

BRB No. 09-0590 BLA

BELLE HAMILTON)	
(on behalf of MORGAN E. HAMILTON,)	
Deceased Miner))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 05/18/2010
)	
A & E COAL COMPANY,)	
INCORPORATED)	
)	
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 on Remand Awarding Living Miner's Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Rita A. Roppolo (M. Patricia Smith, Solicitor of Labor; 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Living Miner's Benefits (2005-BLA-5977) of Administrative Law Judge Richard A. Morgan with respect to a subsequent claim filed on March 29, 2004, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ This case is before the Board for a second time. Pursuant to the Board's prior Decision and Order, the administrative law judge reconsidered the relevant evidence and concluded that the subsequent claim was timely filed and that claimant established that the miner was totally disabled due to coal workers' pneumoconiosis at 20 C.F.R. §718.204(c).² Accordingly, the administrative law judge awarded benefits.

¹ On March 30, 2010, the Board issued an order granting the parties the opportunity to submit briefs regarding the potential effects of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010. The Director, Office of Workers' Compensation Programs, filed a supplemental brief in which he asserted that, based on the filing date of the instant claim, the amendments do not apply. Claimant, the surviving spouse of the deceased miner, who is pursuing the miner's claim on his behalf, also filed a supplemental brief. Claimant argues that if the award of benefits is not affirmed, the administrative law judge should consider the application of the amendments on remand. Upon consideration of this issue, we hold that the recent amendments do not apply to the present subsequent claim, as it was filed prior to January 1, 2005. Miner's Claim Record (M)-Director's Exhibit 4.

² In its previous decision, the Board considered claimant's appeal of the denial of benefits in her survivor's claim, filed on October 27, 2004, and employer's cross-appeal of the award of benefits in the miner's subsequent claim. The miner had filed prior claims in 1977 and 1983 that were denied because he did not establish any of the elements of entitlement. Regarding the miner's subsequent claim, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), and, therefore, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See B.H. [Hamilton] v. A & E Coal Co., Inc.*, BRB No. 07-0778 BLA, slip op. at 3 n.4 (July 9, 2008)(unpub.). In addition, the Board affirmed the administrative law judge's evidentiary rulings and his findings that employer is the responsible operator and that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id.* at 8-9, 11. However, the Board vacated the award of benefits on the grounds that the administrative law judge did not properly address the issues of timeliness and total disability causation. *Id.* at 6, 13. With respect to claimant's survivor's claim, the Board affirmed the denial of benefits, as the administrative law judge's finding, that claimant did not establish death due to

Employer appeals, arguing that it is not the proper responsible operator and that the administrative law judge erred in finding that the miner's subsequent claim was timely filed. In addition, employer asserts that the administrative law judge erred in determining that the miner was totally disabled due to coal workers' pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a response brief in which he maintains that the administrative law judge properly determined that the subsequent claim was timely filed and that it was proper for the administrative law judge to give less weight to the opinions of Drs. Dahhan and Fino regarding total disability causation at 20 C.F.R. §718.204(c). Employer has also filed a reply brief, reiterating its position that the miner's subsequent claim was not timely filed.

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

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. Responsible Operator

Employer requests that the Board reconsider its affirmance of the administrative law judge's determination that employer is the responsible operator. Employer contends that, simply because A & E Coal Company, Incorporated had the same director as A & E Coal Company, it does not mean that it was the successor to, or the same company as, the latter. In addition, employer states that there is no evidence to suggest that employer

pneumoconiosis pursuant to 20 C.F.R. §718.205(c), was rational and supported by substantial evidence. *Id.* at 15.

³ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

acquired a mine, or substantially all of the assets of a prior operator, as required by 20 C.F.R. §725.492. We rejected these same assertions in employer's prior appeal and affirmed the administrative law judge's determination that employer is the responsible operator. See *B.H. [Hamilton] v. A & E Coal Co., Inc.*, BRB No. 07-0778 BLA, slip op. at 8 (July 9, 2008)(unpub.). Because employer has not set forth any compelling argument for altering the Board's prior disposition, it now constitutes the law of the case and will not be disturbed. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993).

II. Timeliness and the Effect of the Sixth Circuit's Decision in *Hatfield*

A. The Administrative Law Judge's Findings

On remand, the administrative law judge again found that the claim was timely filed pursuant to 20 C.F.R. §725.308. Decision and Order on Remand at 2. After stating that the Board instructed him to rely on the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602, 22 BLR 2-291 (6th Cir. 2001), the administrative law judge noted that the Sixth Circuit subsequently adopted the position set forth in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 2002 FED App. 0140P, WL 31205502 (6th Cir. 2002) (Batchelder, J., dissenting), which the administrative law judge relied on in his previous decision. *Id.*, citing *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009).⁴ Therefore, the administrative law judge concluded that his original analysis was in accordance with the Sixth Circuit's interpretation of 20 C.F.R. §725.308. Decision and Order on Remand at 2.

⁴ In *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602, 22 BLR 2-291 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit indicated that "[t]he three-year limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis," even if the physician's opinion was considered in the denial of a prior claim. *Kirk*, 244 F.3d at 608, 22 BLR at 2-298. In *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009), the Sixth Circuit held that a medical determination of total disability due to pneumoconiosis predating a prior, final denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. *Hatfield*, 556 F.3d at 483, 24 BLR at 2-151-152.

B. Arguments on Appeal

Employer argues that the record contains at least two reasoned opinions, predating the subsequent claim by more than three years, in which a medical professional informed the miner that he was totally disabled due to pneumoconiosis.⁵ Employer further contends that the Sixth Circuit's determination in *Hatfield*, that the ruling in *Kirk* was dicta, as it was not necessary for the court to reach the timeliness issue, is dicta itself and, therefore, has no precedential value. In the alternative, employer alleges that because Dr. Baker's prior opinion diagnosing total disability due to clinical pneumoconiosis is treated as a misdiagnosis under *Hatfield*, the administrative law judge could not rationally credit the newly submitted medical opinion in which Dr. Baker reached the same conclusion. These contentions are without merit.

Contrary to employer's argument, the Sixth Circuit's ruling with respect to the timeliness issue in *Hatfield* is not dicta. The *Hatfield* court determined that the employer waived its right to controvert the subsequent claim by failing to timely respond to the initial finding of entitlement. If the Sixth Circuit had found merit in the employer's contention that the miner's subsequent claim was not timely filed, an award of benefits would have been precluded, regardless of the employer's waiver of its right to controvert the claim. 20 C.F.R. §725.308(a). Thus, consideration of the timeliness issue was necessary to the disposition of the responsible operator's appeal. *Hatfield*, 556 F.3d at 479 n.2, 24 BLR at 2-147 n.2. We affirm, therefore, the administrative law judge's determination that the miner's subsequent claim was timely filed under 20 C.F.R. §725.308.

Lastly, although employer correctly asserts that diagnoses of total disability due to pneumoconiosis, which pre-date the prior denial, are deemed misdiagnoses, we reject employer's argument that it is irrational to credit a subsequent medical opinion in which a physician reaches the same conclusion. See *Hatfield*, 556 F.3d at 482, 24 BLR at 2-151-152; *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117 (2009). In *Hatfield*, the Sixth Circuit ruled that a medical determination of total disability due to pneumoconiosis, which pre-dates the prior denial of benefits, must be treated as a misdiagnosis for the purpose of assessing when the statute of limitations set forth in 20 C.F.R. §725.308 begins to run. *Hatfield*, 556 F.3d at 482; 24 BLR at 2-152. The court did not indicate that such an opinion is necessarily a genuine misdiagnosis that would detract from the credibility of a subsequent opinion. Thus, under the court's holding in *Hatfield*, the administrative law judge properly treated the previously submitted determinations of Drs.

⁵ Employer states that it preserves its objection to the administrative law judge's finding that Dr. Browning's opinion was insufficient to bar the subsequent claim because it was not in writing. See Employer's Brief in Support of Petition for Review at 15 n.9.

Odom and Cornish, that the miner was totally disabled due to pneumoconiosis, as legally insufficient to trigger the statute of limitations, but he was not required to discredit Dr. Baker's similar determination in his 2004 and 2007 reports.

III. 20 C.F.R. §718.204(c)

A. The Administrative Law Judge's Findings

In reconsidering the evidence at 20 C.F.R. §718.204(c), the administrative law judge addressed the opinions of Drs. Baker, Dahhan, and Fino.⁶ The administrative law judge referenced *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994), a case in which the Board quoted *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1231 (1994), in support of the proposition that the "better way" to evaluate whether the evidence establishes total disability due to pneumoconiosis, "is to treat as less significant those physicians' conclusions about causation when they find no pneumoconiosis." *Kingery*, 19 BLR at 1-14, *quoting Skukan*, 993 F.2d at 1233, 17 BLR at 2-104; *see* Decision and Order on Remand at 4. The administrative law judge applied this reasoning to the opinions of Drs. Dahhan and Fino, "despite their added comments that, even assuming the miner had pneumoconiosis, it did not cause his respiratory impairment," because their "analyses were based on the premise that the miner did not have clinical or legal pneumoconiosis." Decision and Order on Remand at 5. The administrative law judge determined that Dr. Dahhan did not "seriously acknowledge" the existence of positive x-ray evidence, as he testified that it was possible to distinguish a smoking-induced lung disease from a coal dust-induced disease based on the x-ray evidence, the severity of the impairment, and the miner's treatment plan. *Id.* Also, the administrative law judge found that Dr. Dahhan's conclusion, that "the obstructive defect he found would not have caused the miner's

⁶ Dr. Dahhan stated that the miner's pulmonary disability was due to his smoking history, not the inhalation of coal mine dust. M-Director's Exhibit 12; M-Employer's Exhibits 2, 5, 9, 14, 17. In his deposition, Dr. Dahhan stated that, assuming that the miner suffered from coal workers' pneumoconiosis, he would not change his opinion. M-Employer's Exhibit 5 at 12. Dr. Fino opined that the miner did not have coal workers' pneumoconiosis, and that the miner had no disease or impairment caused by his coal dust exposure. M-Employer's Exhibits 3, 4, 8, 10, 13, 15. In his deposition, Dr. Fino stated that even if the miner had coal workers' pneumoconiosis, it would not change his other opinions. M-Employer's Exhibits 4 at 15; 10 at 15. Dr. Baker diagnosed coal workers' pneumoconiosis due to coal dust exposure, and chronic bronchitis, chronic obstructive pulmonary disease, and hypoxemia, all due to coal dust exposure and cigarette smoking. Dr. Baker opined that each of these diagnoses contributed "fully" to the miner's "severe" impairment. M-Director's Exhibit 12; M-Claimant's Exhibit 9.

impairment, merely pertained to the issue of obstructive disease, i.e., legal pneumoconiosis.” *Id.*

Regarding Dr. Fino’s opinion, the administrative law judge concluded that because he found the x-ray evidence to be a “toss up,” he must not have been aware that there were four positive x-ray interpretations, three by physicians who are dually-qualified as Board-certified radiologists and B readers. Decision and Order on Remand at 5. The administrative law judge also found that the lack of convincing positive x-ray evidence was a “central foundation” of Dr. Fino’s disability causation opinion. *Id.* Further, the administrative law judge noted that although Dr. Fino stated that coal dust exposure would not have caused the impairment evident from the pulmonary function studies, he did not address the possibility that clinical pneumoconiosis could have substantially contributed to the miner’s impairment. *Id.* The administrative law judge found, “[w]ith their stated assumption, regarding the existence of clinical pneumoconiosis, the two doctors provided no similarly comprehensive analysis[;] rather[,] they merely added their conclusions that their opinions would not change.” *Id.* The administrative law judge further stated, “[s]uch un-elucidated conclusions hardly qualify as reasoned or documented opinion.” *Id.*

In contrast, the administrative law judge determined that Dr. Baker did not assume that the miner had clinical pneumoconiosis, but instead diagnosed the disease based on positive x-ray interpretations, which were consistent with the administrative law judge’s finding that the existence of clinical pneumoconiosis was established at 20 C.F.R. §718.202(a)(1). Decision and Order on Remand at 5. The administrative law judge found, based on Dr. Baker’s opinion, that claimant established that the miner was totally disabled due to his clinical pneumoconiosis at 20 C.F.R. §718.204(c). *Id.* Accordingly, he awarded benefits in the miner’s claim. *Id.* at 6.

B. Arguments on Appeal

On appeal, employer maintains that the administrative law judge should have determined that collateral estoppel applied to bar claimant from relitigating the issue of total disability causation at 20 C.F.R. §718.204(c), as “the finding that his problems were due exclusively to something other than coal mining became final when [the miner] neither appealed from the decision nor sought modification within one year.” Employer’s Brief at 17-18. Employer also argues that the administrative law judge did not comply with the Board’s instructions on remand because he again discounted the opinions of Drs. Dahhan and Fino on the ground that they did not diagnose pneumoconiosis. Employer further notes that the administrative law judge did not weigh the evidence “even-handedly,” as he did not discredit Dr. Baker’s opinion attributing the miner’s total disability to both clinical and legal pneumoconiosis despite the fact that Dr. Baker’s diagnosis of legal pneumoconiosis conflicted with the administrative law judge’s

finding. *Id.* at 21. Employer also maintains that the administrative law judge's failure to explain why Dr. Baker's opinion is credible, despite his mistaken premise, violates the Administrative Procedures Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Employer's allegations of error are without merit. Collateral estoppel, or issue preclusion, forecloses relitigation in a subsequent action of an issue that was decided in the initial action. *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 908 (6th Cir. 2001); *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir. 1997)(*en banc*) (quoting *Detroit Police Officers Ass'n v. Young*, 842 F.2d 512, 515 (6th Cir. 1987)). Collateral estoppel is properly applied when the following criteria are met:

- (1) The precise issue raised in the present case was raised and actually litigated in the prior proceeding;
- (2) Determination of the issue was necessary to the outcome of the prior proceeding;
- (3) The prior proceeding 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 Ass'n, 821 F.2d 328 (6th Cir. 1987); *see also Zeigler Coal Co. v. Director, OWCP [Villain]*, 311 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). In this case, the first and second criteria are not met, as the miner's prior claims were denied on the ground that he failed to establish total disability. Contrary to employer's assertion, therefore, the prior denials did not contain findings that the miner's impairment was "due exclusively to something else." Employer's Brief at 17-18; Miner's Claim Record (M)-Director's Exhibit 2. Thus, the issue of total disability causation was not actually litigated, nor was it necessary to the outcome of the prior proceedings.

We also reject employer's contentions that the administrative law judge failed to comply with the Board's remand instructions and erred in discrediting the opinions of Drs. Dahhan and Fino. The Board previously vacated the administrative law judge's findings regarding the opinions of Drs. Dahhan and Fino at 20 C.F.R. §718.204(c) because he did not consider their statements that, even if the miner had clinical pneumoconiosis, their opinions regarding disability causation would remain the same. *Hamilton*, slip op. at 13. On remand, the administrative law judge complied with the Board's instructions and rationally determined that Dr. Dahhan consistently identified the negative x-ray findings as a reason for not attributing the miner's respiratory impairment,

in part, to his coal dust exposure. Decision and Order on Remand at 5; M-Employer's Exhibits 5 at 8, 10-11. The administrative law judge also acted within his discretion in finding that Dr. Fino assumed the presence of simple coal workers' pneumoconiosis, but focused mainly on the cause of the miner's death. Decision and Order on Remand at 5; M-Employer's Exhibits 3 at 5; 4 at 10; 10 at 11-12.

Furthermore, the administrative law judge rationally concluded that, like Dr. Dahhan, Dr. Fino stated that the coal dust inhalation would not have resulted in the degree of impairment shown on the pulmonary function studies, but did not explain why it could not have contributed, in part, to his impairment. M-Employer's Exhibits 3, 4 at 10-11. In addition, the administrative law judge reasonably found that Dr. Fino consistently listed the lack of x-ray findings of pneumoconiosis as a reason for declining to attribute the miner's respiratory impairment to coal dust exposure, and, after acknowledging that the x-ray evidence might be positive, he immediately reversed his position, based on the bullous emphysema evident on the x-rays. M-Employer's Exhibits 4 at 14, 10 at 11-12.

In light of these permissible findings, the administrative law judge rationally determined that assuming that the miner had clinical pneumoconiosis did not cure the defects in the disability causation opinions of Drs. Dahhan and Fino, as they did not explain their dismissal of clinical pneumoconiosis as a contributing cause of the miner's totally disabling respiratory impairment. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); 20 C.F.R. §718.204(c)(1); *see also Skukan*, 99 F.2d at 1233, 17 BLR at 2-104; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). We affirm, therefore, the administrative law judge's discrediting of the opinions of Drs. Dahhan and Fino under 20 C.F.R. §718.204(c).

In addition, contrary to employer's allegation, there was no need for the administrative law judge to require Dr. Baker to "reconsider his opinion in the absence of legal pneumoconiosis," based on the administrative law judge's finding that legal pneumoconiosis was not established. Employer's Brief in Support of Petition for Review at 22. As the Board previously held, in addition to indicating that the miner's total disability was related to chronic bronchitis and chronic obstructive pulmonary disease, caused by smoking and coal dust exposure, Dr. Baker opined that clinical pneumoconiosis contributed fully to the miner's totally disabling respiratory impairment. *Hamilton*, slip op. at 12. Therefore, we affirm the administrative law judge's determination that Dr. Baker's opinion is sufficient to establish that the miner is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Living Miner's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge