BRB Nos. 98-1246 BLA

TROY L. FRAZIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Myers N. Massengill (Massengill, Caldwell & Hyder, P.C.), Bristol, Tennessee, for claimant.

Edward Waldman (Henry L. Solano, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1200) of Administrative Law Judge Thomas M. Burke denying benefits 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). This case is on appeal before the Board for the fourth time. In his initial Decision and Order issued on January 27, 1989, Administrative Law Judge Giles J. McCarthy credited claimant with eight years of qualifying coal mine employment, and found the evidence insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's findings regarding the length of claimant's coal mine employment, and affirmed his denial of benefits pursuant to

20 C.F.R. Part 410, Subpart D. The Board remanded the case to the administrative law judge, however, for consideration of entitlement pursuant to 20 C.F.R. §410.490, and instructed him to reconsider the x-ray evidence of record and determine whether it was subject to the rereading prohibition at Section 413(b) of the Act, 30 U.S.C. §923(b). *Frazier v. Director, OWCP*, BRB No. 89-0515 BLA (Oct. 30, 1990)(unpublished).

On remand, the administrative law judge determined that the rereading prohibition at Section 413(b) of the Act, 30 U.S.C. §923(b), was inapplicable because the evidence did not demonstrate the existence of a significant and measurable pulmonary impairment. The administrative law judge found that claimant established invocation of the presumption pursuant to 20 C.F.R. §410.490(b)(1)(i), but further found rebuttal established pursuant to 20 C.F.R. §410.490(c), and consequently denied benefits.

On the second appeal, the Board vacated the administrative law judge's finding of invocation at Section 410.490(b)(1)(i), and remanded the case for consideration of whether the weight of the evidence established complicated pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and whether pneumoconiosis, if established, arose out of coal mine employment. The Board also vacated the administrative law judge's finding of rebuttal at Section 410.490(c)(2), and instructed him to consider rebuttal pursuant to the provisions at 20 C.F.R. §727.203(b) if, on remand, invocation was established. *Frazier v. Director, OWCP*, BRB No. 91-2107 BLA (Sep. 29, 1993)(unpublished).

On remand, this case was assigned to Administrative Law Judge Daniel L. Stewart. In a Decision and Order issued on March 9, 1994, the administrative law judge found the evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), or invocation pursuant to Section 410.490, and thus denied benefits.

On the third appeal, the Board vacated the administrative law judge's findings pursuant to Section 410.490(b)(1)(i) because he improperly relied on the C-reader status of Drs. Felson and Wiot in finding the weight of the x-ray evidence negative for simple and complicated pneumoconiosis. The Board remanded the case for reconsideration of the x-ray evidence, and instructed the administrative law judge to determine whether pneumoconiosis, if established, arose out of coal mine employment and, if so, whether rebuttal was established pursuant to Section 727.203(b). *Frazier v. Director, OWCP*, BRB No. 94-2292 BLA (Mar. 14, 1995)(unpublished).

On remand, the administrative law judge issued an Order on June 20, 1995, remanding the case to the district director for the purpose of allowing the parties to submit new medical evidence. Following the development of evidence, the case was forwarded to the Office of Administrative Law Judges, and assigned to Administrative Law Judge Thomas M. Burke for

hearing. In a Decision and Order issued on May 20, 1998, the administrative law judge found the evidence insufficient to establish invocation pursuant to Section 410.490 or entitlement pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied.

In the present appeal, claimant challenges the administrative law judge's readjudication of the issue of simple pneumoconiosis and his discounting of Dr. Robinette's opinion. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of benefits.[1]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially contends that the doctrine of collateral estoppel precludes relitigation of the issue of simple pneumoconiosis, previously decided in claimant's favor in the Decision and Order issued by Judge McCarthy on August 12, 1991, and that the administrative law judge exceeded the scope of the Board's 1993 and 1995 remand orders. We disagree. 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 estoppel is asserted had a full and fair opportunity to litigate. *See Ramsay v. INS*, 14 F.3d 206 (4th Cir. 1994). In the present case, inasmuch as Judge McCarthy's 1991 Decision and Order does not constitute a final judgment, the doctrine of collateral estoppel is not applicable. *See Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Ramsey, supra*. The Director also correctly notes that Judge McCarthy's 1991 finding of simple pneumoconiosis was based on the "true doubt" rule, *see* Director's Exhibit 71, which was subsequently overturned, *see 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), thus precluding application of the "law of the case" doctrine. *See Richardson v.*

[1] The administrative law judge's finding that the record contained no biopsy or autopsy evidence, and his finding that the results of the pulmonary function studies and blood gas studies of record exceeded the table values at 20 C.F.R. Part 410, Subpart D, are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

United States, 841 F.2d 993 (9th Cir. 1988). Moreover, the Decisions and Orders issued by the Board on September 29, 1993, and March 14, 1995, vacated the administrative law judge's findings at Section 410.490(b)(1)(i) for reconsideration of the x-ray evidence of record and a determination of whether simple and/or complicated occupational pneumoconiosis was established. *See* Director's Exhibits 79, 92. Thus, Administrative Law Judge Burke properly readjudicated the issue of simple pneumoconiosis.

Claimant next asserts that Dr. Robinette's report of September 1, 1995, is reasoned and documented, and contends that the administrative law judge provided invalid reasons for discounting Dr. Robinette's diagnosis of pneumoconiosis and his positive x-ray interpretations of a film taken on August 10, 1995. Claimant's arguments are without merit. In evaluating the x-ray evidence relevant to complicated pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and to simple pneumoconiosis pursuant to Section 410.490(b)(1)(i), the administrative law judge permissibly credited the negative interpretations of Dr. Sargent, based on his superior radiological credentials as a dually qualified Board-certified radiologist and B-reader, over the positive interpretations of Dr. Robinette, a B-reader. Decision and Order at 7; *see generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). In finding the weight of the medical opinions of record insufficient to establish the existence of pneumoconiosis pursuant to Section 410.414(c), the administrative law judge acted within his discretion as trier-of-fact in finding that Dr. Robinette's diagnosis of "probable" pneumoconiosis[2] was neither well-reasoned nor persuasive because the physician did not explain his diagnosis in light of claimant's remote history of coal mine employment as compared to claimant's extensive

[2] We reject claimant's argument that the administrative law judge erroneously determined that Dr. Robinette's diagnosis was equivocal. While claimant asserts that Dr. Robinette ultimately concluded "it is my medical opinion that Mr. Frazier does have an occupational pneumoconiosis consistent with his prior coal dust exposure," Director's Exhibit 102 at 4, the administrative law judge accurately summarized the physician's report, Decision and Order at 11, noting the impression of "probable coal workers' pneumoconiosis with a profusion abnormality of 1/0, predominant Q/T opacities with a category A mass in the left upper lung," Director's Exhibit 102 at 3, which the administrative law judge reasonably concluded was speculative. Decision and Order at 12; *see generally Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The Director additionally notes that Dr. Robinette's conclusions are undermined by the fact that the physician apparently based his opinion primarily on his positive x-ray interpretation, which was reread as negative by a better qualified physician. *See generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

smoking history.[3] Decision and Order at 12; *see generally Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). While noting that Drs. Robinette and Taylor provided the most recent medical opinions of record, the administrative law judge permissibly accorded Dr. Swann's contrary opinion, dated December 16, 1987, determinative weight because he found it better supported by the objective evidence of record. Decision and Order at 12-13; *see generally King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Inasmuch as claimant has not challenged the administrative law judge's evaluation and weighing of the remaining relevant evidence of record, we affirm the administrative law judge's findings pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3); Section 410.490(b)(1)(i); and Section 410.414(c), as supported by substantial evidence and in accordance with law. Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits pursuant to 20 C.F.R. §410.490 and 20 C.F.R. Part 410, Subpart D.[4]

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[3] The administrative law judge determined that claimant established eight years of qualifying coal mine employment ending in 1954, and smoked from one to two packs of cigarettes per day for fifteen to twenty-five years, which Dr. Taylor recorded as ending in 1974. Decision and Order at 11-12.

[4] We reject the Director's argument that adjudication pursuant to 20 C.F.R. Part 718 is appropriate where entitlement is not established under the interim presumption. Director's Brief at 8-9. Inasmuch as this case arises within the jurisdiction of the United States Court of

Lastly, claimant maintains that new evidence exists that was not available at the time of the hearing before Judge Burke, and claimant argues that remand is appropriate for consideration of this evidence. Contrary to claimant's arguments, however, the Director accurately notes that claimant must file a request for modification pursuant to 20 C.F.R. §725.310 with the district director in order for any new evidence to be considered. *See Lee v. Consolidation Coal Co.*, 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

Appeals for the Fourth Circuit, adjudication pursuant to 20 C.F.R. Part 410, Subpart D is proper for all claims, such as this, filed before March 31, 1980, where entitlement pursuant to 20 C.F.R. Part 727 is not established. *Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981). We also reject the Director's argument that because the Board affirmed Judge McCarthy's 1989 finding that entitlement was not established under Part 410, Subpart D, the issue of entitlement thereunder was not properly before Judge Burke. Director's Brief at 8. Pursuant to Judge Stewart's June 20, 1995, Order of Remand, new evidence was developed before the district director and admitted into the record at the hearing before Judge Burke, who was then obligated to readjudicate the merits pursuant to all applicable regulations.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge