BRB No. 09-0223 BLA

T.B. (Widow of B.B.)	)	
v.	)	
DEHUE COAL COMPANY	)	DATE ISSUED: 09/16/2009
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

T.B., Wilkinson, West Virginia, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits (06-BLA-6102) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited the miner with thirty-three years of coal mine employment[1] and adjudicated this claim, filed on August

[1] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. 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*).

15, 2005, pursuant to 20 C.F.R. Part 718. The administrative law judge initially determined that although the miner was receiving federal black lung benefits at the time of his death pursuant to a final award on his lifetime claim, the doctrine of collateral estoppel did not apply to preclude litigation of the issue of the existence of pneumoconiosis in this survivor's claim. The administrative law judge further found that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to file a response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2),(c)(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

We first address the administrative law judge's finding that collateral estoppel did not apply to the finding of the existence of pneumoconiosis that was made in the miner's successful claim for benefits. 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 Servs. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). The doctrine of collateral estoppel "does not apply to a legal ruling if there has been a 'major' change in the governing law since the prior adjudication that 'could render [the] previous determination inconsistent with prevailing doctrine.'" *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 218, 23 BLR 2-393, 2-401-02 (4th Cir. 2006) (citation omitted). Additionally, "the doctrine of collateral estoppel does not bar the relitigation of factual issues 'where the party against whom collateral estoppel is asserted had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first.'" *Collins*, 468 F.3d at 218, 23 BLR at 2-401 (citation omitted).

In the instant case, the administrative law judge accurately determined that Administrative Law Judge Robert J. Shea's 1991 finding of pneumoconiosis in the miner's claim was based on the true doubt rule, which placed the risk of nonpersuasion on the party opposing the claim.[2] The true doubt rule was subsequently invalidated by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Thus, claimant now bears the burden of establishing each element of entitlement by a preponderance of the evidence. *Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9. Because the allocation of the burden of proof differed in the two proceedings, the administrative law judge properly found that the doctrine of collateral estoppel did not apply to preclude litigation of the issue of pneumoconiosis in this survivor's claim. *See Collins*, 468 F.3d at 218, 23 BLR at 2-401-02; *Sturgill v. Old Ben Coal Co.*, 22 BLR 1-314, 1-318-19 (2003). Consequently, we affirm the administrative law judge's finding with respect to collateral estoppel, and turn to the administrative law judge's findings regarding whether claimant established that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered three interpretations of two x-rays, dated February 9, 1979 and August 31, 1988, designated by the parties as evidence in support of their respective cases. *See* 20 C.F.R. §725.414(a)(2),(3). Dr. Subramaniam, a Board-certified radiologist, interpreted the February 9, 1979 x-ray as positive for simple pneumoconiosis. Claimant's Exhibit 2. Dr. Morgan, a Board-certified radiologist and B reader, interpreted the same x-ray as

[2] Under the true doubt rule, if the evidence on an issue was conflicting and equally probative, as Administrative Law Judge Robert J. Shea found the x-ray readings and medical opinions to be in the miner's claim, the evidentiary conflict was resolved in favor of the claimant. *See, e.g., Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76 (1990).

negative for pneumoconiosis. Employer's Exhibit 11. Dr. Zaldivar, a B reader, interpreted the August 31, 1988 x-ray as negative for pneumoconiosis. Employer's Exhibit 8. Based on Dr. Morgan's superior radiological credentials, the administrative law judge permissibly found that the February 9, 1979 x-ray did not support a finding of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). Further, because Dr. Zaldivar's negative interpretation of the August 31, 1988 x-ray was uncontradicted, the administrative law judge rationally determined that the August 31, 1988 x-ray did not support a finding of pneumoconiosis.

Additionally, the administrative law judge reviewed several x-ray readings that were contained in the miner's hospitalization and medical treatment records. *See* 20 C.F.R. §725.414(a)(4); Director's Exhibit 9. The administrative law judge considered that Dr. Kowatli, whose radiological qualifications are not of record, stated in a June 3, 2004 consultation report that an x-ray of the same date revealed "Stage III pneumoconiosis." Director's Exhibit 9. However, the administrative law judge accurately noted that the underlying interpretation of the June 3, 2004 x-ray by Dr. Valiveti made no mention of pneumoconiosis. Decision and Order at 6; Director's Exhibit 9. The administrative law judge further found that, although "pneumoconiosis" was noted, among various abnormalities, on several of the miner's remaining hospital x-rays, those "descriptive interpretations do not comply with the classification requirements set forth in [20 C.F.R.] §718.102(b)."[3] Decision and Order at 6. As substantial evidence supports the administrative law judge's finding that the preponderance of the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the finding is affirmed.

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge correctly found that the record contains no biopsy or autopsy evidence. Decision and Order at 13. Accordingly, the administrative law judge's finding that the existence of pneumoconiosis could not be established pursuant to Section 718.202(a)(2) is affirmed.

[3] The quality standard referenced by the administrative law judge does not apply to x-rays obtained in connection with a miner's hospitalization or medical treatment. *See* 20 C.F.R. §718.101(b); *J.V.S. v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008). However, as discussed above, the administrative law judge permissibly accorded greater weight to the x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists, whereas the radiological qualifications of the doctors who read the miner's hospitalization and medical treatment x-rays are not contained in the record. Thus, any error by the administrative law judge in applying the 20 C.F.R. §718.102 quality standard to the miner's medical treatment x-rays was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge found the presumptions at 20 C.F.R. §§718.304, 718.305, and 718.306 to be inapplicable. The administrative law judge found the irrebuttable presumption at Section 718.304 to be inapplicable because the relevant evidence did not support a finding of complicated pneumoconiosis.[4] Specifically, the administrative law judge found that, "despite some references to progressive massive fibrosis among the descriptive x-ray interpretations" contained in the miner's treatment records, the preponderance of the x-ray evidence was negative for pneumoconiosis, and the "more probative" computerized tomography (CT) scan evidence was negative for pneumoconiosis.[5] Decision and Order at 13. In this regard, the administrative law judge considered two interpretations of a June 22, 2004 CT scan. Dr. Koppikar, whose radiological qualifications are not of record, interpreted the June 22, 2004 CT scan as "most probably representing progressive massive fibrosis." Director's Exhibit 9. Dr. Wheeler, a Board-certified radiologist and B reader, interpreted the same CT scan as negative for pneumoconiosis. Employer's Exhibit 3. Based on Dr. Wheeler's superior radiological qualifications, the administrative law judge reasonably found that the CT scan evidence was negative for pneumoconiosis, and that it "buttress[ed] the negative x-ray evidence." Decision and Order at 13, 14; *see* 20 C.F.R. §718.304(a),(c); *Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). As substantial evidence supports the administrative law judge's finding that claimant did not establish invocation of the irrebuttable presumption set forth at Section 718.304, the finding is affirmed.

[4] Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304, provides in relevant part that there is an irrebuttable presumption that the miner died due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). In determining whether claimant has established invocation of the irrebuttable presumption, the administrative law judge must consider all relevant evidence. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

[5] The administrative law judge cited Dr. Fino's uncontradicted testimony that a CT scan is a medically acceptable tool that is more sensitive than a conventional x-ray for detecting pneumoconiosis. 20 C.F.R. §718.107(a); Decision and Order at 12; Employer's Exhibit 10 at 21-24.

Further, as the administrative law judge found, 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). Additionally, the administrative law judge noted correctly that the Section 718.306 presumption does not apply where the miner died after March 1, 1978.[6] *See* 20 C.F.R. §718.306(a). We therefore affirm the administrative law judge's finding that none of the presumptions at 20 C.F.R. §718.202(a)(3) is applicable.

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Velasco, Zaldivar, Kahn, and Fino; the interpretations of the June 22, 2004 CT scan; the miner's medical treatment records, including those of Dr. Perez, who was the attending physician at the time of the miner's death;[7] and the miner's death certificate.[8] With respect to the medical opinion evidence, Dr. Kahn diagnosed the miner with coal workers' pneumoconiosis, Dr. Velasco diagnosed chronic obstructive pulmonary disease and emphysema due to coal dust exposure, and Drs. Zaldivar and Fino opined that the miner did not have either clinical or legal pneumoconiosis.[9] Claimant's Exhibits 1, 2; Employer's Exhibits 1, 5, 7, 10. The administrative law judge permissibly found that Dr. Velasco did not consider "relevant information, such as the miner's occupational and/or cigarette smoking histories," and that Drs. Kahn and Velasco provided "cursory" analyses in which they failed to explain the bases for their opinions. Decision and Order at 10, 14; s*ee Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). By contrast, the administrative law judge permissibly found that both Drs. Zaldivar and Fino rendered better reasoned opinions explaining that the miner's x-rays and CT scan were not consistent with pneumoconiosis, and he found that Dr. Fino explained that there was no evidence that the miner had COPD because the two pulmonary function studies of record were normal. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision

[6] The miner died on August 9, 2005. Director's Exhibit 8. Moreover, the presumption of 20 C.F.R. §718.306 does not apply to survivors' claims filed on or after June 30, 1982. 20 C.F.R. §718.306(a).

[7] The miner's hospitalization records, including the treatment records of Dr. Perez, list "CWP'" or "Pneumoconiosis" in the miner's medical history or among the diagnosed conditions. Director's Exhibit 9.

[8] The miner's death certificate, signed by Dr. Perez, lists the cause of death as "CO2 Narcosis" due to "End Stage COPD/pneumoconiosis [with] CO2 retention." Director's Exhibit 8.

[9] "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).

and Order at 12, 15; Employer's Exhibits 5, 10 at 21-26. Additionally, the administrative law judge reasonably found the qualifications of Drs. Zaldivar and Fino to be superior to those of Drs. Kahn and Velasco for purposes of determining the existence of pneumoconiosis in this case.[10] *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

With respect to the miner's medical treatment records, substantial evidence supports the administrative law judge's permissible findings that the diagnoses of pneumoconiosis listed in the treatment records were not reasoned or documented, and that Dr. Perez did not explain the basis for his diagnosis of pneumoconiosis. *See* 20 C.F.R. §718.104(d)(5); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Additionally, the administrative law judge permissibly discounted the diagnosis of pneumoconiosis listed on the miner's death certificate because Dr. Perez provided no rationale for the diagnosis. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000). Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Additionally, we affirm the administrative law judge's finding that all of the relevant evidence weighed together did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In light of our affirmance of the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits. *Anderson*, 12 BLR at 1-114; *Trent*, 11 BLR at 1-27.

[10] The administrative law judge accurately observed that Drs. Zaldivar and Fino are Board-certified in Internal Medicine and Pulmonary Disease, whereas Dr. Velasco's credentials are not of record. The administrative law judge considered that Dr. Kahn is Board-certified in Anatomic and Clinical Pathology, but reasonably found that "the value of Dr. Kahn's expertise in the field of pathology is undermined in the current case, because the record does not contain any biopsy or autopsy evidence." Decision and Order at 14; s*ee Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge