1-120; *Skrack*, 6 BLR at 1-711. We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[6] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Accordingly, the administrative law judge's Decision and Order awarding 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