BRB No. 01-0951 BLA

GENIVEE HUGHES (Widow of ROBERT O. HUGHES)	)	
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 - Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia.

Michael J. Rutledge (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner=s widow, appeals the Decision and Order - Denying Benefits (00-BLA-205) of Administrative Law Judge Gerald M. Tierney rendered on a 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] The administrative law judge found at least thirty-eight years of coal mine employment established and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Considering the newly submitted evidence in conjunction with the previously submitted evidence, in this request for modification of the previous denial of claimant=s survivor=s claim, the administrative law judge concluded that the evidence failed to establish the existence of pneumoconiosis and that, therefore, a mistake in a determination of fact in the prior denial had not been shown. The

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The miner filed his claim for benefits on May 19, 1982. Director=s Exhibit 28-1. On August 31, 1989, in a Decision and Order awarding benefits, Administrative Law Judge James L. Guill found the existence of pneumoconiosis was established by x-ray evidence at 20 C.F.R. '718.202(a)(2000) pursuant to the true doubt rule. Director=s Exhibit 28-41. The Board affirmed the award of benefits on March 27, 1992. Director=s Exhibit 28-53. The miner died on January 15, 1998. Director=s Exhibit 6. Claimant filed her survivors= claim for benefits on January 30, 1998, which was denied by the district director on July 9, 1998. Director=s Exhibits 1, 11. Claimant filed a request for modification on June 2, 1999, which was again denied by the district director and the administrative law judge. Director=s Exhibits 21, 25, 30.

administrative law judge, therefore, found that claimant failed to establish a basis for modification. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that employer was not collaterally estopped from re-litigating the existence of pneumoconiosis which was previously established in the living miner=s claim.[3] Claimant further contends that if the doctrine of collateral estoppel is not applied in this case, the case should be remanded for the administrative law judge to reconsider the evidence at Section 718.202(a)(1) and (4). Employer responds, urging affirmance. The Director, Office of Workers= Compensation Programs responds, contending that there has been no violation of the doctrine of collateral estoppel and urging affirmance of the denial of benefits.

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. 20 C.F.R. ' '718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor=s claims filed on or after 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 Section 718.304, is applicable. 20 C.F.R. '718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner=s death if it hastens the miner=s death. 20 C.F.R. '718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 969 F.2d 977-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), cert denied, 506 U.S. 1050 (1993).

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[3] Under the doctrine of collateral estoppel, a party may not relitigate an issue which was decided adversely to it in an earlier adjudication if the party had a full and fair opportunity to litigate the issue. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-135, 1-137 (1999). Pursuant to the collateral estoppel doctrine, an issue may not be relitigated if: (1) the issue sought to be precluded is identical to the 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 judgement is final and valid; (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *See Hughes*, *supra*.

Claimant contends that because all of the requirements for invoking the doctrine of collateral estoppel have been met in the instant case, reconsideration of the issue of the existence of pneumoconiosis in the survivor=s claim is precluded. We disagree.

In finding the existence of pneumoconiosis established in the miner=s claim, Administrative Law Judge James L. Guill applied the principle of Atrue doubt@ in determining that the x-ray evidence established the existence of pneumoconiosis. *See* Decision and Order at 11. In the instant case, however, the administrative law judge reconsidered the evidence relevant to the existence of pneumoconiosis as the principle of true doubt had been held invalid by the United States Supreme Court in 1994. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994), *aff=g sub. nom.*, *Greenwich Colleries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). Moreover, the administrative law judge found that the standard for establishing the existence of pneumoconiosis has been changed by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 204, 22 BLR 1-162 (4th Cir. 2000) to now require that all relevant evidence at Section 718.202(a)(1)-(4) be weighed together in determining whether the existence of pneumoconiosis is established.

In this case, therefore, the administrative law judge acted properly in not applying the doctrine of collateral estoppel to preclude employer from relitigating the existence of pneumoconiosis because there was a change in the applicable burden of proof for establishing the existence of pneumoconiosis, *i.e.*, in the miner=s case, the existence of pneumoconiosis was established by x-ray evidence alone based on the true doubt rule. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988); *see also Montana v. United States*, 440 U.S. 147, 153-62 (1979). Thus, because there has been a change in the standard for determining how the existence of pneumoconiosis may be established, the issue of pneumoconiosis is no longer identical to the one litigated and actually determined in the miner=s claim and the finding of pneumoconiosis made on the miner=s claim can no longer serve to collaterally estop employer from litigating the issue in this survivor=s claim. Claimant=s argument is, therefore, rejected and we hold that the administrative law judge properly considered whether the existence of pneumoconiosis was established in this claim. *See Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992); *see Ramsay v. INS*, 14 F.3d 206 (4th Cir. 1994); *Virginia Hosp. Ass=n v. Baliles*, 830 F.2d 1308 (4th Cir. 1987); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en*

banc).

Claimant next contends that the administrative law judge erred in finding that the x-ray evidence failed to establish the existence of pneumoconiosis. Specifically, claimant asserts, citing *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), that the administrative law judge should have credited claimant=s June 30, 1982 x-ray, which was read positive by a dually qualified reader, and the administrative law judge should not have considered subsequent x-rays read negative by physicians who were not as well qualified. Contrary to claimant=s argument, however, the administrative law judge in this case properly considered all the x-ray evidence of record, and the qualifications of the physicians, in finding that it was insufficient to establish the existence of simple pneumoconiosis at Section 718.202(a)(1). Specifically, in addition to considering the positive reading of the June 30, 1982 x-ray by, Dr. Cole, a Board-certified, B-reader, the administrative law judge noted that an August 27, 1982 x-ray was read negative by a Board-certified, B-reader and that several subsequent x-rays taken in 1997 and 1998 were read both positive and negative by Board-certified, B-readers, but more frequently as negative.

Contrary to claimant=s argument, *Adkins* does not require an administrative law judge to find the existence of pneumoconiosis established once an x-ray is read as positive by a highly qualified physician regardless of the readings and the qualifications of readers of subsequent x-rays. Rather, *Adkins* holds that the more recent negative x-ray evidence may not be automatically accorded greater weight solely due to its recency, in light of the progressive nature of pneumoconiosis. *Adkins*, *supra*. *Adkins* does not, however, require that positive readings must always be credited over negative readings and that the administrative law judge may not consider the probative value of the x-ray evidence when, as here, x-rays taken within two months of each other were read both positive and negative, by equally qualified physicians, and where, as here, the reliability of an x-ray read positive is called into question by numerous negative readings of x-rays, by equally qualified physicians. Accordingly, the administrative law judge=s finding that the x-ray evidence failed to establish the existence of pneumoconiosis is affirmed. Decision and Order at 3-5; Director=s Exhibits 28; Employer=s Exhibits 1, 3, 4, 8, 9, 11; Claimant=s Exhibits 1, 4; 20 C.F.R. ' 718.202(a)(1); *see Adkins*, *supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Staton v. Norfolk v. Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17

BLR 2-77 (6th Cir. 1993).[4]

Claimant also contends that the opinions of Drs. Roberts, Reynolds and Rasmussen establish the existence of pneumoconiosis. In considering the medical opinion evidence, the administrative law judge acknowledged that Dr. Roberts=s opinion was entitled to special consideration because Dr. Roberts was the miner=s treating physician, however, the administrative law judge permissibly accorded little weight to that opinion because the physician failed to explain his diagnosis and his diagnosis was challenged by physicians with superior qualifications in the field of pulmonary disease. This was rational. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark*, *supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Likewise, the administrative law judge rationally accorded little weight to Dr. Reynolds=s opinion because she provided no explanation for her diagnosis of pneumoconiosis. *See Clark*, *supra*; *Fields*, *supra*. The administrative law judge also permissibly accorded little weight to Dr. Rasmussen=s 1987 opinion, even though it was reasoned, because the physician did not have an opportunity to consider the subsequent, more recent evidence developed in the ten years since he had seen claimant. *See Clark*, *supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984). Thus, the administrative law judge rationally found that the medical opinion evidence did not support a finding of pneumoconiosis at Section 718.202(a)(4).

The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge=s findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge=s findings that the evidence of record failed to establish the existence of pneumoconiosis and, therefore, a basis for modification of the previous denial as they are supported by

[4] Because claimant has not challenged the administrative law judge=s finding that the x-ray evidence does not establish the existence of complicated pneumoconiosis or the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(2), (3), those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

substantial evidence and in accordance with law. *Compton*, *supra*; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Trumbo*, *supra*; *Trent*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge=s Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge