

BRB No. 06-0945 BLA

V.L.)
(Widow of M.L.))
)
Claimant-Petitioner)
)
v.)
)
WESTMORELAND COAL COMPANY) DATE ISSUED: 09/25/2007
)
Employer-Respondent)
)
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

Douglas A. Smoot (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-5302) of Administrative Law Judge Michael P. Lesniak on a survivor's claim¹ filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹ Claimant is the surviving spouse of the miner, who died on March 6, 2002. Director's Exhibit 7. Claimant filed her application for survivor's benefits on March 25, 2002. Director's Exhibit 3.

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 credited employer's concession that the miner² worked in qualifying coal mine employment for thirty-four years. The administrative law judge raised *sua sponte* the issue of whether to apply the doctrine of collateral estoppel based on the prior determination in the miner's claim regarding the existence of pneumoconiosis.³ Applying the Board's holding in *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003), the administrative law judge concluded that the doctrine of collateral estoppel was inapplicable to preclude employer from contesting the issue of the existence of pneumoconiosis and consequently, adjudicated the issue pursuant to 20 C.F.R. §718.202(a). In so doing, the administrative law judge found that claimant failed to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that pneumoconiosis substantially contributed to his death pursuant to 20 C.F.R. §718.205(c). In addition, the administrative law judge found that the x-ray evidence of record was insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, based on a finding that the miner suffered from complicated pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Section 718.202(a)(1) and (a)(4) and in failing to find that the miner's death was due to pneumoconiosis under Section 718.205(c). Claimant additionally challenges the administrative law judge's determination that the x-ray evidence and the opinion of Dr. Perper were insufficient to establish the presence of complicated pneumoconiosis pursuant to Section 718.304. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

² The miner filed his first application for benefits on July 25, 1979, which was finally denied by the district director on December 29, 1980. Director's Exhibit 2. Subsequently, the miner filed a duplicate claim on October 19, 1987 and, by Decision and Order dated January 17, 1990, Administrative Law Judge Glenn Robert Lawrence awarded benefits. Director's Exhibit 1.

³ Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have been actually 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).

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 may not be disturbed. 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).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, overruled the Board's decision in *Collins*.⁴ The Board had 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 was not applicable to preclude relitigation of the issue of the existence of pneumoconiosis in light of *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), where the Fourth Circuit court held that all types of relevant evidence must be weighed together to determine whether a miner suffers from pneumoconiosis. As the miner was awarded benefits at a time when evidence sufficient to establish pneumoconiosis under one of the four methods set forth in Section 718.202(a)(1)-(4) obviated the need to do so under any of the other methods, the Board reasoned that *Compton* constituted a change in the law with respect to the standard for establishing the existence of pneumoconiosis, thereby creating a difference in the substantive legal standards applicable to the two proceedings. *Collins*, 22 BLR at 1-232-233.

In overruling the Board's decision, however, the Fourth Circuit court held that *Compton* did not constitute a change in law and that survivor-claimants bear the same burden to establish, by a preponderance of the evidence, the same fact that miner-claimants must establish, *i.e.*, the existence of pneumoconiosis arising out of coal mine employment, in the same manner through one of the four methods prescribed by the subsections set forth in Section 718.202(a). The court concluded, therefore, that the issue of the existence of pneumoconiosis in the survivor's claim was identical to the issue previously litigated in the miner's claim and should have been given preclusive effect in the survivor's claim. *See* 20 C.F.R. §718.202(a)(1)-(4); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 218-219, 23 BLR 2-394, 2-403-406 (4th Cir. 2006). In light of the Fourth Circuit's decision, we vacate the administrative law judge's Section 718.202(a) determination and remand the case for the administrative law judge to reconsider, in accordance with *Collins*, whether employer is collaterally estopped from relitigating the issue of the existence of pneumoconiosis in this survivor's claim where the miner was

⁴ Because claimant's last coal mine employment occurred in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

awarded lifetime benefits⁵ and no autopsy evidence was presented. *See Collins*, 468 F.3d at 218-223, 23 BLR at 2-403-410; *see also Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 334, 22 BLR 2-581, 2-587 (7th Cir. 2002). Because the administrative law judge's determination on remand concerning the existence of pneumoconiosis may affect his analysis of the medical evidence with respect to the issues of the presence of complicated pneumoconiosis under Section 718.304 and whether the miner's death was substantially contributed to by pneumoconiosis under Section 718.205(c), we, likewise, vacate these determinations and instruct the administrative law judge to reconsider these issues.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is vacated and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵ In the living miner's claim, Administrative Law Judge Glenn Robert Lawrence relied on the true doubt rule to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1), but also found the existence of legal pneumoconiosis established at Section 718.202(a)(4) based on a preponderance of the evidence. Director's Exhibit 2.