BRB Nos. 99-0314 BLA
and 99-0314 BLA-A

HAROLD L. TERRY	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
HOBET MINING, INC.	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
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 Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1383) of Administrative Law Judge Daniel F. Sutton awarding 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 has a lengthy procedural history. In a Decision and Order issued on April 18, 1989, Administrative Law Judge Richard E. Huddleston credited claimant with twenty-six years of qualifying coal mine

employment, and adjudicated claimant's original claim, filed on July 1, 1980, pursuant to the provisions at 20 C.F.R. Part 718. Judge Huddleston found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1), 718.203(b), but insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Director's Exhibit 35.

On appeal, the Board affirmed Judge Huddleston's denial of benefits, and thus did not reach employer's arguments on cross-appeal regarding the length of claimant's qualifying coal mine employment. *Terry v. Hobet Mining, Inc.*, BRB Nos. 89-1650 BLA and 89-1650 BLA-A (Dec. 19, 1990)(unpub.). Claimant took no further action until the filing of the instant claim for benefits on October 18, 1993.

In a Decision and Order issued on October 4, 1995, Administrative Law Judge Edward Terhune Miller determined that the present claim was subject to the duplicate claim provisions at 20 C.F.R. §725.309, and found that claimant failed to establish a material change in conditions thereunder inasmuch as the weight of the new evidence was insufficient to establish total respiratory disability at Section 718.204(c). Consequently, Judge Miller denied benefits. Director's Exhibit 58.

On November 30, 1995, claimant sought modification pursuant to 20 C.F.R. §725.310 with the district director. Director's Exhibit 63. Following the district director's denial of modification, claimant requested a formal hearing, and this case was forwarded to the Office of Administrative Law Judges and ultimately assigned to Administrative Law Judge Daniel F. Sutton. On March 11, 1998, the administrative law judge issued an order granting claimant's motion for partial summary judgment on collateral estoppel grounds with regard to the issues of length of coal mine employment, the existence of pneumoconiosis, and the etiology of the disease. Administrative Law Judge Exhibit 29. The administrative law judge also deferred ruling on claimant's motion to submit evidence post-hearing as premature, and denied employer's motion for a continuance of the hearing scheduled for March 25, 1998. *Id*.

In a Decision and Order issued on November 17, 1998, the administrative law judge found a change in conditions established pursuant to Section 725.310 based on new evidence of total respiratory disability at Section 718.204(c)(4), and further found that the evidence of record established disability causation at Section 718.204(b). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's findings pursuant to Sections 725.310, 718.204(b), (c)(4), and his finding that the doctrine of collateral estoppel is applicable to preclude employer from relitigating the

issue of the existence of pneumoconiosis. Employer additionally contends that the administrative law judge abused his discretion in declining to direct the court reporter to reissue the hearing transcript after correcting the mistakes therein as identified by employer. Claimant responds, urging affirmance of the award of benefits, and cross-appeals, challenging the administrative law judge's finding of no mistake in a determination of fact pursuant to Section 725.310. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

Turning first to the procedural issue, employer initially contends that the administrative law judge erred in failing to require the court reporter to reissue the hearing transcript after substituting the medical term "bleb" for the incorrect term "blob" as reported in multiple places therein. We disagree. The administrative law judge is accorded broad discretion in resolving procedural matters, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989), and the applicable regulations require merely that the hearing be mechanically or stenographically reported, with all evidence upon which the administrative law judge relies for decision to be contained in the transcript of testimony, which must be printed and delivered to the administrative law judge. *See* 20 C.F.R. §§725.464, 725.475. In the present case, the administrative law judge reasonably determined that reissuance of the hearing transcript was unnecessary and instead treated employer's request as a motion to correct the transcript, which the administrative law judge granted by ordering that "blob" shall be read as "bleb" wherever it appears in the transcript. Decision and Order at 6. Inasmuch as employer has provided no authority in support of its position, and we discern no abuse of the administrative law judge's discretion, we reject employer's arguments. *Clark*, *supra*.

[1] The administrative law judge's finding that the new evidence of record is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(3) is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant and employer next maintain that the administrative law judge's analysis at Section 725.310, in finding that claimant did not establish a mistake in a determination of fact, does not comport with the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Employer also challenges the administrative law judge's finding that the evidence submitted in support of modification establishes total respiratory disability at Section 718.204(c)(4) and thus establishes a change in conditions at Section 725.310. We agree with the argument of claimant and employer that the administrative law judge applied an incorrect legal standard in determining whether modification was appropriate pursuant to Section 725.310.

In the present case, the administrative law judge reviewed Judge Miller's findings on the issue of total respiratory disability and found that Judge Miller "clearly considered all of the evidence...and determined that the weight of the credible evidence did not establish that the Claimant is totally disabled." Decision and Order at 22. The administrative law judge then concluded that although new evidence submitted subsequent to Judge Miller's denial established a deterioration in claimant's condition since July 1995, he was "not persuaded upon consideration of all the evidence that there was any mistake of fact in Judge Miller's determination that a preponderance of credible evidence did not establish total disability." Decision and Order at 23. The instant case, however, involves a request for modification from a denial of benefits in a duplicate claim, thus the proper issue before the administrative law judge is whether the evidence submitted in support of modification and the evidence before Judge Miller, as evaluated by the administrative law judge *de novo*, establishes a material change in conditions pursuant to Section 725.309 since Judge Huddleston's denial of claimant's original claim. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998). We therefore vacate the administrative law judge's findings pursuant to Section 725.310 and remand this case for a determination of whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to Section 725.309 under the applicable standard as articulated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *cert. denied*, 519 U.S. 1090 (1997). If, on remand, the administrative law judge finds a material change in conditions established, he must then adjudicate the merits of this duplicate claim based on his assessment of the entirety of the evidentiary record.

Employer next contends that under the facts of this case, the doctrine of collateral estoppel is not applicable to preclude employer from relitigating the issue of the existence of pneumoconiosis. We agree. In cases where a final and valid prior judgment exists, collateral estoppel, or issue preclusion, forecloses the

relitigation of issues of fact or law that are identical to issues which were actually determined and necessarily decided in the prior litigation wherein the party against whom estoppel is asserted had a full and fair opportunity to litigate. *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 v. INS*, 14 F.3d 206 (4th Cir. 1994). In the present case, inasmuch as benefits were ultimately denied in claimant's original claim, the doctrine of collateral estoppel is not applicable because Judge Huddleston's finding that claimant had pneumoconiosis, based on the weight of the x-ray evidence, was not necessary to support the unfavorable judgment. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). Additionally, relitigation of an issue is not precluded where the party against whom the doctrine of collateral estoppel is invoked had a heavier burden of persuasion on that issue in the first action than in the second, or where his adversary has a heavier burden in the second action than he did in the first. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.3d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). Similarly, a difference in the applicable legal principles or substantive standards of proof pertaining to the two proceedings, where the difference undermines the rationale of the doctrine, may defeat the use of collateral estoppel. *Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18, 31 BRBS 109 (CRT)(1st Cir. 1997). In the present case, in weighing the conflicting x-ray evidence, Judge Huddleston applied the "true doubt" rule, 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 claimant's burden of proof was lighter in the original claim, and application of the doctrine of collateral estoppel is barred. Consequently, if on remand the administrative law judge finds a material change in conditions established at Section 725.309, he must readjudicate the issue of the existence of pneumoconiosis.

Employer next challenges the administrative law judge's conclusion that the new evidence establishes total respiratory disability pursuant to Section 718.204(c)(4). Specifically, employer maintains that the administrative law judge selectively and inconsistently analyzed the conflicting medical opinions, and provided invalid reasons for discounting the opinions of Drs. Zaldivar, Hippensteel and Crisalli that claimant did not suffer a totally disabling respiratory impairment. Employer additionally asserts that the administrative law judge failed to weigh the contrary probative evidence together, like and unlike, at Section 718.204(c)(1)-(4), pursuant to *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Employer's arguments have merit. The administrative law judge accorded little weight to Dr.

Zaldivar's opinion on the ground that the physician did not discuss the impact of claimant's recurrent pneumothoraces and the degree of impairment reflected in the results of the more recent pulmonary function studies and blood gas studies on claimant's ability to meet the exertional demands of his last coal mine job, but instead based his conclusions on the results of Dr. Crisalli's September 1994 pulmonary function study. Decision and Order at 23-24. Contrary to the administrative law judge's findings, however, Dr. Zaldivar explained at the hearing that the pulmonary function studies and blood gas studies conducted subsequent to September 1994 did not validly measure the extent of any permanent respiratory impairment because they were obtained before claimant fully recovered from the effects of his pneumothoraces, which Dr. Zaldivar discussed at length. Hearing Transcript at 107-116. The administrative law judge also determined that "Dr. Hippensteel is the only physician to challenge the validity of the September 28, 1995 [sic][2] pulmonary function study and...his opinion that this study should not be used as evidence of disability is specifically contradicted by Dr. Fino's reliance on the results of the study." Decision and Order at 24. A review of the record reveals, however, that Dr. Zaldivar testified at the hearing that this study was invalid, Hearing Transcript at 107, and Dr. Marciales, who conducted the test, indicated that claimant was "unable to perform this PFT, he did not complete a single test....[h]e complained of pain in the center of his back and refused any further testing." Claimant's Exhibit 23 at 11. Moreover, the administrative law judge provided no reason for crediting Dr. Fino's reliance on the test over Dr. Hippensteel's invalidation.[3] The administrative law judge also indicated that while Dr. Hippensteel suggested that pain can affect the validity of a diffusing capacity study, no physician of record opined that the diffusing capacity tests administered to claimant were not valid. Decision and Order at 24. Employer correctly notes, however, that the administrative law judge did not weigh the conflicting opinions regarding the significance of these tests in determining the extent of claimant's respiratory disability. Additionally, the administrative law

[2] As the record does not contain a pulmonary function study dated September 28, 1995, it appears that the administrative law judge intended to refer to the study obtained on August 28, 1995.

[3] Although employer additionally argues that Dr. Hippensteel cannot be faulted for relying on claimant's own description of his job duties and concluding that they involved merely occasional heavy labor, Employer's Brief at 9-10, the administrative law judge permissibly gave less weight to the opinion on the ground that Dr. Hippensteel did not have an accurate understanding of the exertional requirements of claimant's usual coal mine employment, which regularly included heavy manual tasks. Decision and Order at 24; *see generally McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984).

judged discounted the opinion of Dr. Crisalli on the ground that the physician identified no objective support for his opinion that claimant was not totally disabled,[4] and then credited the opinions of Drs. Doyle, Rasmussen, Cohen and Fino, Decision and Order at 24, without explaining why he found that these opinions were well reasoned and supported by the objective evidence of record,[5] thereby failing to satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). *See Collins v. J & L Steel*, 21 BLR 1-181 (1999). Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(c)(4) for a reevaluation on remand of the medical opinions and their underlying documentation in accordance with the principles enunciated by the Fourth Circuit in *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), and, if he finds total respiratory disability established at Section 718.204(c)(4), for a weighing of the contrary probative evidence together, like and unlike, at Section 718.204(c)(1)-(4) pursuant to *Fields*, *supra*.

[4] Employer accurately notes, however, that Dr. Crisalli reviewed pulmonary function studies and blood gas studies and concluded that they showed only a mild degree of impairment. Employer's Exhibits 4, 8; *see* Decision and Order at 21.

[5] Inasmuch as the administrative law judge found that the weight of the objective evidence of record was non-qualifying, and multiple physicians challenged the validity and/or significance of various tests, the administrative law judge must assess the reliability of the objective evidence before evaluating the quality of the physicians' reasoning. *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); *Collins v. J & L Steel*, 21 BLR 1-181 (1999).

Lastly, employer challenges the administrative law judge's finding that claimant established disability causation at Section 718.204(b). Inasmuch as the administrative law judge must reevaluate the medical opinions of record at Section 718.204(c)(4) and readjudicate the issue of the existence of pneumoconiosis, and his findings on remand may impact upon his evaluation of the evidence relevant to disability causation, we also vacate his findings at Section 718.204(b) for the administrative law judge to reassess the medical opinions thereunder and determine whether claimant's pneumoconiosis was a contributing cause of his totally disabling respiratory impairment, if established, consistent with *Robinson v. Pickands Mather & Co.*, 914 F.2d 790, 14 BLR 2-68 (4th Cir. 1990); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hicks*, *supra*.[6]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

[6] We note employer's argument that the administrative law judge unreasonably required Drs. Zaldivar, Fino and Hippensteel to provide references to supporting studies or medical literature to support the various medical principles they expressed, rather than relying on their medical expertise as reflected in their qualifications. Employer's Brief at 20. While we agree that a pulmonary expert need not supply such references, in the present case we find no error in the administrative law judge's determination that the contrary opinion of Dr. Koenig, a physician with comparably impressive credentials, was more persuasive because Dr. Koenig cited extensive medical literature which buttressed his opinion. On remand, however, the administrative law judge must evaluate all the medical opinions in accordance with *Akers*, *supra*; *Hicks*, *supra*.

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge