

BRB No. 09-0643 BLA

SHERRY SHAFF)
(Widow of EDWARD E. SHAFF))
)
 Claimant-Petitioner)
)
 v.)
)
 U.S. STEEL CORPORATION)
)
 and)
) DATE ISSUED: 05/28/2010
 ACORDIA EMPLOYERS SERVICE)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Decision and Order Denying Motions for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman, Denver, Colorado, for claimant.

William J. Evans and Susan Baird Motschiedler (Parsons Behle & Latimer), Salt Lake City, Utah, for employer.

Helen H. Cox (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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits and the Decision and Order Denying Motions for Reconsideration (2006-BLA-00051 and 2006-BLA-06161) of Administrative Law Judge Richard K. Malamphy (the administrative law judge), which were issued pursuant to 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).² The relevant procedural history of this case is as follows. The miner filed a claim for benefits on March 29, 1989, which was awarded by Administrative Law Judge Alexander Karst on March 30, 1994. Director's Exhibit 1. Thereafter, the miner was paid monthly benefits by employer, commencing March 1, 1989. On February 5, 2004, the miner died and claimant filed a survivor's claim on March 23, 2004. Director's Exhibits 50, 66. In a Proposed Decision and Order Awarding Benefits dated December 8, 2004, the district director found that the miner had pneumoconiosis and that his death was due to pneumoconiosis. Director's Exhibit 84. Employer contested the award and requested a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 85.

On February 4, 2005, employer filed a Petition for Modification of Judge Karst's 1994 Decision on Remand in the miner's claim. Director's Exhibit 50. The miner's and the survivor's claims were consolidated for a hearing before the administrative law judge on July 28, 2008. Prior to the hearing, claimant filed a motion for partial summary judgment on July 8, 2008, asserting that employer's petition for modification in the miner's claim was untimely and would not render justice under the Act, and that employer was barred from relitigating, in the survivor's claim, the issues of pneumoconiosis, causal relationship, and length of coal mine employment, based on the doctrine of collateral estoppel. Claimant also filed an amended motion for partial

¹ Claimant, Sherry Shaff, is the widow of the deceased miner, Edward Shaff.

² By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Black Lung Benefits Act (the Act) with respect to the entitlement criteria for certain claims. *Shaff v. U.S. Steel Mining Co.*, BRB No. 09-0643 BLA (Mar. 30, 2010) (unpub. Order). Employer and the Director, Office of Workers' Compensation Programs (the Director), respond and assert that Section 1556 does not apply to either the miner's claim or the survivor's claim, as they were filed prior to January 1, 2005. Based on the parties' responses, and our review, we hold that the recent amendments to the Act are not applicable, based on the filing dates of the claims.

summary judgment on July 24, 2008. The administrative law judge issued his Decision and Order Denying Benefits on February 6, 2009, in which he denied claimant's motions, granted employer's petition for modification of the award of benefits in the miner's claim and further denied benefits in the survivor's claim. Claimant and employer subsequently filed motions for reconsideration, which were denied on April 28, 2009.³ Thereafter, claimant filed the instant appeal with the Board.

On appeal, claimant contends that employer's petition for modification was untimely because it was filed more than one year after the miner's death. Alternatively, claimant argues that the administrative law judge erred in granting employer's motion for modification, without giving proper consideration as to whether granting modification would render justice under the Act. Claimant also contends that the administrative law judge erred in his evaluation of whether there was a mistake in determination of fact with regard to the issue of legal pneumoconiosis in the miner's claim. With respect to the survivor's claim, claimant asserts that the doctrine of collateral estoppel is applicable to preclude employer from relitigating the issue of whether the miner had pneumoconiosis arising out of his coal mine employment. Claimant also contends that the administrative law judge erred in finding that the miner's death was not due to pneumoconiosis, based on his erroneous findings under 20 C.F.R. §718.202(a)(4).

Employer responds, urging affirmance of the administrative law judge's decision to grant the petition for modification in the miner's claim and to deny benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that, while the administrative law judge's analysis of the timeliness issue is flawed, he correctly determined that the petition for modification was timely filed. The Director agrees with claimant that the administrative law judge provided no analysis as to whether employer's modification petition would render justice under the Act. The Director, however, asserts that employer's modification petition is "moot because employer has no remedy against the miner's estate." Director's Letter Brief at 3. The Director maintains that the Board should vacate the denial of benefits in both claims and remand the case in order for the administrative law judge to address whether modification would render justice and to determine whether collateral estoppel is applicable in the survivor's claim. In response to the Director's assertion, that employer's modification request may be moot, employer filed a motion to strike the Director's brief or file a supplemental brief, which was denied by the Board. *Shaff v. U.S. Steel Corp.*, BRB No. 09-0643 BLA (Dec. 20, 2009) (unpub. Order).

³ Employer sought reconsideration in order to have the administrative law judge reopen the record for admission of employer's brief in opposition to claimant's amended motion for partial summary judgment. Employer's Brief at 13.

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.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

II. The Miner's Claim

A. Timeliness of Petition for Modification

Claimant first contends that the administrative law judge erred in finding that employer's petition for modification was timely filed pursuant to 20 C.F.R. §725.310 (2000).⁵ In addressing this issue, the administrative law judge specifically stated:

The miner died on February 10, 2004 and the petition was filed on February 7, 2005 [The regulation at] 20 C.F.R § 725.310 [2000] states that such a petition must be filed within one year of the date of the last payment of benefits. The miner was "technically" in payment status at the time of his death. As the petition was filed within one year of the date, the petition was timely filed.

Decision and Order Denying Motions for Reconsideration at 3. Claimant maintains that the administrative law judge's finding was in error because he misstated the date of the miner's death. Claimant asserts that because employer's petition for modification was filed on February 7, 2005, more than one year after the miner's death on February 5, 2004, and beyond the one year limitation period set forth at 20 C.F.R. §725.310 (2000), it must be deemed untimely.⁶ Although claimant is correct that the administrative law

⁴ The record indicates that the miner's coal mine employment was in Utah. Director's Exhibit 1, 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

⁵ The Department of Labor revised the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the revised regulations. The revised regulations at 20 C.F.R. §725.310 do not apply to the miner's claim, as it was pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

⁶ The administrative law judge incorrectly stated that the miner died on February 10, 2004, as the record reflects that the miner died on February 5, 2004. Decision and Order Denying Motions for Reconsideration at 3; Director's Exhibit 52.

judge misstated the date of the miner's death, we reject claimant's assertion that the administrative law judge erred in concluding that employer's petition for modification was timely filed within one year of the date of the last payment of benefits to the miner.

The regulation at 20 C.F.R. §725.310(a) (2000) provides:

Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

20 C.F.R. §725.310(a) (2000). As the Director notes, the record in this case establishes that employer issued its last check to the miner for payment of January 2004 benefits on February 10, 2004, and that the check was deposited on February 18, 2004. Director's Letter Brief at 2, *citing* Director's Exhibit 50. Employer filed its petition for modification on February 7, 2005. Director's Exhibit 50. Because employer's petition for modification was filed within one year of the date of the issuance of the miner's last payment check, we agree with the Director that employer's petition was timely filed in accordance with 20 C.F.R. §725.310 (2000). Accordingly, we reject claimant's assertion of error and affirm the administrative law judge's timeliness finding on alternative grounds.

A. Mistake in a Determination of Fact

Claimant argues that the administrative law judge erred in finding a mistake in a determination of fact with respect to the award of benefits in the miner's claim. First, claimant contends that the administrative law judge erred in finding that Judge Karst applied the true doubt rule to find that the miner had pneumoconiosis. Claimant also asserts that the administrative law judge failed to explain the basis for his credibility determinations or how he resolved the conflict in the evidence as to the existence of pneumoconiosis in the miner's claim. Claimant's assertions of error have merit.

Contrary to the administrative law judge's characterization of Judge Karst's opinion, the record reflects that, in considering the etiology of the miner's respiratory condition, Judge Karst specifically weighed the contrary opinions of Dr. Rasmussen, that the miner had a respiratory condition due, at least in part, to coal dust exposure and Dr. Farney's opinion, that the miner did not have pneumoconiosis. Judge Karst stated that he was "more persuaded by Dr. Rasmussen's report, than Dr. Farney's report," based on Dr. Rasmussen's credentials and the fact that Dr. Rasmussen's opinion was supported by the medical literature. April 8, 1994 Decision on Remand at 7-8. Judge Karst stated that he was "inclined to give more credence to Dr. Rasmussen," but also noted that "even if I were to find the conflicting opinions . . . equally credib[le], I would have to resolve the

conflict in [the miner's] favor. . ." *Id.* at 8. Thus, we agree with claimant that the administrative law judge erred in stating that Judge Karst's finding of pneumoconiosis was based on application of the true doubt rule.

We also agree that the administrative law judge erred in finding that the miner did not have pneumoconiosis. In reviewing the medical opinions at 20 C.F.R. §718.202(a)(4), the administrative law judge did not address Dr. Rasmussen's opinion. Rather, he noted only that the miner's treating physician, Dr. Monahan, opined that the miner had a coal dust-related lung condition, while Drs. Farney, Repsher and Black opined that the miner did not have occupational lung disease. The administrative law judge then summarily stated that because three physicians did not diagnose an occupational lung disease, "one would conclude that a review of the evidence as a whole did not reflect the presence of [coal workers' pneumoconiosis] or other occupational dust disease of the lung." Decision and Order at 14. Insofar as the administrative law judge found that there was a mistake in a determination of fact as to whether the miner had pneumoconiosis, he concluded that living miner's benefits should not have been awarded and granted employer's request for modification under 20 C.F.R. §725.310 (2000). Decision and Order Denying Motions for Reconsideration at 4.

We conclude that the administrative law judge's finding of a mistake in a determination of fact was in error, as he failed to address all of the relevant evidence and gave no explanation as to how he resolved the conflict in evidence pursuant to 20 C.F.R. §718.202(a)(4). *See Wojtowicz*, 12 BLR at 1-165; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). The administrative law judge also erred in failing to consider Dr. Rasmussen's July 17, 1990 medical report, in which the doctor opined it was medically reasonable to conclude that coal mine dust exposure was "at least a potent and significant aggravating factor" in the miner's respiratory condition. Director's Exhibit 25; *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Therefore, we vacate his finding that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as well as his finding that employer was entitled modification pursuant to 20 C.F.R. §725.310 (2000), based on a mistake in a determination of fact in the miner's claim.

We instruct the administrative law judge, on remand, to reconsider Judge Karst's prior award of benefits and the medical evidence, and explain the basis for his credibility determinations, and all of his findings of fact and conclusions of law as required by the APA. We also instruct the administrative law judge to consider Dr. Rasmussen's opinion in determining whether a mistake in a determination of fact has been established pursuant to 20 C.F.R. §725.310 (2000).

B. Rendering Justice Under the Act

Claimant asserts that the administrative law judge erred in granting employer's petition for modification because he did not specifically address whether granting employer's petition would render justice under the Act. We agree.

Although the administrative law judge acknowledged that claimant challenged employer's petition for modification on the grounds that it did not render justice under the Act, the administrative law judge summarily concluded:

[O]ne does question the [e]mployer's motives in not challenging the award in 1994 and waiting until 2005 to file a request for modification.

There is a question as to the concept of 'against equity and good conscience' in an attempt to recover an overpayment of living miner's benefits. It appears that 20 C.F.R. § 725.310(d) (2000) applies in this case.

Decision and Order at 14.

Under Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §922, as incorporated into the Black Lung Act by 30 U.S.C. §932(a), the fact-finder *may*, on the ground of a change in conditions or because of a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310 (2000) (emphasis added). The intended purpose of modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987). However, the modification of a claim does not automatically flow from a finding that a mistake was made on an earlier determination, and should be made only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (the purpose of modification under the Longshore Act, also applicable to the Black Lung Act, is to "render justice.").

We agree with the Director that the administrative law judge "provided no analysis to support his summary conclusion that justice would be served by revisiting the miner's award eleven years after Judge Karst's decision." Director's Letter Brief at 3.⁷ *Banks*,

⁷ The Director maintains that unless there is an adverse party upon which employer can obtain relief, its modification request is "moot." Director's Letter Brief at

390 U.S. at 464. The administrative law’s conclusory statement that employer was entitled to pursue modification under 20 C.F.R. §725.310 (2000) fails to satisfy the Administrative Procedure Act (APA), 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), which requires that every adjudicatory decision be accompanied by a statement of “findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record.” 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge did not render specific findings as to whether reopening the award of benefits in the miner’s claim would render justice under the Act, we vacate the administrative law judge’s finding that employer was entitled to modification pursuant to 20 C.F.R. §725.310 (2000), and remand this case for further consideration.

III. Survivor’s Claim

In a survivor’s claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner’s death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a “substantially contributing cause” of a miner’s death if it hastens the miner’s death. *See* 20 C.F.R. §718.205(c)(5); *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996).

A. Collateral Estoppel

4. The Director notes that employer’s modification petition will have no impact on benefit payments on the miner’s claim since the miner is deceased and there is no evidence in the record that an estate exists by which employer would be able to recuperate benefits. Contrary to employer’s assertion, the Director has standing in this appeal to challenge whether employer’s petition for modification may be considered moot. *See* 20 C.F.R. §725.456(d); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989) (*en banc order*); Employer’s Motion to Strike Brief at 4. On remand, the administrative law judge should consider the Director’s position in determining whether granting employer’s modification request will render justice under the Act.

The doctrine of collateral estoppel refers to the effect of a judgment in foreclosing relitigation, in a subsequent action, of an issue of law or fact that actually has been litigated and decided in the initial action. *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). In order to successfully invoke the doctrine of collateral estoppel, a party must establish: (1) that the issue sought to be precluded is identical to the one previously litigated; (2) that the issue was actually determined in the prior proceeding; (3) that the issue's determination was a critical and necessary part of the decision in the prior proceeding; (4) that the prior judgment is final and valid; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *See Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009); *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir. 1995); *Forsythe*, 20 F.3d at 293-4, 18 BLR at 2-195; *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The doctrine of collateral estoppel does not apply to a legal ruling if there has been a major change in the governing law since the prior adjudication that could render the previous determination inconsistent with prevailing doctrine or where the party who is asserting the doctrine has a heavier burden in the second action than he did in the first. *See Montana v. United States*, 440 U.S. 147, 161 (1979); *Forsythe*, 20 F.3d at 293-4, 18 BLR at 2-195.

Claimant's asserts that the administrative law judge erred in failing to apply the doctrine of collateral estoppel to find that the miner had pneumoconiosis. Claimant contends that because the administrative law judge erred in failing to find the existence of pneumoconiosis established, he also erred in failing to find that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer asserts that collateral estoppel does not apply to preclude relitigation of the issue of the existence of pneumoconiosis because employer's petition for review reopened the miner's claim. We agree with employer.

Contrary to claimant's contention, in order for collateral estoppel to apply in the survivor's claim, there must be a final judgment in the miner's claim. *See Moss*, 559 F.3d at 1161; *Frandsen*, 46 F.3d at 978; *Forsythe*, 20 F.3d at 293-4, 18 BLR at 2-195. Because employer timely filed a petition for modification of the award of benefits in miner's claim, there is no final judgment with respect to the issue of the existence of pneumoconiosis, as that element of entitlement has not been finally determined. Thus, although the administrative law judge stated alternative grounds for finding that collateral estoppel was not applicable, we affirm his conclusion. We therefore reject claimant's assertion of error and hold that the application of collateral estoppel is precluded in the survivor's claim as a matter of law. *See Forsythe*, 20 F.3d at 2-93-4; 18 BLR at 2-195; 20 C.F.R. 725.310 (2000).

B. Death Due to Pneumoconiosis

Claimant next contends that the administrative law judge erred in finding that the miner's death was not due to pneumoconiosis. The administrative law judge made the following statements with respect to 20 C.F.R. §718.205(c):

Dr. Monahan suggests that dust disease of the lung was a contributing factor to the [m]iner's demise. Other physicians with more specialized credentials have determined that a dust disease of the lung was not present. Their opinions are persuasive . . .

I find that [claimant] has failed to establish that coal workers' pneumoconiosis was a substantially contributing cause or factor in the death of the [m]iner.

Decision and Order at 17. On reconsideration, the administrative law judge also summarily stated that he found "the reports of Drs. Farney and Repsher to be more credible than those from Drs. Monahan and Rasmussen." Decision and Order Denying Motions for Reconsideration at 5.

The administrative law judge's credibility statements with regard to the conflicting medical opinions under 20 C.F.R. §718.205(c) do not satisfy the requirements of the APA. *See Wojtowicz*, 12 BLR at 1-165. Thus, we vacate the administrative law judge's denial of benefits in the survivor's claim and remand the case for further consideration.

To summarize, we instruct the administrative law judge, on remand, to make specific findings in the miner's claim as to whether employer's petition for modification should be granted based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Thereafter, as necessary, the administrative law judge must make a specific finding as to whether granting modification of the award of benefits in the miner's claim would render justice under the Act. With respect to the survivor's claim,

the administrative law judge must reconsider whether the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Trumbo*, 17 BLR at 1-87-88. In rendering his decision on remand, the administrative law judge is specifically instructed to explain the bases for his credibility determinations, and his findings of fact and conclusions of law in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and the Decision and Order Denying Motions for Reconsideration are affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge