BRB No. 00-0644 BLA

CAPITOLA WALKER (Widow of CHARLES WALKER)	)	
Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY	)	
and	)	DATE ISSUED:
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Dorothy L. Page (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.
PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (95-BLA-2199) of Administrative Law Judge Donald W. Mosser 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] This case involves a survivor's claim filed on February 13, 1995, which the administrative law judge properly considered under the regulations at 20 C.F.R. Part 718.[2] The administrative law judge found that claimant[3] established that the miner worked in coal mine employment for over forty years. The administrative law judge also found that, because Administrative Law Judge Robert G. Mahony previously found, in adjudicating the living miner's claim, that the x-ray evidence established that the miner suffered from pneumoconiosis under 20 C.F.R. §718.202(a)(1) (2000), employer was collaterally estopped from litigating that issue again in the survivor's claim. The administrative law judge found that, regardless of that finding, the x-ray evidence was still sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000). The administrative law judge further found claimant entitled to the presumption that the miner's pneumoconiosis was due to coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000), and that the presumption was not rebutted. Finally, the administrative law judge found that, although the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c)(1) and (c)(3) (2000),

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]A living miner's claim was filed on September 6, 1988. Director's Exhibit 18. In a Decision and Order dated October 31, 1991, Administrative Law Judge Robert G. Mahony credited the miner with forty-one years of coal mine employment, and properly considered the claim under 20 C.F.R. Part 718 (2000). *Id*. Judge Mahony determined that the miner established the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) (2000) and 718.203(b) (2000), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). *Id*. Judge Mahony accordingly awarded benefits. *Id*. Employer appealed. The Board affirmed Judge Mahony's findings and consequent decision awarding benefits. *Walker v. Peabody Coal Co.*, BRB No. 92-0545 BLA (June 23, 1993)(unpublished). Employer took no further action with respect to the miner's claim subsequent to the Board's decision.

[3]Claimant is the surviving spouse of the miner, who died on September 14, 1994. Director's Exhibit 3. The miner's death certificate lists irreversible progressive respiratory failure and end stage cancer of the larynx as the immediate causes of the miner's death. *Id*.

claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2) (2000). Consequently, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's application of the doctrine of collateral estoppel, and the administrative law judge's weighing of the evidence under Sections 718.202(a)(1) (2000) and 718.205(c)(2) (2000). Claimant responds in support of the administrative law judge's decision awarding benefits. Employer filed a reply brief, reiterating contentions raised in its Petition for Review and Brief.[4] The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he disagrees with employer's challenge of the administrative law judge's application of the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of pneumoconiosis.[5]

[4]Employer subsequently filed a supplemental appeal of the administrative law judge's Supplemental Decision and Order Granting Attorney's Fees, dated June 22, 2000, but moved that the appeal be dismissed in a motion filed on October 5, 2000. In an Order dated October 24, 2000, the Board granted employer's motion, dismissing employer's supplemental appeal. *Walker v. Peabody Coal Co.*, BRB No. 00-0644 BLA (Oct. 24, 2000)(unpublished Order).

[5]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, and findings pursuant to 20 C.F.R. §§718.203(b) (2000) and 718.205(c)(1) and (c)(3) (2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 6-7.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule in an Order issued on March 2, 2001, to which claimant, employer and the Director have responded. Claimant and the Director contend that the amended regulations will not affect the outcome of the case and, therefore, request that the Board decide, rather than stay, this case. Employer asserts that the hastening death standard adopted by the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992), within whose jurisdiction the instant case arises,[6] is not controlling precedent in light of the new regulation codifying the standard. Employer asserts that, as the regulations are being challenged, the case should be stayed pending the outcome of the lawsuit.

The instant case involves, among other issues, the issue of whether the administrative law judge properly applied the doctrine of collateral estoppel to preclude relitigation in the instant survivor's claim of a finding that the miner suffered from pneumoconiosis, a finding which was made in a previous living miner's claim. All parties agree that, since the doctrine of collateral estoppel is not governed by the regulations, the revised regulations would have no effect on this issue. All parties also agree that the revised regulations would have no effect on the issue of the existence of pneumoconiosis, an issue which the administrative law judge addressed upon having assumed *arguendo* that collateral estoppel did not preclude relitigation of the issue. Finally, the new regulation pertaining to establishing pneumoconiosis as a substantial cause of a miner's death codifies the "hastening death" standard adopted by the Seventh Circuit in *Railey*. As claimant and the Director note, inasmuch as the new regulation is consistent with controlling precedent in the Seventh Circuit, the new regulation at Section 718.205(c)(2) would not affect the outcome of this case. We reject employer's contention that the case should be stayed on the ground that an agency's rulemaking negates previously controlling precedent governing the issue addressed by the rulemaking. Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations, inasmuch as the new regulation at Section 718.205(c)(2) is consistent with controlling precedent in the Seventh Circuit. Therefore, the Board will adjudicate the merits of this appeal.

[6]Because the miner's coal mine employment occurred in Illinois, the instant case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, employer first contends that the administrative law judge erred in finding that employer was collaterally estopped from contesting whether the miner had pneumoconiosis. Employer argues that one of the conditions for invoking collateral estoppel has not been established in this case; *i.e.*, the requirement that the issue sought to be precluded must be the same as that involved in the previous action. Specifically, employer asserts that the finding of pneumoconiosis in the miner's claim is not the same issue as whether the miner has pneumoconiosis in the survivor's claim. Employer's contention lacks merit. In adjudicating the previous miner's claim, Administrative Law Judge Robert G. Mahony found the existence of pneumoconiosis established based upon the x-ray evidence of record. Decision and Order at 5. In considering the instant survivor's claim, the administrative law judge correctly noted that the record did not include more definitive evidence than x-ray evidence, such as autopsy or biopsy evidence, so as to possibly warrant relitigation of the issue of pneumoconiosis. *Id.* As the administrative law judge noted, the evidence developed since the survivor's claim was filed includes negative readings of a film dated September 15, 1993 by Drs. Kanwat and Fino, and rereadings by Dr. Fino of two x-rays, dated August 8, 1989 and August 25, 1989, films which were previously interpreted in the miner's claim. Decision and Order at 4-5; Employer's Exhibit 3. Where a survivor's claim includes autopsy evidence which was not available and could not have been adduced at the time of the adjudication of the miner's claim, an exception to the doctrine of collateral estoppel may be warranted to allow relitigation of the issue of the existence of pneumoconiosis. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-135 (1999).[7] Inasmuch as

[7]In *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-135 (1999), the Board set forth five elements which must be met for collateral estoppel to apply, one of which is that the issue which is sought to be precluded must have been a critical and necessary part of the judgment in the prior proceeding. *Hughes* primarily involved a circumstance where the Board held that it was improper for an administrative law judge to apply collateral estoppel to preclude an employer from contesting, in a survivor's claim, a finding made in the earlier miner's claim that the miner had pneumoconiosis. However, in *Hughes*, unlike in the instant case, the prior finding of pneumoconiosis in the miner's claim was made in a judgment *denying* benefits, as opposed to a judgment of entitlement to benefits. The Board held in *Hughes* that the establishment of the existence of pneumoconiosis, while essential to entitlement to benefits, does not support, and is thus not essential to, a judgment denying benefits. The Board, therefore, held that one of the elements for applying collateral estoppel was not met given the

the evidence in the record contains no autopsy evidence, however, this exception does not apply. Furthermore, employer had a full and fair opportunity to litigate the issue of the existence of pneumoconiosis in the miner's claim. Employer appealed the finding of Administrative Law Judge Robert G. Mahony in the miner's claim, that the miner had pneumoconiosis, and the Board affirmed this finding. *Walker v. Peabody Coal Co.*, BRB No. 92-0545 BLA (June 23, 1993)(unpublished), slip op. at 2-4. Thus the elements for collateral estoppel to apply are present in the instant case. *See Hughes, supra*. Accordingly, we affirm the administrative law judge's finding that employer was estopped from relitigating the issue of the existence of pneumoconiosis. Consequently, we need not address employer's contentions with respect to the administrative law judge's alternative finding that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), which the administrative law judge made only provisionally, upon having assumed *arguendo* that employer was not collaterally estopped from contesting the issue.

Employer next challenges the administrative law judge's finding that the weight of the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2) (2000). In order to establish that the miner's death was due to pneumoconiosis under Section 718.205(c)(2), claimant need only establish that the pneumoconiosis hastened the miner's death. 20 C.F.R. §718.205(c)(2); *see Railey, supra*. In challenging the administrative law judge's finding that the evidence was sufficient to establish that pneumoconiosis hastened the miner's death, employer argues that the administrative law judge improperly determined that Dr. Ngo's medical opinion was well-reasoned, and improperly accorded Dr. Ngo's opinion great weight on the basis that the doctor was the miner's treating physician. Employer also argues that the opinions of Drs. Long and Cohen are not well-reasoned or documented in light of the other evidence of record, and that the administrative law judge thus erred in crediting the opinions of Drs. Long and Cohen as supportive of Dr. Ngo's opinion. Employer's contentions have merit, in part.

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facts of that case. *See Hughes, supra*.

In a letter dated March 2, 1995, Dr. Ngo indicated that the miner's pneumoconiosis was a major contributor to his death. Director's Exhibit 4. Dr. Ngo stated that if the miner had not suffered from pneumoconiosis, "his survival may have been much longer" even with his bleeding ulcer and carcinoma of the vocal chords. *Id*. Dr. Ngo further stated that, based upon his knowledge of the miner and the miner's medical history, he had "no doubt" that the miner's pneumoconiosis played a major role in precipitating the miner's death. *Id*. Dr. Long, based upon her review of medical evidence, indicated that the miner's pneumoconiosis contributed to his death. Director's Exhibit 5. Dr. Cohen, who reviewed all of the medical evidence of record, opined that the miner died from progressive respiratory failure, a major portion of which was caused by his coal dust and tobacco induced chronic lung disease.[8] Claimant's Exhibits 1, 2. Contrary to employer's contention, the opinions of these three physicians could properly be credited as well-reasoned and documented opinions supporting a finding that the miner's death was hastened by pneumoconiosis. Whether a medical opinion is documented and well reasoned is for the administrative law judge as fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We agree with employer, however, that the administrative law judge did not adequately articulate his reasons for concluding that the opinions were well-reasoned and documented. Furthermore, we agree with employer that the administrative law judge appears to have mechanically credited Dr. Ngo's opinion on the ground that the doctor was the miner's treating physician, without addressing why this factor put Dr. Ngo in a better position than the other physicians of record to render an opinion on the cause of the miner's death. *See Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Accordingly, we vacate the administrative law judge's findings with respect to the opinions of Drs. Ngo, Long and Cohen, and remand the case for the administrative law judge to reconsider the opinions, and to provide an adequate rationale for crediting or discounting the opinions under Section 718.205(c)(2).

[8]Dr. Cohen stated that the miner did not die from his vocal chord tumor because it responded to chemotherapy and radiation. Claimant's Exhibit 1. Dr. Cohen further stated that neither did the miner die from airway obstruction, as the miner had a tracheostomy in place at the time of his death. *Id*. Dr. Cohen also opined that the miner did not die from his proven brain metastasis. *Id.*

In addition, we agree with employer that the administrative law judge improperly discounted the opinions of Drs. Tuteur and Fino. Drs. Tuteur and Fino reviewed the medical evidence of record, opined that the miner died from laryngeal cancer, and concluded that pneumoconiosis, even if it had been present, did not contribute in any way to the miner's death. Employer's Exhibits 1, 3, 5. The administrative law judge improperly discounted Dr. Tuteur's opinion, in part, on the ground that it was hostile to the Act because Dr. Tuteur believed that the obstructive nature of claimant's impairment militated against a finding of pneumoconiosis. Decision and Order at 11. The United States Court of Appeals for the Seventh Circuit held in *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995), that medical opinions which indicate that coal dust exposure does not cause obstructive impairment are not "hostile to the Act" or inherently incredible and necessarily less persuasive.[9] In addition, the administrative law judge improperly discounted the opinions of Drs. Tuteur and Fino on the ground that the doctors had difficulty accepting that the miner suffered from pneumoconiosis. Decision and Order at 11. As employer contends, both Drs. Tuteur and Fino stated that they assumed the presence of pneumoconiosis in expressing their opinions that the miner's death was in no way related to the disease. Employer's Exhibits 1, 3, 5. Consequently, we vacate the administrative law judge's findings with respect to the opinions of Drs. Tuteur and Fino, and remand the case for the administrative law judge to reconsider these opinions under Section 718.205(c)(2).[10]

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

SO ORDERED.

BETTY JEAN HALL, Chief

[9]As employer asserts, while Dr. Tuteur expressed his opinion that he does not believe the miner's obstructive impairment was due to coal dust exposure, Dr. Tuteur did not state that pneumoconiosis never causes obstructive disorders. Employer's Exhibits 1, 5.

[10]Finally, employer argues that the administrative law judge erred in ignoring the treatment records of Drs. Gumprecht and Paul, developed during the miner's lifetime. These records may be relevant, although not dispositive, as to whether the miner's death was hastened by pneumoconiosis. Accordingly, the administrative law judge should consider the opinions on remand under 20 C.F.R. §718.205(c)(2).

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge