BRB No. 99-0595 BLA

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

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Joseph M. Cosgrove, Forty Fort, Pennsylvania, for claimant.

Sarah M. Hurley (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, the United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1650) of Administrative Law Judge Ralph A. Romano 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 involves claimant's request for modification of the denial of his duplicate claim. Claimant filed his original claim for benefits on June 29, 1973. Director's Exhibit 15. This claim was denied by Administrative Law Judge Frank J. Marcellino in a Decision and Order issued on March 26, 1985, finding that although claimant had established the existence of

pneumoconiosis pursuant to 20 C.F.R. §410.414(a), claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R.§410.414(c). Director's Exhibit 15. Claimant filed a second claim for benefits on October 5, 1988. Director's Exhibit 1. Administrative Law Judge Frank D. Marden credited claimant with eight years of coal mine employment, and found Judge Marcellino's finding regarding the existence of pneumoconiosis to be *res judicata.* The administrative law judge further found that claimant failed to establish total disability due to pneumoconiosis, and thus, had failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. Director's Exhibit 32. On appeal, the Board affirmed the denial of benefits. *Mullery v. Director, OWCP,* BRB No. 93-1276 BLA (May 27, 1994)(unpub.). Claimant filed a request for modification on May 25, 1995. Director's Exhibit 41. Based on the Director's, Office of Workers' Compensation Programs (the Director), concession that claimant was now totally disabled, Judge Romano found that a material change in condition had been established pursuant to Section 725.309(d) and reviewed the entire record *de novo* to determine whether claimant was entitled to benefits. The administrative law judge found the doctrine of *res judicata* inapplicable to the instant case, and further found that the evidence of record failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred by failing to apply the doctrine of *res judicata* to the issue of the existence of pneumoconiosis at Section 718.202(a). Alternatively, claimant contends that the issue of the existence of pneumoconiosis has been conceded, and that the administrative law judge erred by failing to find this element established based on the opinion of his treating physician. The Director, responds urging affirmance of the denial of benefits.

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 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 be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest,* 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987);

Perry v. Director, OWCP, 9 BLR 1-1 (1986)(*en banc*).[1] Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra.*

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

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order denying benefits is supported by substantial evidence and contains no reversible error herein. Claimant initially contends that the administrative law judge erred in addressing the issue of the existence of pneumoconiosis as Judge Marcellino had previously determined that claimant had established the presence of the disease. Collateral estoppel, or issue preclusion,[2] refers to the effect of a judgment in foreclosing relitigation in a subsequent action, of an issue of law or fact that has been fully litigated and decided in the initial action. *See United Coal Mining Co. v. Director, OWCP [Forsythe],* 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). To successfully invoke collateral estoppel, the party asserting it must establish the following criteria:

(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
(2) determination of the issue must have been necessary to the outcome of the prior proceeding;
(3) the prior proceeding must have resulted in a final judgment on the merits; and
(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

See Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., Ltd., 63 F.3d 1227 (3d Cir. 1995); *O'Leary v. Liberty Mutual Insurance Co.,* 923 F.2d 1062 (3d Cir. 1991); *N.A.A.C.P., Detroit Branch v. Detroit Police Officers Association,* 821 F.2d 328 (6th Cir. 1989); *Virginia Hospital Association v. Baliles,* 830 F.2d 1308 (4th Cir. 1987), *appeal after remand* 868 F.2d 653, *reh'g denied, certiorari granted in part* 110 S.Ct. 49 (1989), *aff'd Wilder v. Virginia Hospital Association,* 110 S.Ct. 2510 (1990); *Forsythe, supra; see also Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).

Applying these principles to the facts of this case, we hold that the administrative law judge properly addressed the existence of pneumoconiosis in the present claim. In the original claim, Judge Marcellino issued a Decision and Order in

[2]Claimant's brief erroneously refers to the doctrine of *res judicata*, or claim preclusion, rather than collateral estoppel, or issue preclusion, which is asserted herein.

which he denied benefits after finding that claimant had established the presence of pneumoconiosis, but failed to establish total disability at 20 C.F.R. Part 410, Subpart D. Claimant did not appeal this denial, hence the Director was precluded from seeking review of the finding of the existence of pneumoconiosis as there no longer existed a case or controversy sufficient to invoke appellate jurisdiction. *See* 20 C.F.R. §802.201(a); *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 110 S.Ct. 1249 (1990). Therefore, the application of collateral estoppel is precluded as the existence of pneumoconiosis was not essential to the denial of benefits in the original claim, and the Director did not have a full and fair opportunity to litigate the issue in the prior proceeding since the miner did not appeal the judgment. Thus, we affirm the administrative law judge's determination to consider the issue of the existence of pneumoconiosis pursuant to Section 718.202(a). *Hughes v. Clinchfield Coal Company,* 21 BLR 1-134 (1999); *Sellards v. Director, OWCP,* 17 BLR 1-77 (1993).

Claimant also contends that the administrative law judge erred by failing to find that the Director conceded the issue of the existence of pneumoconiosis at the original hearing. The record indicates that the hearing on the original claim was held on December 11, 1984. At the beginning of the hearing, the Director indicated that the presence of pneumoconiosis was at issue. 1984 Hearing Transcript at 16. During the Director's closing argument, he pointed out that the latest evidence which claimant had submitted into evidence included a positive x-ray reading, and the report of Dr. Levinson which diagnosed the presence of simple pneumoconiosis and hypertension. 1984 Hearing Transcript at 95. At no time however, does the hearing transcript indicate that the Director knowingly conceded the issue of the presence of pneumoconiosis. Moreover, the record clearly indicates that the Director contested the issue of the existence of pneumoconiosis at every stage of the subsequent proceedings. Director's Exhibits 27, 51. Accordingly, we reject claimant's contention that the Director conceded this issue.

Claimant further contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.202(a)(4).[3] Specifically, claimant asserts that the administrative law judge erred by failing to credit the opinion of his treating physician, Dr. Aquilina, as this physician would have been most familiar with claimant's condition. The record indicates that Dr. Aquilina, a board-certified anesthesiologist, diagnosed totally disabling pneumoconiosis.

[3]The administrative law judge's findings pursuant to Section 718.202(a)(1)-(3), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Director's Exhibits 15, 33, 48. The record also contains the report of Dr. Karetzky, a board-certified pulmonologist, diagnosing bronchitis, hypertension, and an obstructive ventilatory defect due to coal mine employment, and that of Dr. Levinson also a board-certified pulmonologist, who diagnosed coal workers' pneumoconiosis in his 1984 report. Dr. Levinson also submitted reports in 1988 and 1991, diagnosing only hypertension and obesity. Director's Exhibits 6, 15, 22. Finally, the record contains the opinions of Drs. Spagnolo and Talati, who are both board-certified in internal medicine with a sub-speciality in pulmonary diseases, who found no evidence of coal workers' pneumoconiosis. Director's Exhibits 48, 56. The administrative law judge considered all the aforementioned medical reports, and rationally accorded greater weight to the opinions of Drs. Spagnolo and Talati that claimant does not have pneumoconiosis, due to their superior qualifications as board-certified physicians in internal medicine and pulmonary diseases, and he found their opinions well reasoned and documented. *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP,* 8 BLR 1-139(1985). Contrary to claimant's contention, the administrative law judge rationally found Dr. Aquilina's opinion insufficient to establish the existence of pneumoconiosis since Dr. Aquilina's diagnosis was based on x-rays that were reread as negative by more qualified physicians, and his report failed to provide an adequate rationale for its conclusions. *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989); *Tackett v. Cargo Mining Co.,* 12 BLR 1-11 (1988). Moreover, the administrative law judge is not required to accord determinative weight to the opinion of claimant's treating physician, although that is a factor which may be considered in weighing the medical evidence. *See Mancia v. Director, OWCP,* 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Schaaf v. Matthews,* 574 F.2d 160, (3d Cir. 1978); *Tedesco v. Director, OWCP,* 18 BLR 1-104 (1994); *Wetzel, supra*. Since the Decision and Order clearly indicates that the administrative law judge credited the reports of Drs. Spagnolo and Talati as better reasoned, based on their superior qualifications, a finding which is within the administrative law judge's discretion, we hold that substantial evidence supports the finding that claimant failed to establish the existence of pneumoconiosis. *Trumbo, supra.* Accordingly, we affirm the findings at Section 718.202(a).

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *see Maypray v. Island Creek Coal Co.,* 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge