BRB No. 05-1013 BLA

GENIVEE HUGHES (Widow of ROBERT O. HUGHES)	)	
Claimant-Petitioner	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 06/21/2006
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 Daniel L. Leland, Administrative Law Judge, United States of Department of Labor.

James Hook, Waynesburg, Pennsylvania for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denying Benefits (2004-BLA-70) of Administrative Law Judge Daniel L. Leland 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). Prior to his death, the miner filed a claim on

[1] Claimant, is the widow of the miner, who died on January 15, 1998. The death certificate lists the cause of death as cardiorespiratory arrest due to pulmonary hypertension, chronic obstructive pulmonary disease, and arteriosclerosis. Director's Exhibit 7.

May 19, 1982, and was awarded benefits in a Decision and Order issued by Administrative Law Judge James L. Guill on August 29, 1989. Director's Exhibit 1. Judge Guill found the existence of pneumoconiosis established by x-ray evidence at 20 C.F.R. §718.202(a)(1) pursuant to the "true doubt" rule. *Id.* The award of benefits on the miner's claim was affirmed by the Board in *Hughes v. Consolidation Coal Co.*, BRB No. 89-3328 BLA (Mar. 27, 1992) (unpub.).[2] Subsequent to the miner's death, claimant filed the instant survivor's claim on January 30, 1998, Director's Exhibit 2. Administrative Law Judge Gerald M. Tierney issued a Decision and Order denying benefits on the survivor's claim because claimant failed to establish that the miner suffered from pneumoconiosis. The Board affirmed that denial in *Hughes v. Consolidation Coal Co.*, BRB No. 01-0951 BLA (Jul. 16, 2002) (unpub.) and denied claimant's request for reconsideration in *Hughes v. Consolidation Coal Co.*, BRB No. 01-0951 BLA (Nov. 20, 2002)(unpub.). Claimant sought modification. The administrative law judge found that the instant survivor's claim was a request for modification pursuant to 20 C.F.R. §725.310, and that, as a survivor's claim, modification could only be based on a mistake in the determination of fact. Considering the evidence submitted in conjunction with the request for modification in addition to all previously submitted evidence, the administrative law judge found that the evidence did not support a finding that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a), citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Accordingly, the administrative law judge denied claimant's request for modification and, therefore, denied benefits.

On appeal, claimant contends, as she did when her case was previously before the Board, that employer is collaterally estopped from relitigating the existence of pneumoconiosis as the existence of pneumoconiosis was established in the miner's claim. Claimant further contends that administrative law judge erred in failing to find that the evidence of record established the existence of pneumoconiosis and that pneumoconiosis played a role in the disabling disease which contributed to the miner's death. Neither employer, nor the Director, Office of Workers' Compensation Programs, (the Director) has filed a brief in this appeal.[3]

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,

[2] Claimant is not eligible for derivative survivor's benefits based on the filing date of the miner's claim. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf., Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86-87 (1988).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

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).

In a survivor's claim, a claimant may establish a basis for modification by establishing that a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310 (2000).[4] The administrative law judge has the authority to consider all the evidence of record to determine whether a mistake in a determination of fact was made, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

When this survivor's claim was before the Board, claimant argued that because all of the requirements for invoking the doctrine of collateral estoppel had been met, reconsideration of the issue of the existence of pneumoconiosis, which was established in the miner's claim, could not now be relitigated in the survivor's claim.[5] The Board

[4] The revised regulation at 20 C.F.R. §725.310 (2002) does not apply to claims, such as this one, which were pending on January 19, 2001. 20 C.F.R. §725.2(c). As the survivor's claim was filed prior to the effective date of the revised regulations, the administrative law judge was required to consider all the evidence of record, including that in the miner's claim, without regard to the evidentiary limitations set forth in the revised regulations at 20 C.F.R. §725.414(a)(3)(i). *See* 20 C.F.R. §725.310 (2000); *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23-2-28 (4th Cir. 1997).

[5] 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

rejected this assertion. *Hughes*, BRB No. 01-0951 BLA, *slip op.* at 3. Claimant renews this argument in the instant appeal asserting that employer is estopped from raising the issue of pneumoconiosis in this survivor's claim because: the existence of pneumoconiosis was found in the original miner's claim; was affirmed by the Board in *Hughes*, BRB No. 89-3328 BLA, *slip op.* at 2 n.2; and was unchallenged by employer.

In its prior decision on the survivor's claim, the Board noted that Judge Guill, in his 1992 decision on the miner's claim, applied the principle of "true doubt" to determine that the x-ray evidence established the existence of pneumoconiosis based on the controlling law at that time. *Hughes*, BRB No. 01-0951 BLA *slip op*. at 3. The Board noted, however, that subsequent to that decision the principle of true doubt was held to be invalid by the United States Supreme Court in 1994 in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251 (1994), *aff'g sub. nom., Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993), and the standard for establishing the existence of pneumoconiosis was changed by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Compton*, 211 F.3d 204, 22 BLR 1-162, which now requires that all relevant evidence at Section 718.202(a)(1)-(4) be weighed together in determining whether the existence of pneumoconiosis is established. Accordingly, the Board held, in light of those decisions, that Judge Tierney properly found that the doctrine of collateral estoppel no longer precluded employer from relitigating the existence of pneumoconiosis in the survivor's claim, as there had been a change in the applicable burden of proof for establishing the existence of pneumoconiosis. *Hughes*, BRB No. 01-0951 BLA *slip op*. at 3; *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 was a change in the standard for determining how the existence of pneumoconiosis could be established, the issue of pneumoconiosis was no longer identical to the one litigated and the finding of pneumoconiosis made in the miner's claim could no longer serve to prevent employer from litigating the issue in the survivor's claim. Claimant's argument is, therefore, again rejected and we hold that the administrative law judge properly considered whether the existence of pneumoconiosis was established in this survivor's 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

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opportunity to litigate the issue. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-135 (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 judgment 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. *Hughes*, 21 BLR at 1-137.

Cir. 1992); *see also 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 x-ray evidence of record supports a finding of the existence of pneumoconiosis. Specifically, claimant asserts that the positive readings of Drs. Cole, Brandon and Morgan, all B-readers and/or board-certified radiologists,[6] support a finding of the existence of the disease. Claimant's Brief at 5. These assertions, however are tantamount to a request that we reweigh the evidence of record, a role outside our scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

In considering the x-ray evidence of record, the administrative law judge found that Judge Tierney had considered all of the x-ray evidence of record and found that it did not support a finding of the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 4. The administrative law judge noted that the Board affirmed that determination. *Id*; *see Hughes*, *slip op.* at 4. Incorporating by reference Judge Tierney's evidentiary summary, Decision and Order at 2, and reviewing the x-ray evidence, the administrative law judge found that the preponderance of the x-ray interpretations by physicians with the superior qualifications of B-reader and/or board-certified radiologist was negative for the existence of the disease and did not, therefore, establish the existence of the disease. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985). Accordingly, as that determination was reasonable and in accord with law, we affirm the administrative law judge's determination that claimant was unable to establish a mistake in determination of fact by establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Claimant next contends that the medical opinion evidence of record supports a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4) because it establishes the existence of legal pneumoconiosis. Claimant contends that the administrative law judge erred in failing to address all evidence relevant to the existence

[6] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

of the disease. In particular, claimant avers that the opinion of Dr. Rasmussen, who diagnosed the existence of diffuse interstitial fibrosis as a result of coal mine employment, Director's Exhibits 53, 59, was entitled to superior weight because Dr. Rasmussen actually examined the miner and his opinion was buttressed by that of Dr. Roberts, who, in examining the miner for Davis Memorial Hospital, diagnosed the presence of a chronic obstructive lung disease. Director's Exhibit 18.

In considering the medical opinion evidence, the administrative law judge found that Dr. Rasmussen's newly submitted medical opinion relied heavily on medical articles establishing a link between diffuse interstitital fibrosis and coal dust exposure. The administrative law judge found that the articles relied upon by Dr. Rasmussen were outweighed by the medical conclusions of Drs. Morgan, Renn and Fino, Director's Exhibits 61, 62, Employer's Exhibits 9, 11, 12, all of whom opined that there was no link between coal dust exposure and diffuse interstitial fibrosis. The administrative law judge concluded that the expertise of these three latter physicians "is at least as great, if not greater than that of Dr. Rasmussen." Decision and Order at 5. The administrative law judge further found that Dr. Rasmussen based his conclusion on "theoretical possibilities rather than the facts in this case." Decision and Order at 5. The administrative law judge further found that Dr. Rasmussen was equivocal when he stated that pneumoconiosis could not be excluded and that the x-ray evidence of record was consistent with a non-occupational disease. The administrative law judge also observed that Dr. Rasmussen conceded that the basis of his diagnosis rested solely on the medical literature he reviewed and his own expertise as a physician. The administrative law judge found the opinions of Drs. Morgan, Fino and Renn entitled to superior weight as their opinions were well-reasoned and were based on factors specifically related to the miner's condition. Decision and Order at 5. In addition, the administrative law judge noted that Judge Tierney discredited the opinion of Dr. Reynolds, diagnosing the existence of coal workers' pneumoconiosis, because the doctor did not provide specific rationale for his conclusions; discredited the opinion of Dr. Roberts concerning the existence of coal workers' pneumoconiosis because the doctor did not explain his conclusions; and lastly, discredited the earlier opinion of Dr. Ramussen because the doctor had not reviewed more recent evidence. Decision and Order at 4. The administrative law judge noted that the Board had affirmed Judge Tierney's bases for discrediting these opinions and affirmed the finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Hughes*, BRB No. 01-0951 BLA, *slip op.* at 5. The administrative law judge also noted that Judge Tierney had accorded superior weight to the opinions of Drs. Renn, Morgan and Fino, that the miner did not suffer from pneumoconiosis or any disease arising out of coal mine employment. The administrative law judge concluded that none of Judge Tierney's conclusions constituted mistakes in determinations of fact. Decision and Order at 4.

We are not persuaded by claimant's assertions and we hold that the administrative law judge's determination that the evidence of record does not support a finding of the existence of pneumoconiosis at Section 718.202(a)(4) is supported by substantial evidence. It is, therefore, affirmed. The administrative law judge rationally called into question Dr. Rasmussen's conclusions because of the equivocal nature of his diagnoses. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Moreover, the administrative law judge permissibly found the opinions of Drs. Morgan, Renn and Fino entitled to superior weight as they were better reasoned and more focused on the miner's specific condition. *See Compton*, 211 F.3d 203, 22 BLR 2-162; *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); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We further note that, contrary to claimant's assertions, the administrative law judge considered all of the evidence relevant to the existence of pneumoconiosis together. We, therefore, affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and we affirm his determination that the overall weight of the evidence does not support a finding of the existence of the disease, *see Compton*, 211 F.3d 203, 22 BLR 2-162. We, therefore, affirm his denial of claimant's request for modification as claimant has failed to establish a mistake in a prior determination of fact, *i.e.*, that the miner did not suffer from pneumoconiosis. *See Jessee*, 5 F.3d 723, 18 BLR 2-26. Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, *see Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2, entitlement is precluded and we need not address claimant's assertions regarding the cause of the miner's death. *See Trumbo*, 17 BLR 1-85.

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