BRB No. 01-0198 BLA

ALICE BREWER (Widow of COLUMBUS BREWER) Claimant-Respondent v. ARCH ON THE NORTH FORK, INC. and ARCH MINERAL CORPORATION Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1445) of Administrative Law Judge Thomas F. Phalen, Jr. 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).[1] The administrative law judge determined that employer was precluded from relitigating the prior findings in the miner's claim of thirty years of coal mine employment and the existence of totally disabling pneumoconiosis arising out of coal mine employment. Decision and Order at 5-6. Based on the date of filing, the administrative law judge considered entitlement in this survivor's claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 2, 5-7. The administrative law judge, after considering all of the

[1]The Department of Labor has amended 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).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board issued an order on August 6, 2001 requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). On August 10, 2001, the Board issued an Order rescinding its August 6, 2001 order.

[2]Claimant is Alice Brewer, the miner's widow. The miner, Columbus Brewer, filed his original claim for benefits on August 21, 1973, which was denied on March 31, 1981. Director's Exhibit 27. The miner took no further action on that claim. The miner filed a second claim for benefits on May 11, 1987. Director's Exhibit 27. Benefits were awarded on the miner's duplicate claim by Administrative Law Judge Donald W. Mosser on July 12, 1994 and affirmed by the Benefits Review Board and the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 27; Claimant's Exhibit 3. The miner died on October 6, 1995. Director's Exhibit 4. Claimant filed her claim for benefits on March 11, 1996, which was denied by the district director on July 31, 1996. Director's Exhibit 11. Claimant subsequently requested a hearing on her survivor's claim on September 11, 1996. Director's Exhibit 13.

evidence of record pursuant to the proper standard, concluded that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2000). Decision and Order at 6-9. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in his evaluation of the medical opinion evidence in concluding that the miner's death was due to pneumoconiosis. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

[3]The administrative law judge's length of coal mine employment determination and his finding that employer is precluded from relitigating the prior findings of entitlement in the miner's claim pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204 (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 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.[4] *See* 20 C.F.R. §718.205(c)(5) (2001); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order must be vacated and the case remanded to the administrative law judge for further consideration. Employer initially contends that the administrative law judge erred in his weighing of the medical opinions of Drs. Powell and Naeye as the

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

administrative law judge impermissibly relied upon the smoking history determination made in the miner's claim to discredit the opinions of the physicians. We agree. 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 an initial action. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*); *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 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.

See Hughes, supra; *Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., Ltd.*, 63 F. 3d 1227 (3d Cir. 1995); *O'Leary v. Liberty Mutual Insurance Co.*, 923 F.2d 1062 (3d Cir. 1991); *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*; *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Applying these principles to the facts of this case, we hold that the administrative law judge erred in failing to address the evidence of record and to make a *de novo* determination with respect to the miner's smoking history in the instant survivor's claim. In the miner's claim, Administrative Law Judge Donald W. Mosser issued a Decision and Order on July 12, 1994, in which he awarded benefits to the miner after finding that the miner was a credible witness and established that his smoking history was minimal. Decision and Order dated July 12, 1994 at 3, 16; Director's Exhibit 27. Employer appealed, in relevant part, asserting that the administrative law judge erred in failing to resolve the conflicts in the miner's testimony regarding his smoking history. The Board held that the administrative law judge's use of the word "minimal" was inconsequential as all of the physicians relied on a thirty-six year smoking history and thus did not address employer's contention further. Director's Exhibit 27. Therefore, based upon the facts of the instant case, the application of collateral estoppel with regard to the miner's smoking history is precluded as this specific determination was not a critical or necessary part of the judgment in the prior case. Thus, we hold that collateral estoppel is inapplicable with respect to the prior smoking history determination in the miner's

claim. We therefore vacate the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.205 (2000) as the administrative law judge gave less weight to the opinions of Drs. Powell and Naeye since the physicians relied on a smoking history much more extensive than that found in the miner's claim and remand the case to the administrative law judge to make a *de novo* determination with respect to the miner's smoking history in light of all the relative evidence of record and to reconsider the medical opinion evidence in light of this finding.[5]

Employer further argues that the administrative law judge violated 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), in finding that the opinion of Dr. Fino should be rejected as the physician's opinion demonstrates bias in favor of employer in this case.[6] Employer's Brief at 7-10. We agree.

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[5]Although Dr. Powell stated that pneumoconiosis did not cause any pulmonary or respiratory impairment, which is contrary to the finding of entitlement in the prior miner's claim, the administrative law judge must reconsider this opinion as this statement does not automatically invalidate the physician's entire opinion with respect to death due to pneumoconiosis. Rather the administrative law judge must consider the credentials of the physician and the documentation that he relied upon in accessing the credibility of the opinion. *See* Director's Exhibits 7, 21, 25; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Hunley v. Director, OWCP*, 8 BLR 1-323 (1985).

[6]The Administrative Procedure Act requires each adjudicatory decision to include 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).

In finding that the miner's death was due to pneumoconiosis, the administrative law judge noted the relevant opinions of record and concluded that the opinion of Dr. Fino, that coal workers' pneumoconiosis played no role in the miner's death and that the miner would have died as and when he did had he never stepped foot in the mines, was entitled to no weight as it was a biased medical opinion. Decision and Order at 5, 8; Employer's Exhibits 1, 2. The administrative law judge reasoned that the physician's opinion was "an apparent attempt to silence a miner's survivor" and that there was insufficient evidence in the record in this case for Dr. Fino to make such an opinion. Decision and Order at 5. The administrative law judge, however, did not indicate any basis for finding that the physician forclosed all possibility that simple pneumoconiosis can contribute to the death of a miner. Decision and Order at 5; Director's Exhibits 5, 23; *see generally Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987). The administrative law judge's finding of bias is not supported by the evidence of record as Dr. Fino reviewed extensive medical records including coal mine employment and smoking histories, the death certificate, autopsy report, the opinions of Drs. Robinette, Clarke, Broudy, Myers, Wright, Mettu, Lane, Jackson, Anderson, Powell, Naeye, McManis, Florence and Wicker as well as numerous objective studies including x-rays, pulmonary function and blood gas studies in reaching his opinion that the miner's death was not due to pneumoconiosis.[7] *See Melnick v. Consolidation Coal*

[7]The administrative law judge also impermissibly substituted his opinion for that of the

Co., 16 BLR 1-31 (1991); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Zamora v. C.F.&I. Steel Corp.*, 7 BLR 1-568 (1984); Employer's Exhibits 1, 2. Although the administrative law judge is empowered to weigh the evidence, inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, the basis for the administrative law judge's credibility determinations in this particular case can not be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). Therefore, on remand, the administrative law judge should again consider Dr. Fino's opinion.

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physician in stating that "there is insufficient evidence in the record in this case for Dr. Fino to find" that the miner would have died as and when he did had he never stepped foot in the mines. Decision and Order at 5; Employer's Exhibits 1, 2. An administrative law judge may not reject a medical report because it does not accord with his own medical conclusion. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984).

Employer finally contends that the administrative law judge should not mechanically accord deference to the opinions of the treating physician and the autopsy prosector. Employer's Brief at 18-19, 21. We agree. In addressing the medical opinion evidence of record in the instant case, the administrative law judge accorded weight to the opinions of Dr. Florence as he was the miner's treating physician and to Dr. McManis as he was the autopsy prosector. Decision and Order at 8. The administrative law judge further noted that their greater expertise merits deference.[8] Decision and Order at 8. These factors are relevant in determining the weight to be assigned a particular medical opinion, but the administrative law judge must first determine if the opinions of record are reasoned and documented and therefore credible. *See Trumbo, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). In the instant case, the administrative law judge only compared the physicians findings on physical examination. The administrative law judge did not review the medical opinions in the context of their objective evidence which may provide a basis for determining the credibility of the opinions. *See Trumbo, supra*. We therefore vacate the administrative law judge's denial of benefits and remand this case to the administrative law judge to specifically set forth the basis for finding the opinions reasoned and documented and to specifically discuss the credibility of each opinion pursuant to the appropriate standard set forth at 20 C.F.R. §718.205 (2001). *See Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-233 (6th Cir. 1995); *Harlan Bell Coal*

[8]The administrative law judge failed to explain how Dr. Florence's board-certification in family practice merits deference. Decision and Order at 8; Director's Exhibits 5, 23.

Co. v. Lemar, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Accordingly, the administrative law judge's Decision and Order awarding benefits in this survivor's claim is affirmed in part, 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

NANCY S. DOLDER

Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge