

BRB No. 08-0627 BLA

M.B.)
(Widow of D.E.B.))
)
Claimant-Respondent)
)
v.)
)
ISLAND CREEK COAL COMPANY)
) DATE ISSUED: 05/29/2009
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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 Decision and Order Awarding Benefits (07-BLA-5693) of Administrative Law Judge Linda S. Chapman rendered 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).

At the time of the miner's death, he was receiving federal black lung benefits pursuant to a final award on a lifetime claim filed in 2003.¹ Director's Exhibit 1. In a Proposed Decision and Order finding the miner entitled to benefits, the district director determined that the miner had "contracted pneumoconiosis" and that "such disease has caused a breathing impairment of sufficient degree to establish total disability." District Director's Proposed Decision and Order at 1. In a summary of medical evidence attached to the proposed decision, the district director stated that the miner had established the existence of complicated pneumoconiosis by x-ray, pursuant to 20 C.F.R. §§718.202(a)(3), 718.304(a), and that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The district director further indicated that the miner had established the existence of a totally disabling respiratory impairment due to pneumoconiosis, through blood gas studies pursuant to 20 C.F.R. §718.204(b)(2)(ii), and through invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304.²

Employer contested the district director's finding of entitlement and requested a hearing before an administrative law judge. Prior to the scheduled hearing, however, by letter dated March 30, 2005, employer withdrew its controversion, stating that it had "decided to accept liability and withdraw its request for a formal hearing." Accordingly, at employer's request, the hearing was cancelled, and the miner's claim was remanded to the district director for payment of benefits. Director's Exhibit 1.

The miner died on January 20, 2006, and claimant filed her application for survivor's benefits on July 17, 2007. Director's Exhibits 3, 10. Employer contested all issues of entitlement. Director's Exhibit 21. In the ensuing Decision and Order Awarding Benefits, the administrative law judge credited the miner with thirty-eight years of coal mine employment,³ and initially found that, during the proceedings in the

¹ The 2003 claim was the miner's third claim. He had filed two earlier applications for benefits, on December 31, 1982 and October 25, 1994, which were finally denied on October 5, 1983 and October 18, 2001, respectively. Director's Exhibit 1.

² The regulation at 20 C.F.R. 718.304 provides, in pertinent part, that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, or that a miner's death was due to pneumoconiosis, if specified types of medical evidence establish that the miner is suffering or suffered from a chronic dust disease of the lung commonly known as complicated pneumoconiosis. 20 C.F.R. §718.304.

³ The record indicates that the miner's coal mine employment occurred in Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the

survivor's claim, employer had "acknowledged its 'concession of entitlement in the miner's claim.'" Decision and Order at 13. Thus, pursuant to the decision of the United States Court of Appeals for the Fourth Circuit in *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), the administrative law judge determined that employer's concession in the survivor's claim to the miner's entitlement operated as a binding stipulation to the district director's findings in the miner's claim. Thus, the administrative law judge concluded that, during the proceedings in the survivor's claim, employer had stipulated to the district director's finding that the miner suffered from complicated pneumoconiosis. Decision and Order at 13. The administrative law judge therefore concluded that claimant was entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 17.

In addition to finding that employer had stipulated to the existence of complicated pneumoconiosis during the survivor's claim proceedings, the administrative law judge found that employer was collaterally estopped from relitigating the issue of the existence of complicated pneumoconiosis, as that issue was both "actually litigated" and "actually determined" in the miner's claim.⁴ Decision and Order at 11. Finally, reviewing the medical evidence developed in connection with the survivor's claim, the administrative law judge found that claimant established the existence of simple pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), but did not establish the existence of complicated pneumoconiosis, or that the miner's death was due to simple pneumoconiosis, pursuant to 20 C.F.R. §§718.205(c), 718.304. However, despite the lack of medical evidence, based on employer's concession, and on the principles of collateral estoppel, the administrative law judge concluded that claimant had nonetheless established invocation of the irrebuttable presumption of death due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge's application of *Richardson* is improper on the facts of this case. Employer further asserts that the administrative law judge's application of collateral estoppel to the issue of complicated

United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

⁴ In certain circumstances, collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have been actually 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*).

pneumoconiosis is contrary to law. Finally, employer urges affirmance of the administrative law judge's finding that the medical evidence does not establish claimant's entitlement to benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer, albeit for other reasons, that the administrative law judge erred in her application of *Richardson*. Thus, the Director contends that the case should be remanded for further consideration. The Director further asserts, however, that on remand, the administrative law judge could find employer collaterally estopped from relitigating the issue of complicated pneumoconiosis. Employer filed a reply to the Director's response brief. Claimant has not submitted a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(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, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes 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).

Employer initially asserts that the administrative law judge erred in finding, pursuant to *Richardson*, that during the proceedings in the survivor's claim, employer stipulated that the existence of complicated pneumoconiosis was established in the miner's claim, which thereby became binding in the survivor's claim. Employer's argument has merit.

In *Richardson*, the court found it unnecessary to determine whether a concession by the Director in the miner's claim that the miner had pneumoconiosis resulted in

estoppel in a later survivor's claim because, in the survivor's claim, the Director both stipulated before the administrative law judge to the "contents of the award of benefits" and "conceded in his brief that the deputy commissioner had awarded benefits because the miner suffered from totally disabling [chronic obstructive pulmonary disease] arising out of coal miner employment." *Richardson*, 94 F.3d at 167, 21 BLR at 2-378-79. The court held that the Director's combined stipulation and concession made in the survivor's claim established that, at the time of the miner's death, he suffered from pneumoconiosis, as defined in 20 C.F.R §718.201(a)(2). *Richardson*, 94 F.3d at 167, 21 BLR at 2-379.

In the instant case, the administrative law judge found that, as in *Richardson*, employer had conceded, during the survivor's claim, that the miner suffered from complicated pneumoconiosis.⁵ The administrative law judge based her finding on language in employer's closing brief in the survivor's claim, wherein employer stated:

In the miner's third claim for federal black lung benefits, the employer withdrew its request for a formal hearing and asked that the claim be remanded to the district director for payment of benefits. Because of the employer's concession of entitlement in the miner's claim, the requisite elements of entitlement were never 'actually litigated.'

Employer's Closing Argument at 6 (citations omitted).

As employer contends, in contrast to the Director's statements in *Richardson*, which contained concessions and stipulations not just to the miner's entitlement, but to the specific finding that the miner's obstructive disease arose out of coal mine employment, employer's above-quoted statements are less clear. Employer's statements in the instant case do not reference, concede, or stipulate to, any specific findings of fact in the miner's claim; the language relates the procedural history of the miner's claim. As employer's language in the survivor's claim does not reference, concede, or stipulate to, any specific findings of fact in the miner's claim, substantial evidence does not support the administrative law judge's finding that employer's statements in its closing argument in the survivor's claim equated to a concession to the specific finding of complicated pneumoconiosis in miner's claim. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174,

⁵ Contrary to the contention of the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge did not rely on *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), to find employer collaterally estopped from litigating the issue of complicated pneumoconiosis based on a concession or stipulation made in the miner's claim. The administrative law judge relied on *Richardson* to find that employer stipulated to complicated pneumoconiosis based on statements it made in the survivor's claim.

21 BLR 2-34, 2-48 (4th Cir 1997). Therefore, we reverse the administrative law judge's conclusion that, during the proceedings in the survivor's claim, employer stipulated that the miner suffered from complicated pneumoconiosis.

Employer next contends that the administrative law judge erred in applying the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of complicated pneumoconiosis in the survivor's claim. Employer specifically asserts that the issue of complicated pneumoconiosis was never previously litigated or actually determined, because employer's withdrawal of controversion in the miner's claim was akin to a stipulation to the miner's entitlement to benefits, which lacks preclusive effect. Thus, employer argues, the criteria for the application of collateral estoppel have not been met. Employer's Brief at 5-8.

For collateral estoppel to apply in this case, claimant must establish that: (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-394, 2-401 (4th Cir. 2006); *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*). A fact established by stipulation may not be given collateral estoppel effect in a subsequent proceeding because "the issue was not actually litigated." *Justice v. Newport News Shipbuilding and Dry Dock Co.*, 34 BRBS 97, 98 (2000).

In finding that the doctrine of collateral estoppel applied to this case, the administrative law judge found that, because employer vigorously contested the miner's entitlement to benefits up until shortly before the scheduled hearing, employer had actually litigated the issue of complicated pneumoconiosis in the miner's claim. Decision and Order at 11, 13. Contrary to the administrative law judge's findings, the existence of complicated pneumoconiosis was not actually litigated and determined in the miner's claim; rather, employer "decided to accept liability and withdr[e]w its request for a formal hearing" and asked that the claim be remanded for payment.⁶ Employer's letter

⁶ Employer's counsel's March 30, 2005 letter to the administrative law judge withdrawing employer's controversion stated, in its entirety:

A formal hearing is currently scheduled before you in the above-captioned claim on April 5, 2005 in Abingdon, Virginia. My client, Island Creek Coal Company, has decided to accept liability and withdraw its request for a formal hearing. Thus, the Employer requests that the April 5, 2005

asking that the hearing in the miner's claim be cancelled was short and general, and neither referenced, nor agreed with, the district director's finding of the existence of complicated pneumoconiosis. Thus, it is impossible to determine whether employer intended any action beyond the general withdrawal of its controversion to the miner's claim for benefits. Moreover, because the miner's entitlement to benefits was established by employer's concession, no finding was rendered by the administrative law judge as to the existence of complicated pneumoconiosis. For these reasons, we agree with employer that, on the particular facts of this case, the issue of complicated pneumoconiosis was not actually litigated and determined, and that, therefore, a required element of collateral estoppel is not established.⁷ See *Collins*, 468 F.3d at 217, 23 BLR at 2-401; *Justice*, 34 BRBS at 98; see also *Otherson v. Department of Justice*, 711 F.2d 267, 274 (D.C. Cir. 1983)("[W]hen a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been 'actually litigated' and thus is not a proper candidate for issue preclusion."); *Restatement (Second) of Judgments* §27 comment e.

Therefore, we reverse the administrative law judge's finding that employer is collaterally estopped from relitigating the issue of the existence of complicated pneumoconiosis in the survivor's claim. The administrative law judge further found that the medical evidence submitted in support of the survivor's claim did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that there was no evidence that the miner's simple pneumoconiosis played any role in the miner's death pursuant to 20 C.F.R. §718.205(c). Decision and Order at 16. Claimant did not appeal any of these findings by the administrative law judge, nor does any party allege any error in the administrative law judge's determinations. Consequently, the only

hearing be cancelled and the claim be remanded to the District Director for payment of benefits.

⁷ The Director acknowledges that issues determined by concession or stipulation generally lack collateral estoppel effect, but argues that employer's actions in the miner's claim are not akin to a stipulation, but are better "characterized as a default, *i.e.* a giving up of an opportunity to defend the case." Director's Brief at 4. The Director asserts that in certain circumstances, if a party actively participated in prior litigation before defaulting, the default judgment may serve to preclude relitigation of the issue in a subsequent proceeding. The Director's argument is unpersuasive because the multiple cases cited by the Director are distinguishable. Director's Brief at 4-6. The cited cases largely involve situations where a party engaged in misconduct that prevented adjudication and resulted in a default judgment, circumstances that are not present in the instant case.

additional avenues for establishing claimant's entitlement to survivor's benefits are precluded. *See Sparks*, 213 F.3d at 190, 22 BLR at 2-259; *Anderson*, 12 BLR at 1-112. We, therefore, must reverse the administrative law judge's award of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge