BRB No. 00-1134 BLA

ANNA RUTH POWERS (Widow of WOODROW WILSON POWERS)	)	
Claimant-Respondent	)	
v.	)	
MINING ENERGY, INCORPORATED	)	
and	)	DATE ISSUED:
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Anna Ruth Powers, Vansant, Virginia, *pro* se.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-0812 and 95-BTD-0002) of Administrative Law Judge Clement J. Kichuk awarding medical benefits in a deceased miner's claim and survivor's benefits in a widow's claim. Both claims were 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] This case is before the Board for the second

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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

time. Initially, Administrative Law Judge Edward J. Murty, Jr. denied both medical benefits in the deceased miner's claim and benefits in the survivor's claim.

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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 subsequently issued an order 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). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

The Director, Office of Workers' Compensation Programs (the Director), appealed Judge Murty's denial of medical benefits to the Board. Claimant[2] cross-appealed, challenging Judge Murty's denial of medical benefits and survivor's benefits. On appeal, the Board vacated Judge Murty's denial of medical benefits inasmuch as the Board held that Judge Murty did not accord the miner the benefit of the presumption of compensability enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Doris Coal Co. v. Director, OWCP* [*Stiltner*], 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), *aff'g in part and rev'g in part Stiltner v. Doris Coal Co.*, 14 BLR 1-116 (1990)(*en banc*, with Brown, J. dissenting, and McGranery, J., concurring and dissenting). *See Powers v. Mining Energy, Incorporated*, BRB Nos. 97-1305 BLA and 97-1305 BLA-A (Apr. 15, 1999)(unpub.). Additionally, the Board held that Judge Murty's findings, that the miner did not have pneumoconiosis and that the miner's chronic obstructive pulmonary disease was caused by his smoking and not by his coal mine employment, are contrary to *Stiltner*. *See Powers*, *supra*. The Board, citing *Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999), further instructed Judge Murty to determine on remand whether employer established rebuttal of the *Stiltner* presumption by producing credible evidence that the treatment rendered to the miner is for a pulmonary

[2]Claimant is Anna Ruth Powers, widow of the miner, Woodrow Wilson Powers, who filed her survivor's claim for benefits on May 17, 1994. Survivor's Claim-Director's Exhibit 1. The miner, who died on April 30, 1994, was awarded benefits by Administrative Law Judge Henry W. Sayrs on September 14, 1988. Miner's Claim-Director's Exhibit 1, 14. The Board affirmed this award on January 28, 1991. Miner's Claim-Director's Exhibit 4.

disorder apart from those previously associated with the miner's disability, or is beyond that necessary to effectively treat a covered disorder, or is not for a pulmonary disorder at all. *See Powers, supra*. The Board also vacated Judge Murty's denial of benefits in the survivor's claim and remanded the case for consideration of whether, on the facts of the case, employer is precluded from relitigating the issue of the existence of occupational pneumoconiosis under the criteria enunciated by the Fourth Circuit in *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998) and *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992). *See Powers*, *supra*. Moreover, the Board remanded the case to Judge Murty for consideration of all other issues regarding whether claimant has established entitlement to survivor's benefits in the widow's claim. *See Powers*, *supra*.

Employer filed a timely Motion for Reconsideration. The Board denied employer's Motion for Reconsideration. However, in light of the Fourth Circuit court's decision in *General Trucking Corp. v. Salyers*, 175 F.3d 322, 21 BLR 2-565 (4th Cir. 1999), which was issued subsequent to the Board's April 15, 1999 Decision and Order, the Board instructed Judge Murty to additionally consider whether employer has established rebuttal of the *Stiltner* presumption by producing credible evidence that the deceased miner was treated for a pulmonary condition that had not manifested itself, to some degree, at the onset of his disability or for a preexisting pulmonary condition adjudged not to have contributed to his disability.

On remand, this case was transferred without objection by the parties to Administrative Law Judge Clement J. Kichuk (hereinafter, the administrative law judge).

The administrative law judge found that employer failed to rebut the presumption set forth in *Stiltner*. Decision and Order at 14-16. Accordingly, the administrative law judge found employer liable for all of the disputed medical bills. Decision and Order at 16. On the survivor's claim, the administrative law judge found the doctrine of collateral estoppel to be applicable, and, therefore, the administrative law judge found employer precluded from relitigating the issue of the existence of pneumoconiosis arising out of coal mine employment in the survivor's claim. Decision and Order at 16-17. The administrative law judge also found that claimant established that the miner's pneumoconiosis contributed to his death pursuant to 20 C.F.R. §718.205(c) (2000). Decision and Order at 22. Accordingly, the administrative law judge awarded benefits in the survivor's claim, commencing April 1, 1994. *Id.*

In this appeal currently pending before the Board, employer asserts that the administrative law judge erred in applying the doctrine of collateral estoppel to this case. Employer's Brief at 12-19. Employer contends that the administrative law judge impermissibly shifted the burden of proof to employer in considering the medical benefits claim. Employer's Brief at 19-23. Employer additionally asserts that the administrative law judge erred in discrediting the opinions submitted by employer in both the medical benefits and survivor's claims. Employer's Brief at 23-27. The Director has filed a limited response brief addressing the medical benefits claim. The Director contends that the Board should reject employer's assertion that it should be able to relitigate the issue of the existence of pneumoconiosis in a medical benefits claim. Director's Brief at 3-5. The Director

"express[es] no opinion" on whether the administrative law judge properly discredited the opinions submitted by employer. Director's Brief at 5-6. Employer has filed a reply brief.

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 applicable law, they are binding upon this Board and 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Regarding the medical benefits claim, employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to this claim. Employer's Brief at 12-19. The administrative law judge, pursuant to the Board's remand instructions, only applied the doctrine of collateral estoppel to the survivor's claim. Decision and Order at 16-17. In the medical benefits case, the administrative law judge properly did not consider whether the miner had pneumoconiosis. However, employer asserts that it cannot be precluded from relitigating the issue of the existence of pneumoconiosis because there has been a change in law.[3] Employer's Brief at 13-14, 16. Specifically, employer asserts that

[3]Employer asserts that Judge Sayrs mechanically accorded greater weight to the treating physician's opinion and also relied on the true doubt rule in awarding benefits. Employer's Brief at 12-14. Therefore, employer asserts that the United States Supreme Court's 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), which invalidated the true doubt rule, and the intervening Fourth Circuit decisions in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997), which have unequivocally rejected such mechanical crediting of treating physicians opinions, establish a change in law from when Judge Sayrs rendered his

while the Fourth Circuit in *Ling* and *Stiltner* precluded a challenge to a prior finding of pneumoconiosis in a medical benefits claim, the instant case is distinguishable because the employers in *Ling* and *Stiltner* did not assert a change in law. Employer's Brief at 16.

Employer's assertion is without merit. As the Fourth Circuit has stated in *Ling* and *Stiltner*, allowing employer to challenge an element of entitlement in a medical benefits case would be tantamount to compelling a claimant to relitigate an element of entitlement previously established, namely the existence of pneumoconiosis, which a claimant is not required to do in a medical benefits case. *See Ling*, 176 F.3d at 232 and n.13, 21 BLR at 2-581, *citing Stiltner, supra*. The Fourth Circuit in *Ling* and *Stiltner* did not delineate any circumstance that would present an exception to this principle. Indeed, if there were exceptions to this rule, miners would be discouraged from filing medical benefits claims for fear of having to constantly relitigate their entitlement to benefits. Employer is merely trying to circumvent the finality of the decision in the miner's claim, which it cannot do at this stage. As the Fourth Circuit court stated in *Stiltner*:

> In addition to the potential *res judicata* problems, such a requirement would place a significant burden on the Black Lung benefits system, increase litigation costs for all of the parties involved, and further delay important medical benefits that a miner suffering from pneumoconiosis needs. We therefore hold that...operators may not require the miner to prove again that he has pneumoconiosis each time he makes a claim for health benefits.

See Stiltner, 938 F.2d at 497, 15 BLR at 2-140-141.

Additionally, the comments to the new regulations specifically state:

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decision. Employer's Brief at 12-14.

> Section 725.701(f), however, does preclude one defense: the operator cannot escape liability by trying to prove the medical service cannot pertain to disabling pneumoconiosis because the miner was disabled *solely* from smoking or some other non-occupational cause. Once the miner establishes (s)he is entitled to disability benefits, no element of entitlement can be relitigated or otherwise questioned via the medical benefits litigation. Consequently, the operator and its physician must accept that the miner has a totally disabling respiratory or pulmonary impairment, and that pneumoconiosis, as defined in §718.201, is a substantially contributing cause of that impairment.

65 Fed. Reg. 80,022 (2000)(to be codified at 20 C.F.R. Part 725). These comments clearly dismiss employer's assertion that it should now be able to relitigate the existence of pneumoconiosis.[4]

Employer next contends that the administrative law judge impermissibly shifted the burden of proof in the medical benefits claim. Employer's Brief at 19-20. Contrary to employer's assertion, prior to considering the medical evidence, the administrative law judge

[4]Employer contends that new evidence "would have provided the basis for modification of the miner's award because it establishes a mistake in fact regarding the existence of [pneumoconiosis]." Employer's Brief at 15 n.3. However, employer asserts that since it is was precluded from pursuing modification because of the miner's death, it should now be able to relitigate this issue. *Id.* As the Director states in his response brief, employer could have appealed the Board's 1991 affirmance of Judge Sayrs' award of benefits or could have sought modification pursuant to 20 C.F.R. §725.310 (2000) at any time up to one month after the last payment of benefits. Employer chose not to seek either remedy.

correctly noted that the Fourth Circuit in *Ling* rejected employer's argument that the *Stiltner* presumption was contrary to the U.S. Supreme Court's 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). Rather, the administrative law judge noted that the Fourth Circuit stated that "the presumption created in *Stiltner* shifted the burden of *production*, not the ultimate burden of proof, which remained with Claimant." Decision and Order at 14.

The Board has held that the party opposing the payment of medical benefits, in order to rebut the presumption set out in *Stiltner*, may show, by a reasoned medical opinion, (1) that the expenses in question were not reasonable for the treatment of any of claimant's pulmonary diseases (*i.e.*, a reasoned medical opinion which states that a certain type of treatment is excessive or simply not necessary for the treatment of claimant's pulmonary condition); or (2) the treatment is for a condition completely unrelated to claimant's pulmonary condition (*e.g.*, treatment for a heart condition, broken bone or back). *Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(*en banc*)(Brown, J. concurring).

The Fourth Circuit has held that:

> If the party opposing the claim produces credible evidence that the treatment rendered is for a pulmonary disorder apart from those previously associated with the miner's disability, or is beyond that necessary to effectively treat a covered disorder, the mere existence of a medical bill, without more, shall not carry the day. The burden of persuading the factfinder of the validity of the claim remains at all times with the miner.

Ling, 176 F.3d at 233, 21 BLR at 2-583. The Fourth Circuit has further held that the party

opposing payment may also establish rebuttal by producing credible evidence that the miner was "treated for 'a pulmonary condition that had not manifested itself, to some degree, at the onset of his disability,' or for 'a preexisting pulmonary condition adjudged not to have contributed to his disability.'" *See Salyers*, 175 F.3d at 324, 21 BLR at 2-569, *citing Ling*, *supra*.

Employer asserts that the administrative law judge erred in rejecting the opinions of Drs. Branscomb, Dahhan, and Spagnolo because these physicians found that the miner did not have pneumoconiosis or total disability due to pneumoconiosis. Employer's Brief at 20-24. In considering the opinions of Drs. Branscomb, Dahhan, and Spagnolo,[5] the administrative law judge stated:

> While all of these physicians possess impressive qualifications, their opinions are fundamentally flawed because they repudiate the existence of CWP, which has already been established in this miner and cannot now be re-challenged.

Decision and Order at 15. Therefore, the administrative law judge concluded that employer has failed to rebut the *Stiltner* presumption and, therefore, is liable for all of the disputed medical bills. Decision and Order at 16.

Dr. Branscomb initially noted that he "understands that it has already been determined that [the miner] has legal pneumoconiosis." Miner's Claim-Director's Exhibit 30. Dr.

[5]The administrative law judge states that employer also attempts to rebut the presumption by submitting the opinions of Drs. Renn and Castle. However, Drs. Renn and Castle did not discuss whether the miner's medical bills were compensable under the Act.

Branscomb later concluded that:

> none of the treatment documented in these medical records was for [the miner's] legal pneumoconiosis. [The miner's] treatment was for coronary artery disease and for severe chronic obstructive pulmonary disease with periodic exacerbations.
>
> The coronary artery disease is the result of non-occupational factors including heredity and diet. The chronic obstructive lung disease (sometimes referred to as COPD and also as chronic asthmatic bronchitis or as emphysema) was the direct result of cigarette smoking in a susceptible person.
>
> It is not possible in every instance to determine in a patient whether pulmonary impairments are the result of coal mining or cigarette smoking. However, it is indeed possible to make this distinction in th[is] case.... [The miner's] chronic obstructive pulmonary disease and the resulting respiratory impairments are not the result of legal pneumoconiosis nor aggravated by such but are the result of cigarette smoking.

Id.

Dr. Dahhan indicated that the miner's chest x-ray was classified as "0/0 - emphysema, bullae and fractured ribs." Miner's Claim-Director's Exhibit 30. Dr. Dahhan found that the miner had:

> severe chronic obstructive lung disease with the variety of chronic bronchitis and emphysema which has resulted from his 55 pack years of smoking and caused the development of respiratory failure. In addition [the miner] has coronary artery disease with old myocardial infarction.

Id. After reviewing the miner's medical bills, Dr. Dahhan concluded that:

> [the miner's] medical bills indicate that he [was] being treated for chronic obstructive lung disease which I believe is correct. However, none of these treatments...are necessary for the treatment of simple occupational pneumoconiosis....

Id.

In Judge Sayr's Decision and Order awarding benefits, Judge Sayrs found that the miner had established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) by finding that the miner's chronic obstructive pulmonary disease was due to his coal mine employment. Miner's Claim-Director's Exhibit 1. Therefore, the conclusion of Dr. Dahhan, that the miner's chronic obstructive lung disease was due to his smoking, is contrary to the finding Judge Sayrs made previously. While Dr. Branscomb acknowledged that it already has been determined that the miner has legal pneumoconiosis, he later concluded that the miner's chronic obstructive pulmonary disease was "not the result of legal pneumoconiosis nor aggravated by such but [is] the result of cigarette smoking," which is also contrary to Judge Sayrs' finding that the miner's chronic obstructive lung disease was due to his coal mine employment. Miner's Claim-Director's Exhibits 1, 30. Accordingly, these conclusions of Drs. Branscomb and Dahhan render their opinions suspect as legitimate proof that claimant's medical bills are not reimbursable, *see Ling*, *supra*; *Stiltner*, *supra*, especially in light of the new regulations which state that:

> [e]vidence that the miner does not have pneumoconiosis or is not totally disabled by pneumoconiosis arising out of coal mine employment is insufficient to defeat a request for coverage of any medical service or supply under this subpart.

20 C.F.R. §725.701(f). Therefore, contrary to employer's assertions, the administrative law judge properly discredited the opinions of Drs. Dahhan and Branscomb because these physicians did not find that the miner's chronic obstructive lung disease was due to his coal mine employment, which has been established in the miner's claim.

Dr. Spagnolo reviewed the various expenses relating to the miner's pharmacy bills, office visits, and hospitalizations and concluded that none of the expenses was "rendered as treatment of covered pulmonary condition(s), and [he] consider[ed] them NOT reimbursable under the Black Lung Program." Miner's Claim-Director's Exhibit 42. Dr. Spagnolo reasoned that the expenses the miner submitted were for treatment of "airflow obstruction and inflammation caused by cigarette smoking and myocardial dysfunction caused by coronary artery disease" and not for the treatment of simple pneumoconiosis. *Id.* Dr. Spagnolo added that "[n]one of these services [*sic*] to evaluate or provide treatment for a medical condition significantly related to or substantially aggravated by a clinical pneumoconiosis or coal dust exposure." *Id.* Additionally, Dr. Spagnolo consistently stated that he "agree[d] with Drs. Branscomb and Dahhan [sic] reported comments with regard to these services." *Id.*

While Dr. Spagnolo did not explicitly find that the miner's chronic obstructive pulmonary disease was due to smoking, the administrative law judge inferred such a finding from Dr. Spagnolo's statements in his opinion and his consistent agreement with the conclusions of Drs. Branscomb and Dahhan. We hold that the administrative law judge's inference regarding Dr. Spagnolo's opinion was rational, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), inasmuch as Dr. Spagnolo consistently stated that he agreed with the findings of Drs. Branscomb and Dahhan who did find that the miner's chronic obstructive pulmonary disease was due to smoking. Accordingly, the administrative law judge properly discredited the opinions of Drs.

Dahhan, Branscomb, and Spagnolo. We, therefore, affirm the administrative law judge's finding that employer is liable for the payment of the miner's medical bills.

Regarding the survivor's claim, employer initially raises several assertions with regard to the administrative law judge's application of the doctrine of collateral estoppel in the adjudication of this claim. Employer's Brief at 12-19. In determining whether collateral estoppel precluded employer from litigating the issue of pneumoconiosis in the survivor's claim, the administrative law judge considered the criteria set forth in *Sedlack* and *Sandberg*,[6] found all the criteria satisfied, and concluded the issue of the existence of pneumoconiosis need not be relitigated in the survivor's claim. Decision and Order at 17. First, employer asserts that "[c]ollateral estoppel may not be applied when 'a change in controlling legal principles ha[s] occurred between [the first case] and the instant suit.'" Employer's Brief at 12. Specifically, employer asserts that in finding the existence of pneumoconiosis

[6]For collateral estoppel to apply in the present case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, a party 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.

See Sedlack v. Braswell Services Group, Inc., 134 F.3d 219 (4th Cir. 1998); *Ramsey v. INS*, 14 F.3d 206, 210 (4th Cir. 1994); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*).

established in the miner's claim, Administrative Law Judge Henry W. Sayrs mechanically credited the opinion of Dr. Patel, the miner's treating physician, and the intervening Fourth Circuit decisions in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997), have unequivocally rejected such mechanical crediting of treating physicians' opinions. Employer's Brief at 12-15.

In *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999), the Board discussed whether *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), constituted a change in law such that due process required that the Board instruct the administrative law judge, in that case, to reopen the record. The Board held that the administrative law judge's refusal to reopen the record to allow employer to respond to *Swarrow* was not "an abuse of discretion which violated fundamental fairness and employer's right to due process." *See Troup, supra*. In arriving at this holding, the Board stated that the Third Circuit's adoption of the Director's interpretation of a material change in conditions in *Swarrow* did not affect employer's litigation strategy or its ability to present evidence. *Id.* The Board also stated that *Swarrow* did "not significantly alter the type of evidence that is necessary to meet a party's burden of proof." In the instant case, it does not appear that any of the factors discussed in *Troup* have arisen with the intervening cases of *Hicks* and *Akers* such that it would result in employer not having had a full and fair opportunity to litigate pneumoconiosis previously. Rather, it appears that the Fourth Circuit court's statements in *Hicks* and *Akers* clarified, rather than changed, this circuit's law

regarding an administrative law judge's consideration of treating physicians' opinions.[7] *See generally Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997)(court clarified, but did not change, the cause of disability standard adopted by the Sixth Circuit).

Additionally, as the Director asserts, prior to Judge Sayrs' award of benefits in the miner's claim, the Fourth Circuit never approved of an administrative law judge's mechanical crediting of a treating physician's opinion. Director's Brief at 4 n.4. In *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993), the Fourth Circuit court stated that:

> Neither this circuit nor the Benefits Review Board has ever fashioned either a requirement or a presumption that treating or examining physicians' opinions be given greater weight than opinions of other expert physicians.... In neither case [*Hubbard v. Califano*, 582 F.2d 319 (4th Cir. 1978) and *King v. Califano*, 615 F.2d 1018 (4th Cir. 1980)], however, did we suggest, much less hold, that the opinions of treating or examining physicians must be accorded greater weight than opinions of other physicians.

Inasmuch as the Fourth Circuit has never endorsed a mechanical crediting of treating physicians' opinions, *Hicks* and *Akers* do not represent a change in Fourth Circuit law. In

[7]Although employer asserts that it did not have a full and fair opportunity to litigate the existence of pneumoconiosis in the miner's claim, employer did not contest the existence of pneumoconiosis in its Board appeal of Judge Sayrs' award of benefits. Thus, employer did not avail itself of the earlier opportunity it had to challenge the issue of the existence of pneumoconiosis.

light of the foregoing, we reject employer's contrary assertion.

Employer additionally asserts that invocation of collateral estoppel in the survivor's claim was also inappropriate because this claim contains new evidence. Employer's Brief at 18-19. Employer contends, citing *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*), that "[a] party is not precluded from addressing an issue in a related claim if new evidence surfaces that could not have been discovered previously with due diligence." Employer's Brief at 18. It is employer's assertion that the additional treatment and testing it has admitted into the record in the survivor's claim "may have enabled the doctors to render better conclusions regarding the cause of [the miner's] COPD." *Id.* "[N]ewly discovered evidence is generally not accepted as a sufficient ground to preclude the doctrine of collateral estoppel." *See Hughes*, 21 BLR at 1-137 n.2. However, the Board stated in *Hughes* that autopsy evidence, which could not have been adduced at the time of adjudication of the miner's claim, may warrant an exception to allow relitigation of the existence of pneumoconiosis. *Id.* No autopsy was authorized to be performed on the miner in the instant case. Miner's Claim-Director's Exhibit 14. Contrary to employer's assertion, the additional testing and medical opinions proffered by employer do not constitute the kind of new evidence that would preclude the invocation of collateral estoppel in the survivor's claim. The "new evidence" that employer has submitted is merely cumulative of the evidence that it previously had admitted into the record, and, therefore, does not constitute an exception to the application of the doctrine of collateral estoppel. *See Hughes*, *supra*; *see generally*

Stewart v. Wampler Brothers Coal Co., 22 BLR 1-80 (2000)(*en banc*, with Hall, J. and Nelson, J., concurring and dissenting)(an administrative law judge must analyze whether the new evidence submitted in a duplicate claim differs qualitatively from evidence submitted with the previously denied claim, or whether it is merely cumulative of, or similar to, the earlier evidence).

Employer additionally asserts that collateral estoppel should not be applicable in the survivor's claim because the miner's claim addressed whether the miner had pneumoconiosis when his claim was being adjudicated in 1988 and the survivor's claim addresses whether the miner had pneumoconiosis prior to the date of his death in 1994. Employer's Brief at 16-18. In other words, employer asserts that it is entirely possible that the miner's condition changed and that "his legal pneumoconiosis resolved." Employer's Brief at 17. Contrary to employer's assertion, the U.S. Supreme Court, the U.S. Court of Appeals for the Fourth Circuit, and the new regulations recognize the progressive nature of pneumoconiosis. *See* 20 C.F.R. §718.201(c); *Mullins Coal Co. Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Therefore, given the progressive nature of this disease, we reject his contention that collateral estoppel should not be applied on the theory that the miners legal pneumoconiosis may have resolved.

Pursuant to 20 C.F.R. §718.205(c) (2000), employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Dahhan, Renn, and Castle and erred in

crediting the opinion of Dr. Patel. Employer's Brief at 23-27. Specifically, employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Renn and Castle regarding the cause of the miner's death because these physicians did not examine the miner. Employer's Brief at 25. Employer also asserts that the administrative law judge erred in rejecting the opinions of Drs. Dahhan, Renn, and Castle because the administrative law judge found these opinions to be contrary to the Act.[8] Employer's Brief at 25-26.

[8]While employer is correct that the opinions of Drs. Dahhan, Renn, and Castle are not contrary to the Act, *see Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996)(if a physician does not state that pneumoconiosis causes a purely restrictive form of impairment, then his/her opinion is not in conflict with the Act); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the administrative law judge does not base his discrediting of these opinions solely on this basis. *See* discussion, *infra*; *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

However, contrary to employer's assertion, the administrative law judge properly accorded little weight to Dr. Dahhan's opinion, in part, because it was based on this physician's statement that the miner's industrial bronchitis would have reversed itself by

1993, Employer's Exhibit 6, inasmuch as the U.S. Supreme Court, the U.S. Court of Appeals for the Fourth Circuit, and the new regulations recognize the progressive nature of pneumoconiosis, *see* 20 C.F.R. §718.201(c); *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

In considering the issue of the cause of the miner's death, the administrative law judge found "the totally disabling pneumoconiosis from which [the miner] suffered significantly contributed to his death." Decision and Order at 19. The administrative law judge based his finding on the death certificate, which "lists the immediate cause of death as acute respiratory failure and coal workers' pneumoconiosis as a contributing factor," and the opinion of Dr. Patel, the miner's treating physician.[9] *Id.* The administrative law judge next addressed the contrary opinions of Drs. Dahhan, Renn, and Castle, who found that the miner's pneumoconiosis did not contribute to his death.[10] Miner's Claim-Employer's Exhibits 6, 8, 11.

[9]The administrative law judge noted that Dr. Patel treated the miner for at least ten years, up to the time of his death, with an increase in the number of visits over the last three years of the miner's life. Decision and Order at 19. The record confirms these statements. 1995 Hearing Transcript at 15; Miner's-Claim-Director's Exhibit 29; Survivor's Claim Director's Exhibits 18, 40.

[10]The administrative law judge also noted that Dr. Branscomb did not provide a cause of death, but then discredited Dr. Branscomb's opinion at 20 C.F.R. §718.205(c) (2000). Decision and Order at 20-21.

With regard to Dr. Dahhan's opinion, the administrative law judge accorded this physician's opinion "very little weight for several reasons." Decision and Order at 20. First, the administrative law judge stated that Dr. Dahhan erroneously premised his conclusion on the assumption that the miner had only very mild, simple pneumoconiosis, a finding which contradicts the previous finding of Judge Sayrs.[11] *Id.* Second, the administrative law judge noted that Dr. Dahhan stated that coal dust could not have contributed to the miner's disability because he left the mines in 1984. *Id.* The administrative law judge found this statement by Dr. Dahhan, regarding when the miner left the mines, to be irrelevant because it has no bearing on whether coal workers' pneumoconiosis contributed to the miner's death. *Id.* Lastly, the administrative law judge found that Dr. Dahhan's conclusion regarding the cause of the miner's death "does not break the causal link between pneumoconiosis and the miner's death" because Dr. Dahhan fails to address the fact that emphysema and chronic obstructive pulmonary disease can be considered legal pneumoconiosis if linked to coal mine employment. *Id.*

The administrative law judge, after noting that Dr. Renn did not examine the miner, gave two reason for according "no weight" to his opinion regarding the cause of the miner's death. First, the administrative law judge noted that Dr. Renn did not agree that the miner had coal workers' pneumoconiosis. Decision and Order at 20. Second, the administrative law judge found that Dr. Renn rejected the idea that coal workers' pneumoconiosis could

[11]Dr. Dahhan actually found that the miner had no coal workers' pneumoconiosis and had chronic obstructive lung disease due to smoking. Miner's Claim-Employer's Exhibit 6.

manifest anything other than a restrictive defect, which is contrary to the broader, legal definition of pneumoconiosis. *Id.*

Regarding Dr. Castle's opinion, the administrative law judge noted that "he did not have the benefit of personally examining [the miner]." Decision and Order at 21. The administrative law judge stated that Dr. Castle found that the miner suffered from severe obstructive lung disease and emphysema attributable to smoking and that Dr. Castle admitted that if there was evidence of pneumoconiosis, he would find that it contributed to the miner's death. *Id.* Therefore, the administrative law judge, citing *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), found that Dr. Castle also failed to acknowledge the broader, legal definition of pneumoconiosis and gave his opinion "little weight" because it was based only on clinical pneumoconiosis. *Id.*

Moreover, the administrative law judge noted that Drs. Dahhan, Renn, and Castle "possess impressive qualifications" and that "their opinions have not been treated lightly, but have been carefully considered." Decision and Order at 21. However, the administrative law judge found that he "cannot accord determinative weight" to the opinions of Drs. Dahhan, Renn, and Castle because these physicians either fail to acknowledge the very existence of pneumoconiosis or "only concede to a finding of simple pneumoconiosis, where it has been affirmatively shown that this miner was totally disabled by legal pneumoconiosis." *Id.* The administrative law judge added that his findings regarding Dr. Patel "are not based upon a mechanical reliance" on Dr. Patel's status as the miner's treating physician. *Id.* Rather, the administrative law judge stated that Dr. Patel's "medical narratives, coupled with the

objective data, pharmacy bills and extensive treatment records, combine with the findings made in the miner's living claim" to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Decision and Order at 21-22.

Drs. Renn, Dahhan, and Castle all found that the miner did not have coal workers' pneumoconiosis. Miner's Claim-Employer's Exhibits 6, 8, 10, 11. Additionally, Dr. Castle testified at his deposition that if the miner had evidence of coal workers' pneumoconiosis, then it would have contributed to the miner's death. Miner's Claim-Employer's Exhibit 11 at 26. Therefore, contrary to employer's contentions,[12] the administrative law judge properly discredited the opinions of Drs. Dahhan, Renn, and Castle, that the miner's pneumoconiosis did not contribute to his death, because their opinions are based on the erroneous assumption the miner did not have pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) *see also Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), *rev'g on other grds*, 18 BLR 1-59 (1994)(en banc); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). Additionally, because the administrative law judge considered the credibility of the contrary opinions, he did not

[12]Inasmuch as the administrative law judge discredited the opinions of Drs. Renn and Castle, in part, because they were based on an assumption contrary to an established fact, the administrative law judge did not discredit their opinions solely because these physicians did not examine the miner. *See Hicks, supra*; *Akers, supra*; *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) *see also Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), *rev'g on other grds*, 18 BLR 1-59 (1994)(en banc); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).

mechanically accord greater weight to Dr. Patel's opinion based on his status as treating physician. *See Compton*, *supra*; *Hicks*, *supra*; *Akers*, *supra*. Therefore, we affirm the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(c)(2), (c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Accordingly, the administrative law judge's Decision and Order awarding medical benefits in the deceased miner's claim and survivor's benefits in the widow's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge