BRB Nos. 06-0640 BLA
and 06-0640 BLA-A

LODEMA LESTER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 03/27/2007
ROYALTY SMOKELESS COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita A. Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, and employer cross-appeals the Decision and Order (04-BLA-5700) of Administrative Law Judge Pamela Lakes Wood 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).[2] This case involves a survivor's claim filed on October 9, 2001. After crediting the miner with at least fifteen years of coal mine employment, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant contends that employer should have been precluded from relitigating the issue of pneumoconiosis in the present survivor's claim. In the alternative, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis. Claimant further contends that the administrative law judge erred in denying her February 11, 2005 Motion to Compel Discovery. Employer has filed a consolidated response brief and cross-appeal. Employer responds in support of the administrative law judge's denial of benefits. In its cross-appeal, employer argues that the administrative law judge erred in finding claimant's request for a hearing timely. In response to employer's cross-appeal, claimant contends that the administrative law judge properly found that her request for a hearing was timely. The Director, Office of Workers' Compensation Programs (the Director), contends that the administrative law judge erred by failing to give the prior finding of pneumoconiosis in the miner's claim preclusive effect in the instant case. The Director, therefore, urges that the case be remanded to the administrative law judge to consider whether the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Director further contends that the administrative law judge properly found that the hearing request was timely.

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

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[1] Claimant is the surviving spouse of the deceased miner, who died on September 30, 2001. Director's Exhibit 3.

[2] The miner previously filed a claim for benefits on March 12, 1984. Director's Exhibit 1. In a Decision and Order dated August 31, 1990, Administrative Law Judge Lawrence Brenner awarded benefits. *Id.* In so doing, Judge Brenner found that the existence of pneumoconiosis was established by both the x-ray and medical opinion evidence that was presented at 20 C.F.R. §718.202(a)(1),(4). Employer did not appeal this decision.

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

We initially address employer's contention, raised on cross-appeal, that the administrative law judge erred in finding that claimant's request for a hearing was timely. Employer contends that the regulations require that a request for a hearing be "filed," *i.e.*, *received* by the district director, within thirty days of the issuance of a proposed decision and order. Because claimant's request for a hearing was mailed, but not received, within the thirty day time period, employer contends that claimant's request for a hearing was untimely.

The regulations provide that:

> (a) Within 30 days after the issuance of a proposed decision and order, any party may, in writing, request a revision of the proposed decision and order or a hearing….
>
> ***
>
> (d) If no response to a proposed decision and order is *sent* to the district director within the period described in paragraph (a) of this section,….the proposed decision and order shall become a final decision and order, which is effective upon the expiration of the applicable 30 day period. Once a proposed decision and order…. becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, except as provided in §725.310.

20 C.F.R. §725.419(a), (d)(emphasis added).

We agree with the Director that Section 725.419 does not require that a request for a hearing actually be received by the district director prior to the end of the applicable thirty day time period. Section 725.419 requires only that a request for a hearing be "sent" within thirty days of the issuance of a proposed decision and order. We also agree with the Director that since neither the word "filed," nor any requirement of actual receipt, appears within Section 725.419, actual "receipt" of a request for a hearing within thirty days is not required to satisfy the time limitation.

Employer contends that the administrative law judge erred in not considering Sections 725.418 and 725.419 together. Employer argues that a request for a hearing must be "filed" within thirty days, since Section 725.418 refers to a claimant having "filed a request for a hearing." *See* 20 C.F.R. §725.418(c). We disagree. Section 725.418 does not address the timeliness of a hearing request. Rather, Section 725.418(c)

merely provides that if the district director's "proposed decision and order is a denial of benefits, and the claimant *has previously filed a request for a hearing*, the proposed decision and order shall notify the claimant that the case will be referred for a hearing…." 20 C.F.R. §725.418(c)(emphasis added).

We further reject employer's contention that timely receipt is required because other regulations specify timely receipt in some of their provisions. We disagree. The United States Supreme Court has held that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rusello v. U.S.*, 464 U.S. 16, 23 (1983).

Because the Director's interpretation of Section 725.419, to allow satisfaction of the time limitation by mailing a hearing request within thirty days of a proposed decision and order, is reasonable and consistent with the regulatory and statutory schemes, it is entitled to deference. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991).

In this case, the administrative law judge properly found that claimant's request for a hearing was sent within thirty days of the issuance of the director's proposed decision and order.[3] We, therefore, affirm the administrative law judge's finding that claimant's request for a hearing was timely. 20 C.F.R. §725.419.

Claimant contends that employer should have been collaterally estopped from relitigating the issue of the existence of pneumoconiosis in the survivor's claim, based on a prior finding of pneumoconiosis rendered in the miner's claim.[4] Citing *Collins v. Pond*

[3] The district director issued his proposed decision and order denying benefits on August 22, 2003. Director's Exhibit 52. Because the thirtieth day after the issuance of the district director's proposed decision and order (September 21, 2003), fell on a Sunday, the administrative law judge properly found that claimant was required to send her request for a hearing by Monday, September 22, 2003. Decision and Order at 11-12; *see* 20 C.F.R. §725.311(c). In a letter dated September 22, 2003, claimant requested a hearing. Director's Exhibit 57. Employer does not challenge the administrative law judge's finding that claimant's request for a hearing was sent within thirty days of the issuance of the district director's proposed decision and order.

[4] Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have actually been determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (*en banc*), *citing Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994).

Creek Mining Co., 22 BLR 1-229 (2003),[5] the administrative law judge found that the doctrine of collateral estoppel was inapplicable, because the issue of whether the existence of pneumoconiosis was established in this survivor's claim was not identical to the one previously litigated in the living miner's claim. Decision and Order at 14. However, subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, issued *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, BLR (4th Cir. 2006). In *Collins*, the Fourth Circuit held that the Board erred in permitting the employer to relitigate, in the survivor's claim for benefits, the issue of whether the miner had suffered from pneumoconiosis. *Id.* The Fourth Circuit held that the Board erred in interpreting *Compton* as constituting a substantial change in the law with regard to a claimant's burden of proof for establishing the existence of pneumoconiosis pursuant to Section 718.202(a). *Collins*, 468 F.3d at 219, BLR at .

To invoke the doctrine of collateral estoppel, in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the party asserting collateral estoppel must establish the following criteria:

> (1) the issue sought to be precluded is identical to the one previously litigated;
> (2) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
> (3) determination of the issue must have been necessary to the outcome of the prior determination;
> (4) the prior proceeding must have resulted in a final judgment on the merits; and
> (5) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Sedlack v. Braswell Services Group, Inc., 134 F.3d 219 (4th Cir. 1998).

[5] In *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), the Board held that, in a survivor's claim where no autopsy evidence was obtained and entitlement to benefits was established in the living miner's claim, the doctrine of collateral estoppel was not applicable to preclude litigation of the issue of the existence of pneumoconiosis, because the decision in *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), constituted a change in the law with respect to the standard for establishing the existence of pneumoconiosis under 20 C.F.R. § 718.202(a). Therefore, the Board held that a difference in the substantive legal standards applicable to the two proceedings existed. *Collins*, 22 BLR at 1-232-233.

In light of the Fourth Circuit's recent holding in *Collins*, that *Compton* does not constitute a substantial change in the law that is sufficient to preclude the application of the doctrine of collateral estoppel,[6] we recognize that claimant is entitled to further consideration of whether she may rely on the doctrine of collateral estoppel to establish that the miner had pneumoconiosis. *See Collins*, 468 F.3d at 217-220, BLR at . We therefore vacate the administrative law judge's decision, in part, and remand this case for further consideration of whether claimant is entitled to invoke the doctrine of collateral estoppel, pursuant to the Fourth Circuit's holding in *Collins*.

On remand, if the administrative law judge determines that collateral estoppel is applicable, then the existence of pneumoconiosis would be established at Section 718.202(a). The administrative law judge should then determine whether the evidence establishes that the miner's death was due to pneumoconiosis at Section 718.205(c). *See Collins*, 468 F.3d at 223-24, BLR at .

If, however, the administrative law judge, on remand, determines that collateral estoppel is inapplicable, claimant would have the burden of establishing the existence of pneumoconiosis. Although the administrative law judge found that the evidence did not establish the existence of pneumoconiosis at Section 718.202(a), claimant argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of "legal" pneumoconiosis at Section 718.202(a)(4).[7] Specifically, claimant contends that the administrative law judge erred in finding the opinions of Drs. Cohen and Rasmussen insufficient to establish the existence of legal pneumoconiosis.

Drs. Cohen and Rasmussen opined that the miner's chronic obstructive pulmonary disease was due to both cigarette smoking and coal mine dust exposure, Claimant's Exhibits 1, 2. By contrast, Drs. Dahhan and Fino opined that there was no objective evidence that the miner's coal mine dust exposure contributed to his chronic obstructive

[6] As noted by the administrative law judge, there were changes in the law since Judge Brenner's decision in the living miner's claim, based on the new regulations that became effective on January 19, 2001. Decision and Order at 15. However, contrary to the administrative law judge's finding, the new evidentiary limitations at 20 C.F.R. §725.414, and the amendment to the definition of pneumoconiosis at 20 C.F.R. §718.201, did not change the method of proving pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4).

[7] "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). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.*

pulmonary disease. Director's Exhibits 50, 51. Drs. Dahhan and Fino attributed the miner's chronic obstructive pulmonary disease exclusively to cigarette smoking. *Id*.

Although the administrative law judge found that the opinions of Drs. Cohen and Rasmussen were "particularly persuasive in their discussion of the epidemiological evidence," he found that neither doctor cited any evidence supportive of a connection between the miner's chronic obstructive pulmonary disease and coal dust exposure in this particular case. Decision and Order at 19. Conversely, the administrative law judge noted that:

> Drs. Dahhan and Fino have taken the position that the [m]iner's presentation of symptoms and test results is more consistent with a cigarette-smoke induced pulmonary impairment. In particular, Dr. Fino, while acknowledging the likelihood of a minimal loss of FEV1 in miners with the degree of exposure that the [m]iner had in the instant case, pointed to the lack of dust deposition on the x-rays as making it unlikely that any such loss would be of clinical significance. Therefore, the COPD may not be deemed to be "significantly related to, or substantially aggravated by, dust exposure in coal mine employment" under Dr. Fino's analysis. Inasmuch as Drs. Rasmussen and Cohen cannot point to any case-specific evidence suggesting otherwise, I find Dr. Fino's analysis to be persuasive. Accordingly, I find that the medical opinion evidence does not support a finding of legal pneumoconiosis.

Decision and Order at 19-20.

Claimant argues that the administrative law judge mischaracterized the opinions of Drs. Cohen and Rasmussen. We disagree. The administrative law judge accurately noted that Drs. Cohen and Rasmussen failed to cite any specific evidence in this case that supports their respective opinions that the miner's chronic obstructive pulmonary disease was attributable in part to his coal dust exposure. Consequently, we reject claimant's contentions that the administrative law judge mischaracterized the evidence and improperly substituted her opinion for that of Drs. Cohen and Rasmussen.[8]

[8] Claimant also argues that the administrative law judge erred in crediting Dr. Fino's opinion. However, because the administrative law judge permissibly discredited the opinions of Drs. Cohen and Rasmussen, the only medical opinions supportive of a finding of legal pneumoconiosis, error, if any, in the administrative law judge's consideration of Dr. Fino's opinion on this issue is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Finally, if the administrative law judge, on remand, determines that collateral estoppel is inapplicable, she must issue a more complete explanation for her decision to deny claimant's Motion to Compel Discovery.[9] By motion dated February 11, 2005, and again at the hearing, claimant sought production of x-ray evidence and opinions from non-testifying experts obtained by employer. Hearing Transcript at 9-18. Employer asserted that the requested information was privileged. *Id.* In denying claimant's motion, the administrative law judge stated that her "general position is that one cannot discover the opinions of experts that are not going to be named in a suit." *Id.* at 9. The administrative law judge noted that "work product rule in *Hickman*"[10] allows a party the "advantage of being able to disclose the most favorable opinions and then not retain the experts with unfavorable opinions." *Id.* at 15. The administrative law judge did not identify the regulation or discuss the precedent on which she relied, or otherwise analyze this issue.

In order to determine whether the administrative law judge properly denied claimant's motion to compel, the Board must have before it the administrative law judge's "reasons or basis therefor . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998)(observing that a function of Section 557(c)(3)(A) is to permit appellate review); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). As the administrative law judge's ruling does not allow us to conduct a proper appellate review of her holdings, the administrative law judge, should she find the doctrine of collateral estoppel inapplicable on remand, is instructed to reconsider claimant's Motion to Compel Discovery and to fully explain the rationale for granting or denying claimant's motion. *See Elm Grove Coal Co. v. Director, OWCP [Blake]*, 2007 WL 678248 (4th Cir. Mar. 7, 2007)(recognizing that, in connection with discovery issues, it is important to distinguish between testifying and non-testifying experts).

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

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[9] If the administrative law judge, on remand, determines that collateral estoppel is applicable, then the existence of pneumoconiosis is established at Section 718.202(a). Having established the existence of pneumoconiosis, claimant's contention that employer should be compelled to disclose withheld, x-ray evidence would be rendered moot. *Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984).

[10] *Hickman v. Taylor*, 329 U.S. 495 (1947).

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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BETTY JEAN HALL
Administrative Appeals Judge