BRB No. 09-0107 BLA

R.W.B. Claimant-Petitioner v. COPPERAS COAL CORPORATION and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/25/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

R.W.B., Beckley, West Virginia, *pro se*.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand – Denying Benefits (05-BLA-5256) of Administrative Law Judge Richard A. Morgan rendered on a 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). This case involves a subsequent claim[1] filed on December 9, 2003, and is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with eighteen years of coal mine employment[2] and found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement under 20 C.F.R. §725.309.[3] Considering the merits of entitlement, the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis,[4] or that claimant

[1] Claimant previously filed a claim on November 2, 1998. Director's Exhibit 1. On September 11, 2000, Administrative Law Judge Robert J. Lesnick issued a Decision and Order denying benefits. Judge Lesnick specifically determined that while claimant established the existence of pneumoconiosis, he failed to establish that he was totally disabled. *Id*. Claimant appealed, and the Board affirmed Judge Lesnick's denial of benefits. [*R.W.B.*] *v. Copperas Coal Corp.*, BRB No. 00-1186 BLA (Aug. 31, 2001) (unpub.). Claimant took no further action with regard to the denial of his claim until filing the instant claim on December 9, 2003. Director's Exhibit 3.

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because he failed to establish total disability. Director's Exhibits 1, 3. Consequently, claimant had to submit new evidence establishing that element of entitlement in order to obtain review of the case on the merits. 20 C.F.R. §725.309(d)(2), (3); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996).

[4] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Clinical pneumoconiosis" is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e*., the conditions characterized by permanent deposition of substantial amounts of

was totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board held that the administrative law judge erred in failing to consider whether collateral estoppel[5] precludes employer from relitigating the issue of the existence of pneumoconiosis, and in failing to consider whether the medical opinion evidence established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The Board therefore vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 718.204(c), and remanded the case for further consideration.[6] *R.W.B. v. Copperas Coal Corp*., BRB No. 07-0290 BLA (Nov. 30, 2007) (unpub).

On remand, the administrative law judge initially found that collateral estoppel does not preclude employer from relitigating the existence of pneumoconiosis. Decision and Order on Remand at 5. On the merits of entitlement, the administrative law judge again found that claimant did not establish the existence of pneumoconiosis or that his totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

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particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] Under certain circumstances, as discussed *infra*, the doctrine of collateral estoppel protects parties from the burden of relitigating an issue when the identical issue was previously decided in a prior proceeding involving the same parties. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979); *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*).

[6] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding of eighteen years of coal mine employment, and his findings that claimant established the existence of a totally disabling respiratory impairment and, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2) and 725.309. *R.W.B. v. Copperas Coal Corp*., BRB No. 07-0290 BLA, slip op. at 3 (Nov. 30, 2007) (unpub); *see Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

On appeal, claimant generally challenges the administrative law judge's Decision and Order. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

We first address the administrative law judge's finding that collateral estoppel does not bar employer from relitigating the existence of pneumoconiosis. 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 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).

In the present case, the administrative law judge initially found, correctly, that, as expressly provided at 20 C.F.R. §725.309(d)(4), collateral estoppel is not applicable to this subsequent claim where employer previously contested the presence of pneumoconiosis. 20 C.F.R. §725.309; 65 Fed. Reg. 79972, 79975 (Dec. 20, 2000); *Hughes*, 21 BLR at 1-137; Decision and Order on Remand at 4-5. The administrative law judge also correctly determined that the finding of the existence of pneumoconiosis in claimant's prior claim was not necessary to the outcome of the prior proceeding, wherein benefits were denied. *Hughes*, 21 BLR at 1-137; Decision and Order on Remand at 4. Thus the administrative law judge properly found that application of the doctrine of collateral estoppel was precluded.

Turning to the merits of entitlement, the administrative law judge incorporated, by reference, his prior finding that the preponderance of the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). Decision and Order on Remand at 4; 2006 Decision and Order at 4, 11-12. In his prior decision, pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accurately noted that the newly submitted x-ray evidence consists of eight interpretations of three x-rays, dated February 18, 2004, June 9, 2004, and July 20, 2004,[7] and that the previously submitted x-ray evidence consists of six interpretations of two x-rays, dated January 8, 1999 and July 7, 1999.[8] 2006 Decision and Order at 4, 13-14. The administrative law judge permissibly found the June 9, 2004 x-ray to be negative, given the lack of contrary interpretations, and further permissibly found the February 18, 2004 and July 20, 2004 x-rays to be in equipoise in light of the conflicting readings by physicians with equal qualifications. *See* 20 C.F.R. §718.202(a)(1); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-274 (4th Cir. 1997); 2006 Decision and Order at 14. The administrative law judge also found, correctly, that the January 8, 1999 x-ray was interpreted as positive for pneumoconiosis by two physicians who are dually-qualified as Board-certified radiologists and B readers, but was interpreted as negative for pneumoconiosis by three dually-qualified physicians. 2006 Decision and Order at 14. Finally, the administrative law judge found that the July 7, 1999 x-ray was interpreted once as negative by Dr. Zaldivar, a B reader. Decision and Order at 14. Weighing the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge found that the preponderance of the x-ray evidence does not establish pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order on Remand at 12, 14. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the preponderance of the x-ray evidence does not support a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(1). *See Compton v. Island*

[7] The February 18, 2004 x-ray was interpreted once as positive for pneumoconiosis and once as negative for pneumoconiosis by Drs. Patel and Binns, both of whom are dually-qualified as Board-certified radiologists and B readers. Director's Exhibits 11, 12. The June 9, 2004 x-ray was interpreted as negative by both Dr. Wiot, a Board-certified radiologist and B reader, and Dr. Castle, a B reader. Employer's Exhibits 1, 2. The July 20, 2004 x-ray was interpreted twice as positive by Drs. Cappiello and Ahmed, both dually-qualified physicians, and twice as negative by Drs. Wiot and Spitz, also dually-qualified physicians. Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3.

[8] The January 8, 1999 x-ray was interpreted twice as positive for pneumoconiosis by Drs. Patel and Cole, who are dually-qualified as Board-certified radiologists and B readers, and thrice as negative by Drs. Wiot, Spitz, and Meyer, all of whom are also dually-qualified physicians. Director's Exhibit 1. The July 7, 1999 x-ray was interpreted once as negative by Dr. Zaldivar, a B reader. *Id*.

Creek Coal Co., 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge correctly found that the record contains no biopsy evidence. The administrative law judge also properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).[9] 2006 Decision and Order at 13. Consequently, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2), (3).

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered whether the opinions of Drs. Rasmussen,[10] Zaldivar,[11] and Castle[12] establish the existence

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[9] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[10] Dr. Rasmussen examined claimant for the Department of Labor on January 8, 1999 and February 18, 2004. Director's Exhibits 1, 11. In his 1999 report, Dr. Rasmussen diagnosed coal workers' pneumoconiosis based on the January 8, 1999 x-ray and claimant's history of coal mine employment. Dr. Rasmussen additionally diagnosed a "marked impairment in oxygen transfer and hypoxia during exercise" due to smoking and coal dust exposure. Dr. Rasmussen further indicated that these abnormalities may be due to a "right to left cardiac shunt appearing only during exercise." *Id*. Although Dr. Rasmussen also diagnosed chronic bronchitis, he did not give an opinion as to its etiology.

In his 2004 report, Dr. Rasmussen diagnosed coal workers' pneumoconiosis based on an x-ray and claimant's coal mine employment history. He additionally diagnosed chronic bronchitis due to coal mine dust exposure and cigarette smoking, and opined that the "marked loss of lung function" seen on claimant's objective studies is due to cigarette smoking and coal mine dust exposure. Director's Exhibit 11.

[11] Dr. Zaldivar examined claimant on July 7, 1999 and June 9, 2004. Director's Exhibits 1, 13; Employer's Exhibit 5. In his 1999 report, Dr. Zaldivar opined that claimant did not have x-ray evidence of coal workers' pneumoconiosis, and that the mild pulmonary impairment and hypoxemia at very high exercise is not the result of coal mine employment because "[c]oal workers' pneumoconiosis does not cause an isolated diffusion abnormality in the absence of airway damage." Director's Exhibit 1.

of clinical or legal pneumoconiosis. Relevant to the existence of clinical pneumoconiosis, the administrative law judge accorded greater weight to Dr. Castle's opinion, that claimant does not have clinical pneumoconiosis, than to the contrary opinions of Drs. Rasmussen and Zaldivar. Specifically, the administrative law judge permissibly discounted Dr. Rasmussen's 1999 and 2004 diagnoses of clinical pneumoconiosis as based primarily on questionable positive x-ray readings and claimant's history of coal dust exposure. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Decision and Order on Remand at 12-13. The administrative law judge also acted within his discretion in discounting Dr. Zaldivar's recent opinion that claimant "may have radiographic pneumoconiosis," as equivocal and ambiguous. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order on Remand at 13-14. By contrast, the administrative law judge found that Dr. Castle's opinion was reasoned and documented and more consistent with the objective evidence of record, including the preponderance of the negative x-ray evidence. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-31 (4th Cir. 1997); *Mays*, 176 F.3d at 756, 21 BLR at 2-591; *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); Decision and Order on Remand at 14. Thus, the administrative law judge determined that the medical opinion evidence does not establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order on Remand at 14. Substantial evidence supports this finding. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; *Hicks*, 138 F.3d at 528, 21 BLR at 2-326.

Relevant to the existence of legal pneumoconiosis, the administrative law judge again accorded greatest weight to the opinion of Dr. Castle, that claimant does not have legal pneumoconiosis. Specifically, the administrative law judge discounted Dr. Zaldivar's opinion, that claimant does not have legal pneumoconiosis, because it is based

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In his 2004 report, Dr. Zaldivar opined that claimant "may have radiographic pneumoconiosis but he does not have any dust disease of the lungs" because simple pneumoconiosis does not cause a restrictive impairment. Director's Exhibit 13; Employer's Exhibit 5 at 12-17.

[12] Dr. Castle submitted a consultative report, dated April 14, 2006, and was deposed on the same date. Employer's Exhibits 1, 4. Dr. Castle stated that the x-ray evidence is negative for coal workers' pneumoconiosis, and he opined that abnormalities seen on the valid physiologic studies are due to claimant's ongoing tobacco smoking habit. Employer's Exhibit 1 at 9.

on Dr. Zaldivar's belief that coal workers' pneumoconiosis does not cause a restrictive impairment, which is contrary to the regulations that define legal pneumoconiosis to include any chronic restrictive pulmonary disease arising out of coal mine employment.[13] 20 C.F.R. §718.201(a)(2); *see Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987); Decision and Order on Remand at 14. The administrative law judge also found that Dr. Rasmussen's 1999 opinion was entitled to little weight because, although Dr. Rasmussen diagnosed claimant with a "marked impairment in function" due to coal dust exposure and smoking, Dr. Rasmussen additionally stated that the impairment could have been caused by a "right to left cardiac shunt." *See Mays*, 176 F.3d at 764, 21 BLR at 2-606; *Justice*, 11 BLR at 1-94; Decision and Order on Remand at 13; Director's Exhibit 1. In addition, administrative law judge discounted Dr. Rasmussen's 2004 diagnosis of chronic bronchitis due to coal mine dust exposure and smoking, because Dr. Rasmussen provided "little analysis for his determination." *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; *Underwood*, 105 F.3d at 949, 21 BLR at 2-31; Decision and Order on Remand at 13; Director's Exhibit 11. Thus, finding that "unlike Dr. Rasmussen, who relied almost exclusively upon his own evaluation of the Claimant, Dr. Castle reviewed and analyzed all of the available evidence," the administrative law judge concluded that Dr. Castle's opinion was better reasoned and documented than the opinions of Drs. Rasmussen and Zaldivar and entitled to the greatest weight. Decision and Order on Remand at 14. Consequently, the administrative law judge determined that the medical opinion evidence does not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Because it is supported by substantial evidence, we affirm the administrative law judge's permissible finding. *See Underwood*, 105 F.3d at 949, 21 BLR at 2-28.

Substantial evidence supports the administrative law judge's additional finding that all of the evidence weighed together does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Compton*, 211 F.3d at 210-11, 22 BLR at 2-172-74; Decision and Order on Remand at 14.

Because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

[13] Carrier does not challenge this finding.

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge