BRB No. 05-0821 BLA

HAZEL TILLEY (Widow of and o/b/o MACK TILLEY) Claimant-Petitioner v. RANGER FUEL CORPORATION and PITSTON COMPANY Employer/Carrier- Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/30/2006 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Douglas Smoot (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (04-BLA-5169 and 04-5170) of Administrative Law Judge Jeffrey Tureck on both a miner's subsequent claim and 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] In a Decision and Order dated June 27, 2005, the administrative law judge credited the miner with fourteen years of coal mine employment,[3] as stipulated by the parties, and after considering all the evidence of record, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and therefore, insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on both the miner's and the survivor's claims.

On appeal, claimant contends that the existence of pneumoconiosis had been established in the miner's prior claim. Claimant asserts that in re-adjudicating the issue

[1] Claimant is the widow of the miner, Mack Tilley. Director's Exhibit 2. The miner filed his initial claim for benefits on March 16, 1981, which was denied by the district director on August 17, 1981 on the ground that the evidence of record failed to establish either the existence of pneumoconiosis, or a totally disabling respiratory impairment. Director's Exhibit 1. On February 2, 1987, the miner filed a second, duplicate claim, which was denied on June 12, 1990 by Administrative Law Judge Eric Feirtag, who found that the miner had established the existence of pneumoconiosis, but failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2. The denial of benefits was affirmed by the Benefits Review Board, and by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises. The miner filed the current, subsequent claim on February 9, 2001, but died on July 9, 2001, before its final resolution. Director's Exhibits 4, 11. On January 17, 2002, claimant filed a claim for survivor's benefits, and further indicated that she wished to pursue the miner's claim on behalf of his estate. Director's Exhibit 2.

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

of the existence of pneumoconiosis, the administrative law judge erred in his analysis of the medical opinion evidence relevant to that issue pursuant to 20 C.F.R. §718.202(a)(4), and relevant to the issue of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In addition, claimant asserts that with respect to the existence of pneumoconiosis, the administrative law judge failed to weigh all of the relevant evidence together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response in this appeal.[4]

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, 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 be entitled to benefits under the Act in the miner's claim, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

To establish entitlement to survivor's benefits, pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d

[4] The administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414, his findings that the evidence establishes a fourteen year coal mine employment history, and his findings at 20 C.F.R. §718.202(a)(1)-(3) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

977, 16 BLR 2-90 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

On appeal, claimant initially contends that the administrative law judge erred in re-adjudicating the issue of the existence of pneumoconiosis, which was previously found established by Administrative Law Judge Eric Feirtag in a decision dated June 12, 1990. The administrative law judge found that because the existence of pneumoconiosis had been previously established based solely on the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and through application of the true doubt rule, which was subsequently invalidated by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), the doctrine of collateral estoppel does not apply to prevent re-adjudication of the existence of pneumoconiosis in the miner's claim or adjudication of the existence of pneumoconiosis in the survivor's claim.[5] *Sturgill v. Old Ben Coal Co.*, 22 BLR 1-314, 1-318-19 (2003); Decision and Order at 3. The administrative law judge was correct in holding that the doctrine of issue preclusion does not apply to either claim. Although the doctrine of collateral estoppel may apply in a survivor's claim, *e.g. Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002), the doctrine has no application when the law has significantly changed since the prior judgment. *Montana v. U.S.*, 440 U.S. 147, 153 (1979). Furthermore, 20 C.F.R. §725.309(d)(4) plainly states that the doctrine of *res judicata* cannot apply in the miner's subsequent claim unless the opposing party failed to contest the issue.

Claimant further asserts that in evaluating the medical opinion evidence as to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge erred in failing to credit the opinion of Dr. Larson, claimant's treating physician, over the contrary opinions of Drs. Zaldivar, Rosenberg, Castle and Fino. We disagree.

[5] In addition, we note that subsequent to the June 12, 1990 finding of pneumoconiosis by x-ray evidence alone, the United States Court of Appeals for the Fourth Circuit held that all types of relevant evidence under 20 C.F.R. §718.202(a)(1)-(4) must be weighed together to determine whether a preponderance of the evidence establishes the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000). The Board has recognized that, in addition to the change in law invalidating the true doubt rule, the change in the law in *Compton* also affects the fact-finder's weighing of the evidence, and has thus held, "the issue [of the existence of pneumoconiosis] is not identical to the one previously litigated" in a pre-*Compton* claim where, as here, the previous finding of pneumoconiosis was based on consideration of only one subsection of 20 C.F.R. §718.202(a). *Sturgill v. Old Ben Coal Co.*, 22 BLR 1-314, 1-318-19 (2003).

Reviewing the medical opinion evidence, the administrative law judge properly noted that in the two and one-half years before the miner's death, Dr. Larson, claimant's treating oncologist, listed pneumoconiosis as a diagnosis in numerous reports documenting the miner's treatment at Raleigh General Hospital and the Raleigh Regional Cancer Center. Director's Exhibits 11-12; Decision and Order at 5. The administrative law judge permissibly concluded, however, that as Dr. Larson's diagnosis is completely unexplained, it does not constitute credible medical evidence sufficient to establish the existence of pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-282 (1983); Director's Exhibits 11-12; Decision and Order at 5. The administrative law judge further permissibly found that the death certificate, also completed by Dr. Larson, similarly lacked any explanation for the conclusion that the miner's death was due to acute cardiac arrest, due to arteriosclerotic cardiovascular disease, due to pneumoconiosis and recent stress, with metastatic prostate cancer listed as a significant condition contributing to, but not resulting in, death. *Sparks*, 213 F.3d 186, 22 BLR 2-251; Director's Exhibit 9; Decision and Order at 6. The administrative law judge also acted within his discretion in according little weight to the only remaining report from Dr. Larson, a short note dated December 17, 2002, in which he stated that the miner had been his patient and "was known to have metastatic prostate cancer, bone metastases, COPD, Black Lung disease, marked hypoxemia." Director's Exhibit 12; Decision and Order at 6. The administrative law judge permissibly concluded that this report was of no probative value because, like Dr. Larson's prior reports, it provides no basis for the physician's conclusions that the miner had pneumoconiosis. *Clark*, 12 LR at 1-149; Director's Exhibit 12; Decision and Order at 6.

By contrast, the administrative law judge permissibly found the opinions of Drs. Zaldivar, Fino, Castle and Rosenberg, that claimant does not have pneumoconiosis, to be of greater probative value than that of Dr. Larson, because their conclusions were well reasoned and more consistent with the objective evidence of record, including the preponderance of the negative x-ray readings by better qualified readers and the negative CT scan interpretation. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-332, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-6 (4th Cir. 1997); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, contrary to claimant's arguments, the opinions of Drs. Zaldivar, Fino, Castle and Rosenberg were not based solely on negative x-rays, but were based on their review of all of the relevant medical evidence of record, including the negative CT scan, the objective test results and the physical examination results. The evaluation of the physicians' opinions is within the province of the administrative law judge. *Compton*, 211 F.3d at 211, 22 BLR at 2-174. As the administrative law judge properly considered all of the relevant medical evidence, and as his analysis of that evidence is supported by the record, we affirm the

administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4). *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n. 10, 21 BLR 2-587, 2-603 n. 10 (4th Cir 1999).

Finally, we reject claimant's assertion that the administrative law judge committed reversible error in failing to weigh together of all of the evidence relevant to the existence pneumoconiosis pursuant to *Compton*, 211 F.3d at 211, 22 BLR at 2-174, as the administrative law judge found that claimant failed to establish the existence of pneumoconiosis in any of the four categories available at Section 718.202(a)(1)-(4). The administrative law judge has exclusive power to make credibility determinations and resolve inconsistencies in the evidence, *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993), and the Board will not substitute its inferences for those of the administrative law judge, *Mays*, 176 F.3d at 753, 21 BLR at 2-587. As the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) is supported by substantial evidence and contains no reversible error, it is hereby affirmed. We therefore further affirm the administrative law judge's denial of benefits on the survivor's claim pursuant to 20 C.F.R. §718.205(c), *see Sparks*, 213 F.3d at 186, 22 BLR at 2-251; *Shuff*, 967 F.2d at 977, 16 BLR at 2-90; *Trumbo*, 17 BLR at 1-85, 1-87-88. Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement to benefits under Part 718, *see Gee. v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), an award of benefits is precluded in both the miner's and survivor's claims.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge