BRB No. 97-0561 BLA

NORMA LAUER (Widow of THOMAS M. LAUER)	)	
Claimant-Respondent	)	
v.	)	
C & K COAL COMPANY	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Phillip L. Wein, Clarion, Pennsylvania, for claimant.

Raymond F. Keisling (Keisling & Associates, P.C.), Carnegie, Pennsylvania, for employer.

Before: HALL, Chief Administrative Law Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-0530) of Administrative Law Judge Daniel L. Leland awarding benefits on 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). The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), and that employer was barred by the doctrine of collateral estoppel from raising the issue of the existence of pneumoconiosis. The administrative law judge further found that claimant[1] established death due to

[1]Claimant is Norma Lauer, the miner's widow, who filed her survivor's claim on January 31, 1994.

pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's application of the doctrine of collateral estoppel and his findings pursuant to Sections 718.202(a)(4) and 718.205(c). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 initially contends that the administrative law judge erred in applying the doctrine of collateral estoppel to bar employer from litigating the issue of the existence of pneumoconiosis. We disagree. Collateral estoppel, or issue preclusion, refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the initial action. *See Freeman v. 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 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, the administrative law judge determined that Administrative Law Judge Robert M. Glennon issued a Decision and Order on November 10, 1988, in which he awarded benefits to the miner, payable by employer, after finding that the miner established the contested issues of the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202 and 718.203, and total disability due to pneumoconiosis pursuant to Section 718.204. Decision and Order at 4; Director's Exhibit 26. Inasmuch as the Board affirmed Judge Glennon's

findings on the merits, *see Lauer v. C & K Coal Co.*, BRB No. 88-4117 BLA (Jan. 25, 1991)(unpublished), and employer did not seek further review, the administrative law judge reasonably concluded that employer was estopped from relitigating the issue of the existence of pneumoconiosis in the instant action involving the survivor's claim. Decision and Order at 4.

In the present appeal, employer does not argue that the criteria for invoking the doctrine of collateral estoppel have not been met; rather, employer asserts that the doctrine should not be applied because after-discovered evidence shows there was a mistake in a prior determination of fact, and had this evidence been made available during the miner's lifetime, employer would have been able to petition for modification, pursuant to 20 C.F.R. §725.310, of the miner's award of benefits. Employer's Brief at 4. Although we agree that the doctrine of collateral estoppel would not be applicable where modification procedures have been timely instituted, employer never sought modification of the miner's award of benefits, and the mere fact that such procedures are available does not preclude application of collateral estoppel where no action was taken. *See generally Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18, 31 BRBS 109 (CRT)(1st Cir. 1997). Thus, under the facts of this case, we affirm the administrative law judge's finding that employer is estopped from relitigating the issue of the existence of pneumoconiosis pursuant to Section 718.202. Consequently, we need not reach employer's arguments regarding the administrative law judge's findings pursuant to Section 718.202(a)(4).

Employer next contends that the administrative law judge erred in finding the evidence sufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c). Specifically, employer maintains that the hospital records and the opinion of Dr. Fino establish that cancer was the sole cause of the miner's death. Employer also asserts that, in finding that pneumoconiosis was a substantial contributing cause of death, the administrative law judge improperly relied upon medical opinions which provided no rationale for the conclusions reached and which were unsupported by any objective evidence. Employer's arguments are without support in the record. The administrative law judge accurately summarized the medical opinions of record and the qualifications of the physicians, and determined that six physicians concluded that pneumoconiosis either played a substantial role in the miner's death or actually hastened death. Decision and Order at 2-5; *see generally Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). The administrative law judge then permissibly accorded determinative weight to the opinions of Drs. Spadoro and Houser, as they were the miner's treating physicians prior to death, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), and to the opinions of reviewing physicians Drs. Wecht and Puckett, as they are pathologists who possess expertise on the causes of death, *see generally Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Contrary to employer's arguments, these physicians explained how pneumoconiosis contributed to the miner's death, and the administrative law judge could properly find their opinions well-reasoned, as based on adequate documentation which supported the conclusions reached. Director's Exhibit 8-10; Claimant's Exhibits 1, 2, 9, 11, 12; *see generally Fields v Island Creek Coal*

Co., 10 BLR 1-19 (1987). The administrative law judge acted within his discretion in according little weight to the sole contrary opinion of record provided by Dr. Fino, as Dr. Fino did not examine the miner while the miner was alive, *see generally Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984), and he was not a pathologist, *see generally Dillon, supra.* The administrative law judge also accorded little weight to Dr. Fino's opinion because most of his report was written in support of his opinion that coal dust exposure causes neither lung cancer, an issue which was not disputed, nor obstructive lung disease, a view which the administrative law judge found to be inconsistent with the Act. Decision and Order at 5; *see generally Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). The administrative law judge's findings pursuant to Section 718.205(c) are affirmed as supported by substantial evidence and in accordance with law. *See Lukosevicz, supra.* Consequently, we affirm his award of benefits.

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge