BRB No. 06-0375 BLA

JUDITH A. RORRER (Widow of RALPH RORRER) Claimant-Respondent v. SHAMROCK PROCESSING COMPANY, INCORPORATED and WAUSAU INSURANCE COMPANIES Employer/Carrier-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/06/2006 DECISION and ORDER

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

John H. Callis, III (Kirk Law Firm), Paintsville, Kentucky, for claimant.

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

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

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order -- Awarding Benefits (05-BLA-6843) of Administrative Law Judge Linda S. Chapman on a survivor's claim[1] 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge initially credited the miner with twenty-six years of qualifying coal mine employment. The administrative law judge addressed the issue of whether to apply the doctrine of collateral estoppel[2] to the prior determination in the miner's claim that the existence of pneumoconiosis was established and she determined that employer was collaterally estopped from raising the issues of the existence of pneumoconiosis and whether the miner's pneumoconiosis arose out of coal mine employment. Next, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to bar the relitigation of the existence of pneumoconiosis in this survivor's claim. Employer argues further that the administrative law judge erred in her analysis of the medical evidence when she found that the miner's death was due to pneumoconiosis. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, (the Director), as party-in-interest, has filed a letter indicating his intention not 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 the applicable law, they are binding upon this Board and

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[1] Claimant, Judith A. Rorrer, is the surviving spouse of the miner, Ralph Rorrer, who died on June 21, 2003. Director's Exhibit 10. The miner filed an application for benefits on August 27, 1992, which were awarded by Administrative Law Judge Joel R. Williams in a Decision and Order dated July 25, 1994. Director's Exhibit 1. Employer did not appeal this award; consequently, the miner was receiving benefits until his demise. Claimant filed a survivor's claim on July 17, 2003, which is the subject of the instant appeal. Director's Exhibit 2.

[2] Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have actually been 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*), *citing Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994); *see Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229, 1-232-233 n.2 (2003).

may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Citing *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), employer argues that the administrative law judge erred in applying collateral estoppel to bar the relitigation of the existence of pneumoconiosis in this survivor's claim because the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) (all evidence set forth at Section 718.202(a)(1)-(4) must be weighed together), constituted a change in the law, therefore, the issue of the existence of pneumoconiosis in the survivor's claim was not identical to the issue of pneumoconiosis in the miner's claim.

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. *Sedlack v. Braswell Services Group, Inc*., 134 F.3d 219, 224 (4th Cir. 1998); *Hughes*, 21 BLR at 1-137.

Employer is correct that in *Collins*, the Board held that, in a survivor's claim where no autopsy evidence was obtained and entitlement to benefits was established in the living miner's claim, the doctrine of collateral estoppel is not applicable to preclude litigation of the issue of the existence of pneumoconiosis because the decision by the United States Court of Appeals for the Fourth Circuit in *Compton* constituted a change in the law with respect to the standard for establishing the existence of pneumoconiosis under Section 718.202(a) and, therefore, created a difference in the substantive legal standards applicable to the two proceedings. *Collins*, 22 BLR at 1-232-233.[3] In *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002) (*en banc*), which, like the instant case, arose within the jurisdiction of the United States Court of Appeals for the Sixth Circuit,[4] the Board "declined to apply *Compton* beyond the boundaries of the Fourth Circuit, as it is not apparent that the court's holding is mandated by the Act and the

[3] We note that the Board's decision in *Collins* is on appeal before the United States Court of Appeals for the Fourth Circuit. *Collins v. Pond Creek Mining Co.*, No. 05-1832 (4th Cir. filed Jul. 29, 2005, argued Mar. 2006). At the time of the issuance of this decision, however, the court had not rendered its decision.

[4] The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibits 1, 2. 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, 1-202 (1989) (*en banc*).

implementing regulations. Thus, inasmuch as the instant case arises within the jurisdiction of the Sixth Circuit … and the Sixth Circuit has not adopted the reasoning of the Fourth Circuit, we decline to apply the holding of *Compton* in this case." *Furgerson*, 22 BLR at 1-226-227. Consequently, while noting the holding in *Collins*, the administrative law judge did not err in failing to apply *Collins* to the instant case. Rather, the administrative law judge relied on *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979) and the Seventh Circuit court's pronouncement in *Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002), to hold that readjudicating whether the miner had pneumoconiosis is not necessary unless it is possible to adduce highly reliable evidence, such as autopsy evidence, which could contradict the original finding. Subsequently, the administrative law judge determined that the application of offensive collateral estoppel was "fair" in this case on the grounds that employer had vigorously defended the miner's claim when it was before Administrative Law Judge Joel R. Williams and employer did not pursue an appeal after the claim was awarded. This was rational. *See Parklane Hosiery*, 439 U.S. at 331; *Villain*, 312 F.3d at 334, 22 BLR at 2-587; Decision and Order at 3. We, therefore, reject employer's argument that the decisions in *Compton* and *Collins* were controlling in the instant case.

As further evidence that the law has changed since the miner's claim was decided, employer cites *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), for the proposition that a medical opinion diagnosing pneumoconiosis based on coal mine employment history and a positive x-ray reading alone is insufficient to establish pneumoconiosis under Section 718.202(a)(4). Employer specifically argues that Judge Williams's pneumoconiosis finding in the miner's claim was based on the opinions of Drs. Anderson, Wright, and Mettu, and that their reports do not satisfy *Cornett*.

Employer's argument comes too late. The Sixth Circuit did not purport to change the law in *Cornett* on what constitutes a reasoned medical opinion, and employer chose not to appeal Judge Williams's determination. We, therefore, reject employer's argument.

Likewise, employer argues that other standards governing the adjudication of this survivor's claim, compared to those in effect at the time of the miner's claim, have changed and constitute additional changes in the law, *i.e.*, the evidentiary limitations set forth in Section 725.414 limiting the quantity of admissible evidence and the decision in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), requiring that elements of entitlement be established by a preponderance of the evidence. Employer, however, fails to allege with specificity how these changes in the law impact the instant case or how they provide further grounds supportive of its assertion that the administrative law judge erred. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); Employer's Brief in Support of Petition for Review at 11-12. Employer's argument is, therefore, rejected and, the administrative law judge's

determination that the finding of pneumoconiosis arising out of coal mine employment made in the miner's claim must be given preclusive effect in this survivor's claim is affirmed. *See Villain*, 312 F.3d at 334, 22 BLR at 2-587; *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134 (1999) (*en banc*).

Because the administrative law judge properly applied collateral estoppel to preclude employer from relitigating the issue of the presence of pneumoconiosis, we need not address employer's contention that a preponderance of the evidence filed in the survivor's claim fails to establish the existence of pneumoconiosis.

Turning to the issue of the role of pneumoconiosis in the miner's death at Section 718.205(c), employer contends that, in finding that Drs. Tuteur and Jarboe diagnosed chronic obstructive pulmonary disease, the administrative law judge impermissibly disregarded the fact that neither physician related the miner's chronic obstructive pulmonary disease to coal dust exposure. Employer also 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), by failing to provide an adequate explanation for preferring the opinion of Dr. Fried, who opined that the miner's death was due to pneumoconiosis, over the contrary opinions of Drs. Tuteur and Jarboe.

Employer's contentions lack merit. In her analysis of the medical opinion evidence, the administrative law judge clearly stated, "Both Dr. Tuteur and Dr. Jarboe concluded that [the miner] did not have pneumoconiosis, and that his chronic obstructive pulmonary disease was caused by his cigarette smoking, not his exposure to coal dust." Decision and Order at 9. Hence, the administrative law judge clearly recognized the etiology diagnoses rendered by Drs. Tuteur and Dr. Jarboe. Further, in determining the probative value of the medical opinions relevant to Section 718.205(c), the administrative law judge conducted a qualitative assessment of the medical opinions and rendered an analysis that fully comports with the APA. Finding that neither Dr. Tuteur nor Dr. Jarboe opined that the miner had either clinical or legal pneumoconiosis, the administrative law judge discounted their opinions as to the cause of the miner's death because their opinions were contrary to the conclusion of Judge Williams that the miner had pneumoconiosis. This was proper and we affirm the administrative law judge's determination in this regard. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Cornett*, 227 F.3d at 569, 22 BLR at 2-107; *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); Decision and Order at 9.

Employer contends further that Dr. Fried's opinion contained in the death certificate is insufficient to establish that the miner's death was due to pneumoconiosis because: Dr. Fried did not specifically opine that pneumoconiosis contributed to the miner's chronic obstructive pulmonary disease in the treatment records; he did not explain his ultimate conclusion; and he did not consider the miner's significant smoking history. A review of the medical records from King's Daughters' Medical Center reveals that Dr. Robert Fried, the surgeon who performed the miner's triple vessel coronary artery bypass grafting procedure, listed "black lung," severe chronic obstructive pulmonary disease, and history of tobacco abuse among other medical conditions in both the pre-operative and post-operative diagnoses contained in his May 22, 2003 report. Director's Exhibit 13-23. Thus, Dr. Fried specifically diagnosed "black lung," obviating any need to attribute the miner's chronic obstructive pulmonary disease to coal dust exposure and the physician was aware of the miner's cigarette smoking history. The administrative law judge was persuaded by the opinion of Dr. Fried, who performed the miner's open heart surgery during his final hospitalization and completed the death certificate stating that the direct cause of the miner's death was chronic obstructive pulmonary disease with "black lung" being a significant contributing factor. The judge observed that both Drs. Tuteur and Jarboe agreed with Dr. Fried that the miner's severe chronic obstructive pulmonary disease did, in fact, contribute to his death. Decision and Order at 8; Director's Exhibits 1, 10; Employer's Exhibits 4-6. Relying on the opinion of Dr. Fried, and in part, on the opinions of Drs. Tuteur and Jarboe, therefore, the administrative law judge reasonably concluded that claimant affirmatively established that the miner's "death was due, at least in part, to [the miner's] severe obstructive pulmonary condition, which in turn was caused in part by his exposure to coal mine dust." Decision and Order at 9. Employer's contention that there was insufficient evidentiary support for the administrative law judge's crediting of Dr. Fried's opinion must fail.

Essentially, employer is asking the Board to overturn the administrative law judge's credibility determinations. The Sixth Circuit court has held that a determination requiring the court to address a physician's credibility would exceed its limited scope of review. *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). The Sixth Circuit has categorically emphasized that it is for the administrative law judge as factfinder to "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is 'essentially a credibility matter'." *Stephens*, 298 F.3d at 522, 22 BLR at 2-512, *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Like the Sixth Circuit in *Stephens*, "[w]e recognize that the evidence of record may permit an alternative conclusion, but we defer to the [administrative law judge's] authority in the findings of fact." *Stephens*, 298 F.3d at 836, 22 BLR at 2-513; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Accordingly, as the administrative law judge rationally found the medical opinion evidence sufficient to

demonstrate that pneumoconiosis substantially contributed to the miner's death, we affirm the administrative law judge's Section 718.205(c) determination. *See Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Wagner v. Beltrami Enterprises*, 16 BLR 1-65, 1-68 (1990) (reliable death certificate may be sufficient to establish death due to pneumoconiosis at Section 718.205(c)); *Copley v. Olga Coal Co.*, 6 BLR 1-181, 1-184 (1983).

Based on the foregoing, we affirm the administrative law judge's determinations that the medical evidence of record was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) and that claimant is entitled to benefits. *See Brown*, 996 F.2d at 816, 17 BLR at 2-140; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with the decision to affirm the administrative law judge's application of the doctrine of collateral estoppel to the prior determination in the miner's claim regarding the existence of pneumoconiosis and her resultant finding that employer was collaterally estopped from raising the issues of the existence of pneumoconiosis and whether the miner's pneumoconiosis arose out of coal mine employment. *See Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002) (*en banc*). Additionally, I concur with the decision to affirm the administrative law judge's discounting of the opinions of Drs. Tuteur and Jarboe on the issue of death due to pneumoconiosis based on these

physicians' failure to diagnose either clinical or legal pneumoconiosis, a conclusion that was contrary to that of the administrative law judge. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

However, I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Instead, I would reverse the administrative law judge's Section 718.205(c) determination, hold that claimant's entitlement to benefits is precluded, and deny benefits. I would vacate the administrative law judge's determination that Dr. Fried's opinion was sufficient to establish that the miner's death was due to pneumoconiosis because, in completing the miner's death certificate, Dr. Fried merely listed "chronic obstructive pulmonary disease" as the immediate cause and "black lung" as a significant cause, but failed to provide any rationale explaining his conclusion. Director's Exhibit 10. As employer contends, Dr. Fried did not identify any rationale supportive of his opinion and did not discuss why he believed that pneumoconiosis contributed to the miner's death. Unlike my colleagues, therefore, I cannot conclude that this constitutes a reasoned opinion. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-262 (4th Cir. 2000) (reference on a death certificate to pneumoconiosis as an other condition contributing to death, without further explanation, does not constitute a reasoned opinion); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Because the administrative law judge properly discounted the opinions of Drs. Tuteur and Jarboe, and Dr. Fried's opinion does not constitute a reasoned opinion, I would hold that the evidence of record does not contain a credible, reliable physician's opinion sufficient to establish that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c). Therefore, I would hold that claimant has failed to satisfy her burden of establishing entitlement to benefits in this case. *See Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Accordingly, I would reverse the award of benefits.

ROY P. SMITH
Administrative Appeals Judge