

BRB No. 01-0881 BLA

SOPHIA SURWAY)
(Widow of MIKE SURWAY))
)
 Claimant-Petitioner)
)
 v.)
)
 UNITED POCAHONTAS COAL) DATE ISSUED:
 COMPANY)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (00-BLA-0656) of Administrative Law

¹ Claimant, Sophia Surway, is the widow of the miner, Mike Surway, who died on

Judge John C. Holmes denying benefits 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).² The administrative law judge found that because the instant survivor's claim was a "separate cause of action," from the miner's claim, claimant had the burden of demonstrating all the elements of entitlement and could not rely on the findings of pneumoconiosis and causation made by Administrative Law Judge Clement J. Kichuk in awarding benefits on the miner's claim. Decision and Order at p.5 (unpaginated).³ Turning

February 18, 1999. The death certificate lists the miner's cause of death as respiratory arrest due to multiple sclerosis. Director's Exhibit 6. The miner's June 12, 1973 claim for benefits was denied on April 30, 1980. Director's Exhibit 18. The miner filed a second claim for benefits on April 16, 1987, which was also denied on September 13, 1990. Director's Exhibit 19. The miner filed a third claim for benefits on December 27, 1993. Administrative Law Judge Christine M. Moore denied that claim because she found that while the miner had established x-ray evidence of pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that a totally disabling respiratory impairment was established, the evidence failed to establish that the miner's totally disabling respiratory impairment was due to pneumoconiosis. Subsequent to an appeal by the miner, the Board affirmed, as unchallenged, Judge Moore's finding that the x-ray evidence established the existence of pneumoconiosis arising out of coal mine employment, and further affirmed the finding of a totally disabling respiratory impairment based on employer's concession. The Board vacated, however, Judge Moore's determination that the miner failed to establish that his totally disabling respiratory impairment was due to pneumoconiosis and remanded the claim for further consideration of that issue. Director's Exhibit 20; *Surway v. United Pocahontas Coal Co.*, BRB No. 96-0742 BLA (Dec. 23, 1996). On remand, in a Decision and Order issued on January 14, 1998. Administrative Law Judge Clement J. Kichuk awarded benefits as he determined that the miner established that his totally disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 20. Subsequent to an appeal by employer, the Board affirmed the administrative law judge's finding that claimant established total disability due to pneumoconiosis and, accordingly, affirmed the award of benefits. Director's Exhibit 20; *Surway v. United Pocahontas Coal Co.*, BRB No. 98-0686 BLA (Feb 22, 1999)(unpub.).

² 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.

³ Since the award of benefits on the miner's claim was for a claim filed subsequent to January 1, 1982, however, claimant is not eligible for derivative benefits based on the miner's award and must establish entitlement on her own claim which she filed on August

to the survivor's claim, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. Benefits were, accordingly, denied. Decision and Order at pp. 5-9 (unpaginated).

On appeal, claimant contends that the administrative law judge erred in disregarding the final determination in the miner's claim, that the miner suffered from pneumoconiosis, notwithstanding the presence of new evidence in this survivor's claim. Claimant further argues that the administrative law judge erred in rejecting the opinions of Drs. Jabour and Rasmussen merely because their opinions of pneumoconiosis are in conflict with the weight of the x-ray evidence. Lastly, claimant asserts that the administrative law judge did not have the discretion to "ignore" the finding made in the miner's claim, that the miner was totally disabled due to pneumoconiosis. Carrier responds and urges affirmance of the denial of survivor's benefits. The Director Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's 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); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, 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 death if it hastened 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).

30, 1999. See 30 U.S.C. §901(a); 20 C.F.R. §725.212; *Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf. Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Claimant contends that the doctrine of “issue preclusion” applies in the instant case, and that the previous finding of pneumoconiosis, in the miner’s claim, constitutes a litigated issue between the parties and thus, the administrative law judge did not possess the discretion to disregard that finding and conclude that the miner did not suffer from pneumoconiosis. Claimant asserts that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held in *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998) and *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992), that the concept of collateral estoppel applies in black lung cases where the issues have been previously litigated by the parties.

The administrative law judge found that the instant survivor’s case constitutes a separate case and that the widow must affirmatively establish all elements of entitlement, particularly because new evidence was part of the record. Collateral estoppel, or issue preclusion, 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.” *Ramsay v. INS*, 14 F.3d 206 (4th Cir. 1994); *see 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*). For collateral estoppel to apply in the present case, which arises within the jurisdiction of the Fourth Circuit, 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.

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); *Ramsey, supra*; *Hughes, supra*. While, in the instant case, the administrative law judge did not address the criteria established by the *Sedlack* court, we hold that claimant is precluded from using the doctrine of issue preclusion as a matter-of-law. Subsequent to the award of benefits on the miner’s claim, the Fourth Circuit held that, based on the statutory language at 30 U.S.C. §923(b), all relevant evidence is to be considered together rather than merely within discrete subsections of 20 C.F.R. §718.202(a)(1)-(4) in determining whether claimant has met her burden of establishing the existence of pneumoconiosis by a preponderance of all of the evidence, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). However,

in awarding benefits on the miner's claim, the Board only affirmed, as unchallenged on appeal, the finding that the existence of pneumoconiosis was established by the x-ray evidence pursuant to Section 718.202(a)(1). *Surway*, BRB No. 96-0742 BLA, slip op. at 2 n.2 and *Surway*, BRB No. 98-0686 BLA, slip op. at 2. At the time of the Board's holding the case of *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), constituted established precedent and stood for the proposition that establishing pneumoconiosis under one of the four methods pursuant to Section 718.202(a)(1)-(4) obviated the need for doing so under any of the other methods.

In light of the change in law enunciated in *Compton, supra*, which overruled the Board's holding in *Dixon, supra*, the issue of whether the existence of pneumoconiosis has been established pursuant to Section 718.202(a), that claimant seeks to preclude in the present survivor's claim pursuant to the doctrine of collateral estoppel, is not identical to the one previously litigated and actually determined in the miner's claim, *see Sedlack, supra; Sandberg, supra; Ramsey, supra; Hughes, supra*. Thus, inasmuch as the prerequisites for application of the doctrine of collateral estoppel are not present, the doctrine of collateral estoppel is not applicable in this survivor's claim regarding the existence of pneumoconiosis pursuant to Section 718.202(a), *see Hughes, supra*.

Claimant also asserts that, in addressing the medical evidence of record, the administrative law judge improperly accorded less weight to the opinions of Dr. Jabour, Director's Exhibit 10, and Dr. Rasmussen, Claimant's Exhibit 1, both of whom concluded that the miner suffered from legal pneumoconiosis. Claimant asserts that the administrative law judge improperly discredited these opinions merely because the x-ray evidence of record did not support a finding of the existence of pneumoconiosis. Claimant asserts that the "obvious point" of these physician's opinions was that pneumoconiosis could be demonstrated even without the support of positive x-ray evidence. Claimant's Brief at 6.

In concluding that the weight of the evidence of record failed to support a finding of the existence of pneumoconiosis, the administrative law judge initially found, permissibly, that the great weight of the x-ray readings by physicians with superior qualifications failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), *see Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985). The administrative law judge further concluded that claimant was unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) as the record is devoid of such evidence. Decision and Order at 7.

Lastly, the administrative law judge reviewed the entirety of the medical opinion evidence of record and concluded that the weight of such evidence failed to support a finding of the existence of pneumoconiosis. The administrative law judge found that the opinion of Dr. Jabour, that the miner suffered from pneumoconiosis, Director's Exhibit 10, was "tentative" and based primarily on positive x-ray interpretations and pulmonary function

studies. Decision and Order at 7. The administrative law judge found that the physician failed to address negative x-ray interpretations, nor was his opinion of pneumoconiosis rendered with “medical certitude” or even “medical caution,” but was instead an equivocal diagnosis at best. Decision and Order at 7. Contrary to claimant’s assertion, the administrative law judge, permissibly found that the opinion of Dr. Jabour was entitled to little weight as it was equivocal on the issue of the existence of pneumoconiosis, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge further found, permissibly, that the opinion of Dr. Rasmussen, Claimant’s Exhibit 1, was similarly equivocal on the existence of pneumoconiosis, as the physician rendered no separate diagnosis on the existence of pneumoconiosis, but rather based his conclusion on the opinion of Dr. Jabour, *see Hicks, supra; Akers, supra; Revnack, supra; see also Justice, supra*. We thus reject claimant’s assertions regarding the opinions of Drs. Rasmussen and Jabour and hold that the administrative law judge permissibly accorded the physicians opinion little weight. We conclude that substantial evidence supports the administrative law judge’s determination that the weight of the relevant evidence fails to support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a). *See Compton, supra; see generally Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff’g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Moreover, claimant cannot establish entitlement to survivor’s benefits as the administrative law judge properly found that claimant failed to establish that the miner’s death was due to pneumoconiosis. In considering the evidence relevant to whether death was due to pneumoconiosis, the administrative law judge credited Dr. Fino’s opinion, that the miner’s “death was due to the multiple sclerosis and that coal dust inhalation played no part in the death, Unnumbered Exhibit, over the opinions of Dr. Rasmussen and Dr. Jabour, that pneumoconiosis hastened the miner’s death, Director’s Exhibits 6, 8, Unnumbered Exhibit, as Dr. Fino’s opinion was “well founded, adequately reasoned and, most importantly, full documented and supported by the overwhelming medical evidence of record.” Decision and Order at 9 (unpaginated). This was rational. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262, 1-265 (1985). As further support for his finding, the administrative law judge noted that Dr. Jabour listed on the death certificate only multiple sclerosis as the sole basis for the respiratory arrest which was cited as the cause of the miner’s death, despite other reports in which Dr. Jabour indicated that pneumoconiosis “in some way” contributed to hastening death. *See Decision and Order at 8-9 (unpaginated); Director’s Exhibits 6, 8. See Clark, supra; Justice, supra; Fields, supra; see also Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Accordingly, the administrative law judge rationally found that claimant failed to establish that the miner’s death was due to pneumoconiosis.

Because claimant has failed to establish the existence of pneumoconiosis, and death due to pneumoconiosis, necessary elements of entitlement in a survivor's claim, we affirm the denial of benefits. *See* 20 C.F.R. §§718.201, 718.202, 718.205(c); *Shuff, supra; Trumbo, supra.*⁴

Accordingly, the administrative law judge's Decision and denying survivor's benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ The Board need not address the administrative law judge's findings nor claimant's assertions regarding the cause of the miner's disability in this survivor's claim. *See Trumbo, supra.*