BRB No. 06-0624 BLA

KATHRYN S. BARKER (Widow of JAMES A. BARKER) Claimant-Respondent v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/28/2007 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

Michelle S. Gerdano (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-0511) of Administrative Law Judge Stephen L. Purcell rendered 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).[1] This case involves a survivor's claim filed on June 7, 2003. After crediting the miner with at least ten years of coal mine employment, the administrative law judge noted that employer conceded that the miner suffered from clinical pneumoconiosis. The administrative law judge also found that the evidence established that the miner suffered from legal pneumoconiosis. The administrative law judge further found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.[2]

On appeal, employer challenges the administrative law judge's designation of Dr. Oesterling's June 25, 2004 report as a medical report only and the administrative law judge's denial of employer's request to take the post-hearing deposition of Dr. Oesterling. Moreover, employer appeals the administrative law judge's determination that claimant was not collaterally estopped from establishing the existence of legal pneumoconiosis in this survivor's claim where it was not established in the miner's claim. Lastly, employer challenges the administrative law judge's findings that claimant established that the miner had legal pneumoconiosis at the time of his death and that the miner's death was due to pneumoconiosis. Claimant responds, urging affirmance. The Director has filed a limited response brief, contending that claimant was not collaterally estopped from relitigating the issue of legal pneumoconiosis in her claim.[3]

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[1] 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.

[2] In a Supplemental Decision and Order on Reconsideration dated May 1, 2006, the administrative law judge modified his award to reflect that benefits were payable from the date of the miner's death on January 22, 1999.

[3] The miner filed his claim on January 9, 1980, which was denied on October 31, 1989. Director's Exhibit 1. The miner subsequently requested modification on April 29, 1991, and his modification was finally denied on April 24, 1997. *Id*. In denying the miner's request for modification of the denial of his claim, Administrative Law Judge Frank D. Marden found that the evidence failed to establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Judge Marden had invoked the presumption that the miner was totally disabled due to pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R.

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).

Evidentiary Limitations

We first address employer's argument that the administrative law judge erred in holding that the evidence it submitted (the reports of Drs. Renn and Tuteur, dated February 11, 2005, and February 7, 2005, respectively, and their accompanying depositions dated April 7, 2005, and April 5, 2005, respectively, as well as Dr. Oesterling's June 25, 2004 report) exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414.[4]

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§727.203(a)(4)(2000), as stipulated by the parties, but found that employer had rebutted the presumption pursuant to 20 C.F.R. §727.203(b)(4)(2000). Upon review of claimant's appeal, the Board affirmed Judge Marden's denial of benefits after affirming his findings that employer had established that the miner did not have clinical or legal pneumoconiosis pursuant to Section 727.203(b)(4)(2000). *Barker v. Peabody Coal Co.*, BRB No. 96-0980 BLA (Apr. 24, 1997)(unpub.).

[4] Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted

At the hearing, claimant objected to employer's reports of Drs. Tuteur, Renn, and Oesterling, claiming that they exceeded the evidentiary limitations allowing for only two medical reports. Transcript at 13-14. Employer asserted that Dr. Oesterling's report was an autopsy report and not a medical report. *Id*. The administrative law judge did not resolve claimant's objection to employer's evidence at the hearing. *Id*. at 26-29.

In his July 21, 2005 order, the administrative law judge initially held that Dr. Oesterling's report was a medical report pursuant to 20 C.F.R. §725.414(a)(1) and not an autopsy report pursuant to 20 C.F.R. §§718.106(a), 725.414(a)(3)(i), because Dr. Oesterling reviewed the autopsy findings as well as additional medical evidence supplied to him by employer. The administrative law judge also held that Dr. Oesterling's review of the medical evidence, in addition to the autopsy and biopsy slides, took his report outside the purview of an autopsy report and placed it squarely within the medical report category. The administrative law judge then denied employer's request to conduct a post-hearing deposition of Dr. Oesterling since employer's counsel could have reasonably anticipated that Dr. Oesterling's report would be viewed as a medical report. The administrative law judge reasoned that the evidentiary limitations, implemented in 2001, were in effect long before Dr. Oesterling's 2004 report, and that employer's counsel had given no credible explanation as to why he thought the report was an autopsy report when it contained a review of medical evidence besides the autopsy and biopsy slides. Consequently, the administrative law judge ordered employer to designate which two of its three medical reports were its affirmative evidence, stating that the third report would be excluded. If Dr. Oesterling's report was not designated as one of the two medical reports offered by employer, the administrative law judge granted employer time to obtain supplemental statements from Drs. Renn and Tuteur as to whether their opinions would change if they did not consider Dr. Oesterling's report.

In his August 26, 2005 order, the administrative law judge addressed employer's argument that Dr. Oesterling's report was submitted in rebuttal to Dr. Heidingsfelder's autopsy report offered by claimant. The administrative law judge ruled that Dr. Oesterling's report was not properly classified as rebuttal evidence because his report was based on a review of multiple medical records, only one of which was Dr. Heidingsfelder's autopsy report. Thus, the administrative law judge held that Dr. Oesterling's report had to be excluded unless employer withdrew one of its two other medical reports.

On September 16, 2005, employer designated its affirmative evidence as the two medical reports of Drs. Oesterling and Tuteur, as well as Dr. Tuteur's deposition testimony. Because employer had reached its evidentiary limitations in designating the

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into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

two reports, it designated Dr. Renn's report and deposition testimony as an "offer of proof" pursuant to 29 C.F.R. §18.44(e). Employer also objected to the administrative law judge's denial of its request to take Dr. Oesterling's deposition post-hearing as a violation of its due process rights. Employer asserted that its designation of Dr. Oesterling's report as a medical report permitted employer to depose Dr. Oesterling post-hearing. In his September 22, 2005 order, the administrative law judge acknowledged receipt of employer's designation of the two medical reports of Drs. Oesterling and Tuteur, as well as Dr. Tuteur's deposition testimony, as its affirmative evidence. Dr. Renn's medical report and deposition testimony were not admitted into the record. The administrative law judge closed the record and ordered the parties to file briefs.

We hold that the administrative law judge erred in ruling that Dr. Oesterling's report could not be designated as an autopsy or autopsy rebuttal report. In *Keener v. Peerless Eagle Coal Co.*, BLR , BRB No. 05-1008 BLA (Jan. 26, 2007)(*en banc*), the Board held that, "in light of the comments to the regulations and the practical concerns surrounding the requirement for a detailed macroscopic description of the lungs," a physician's review of a miner's autopsy slides could constitute an employer's "affirmative report of an autopsy pursuant to [20 C.F.R.] Section 725.414(a)(3)(i)." *Keener*, slip op. at 6. Thus, we vacate the administrative law judge's determination that Dr. Oesterling's report is a medical report only, and remand this case to the administrative law judge for reconsideration of the designation of Dr. Oesterling's report. Employer withdrew Dr. Renn's February 11, 2005 report and April 7, 2005 deposition testimony based upon the administrative law judge's erroneous evidentiary ruling that Dr. Oesterling's June 25, 2004 report could not constitute an autopsy or autopsy rebuttal report for purposes of the evidentiary limitations. Employer is entitled to have an opportunity to select its affirmative and rebuttal evidence. Consequently, we vacate the administrative law judge's evidentiary orders dated July 21, 2005, August 26, 2005, and September 22, 2005. On remand, the administrative law judge is instructed to allow employer to designate the autopsy report that it wishes to submit in support of its affirmative case, as well as its two affirmative case medical reports. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006), *cert. denied*, 2007 WL 789094 (Mar. 19, 2007); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*). The administrative law judge is further instructed to allow employer to designate which physician's interpretation of claimant's autopsy evidence it wishes to submit as its rebuttal evidence.[5]

[5] Section 725.456(b)(1) provides that medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). Thus, if a party wishes to submit evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, it is required to make a showing of "good cause" for its submission. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006).

We also address employer's argument that the administrative law judge's denial of its request to depose Dr. Oesterling post-hearing was a violation of its due process rights. The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has recognized the general proposition that there can be no due process without the opportunity to be heard at a meaningful time and in a meaningful manner. *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 997, 23 BLR 2-302, 2-315 (7th Cir. 2005). In light of our holding that the administrative law judge erred in requiring that Dr. Oesterling's report be designated as a medical report in order to be admitted into evidence, we instruct the administrative law judge, on remand, to reconsider employer's request to conduct a post-hearing deposition of Dr. Oesterling.

Given our decision to remand the case to the administrative law judge to reconsider which evidence is admissible in this survivor's claim, we also vacate the administrative law judge's finding that the evidence establishes the existence of "legal pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(4). We similarly vacate the administrative law judge's finding that the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Collateral Estoppel

We next address employer's argument that claimant is collaterally estopped from establishing that the miner had legal pneumoconiosis, or chronic obstructive pulmonary disease arising out of his coal mine employment, at the time of his death. The Seventh Circuit has held that the normal rules of preclusion govern administrative proceedings in black lung cases. *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*), *modifying* 94 F.3d 369 (7th Cir. 1996). For collateral estoppel to apply in the present case, employer must establish that:

Because the amended regulations do not contain a provision regarding the appropriate treatment of admissible evidence that contains references to evidence excluded because it exceeds the evidentiary limitations set forth at 20 C.F.R. §725.414, the disposition of this issue is committed to the administrative law judge's discretion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting). If a physician references inadmissible evidence, the administrative law judge may exclude the report, redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. *Id.* Exclusion of evidence, however, is not the favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id.*

> 1) the issue sought to be precluded must be the same as that involved in the prior action; 2) the issue must have been actually litigated; 3) the determination of the issue must have been essential to the final judgment; and 4) the party against whom estoppel is invoked must be fully represented in the prior action.

Freeman United Coal Mining Co. v. OWCP [Forsythe], 20 F.3d 289, 293, 294, 18 BLR 2-189, 2-195 (7th Cir. 1994); *see also Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*). Collateral estoppel is "offensive" when a party seeks to foreclose the opposing party from litigating an issue that has been previously litigated, and it is "nonmutual" when the party seeking to rely on the earlier ruling was not a party to the earlier proceeding and is not in privity with a party. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 n. 4, 23 BLR 2-393, 2-401 n. 4 (4th Cir. 2006). With regard to the requirement that the party against whom estoppel is asserted have a full and fair opportunity to litigate the issue in the previous forum, the Board has held that a "full and fair opportunity" is not present where the applicable legal principles or standards of proof do not remain the same from the prior to the subsequent proceedings. *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-46 (1988).

In a pre-hearing order dated April 6, 2005, the administrative law judge denied employer's motion for summary judgment that collateral estoppel precluded the relitigation of the issue of legal pneumoconiosis. The administrative law judge reasoned that collateral estoppel was not applicable because claimant was not a party to the miner's claim and because of the autopsy exception, acknowledged by the Seventh Circuit in *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 334, 22 BLR 2-581, 2-586-2-587 (7th Cir. 2002). The administrative law judge denied employer's subsequent motion for reconsideration. *See* Decision and Order at 16 n.3.

We affirm the administrative law judge's finding that claimant was not collaterally estopped from establishing the existence of legal pneumoconiosis based on our holding in *Alexander*, 12 BLR at 1-46, 1-47. In *Alexander*, the Board affirmed the administrative law judge's finding that collateral estoppel did not apply where the miner's claim was adjudicated under 20 C.F.R. Part 727 and the survivor's claim was adjudicated under 20 C.F.R. Part 718 because the standards of proof in the two claims were different, although the issue of whether the miner was totally disabled due to pneumoconiosis arising out of his coal mine employment remained the same. Applying that same rationale, we hold that the finding that the miner did not have legal pneumoconiosis in his claim, adjudicated under Part 727, does not preclude claimant from establishing legal pneumoconiosis in her survivor's claim, adjudicated under Part 718. In this case, the burdens of proof were different in the miner's and survivor's claims, as they were adjudicated under Parts 727 and 718, respectively. Moreover, as the Director asserts, the issues in the miner's claim and the survivor's claim are not the same issues. The issues

are different since, in the miner's claim, the issue was whether the miner had legal pneumoconiosis as of the time of that adjudication whereas, in the survivor's claim, the issue is whether the miner had legal pneumoconiosis at the time of his death which was some years later.

We finally find it necessary to address the interplay between "legal pneumoconiosis"[6] and 20 C.F.R. §718.203. On remand, should the administrative law judge find that the medical opinion evidence establishes the existence of "legal pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge would have already found that the miner's chronic lung disease or impairment arose out of the miner's coal mine employment. 20 C.F.R. §718.201(a)(2). Consequently, if, on remand, the administrative law judge finds the evidence sufficient to establish the existence of "legal pneumoconiosis," he need not separately determine the etiology thereof at 20 C.F.R. §718.203(b), as his findings at 20 C.F.R. §718.202 will necessarily subsume that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).[7]

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[7] Employer correctly notes that, in his consideration of the evidence, the administrative law judge may have improperly granted claimant the benefit of a presumption that the miner's chronic lung disease arose out his coal mine employment. *See* Decision and Order at 15. In order to establish the existence of "legal pneumoconiosis," claimant bears the burden of establishing that the miner had a chronic lung disease or impairment arising out of his coal mine employment. *See* 20 C.F.R. §§718.201(a)(2), 718.202, 718.203.

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

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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JUDITH S. BOGGS
Administrative Appeals Judge