

BRB No. 12-0311 BLA

RUTH CONLEY)	
(Widow of RUBLE CONLEY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ROBERTS & SCHAEFER COMPANY,)	DATE ISSUED: 03/26/2013
INCORPORATED)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Summary Decision Awarding Benefits by Operation of Law of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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:

Employer appeals the Summary Decision Awarding Benefits by Operation of Law (2011-BLA-05871) of Administrative Law Judge Daniel F. Solomon rendered on a survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge determined that the miner was receiving benefits at the time of his death, pursuant to a final award on his lifetime claim.² Based on the doctrine of collateral estoppel,³ the administrative law judge found that employer was barred from relitigating its designation as responsible operator.⁴ As claimant's entitlement to benefits was otherwise

¹ Claimant is the widow of the miner, who died on December 22, 2010. The miner was awarded federal black lung benefits on December 13, 1982. Claimant filed her claim for survivor's benefits on January 24, 2011. Director's Exhibits 1, 2, 4, 5.

² On December 13, 1982, Administrative Law Judge Frank J. Marcellino awarded benefits in the miner's claim, and found that employer was properly designated the responsible operator liable for the payment of benefits. The Board subsequently affirmed Judge Marcellino's decision. *Conley v. Roberts & Schaefer Co.*, 7 BLR 1-309 (1984). Employer's appeal to the United States Court of Appeals for the Seventh Circuit was voluntarily dismissed with prejudice on November 5, 1984. *See* Summary Decision at 2.

³ 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); *see Ziegler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994).

⁴ Employer filed a motion for summary judgment before the administrative law judge, requesting that it be dismissed as the responsible operator in this case because it was not an "operator" for purposes of black lung liability at the time it employed the miner. Employer argued that it is an engineering and construction contractor, and that it last employed the miner in 1975, before the enactment of the 1977 amendments to the Act which, for the first time, included construction contractors within the definition of operators. Employer avers that it was incorrectly held liable in the miner's claim, and should not be collaterally estopped from litigating its designation as responsible operator in the survivor's claim. The Director, Office of Workers' Compensation Programs, opposed employer's motion, contending that the threshold requirements for application of non-mutual offensive collateral estoppel are met, and bar relitigation of employer's status as the responsible operator. The administrative law judge denied the motion, finding that employer fully and unsuccessfully litigated the responsible operator issue in the miner's claim and that, consequently, the doctrine of collateral estoppel bars relitigation of the

uncontested, the administrative law judge awarded benefits on her claim pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).⁵

Employer's sole contention on appeal is that the administrative law judge erred in finding that employer is collaterally estopped from litigating its designation as the responsible operator in this survivor's claim. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge appropriately applied the doctrine of collateral estoppel and properly awarded derivative survivor's 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 rational, supported by substantial evidence, and in accordance with applicable law.⁶ 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).

Employer contends that the administrative law judge erred in finding that employer was collaterally estopped from contesting its status as responsible operator in this survivor's claim. Employer argues that the elements of collateral estoppel are not met here, because "the issue of a construction company's liability for pre-1978 employment was not actually litigated in [the miner's] claim." Employer's Brief at 3. Rather, employer submits that the responsible operator adjudication in the miner's claim

responsible operator issue in the survivor's claim. *See* Order of November 25, 2011, designated as "Denial of Employer's Motion for Summary Decision and Order to Show Cause Why [Employer's] Request for Hearing Should Not Be Dismissed and Cancellation of Hearing;" *see also* Summary Decision at 2.

⁵ On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. Employer does not contest claimant's status as an eligible survivor. 20 C.F.R §725.212.

⁶ The record reflects that the miner's last coal mine employment was in Illinois. Director's Exhibit 2. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

concerned the nature of the miner's employment and the extent of his coal dust exposure for the purpose of establishing rebuttal pursuant to 20 C.F.R. §725.492(c). Thus, employer asserts that the administrative law judge did not make an explicit finding that employer met the statutory definition of an "operator."⁷ *Id.* at 4-5. Employer maintains that it was not involved in coal mining activities during the miner's employment, and should be relieved from liability as the responsible operator for this claim. Finally, employer argues that issue preclusion does not apply when there are good reasons to allow relitigation of the issue such as here, where employer's liability is based on a legal error, and allowing relitigation will cause no harm to claimant, who will receive benefits anyway. *Id.* at 5-6.

Employer's arguments lack merit. To successfully invoke the doctrine of collateral estoppel, the party asserting it must establish the following factors:

- (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. Director, OWCP [Forsythe], 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994).

We reject employer's argument that the first requirement, i.e., identity of issue, is not met under the facts of this case. The fact that employer now advances a different argument in support of its assertion that it does not qualify as a responsible operator does not mean that the responsible operator issue raised in the instant survivor's claim is not the same as that previously contested in the miner's claim. As the Director correctly notes: "[o]nce an issue is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case." Director's Response Brief at 3, citing *Yamaha Corp. of America v. U.S.*, 961 F.2d 245, 254-255 (D.C. Cir.

⁷ Awarding benefits in the miner's claim, Judge Marcellino noted that "employer contests the finding that it is the responsible operator [] on the ground that claimant did not have a cumulative year of dust exposure while in its employ after December 31, 1969.... [A]s the claimant worked for employer as a miner within the meaning of the Act for the employer for 12 years, at least one day of which was after December 31, 1969, I find that employer is the properly named responsible operator in this case." *Conley v. Roberts & Schaefer Co.*, Case No. 80-BLA-5168, slip op. at 3-4 (Nov. 24, 1981).

1992), *cert. denied*, 506 U.S. 1078 (1993). Issue preclusion results from the resolution of a question at issue in the first proceeding, not from the litigation of specific arguments directed to the issue. Thus, a new theory in support of an issue may not be raised in a second proceeding, “even though it was never made in the first proceeding; *so long as argument could have been made*, it is precluded.” *Yamaha*, 961 F.2d at 255 (*emphasis added*).

In view of the foregoing, we also find no merit in employer’s argument that the second requirement for application of collateral estoppel is not met because “the issue of a construction company’s liability for pre-1978 employment was not actually litigated in [the miner’s] claim.” Employer’s Brief at 3-4. The record reveals that employer challenged its status as responsible operator at every stage of the proceedings in the miner’s claim, and the administrative law judge correctly determined that the issue was fully litigated and finally decided against employer. *See Conley v. Roberts & Schaefer Co.*, 7 BLR 1-309 (1984); Director’s Exhibits 1, 19, 23, 41; July 1981 Hearing Transcript at 7-8, 82-84; Summary Decision at 3.

We find no support for employer’s argument that its “liability is based on a legal error,” and that “good reasons” exist to preclude application of the doctrine of collateral estoppel under the facts of this case.⁸ Employer’s Brief at 5-6. Moreover, contrary to employer’s view, the doctrine of collateral estoppel focuses on finality, rather than a determination of whether an issue could or should have been differently framed or determined in a previous forum. As we conclude that employer has failed to demonstrate that the doctrine of collateral estoppel should not apply, we affirm the administrative law judge’s determination that employer is collaterally estopped from relitigating its designation as responsible operator in the survivor’s claim. *See Forsythe*, 20 F.3d at 289, 18 BLR at 2-195; *see also Ziegler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332,

⁸ Employer’s argument that, at the time the miner’s claim was litigated, the Department of Labor allowed construction companies to be named as responsible operators in cases where employment ceased prior to the 1977 amendments, and later changed its policy, is unavailing. *See* Employer’s Brief at 5-6, referencing *E.M. v. Director, OWCP [McAdory]*, 2007-BLA-5510, slip. op. at 4-6 (May 12, 2008)(unpub.). During the pendency of the litigation in the miner’s claim, filed on March 15, 1979, the question of whether a construction company could be held liable for the payment of benefits, as a responsible operator for pre-1977 employment of the miner, was dependent on the specific facts of each case. *See Hughes v. Heyl & Patterson, Inc.*, 647 F.2d 452, 456-57, 3 BLR 2-15, 2-24-26 (4th Cir. 1981). Employer has demonstrated no change in law or policy that would constitute an exception to the applicability of the doctrine of collateral estoppel. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006).

22 BLR 2-581 (7th Cir. 2002); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(en banc). Thus, the administrative law judge's award of survivor's benefits pursuant to amended Section 932(l), payable by employer, is affirmed.

Accordingly, the Summary Decision Awarding Benefits by Operation of Law is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge