IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1553

EASTERN ASSOCIATED COAL COMPANY

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondent

and

ROY M. VEST (deceased)

Claimant

BRIEF FOR THE RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944, filed by Roy M. Vest on May 16, 2001.[1] *See* Joint

[1] The BLBA was amended in 2010. Section 1556 of the Patient Protection and Affordable Care Act revised the entitlement criteria for certain miners' and survivors' claims. Pub. L. No. 111-148, § 1556(a), (b) (2010). These amendments, however, apply only to claims filed after January 1, 2005. Pub. L. No. 111-148, § 1556(c) (2010). Since Mr. Vest's claim was filed in 2001, the amendments have no impact on his claim.

Appendix (JA) 102. Eastern Associated Coal Company (Eastern), the mine operator responsible for paying benefits, timely appealed Administrative Law Judge Edward Terhune Miller's May 10, 2006 decision and order awarding benefits to Mr. Vest to the Benefits Review Board. JA 101. The Board vacated the decision and remanded. JA 90. Eastern then timely appealed ALJ Miller's January 27, 2009, decision awarding benefits to Mr. Vest, and Administrative Law Judge William S. Colwell's Order on Reconsideration on September 9, 2011, denying Eastern's request for reconsideration, to the Board on September 23, 2011. R 85-88;[2] *see* 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a) (thirty day period for appealing ALJ decisions); 20 C.F.R. § 725.479(c) (time for appeal to the Board suspended by motion for reconsideration). The Board had jurisdiction to review the ALJs' decisions pursuant to 33 U.S.C. § 921(b)(3), as incorporated.

The Board affirmed the decisions of ALJ Miller and ALJ Colwell on September 27, 2012. JA 7. Eastern timely sought reconsideration of this decision on October 31, 2012.[3] R 3-14; *see* 20 C.F.R. § 802.207(a) (thirty-day period for

[2] "R" refers to record materials not in the Petitioner's Appendix, but listed in the Board's consecutively paginated certified case record index. *See* Joint Appendix Index.

[3] Thirty days after the Board's September 27, 2012 decision was October 27, 2012 which fell on a Saturday. In addition, the federal government was closed in Washington, D.C., on Monday, October 29 and Tuesday, October 30, 2012,

seeking reconsideration of Board decision). The Board summarily denied the motion for reconsideration on February 25, 2013. JA 6.

Eastern filed a timely petition for review of the Board's decision with this Court on April 25, 2013. JA 1; *see* 33 U.S.C. § 921(c), as incorporated (sixty-day period for seeking review after final decision of the Board); 20 C.F.R. § 802.406 (sixty-day appeal period runs from issuance of decision on reconsideration motion); *Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215, 219 (7th Cir. 1986) (same). The Court has jurisdiction over Eastern's petition under 33 U.S.C. § 921(c), as incorporated, as the "injury," Mr. Vest's exposure to coal mine dust, occurred in Virginia and West Virginia. *See* JA 91.

STATEMENT OF THE ISSUES

20 C.F.R.§ 725.465(d) prohibits an ALJ from dismissing a claim due to a claimant's inaction without the Director's consent in cases where the Trust Fund has paid the claimant interim benefits, and thus has a direct financial stake in the outcome of the case. Eastern claims this regulation violates the APA's grant of ALJ decisional independence. The questions related to this issue are:

1. Whether the validity of section 725.465(d) is properly before the Court

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because of Superstorm Sandy. Pursuant to the Board's Rules of Practice and Procedure, the Board is not open for receiving motions on Saturday, Sunday or legal holidays. 20 C.F.R. § 801.304. Therefore, Eastern's motion for reconsideration was timely filed with the Board on October 31, 2012.

when Eastern did not question the regulation's validity before the ALJs and the ALJs did not rely on the regulation in declining to dismiss the miner's claim.

2. Whether section 725.465(d), which ensures that the Director's interests will be adjudicated without directing a particular, or favorable, result, violates the APA.

The miner and his widow both filed claims for black lung benefits. The widow's claim was finally decided first, and benefits were denied on the ground that she failed to establish the presence of pneumoconiosis. The miner's claim was awarded approximately three months later. The questions related to this issue are:

3. Whether the ALJs properly declined to apply collateral estoppel in the miner's claim when Eastern first raised the defense after the miner's claim had been awarded.

4. Whether Eastern proved that all five elements of collateral estoppel apply to both the miner and the Director.

STATEMENT OF THE CASE

Eastern raises only legal issues on appeal: whether 20 C.F.R. § 725.465(d) is valid and whether the denial of Mrs. Vest's survivor's claim precluded an award in her husband's claim. The facts most relevant to these issues are the administrative decisions and orders and the course of the proceedings below.

A. Statutory and Regulatory Background - Overview of the BLBA Claims Process

The Department of Labor is responsible for the administrative adjudication of black lung cases. Generally speaking, the litigation involves three stages. A miner or his survivor first files a claim with a "district director" from the DOL's Office of Workers' Compensation Programs. After investigating the claim, the district director determines whether the claimant is eligible for benefits and the operator responsible for their payment. *See* 20 C.F.R. §§ 725.301-725.423. Any party may disagree with the district director's decision and request a hearing before the Office of Administrative Law Judges ("OALJ"). 20 C.F.R. §§ 725.450-725.480. The ALJ's decision may then be appealed to the DOL's Benefits Review Board (the Board), 20 C.F.R. § 725.481, and then to the Court of Appeals for the circuit in which the miner's injury occurred, 33 U.S.C. § 921(c); 20 C.F.R. § 725.482. *See National Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 854 (D.C. Cir. 2002).

The Director, OWCP, as the Secretary of Labor's designee, is a party to any claim for black lung benefits and is responsible for administration of the BLBA. 30 U.S.C. § 932(k); 20 C.F.R. § 725.482(b). In addition to administering the BLBA, the Director, as the Secretary's designee, is responsible for conserving the Black Lung Disability Trust Fund's assets.[4] *See Director, OWCP v. Hileman*, 897

[4] The Trust Fund was established in 1977 to transfer responsibility for the payment

F.2d 1277, 1281 n.2 (4th Cir. 1990) (Director "charged with a fiduciary duty to protect Black Lung Disability Trust Fund from unjustified claims"); *Truitt v. North American Coal Co.*, 2 BLR 1-199, 1-202 (BRB 1979), aff'd sub nom. *Director, OWCP v. North American Coal Co.*, 626 F.2d 1137 (3d Cir. 1980).

The Trust Fund is the statutory payor of last resort. It is statutorily required to pay benefits where there is no coal mine operator that may be held liable, the liable coal mine operator defaults, or the liable operator has not timely commenced payment after a district director's initial determination of entitlement.[5] 26 U.S.C. § 9501(d)(1)(A)(i),(ii); 20 C.F.R. §§ 725.420, 522(a). A liable operator is obligated to pay a claimant benefits following the issuance of an award by an ALJ, the Benefits Review Board, or a reviewing court (which are referred to as "effective awards"). 20 C.F.R. § 725.502(a)(1); 20 C.F.R. § 725.530(a).[6] This

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of benefits from the Federal government to the coal industry. 20 C.F.R. § 725.490. It is financed by an excise tax on the sale of coal. 26 U.S.C. § 9501. The terms "Trust Fund" and the "Director" are used interchangeably in this brief.

[5] If an operator controverts the district director's initial determination of eligibility, it is not under a legal obligation to begin paying benefits. *See* 20 C.F.R. § 725.420. The Trust Fund, however, is required to commence interim payments. 26 U.S.C. § 9501(d)(1)(A)(i).

[6] Section 725.502(a)(1) is consistent with incorporated provisions of the Longshore Act. Section 21(a) of the Longshore Act, 33 U.S.C. § 921(a), which is incorporated into the BLBA by 30 U.S.C. § 932(a), provides in pertinent part "[a] compensation order shall become effective when filed in the office of the deputy commissioner." 33 U.S.C. § 921(a). The term "effective" in section 21(a) is equivalent to the terms "due" and "due and payable" in Longshore Act sections 14(f) and 18(a), 33 U.S.C. §§ 914(f) and 918(a), also incorporated into the BLBA.

obligation persists, regardless of any appeal, until the award is vacated or reversed. 20 C.F.R. § 725.502(a). When the operator refuses to pay on an effective order, the awarded claimant nonetheless receives benefits--the Trust Fund pays instead. 26 U.S.C. § 9501(d)(1)(A)(ii) (requiring Trust Fund payment of benefits when the liable operator fails to pay within 30 days after payment is due); 20 C.F.R. § 725.522(a) (same).

The operator is then obligated to reimburse the Trust Fund (with interest) from the date of issuance of an effective award. 20 C.F.R. § 725.602(a). An operator that fails to timely reimburse the Trust Fund is subject to a lien on its property in the amount of the debt, and a lawsuit by the Director to enforce the lien and/or collect the debt. 30 U.S.C. § 934(b)(2), (4). The Director, however, may enforce these rights only after the claimant's award has become final, *i.e.*, the time for appeal has expired.[7] *Id.*; *see Bethenergy Mines, Inc. v. Director, OWCP*, 32 F.3d 843, 849 (3d Cir. 1994).

Tidelands Marine Service v. Patterson, 719 F.2d 126, 127 n. 1 (5th Cir. 1983).

When an order becomes "effective" under the black lung regulations depends on the issuer: a district director award is effective after 30 days if no hearing request is made; an ALJ order is effective when filed with the district director; a Board decision is effective when issued; and a court decision becomes effective in accordance with applicable court rules. 20 C.F.R. § 725.502(a)(2).

[7] When benefits payments are commenced to a claimant prior to the final adjudication of the claim and it is later determined that the claimant was ineligible to receive such payments, such payments are considered overpayments and may be recovered from the claimant by either the operator or Director (depending on the payor). *See* 20 C.F.R. §§ 725.522(b), 725.540.

Section 725.465, 20 C.F.R., entitled "dismissals for cause," allows an ALJ to dismiss a claim prior to a final adjudication of eligibility when a claimant or his representative fails to attend a hearing or comply with a lawful order.[8] 20 C.F.R. § 725.465(a)(1), (2). Before an ALJ may summarily dismiss due to such claimant inaction, the ALJ must obtain the Director's consent in cases where the Trust Fund has paid the claimant interim benefits. 20 C.F.R. § 725.465(d).[9] Because a final adjudication of eligibility determines who is responsible to reimburse the Trust Fund for interim benefits, the Director's consent to summary dismissal for cause merely ensures that the Director will "receive[] a complete adjudication of his interests." *See* 65 Fed. Reg. 80005 (Dec. 20, 2000).

B. Course of the Proceedings

Mr. Vest (the miner) filed a claim for federal black lung benefits with the

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[8] Section 725.465 also permits dismissal for cause when the claim was previously finally denied and no new evidence has been submitted. 20 C.F.R. § 725.465(a)(3). That subsection does not apply here because an ALJ had previously awarded (not denied) the miner's claim before it was vacated and remanded by the Board. *See infra* Statement of the Case Sections B (course of proceedings) and C (decisions below).

[9] The regulation provides:

> No claim shall be dismissed in a case with respect to which payments prior to a final adjudication have been made to the claimant in accordance with § 725.522, except upon the motion or written agreement of the Director.

20 C.F.R. § 725.465(d).

Department of Labor (DOL) in May 2001. *See* JA 7. The district director, Office of Workers' Compensation Programs, determined that he was entitled to benefits and began paying interim benefits. Director's Exhibits (DX) 37, 41. Eastern requested an ALJ hearing, after which ALJ Miller found the miner entitled to benefits. JA 101. Eastern appealed. The Board vacated ALJ Miller's decision and remanded the case. JA 90. On remand, ALJ Miller again awarded benefits. JA 51. Eastern filed a motion to dismiss the case, but ALJ Miller denied the motion. JA 45. Eastern then filed a motion for reconsideration, which was denied by ALJ Colwell. JA 19. Eastern again appealed, but the Board affirmed the decisions of the ALJs. JA 7. The Board then summarily denied Eastern's motion for reconsideration. JA 6. Eastern now seeks review by this Court.[10]

Mrs. Vest (the widow) filed a claim for BLBA benefits in May 2006 (shortly after ALJ Miller's initial award of the miner's claim). *See* JA 77. The district director denied her claim because she failed to prove that the miner's death was due to pneumoconiosis. *See* R 37 (Director's March 26, 2012 response brief to Board). Following her request for a hearing, ALJ Tureck denied her claim for failure to prove the existence of pneumoconiosis. JA 76, 82. That decision was not appealed.

[10] On February 13, 2013 -- 2½ months before Eastern took this appeal, the Director requested reimbursement from Eastern in the amount of $1,272.48.

C. Decisions Below

1. ALJ Miller's Initial Award of Benefits in the Miner's Claim (May 10, 2006)

ALJ Miller determined that Eastern was the responsible operator for the miner's claim and that the miner was totally disabled by pneumoconiosis arising out of his eighteen years of coal mine employment.[11] JA 101. After finding the chest x-rays inconclusive, the ALJ found legal pneumoconiosis established on the basis of the medical opinion evidence. JA 115; *see* 20 C.F.R. § 718.202(a)(4). In doing so, the ALJ found more persuasive the opinions of Drs. Forehand and Robinette, who diagnosed the disease, over the contrary opinions of Drs. Zaldivar and Wheeler. He discredited Dr. Zaldivar's opinion for two reasons: first, the doctor contradictorily opined that the miner suffered from no pulmonary impairment but could not return to work due to emphysema; and second, that Dr. Zalidavar's diagnosis of bullous emphysema was contradicted by the other physicians. The ALJ likewise discredited Dr. Wheeler's opinion because the doctor gave contradictory explanations regarding the large opacities found in the

[11] To recover on his claim, the miner had to prove that he had pneumoconiosis arising from coal mine work and a totally disabling pulmonary impairment due to his pneumoconiosis. 20 C.F.R. §§ 718.202-.204; *Daniels Co., Inc. v. Mitchell*, 479 F.3d 321, 336 (4th Cir. 2007). For purposes of the regulations, "pneumoconiosis" includes both "clinical" pneumoconiosis (pneumoconiosis as recognized by the medical community) and the broader category of "legal" pneumoconiosis (any chronic pulmonary condition arising out of coal-mine employment). 20 C.F.R. §§ 718.201(a)(1), (2); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210 (4th Cir. 2000).

miner's lungs and because the doctor relied on an inadmissible CT (computerized tomography) scan and x-ray evidence. (The ALJ excluded the CT scan evidence because no physician attested to its medically acceptability. JA 111. *See* 20 C.F.R. § 718.107).[12]

The ALJ further found a totally disabling respiratory impairment established based on the miner's qualifying pulmonary function study results and the near-unanimous medical opinion evidence. JA 116. Finally, the ALJ found that the miner's totally disabling respiratory impairment was due to pneumoconiosis by relying on Dr. Forehand's opinion. *Id*.

2. The Board's Decision Vacating and Remanding Judge Miller's Award of Miner's Benefits (May 23, 2007)

On appeal, Eastern argued that ALJ Miller erred in holding Eastern liable as the responsible operator, in excluding the CT scan evidence, and in weighing the x-ray and medical opinion evidence. The Board agreed with Eastern's arguments

[12] A CT (computerized axial tomography) scan is the recording of internal body images at a predetermined plane by means of a tomograph. *Dorland's Illustrated Medical Dictionary* (30th ed. 2003) at 1919. CT scans are admissible in a black lung claim under 20 C.F.R. § 718.107, which provides for consideration of "other medical evidence." Any medical test or procedure not covered by a specific provision in Part 718 is admissible as additional medical evidence if the proponent establishes to the satisfaction of the ALJ that the evidence is medically acceptable and relevant to the claimant's entitlement to benefits. 20 C.F.R. § 718.107; *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-33 (BRB 2006) (*en banc*). If the proponent of the evidence fails to meet this burden, the ALJ need not consider the evidence in adjudicating the claim. *Id*.

and vacated ALJ Miller's decision. It determined that the ALJ neglected to consider certain evidence relating to the responsible operator issue, overlooked Dr. Wheeler's testimony that could establish the acceptability of the CT scan evidence, failed to consider the quantitative and qualitative aspects of the x-ray evidence, and committed various errors in weighing the medical opinion evidence. JA 90.

3. ALJ Miller's Procedural Order Directing Designation of Evidence On Remand (Oct. 3, 2008)

In accordance with the Board's instruction that he reconsider the CT scan evidence, Judge Miller issued an Order informing the parties that "the case [was] otherwise ready for decision" and instructing them to select and designate CT scan evidence within 12 days. JA 89.

The miner's former attorney (Frederick Muth, Esq.) responded to the Order, advising the ALJ that the miner had passed away and that the lawyer had no authority to act on behalf of his estate. JA 88. He also informed the ALJ that although the miner had left a surviving widow, "she has since remarried and has no further interest in the pursuit of his case." *Id*. Counsel added that the miner's file "had been retired" since his death, and that counsel was planning to retire from the practice of law in the very near future. *Id.*

Neither Eastern nor the Director responded to ALJ's Miller Order.

4. ALJ Miller's Procedural Order to Give Notice and Show Cause (Oct. 22, 2008)

Less than three weeks later, ALJ Miller issued another procedural order. JA 86. In it, he acknowledged Attorney Muth's reply to his prior order and stated that, in a follow-up conversation, Mr. Muth had confirmed that the miner had died on May 8, 2006, that Mr. Muth had no authority to represent the miner's estate or the miner's surviving widow who apparently was not represented by counsel. To the ALJ, these circumstances suggested that the miner's claim had been abandoned. The ALJ accordingly ordered the parties to show cause how the case should proceed. JA 87.

The Director responded and informed the ALJ that a final adjudication on the miner's claim was necessary to determine the Director's right to reimbursement of paid interim benefits from either the miner's estate (should the claim be denied) or from Eastern (should the claim be awarded). JA 84. The Director stated that, although the miner could not designate CT scan evidence, the merits of his claim could nonetheless be ascertained. The Director also pointed out that, pursuant to 20 C.F.R. § 725.465(d), the claim could not be dismissed without the written consent of the Director, and the Director opposed the dismissal of the case. JA 85.

Eastern again did not respond to the ALJ's Order.

5. ALJ Tureck's Intervening Decision Denying the Widow's Claim (Nov. 3, 2008)

As mentioned above, the widow had filed a claim for survivor's benefits in May 2006, and requested an ALJ hearing after the district director denied the claim

for failure to prove her husband's death was due to pneumoconiosis.[13] While Judge Miller addressed the procedural posture of the miner's claim, ALJ Jeffrey Tureck issued a decision denying the widow's claim. JA 76.

At the outset of his decision, ALJ Tureck noted that the widow had remarried on January 17, 2008; therefore, she was entitled to survivor's benefits for a closed period of less than two years - from the month of the miner's death (May 2006) until the month before she remarried (December 2007). JA 78; *see* 20 C.F.R. §§ 725.213(b), 725.503(c).

On the merits, ALJ Tureck found that the widow had failed to establish pneumoconiosis. JA 82. The ALJ concluded that the x-ray evidence was negative for pneumoconiosis because the doctors with better credentials read the various x-rays as negative, that a biopsy was negative for pneumoconiosis, and doctors with excellent credentials had interpreted that the majority of the CT scans as negative. The ALJ gave little weight to Drs. Patel and Robinette's diagnoses of pneumoconiosis because neither doctor addressed the miner's amyloidosis (which had been diagnosed in 2002). JA 81.[14] Finally, the ALJ gave little weight to the

[13] To receive survivor benefits under the BLBA, the widow was required to prove that her late husband had pneumoconiosis, that the disease arose out of his coal mine employment, and that it caused his death. 20 C.F.R. §§ 718.202, .203, .205; *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 363 (4th Cir. 2006).

[14] "Amyloidosis" is "a group of conditions of diverse etiologies characterized by the accumulation of insoluble fibrillar proteins (amyloid) in various organs and

miner's death certificate because, although it listed pneumonia as the immediate cause of death and pneumoconiosis as an underlying cause, these conclusions were unexplained. JA 82. Because the widow had failed to establish pneumoconiosis, an essential element of entitlement, the ALJ denied her claim. *Id*. The widow did not appeal.

6. ALJ Miller's Award of Benefits in the Miner's Claim (January 27, 2009)

Nearly *three months* after ALJ Tureck denied the widow's claim, ALJ Miller awarded the miner's. JA 51. ALJ Miller first described the procedural posture of the case. JA 52-53. He observed that only the Director had responded to his show cause order, and he summarized that response, described above. JA 53. The ALJ further noted that no party had responded to his order to designate the CT scan evidence. *Id*.

Apparently satisfied with simply describing the procedural posture of the case and the Director's position, the ALJ then turned to the issues remanded to him for reconsideration by the Board. He found that Eastern was the properly-named responsible operator, and that Dr. Wheeler's testimony established the medical acceptability of the CT scans. JA 55-60.

The ALJ then addressed the issue of complicated pneumoconiosis.[15] He

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tissues of the body such that vital function is compromised." *Dorland's* at 69.

[15] Clinical pneumoconiosis "is customarily classified as 'simple' or 'complicated.'"

observed that, although the x-rays indicated the presence of large opacities, the preponderance of the x-ray evidence was interpreted as negative for pneumoconiosis. He then found that Dr. Cappiello's CT scan interpretation indicating complicated pneumoconiosis did not outweigh Dr. Wheeler's three CT scan interpretations that were negative for the disease. However, the ALJ again found the medical opinions of Drs. Forehand and Robinette, who diagnosed complicated pneumoconiosis and a totally disabling respiratory impairment related to coal mine dust exposure, to be the most persuasive because those doctors were well-qualified and their opinions were based on extensive objective evidence, including clinical testing. JA 73. The ALJ was not convinced by the opinions of employer's experts, Dr. Wheeler and Dr. Zaldivar, who diagnosed no pneumoconiosis and no total disability due to pneumoconiosis. He found that Dr. Wheeler's assessment that the large masses in the miner's lungs were due to tuberculosis or some other granulomatous disease relied on x-ray and CT scan interpretations, but little, if any, clinical evidence; and further, Dr. Wheeler impermissibly depended on evidence not included in the record.[16] JA 72.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 7 (1976). Complicated pneumoconiosis is "generally far more serious [than simple pneumoconiosis], involves progressive massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually produces significant pulmonary infection and marked respiratory disability." *Id*.

[16] Dr. Wheeler's x-ray readings for black lung were the subject of an investigation

Similarly, the ALJ faulted Dr. Zaldivar for relying on inadmissible evidence in formulating his opinion. *Id*. Relying on Drs. Forehand and Robinette's opinions, the ALJ concluded that the miner suffered from complicated pneumoconiosis and, in the alternative, totally disabling legal pneumoconiosis. JA 73-74. Accordingly, the ALJ awarded benefits to the miner.

7. ALJ Miller's Order Dismissing Respondent Employer's Motion to Dismiss or Deny for Lack of Jurisdiction (Feb. 5, 2009).

Three days *after* ALJ Miller awarded benefits, Eastern filed a "Motion to Dismiss or Deny," arguing that the miner's claim must be dismissed because the Director lacked standing to assert a claim on the miner's behalf, and that the Director and miner were collaterally estopped by the adverse determination three months earlier in the widow's claim. JA 46.

Eastern did not argue that 20 C.F.R. § 725.456(d) was invalid. In fact, its motion does not even mention the provision.

ALJ Miller dismissed Eastern's motion, explaining that because he had already issued a decision in the case, he was without jurisdiction to consider the motion to dismiss. JA 45.

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by ABC News and the Center for Public Integrity. In response, Johns Hopkins Hospital suspended its black lung reading program (which Dr. Wheeler participates in) pending its internal investigation of the unit. *See* http://www.hopkinsmedicine.org/news/abc_news_report_b-reads_pneumoconiosis_statement.html (last visited January 31, 2014).

8. Judge Colwell's Order on Reconsideration (Sept. 9, 2011)

On February 25, 2009, Eastern moved for reconsideration of Judge Miller's January 27, 2009 Decision and Order awarding benefits, and his February 5, 2009 Order refusing to dismiss the miner's claim. JA 36. Eastern renewed its arguments that the Director did not have standing to pursue the miner's claim, and that collateral estoppel compelled its denial. Eastern also challenged ALJ Miller's finding that the miner suffered from complicated pneumoconiosis.

Once again, Eastern did not cite section 725.456(d) or argue it was invalid.

On September 9, 2011, ALJ Colwell, to whom the case had been reassigned because Judge Miller had retired, granted Eastern's request for reconsideration but denied the relief requested. JA 19. ALJ Colwell declined to apply collateral estoppel because he found that black lung case law allowed for the application of collateral estoppel only in very specific circumstances and, here, "[e]mployer cites to no authority permitting application of collateral estoppel to preclude a finding of pneumoconiosis in the miner's claim, where the disease was not established in a separate survivor's claim." JA 20.

The ALJ also rejected Eastern's argument that the Director lacked standing to pursue the miner's claim. Quoting 20 C.F.R. § 725.360(a)(5) and Board precedent, the ALJ explained that the Director is "a party 'in all proceedings relating to a claim for benefits;'" that "'[he] has standing to ensure the proper

administration of the Black Lung Program;" and that addressing "questions regarding the 'statutory and regulatory authority of the administrative law judge to act as he did is fundamental to the proper administration of the Act.'" JA 21.

Applying those principles here, ALJ Colwell found that it was "proper" "to adjudicate the claim on the merits at the *request* of the Director." JA 22 (emphasis added). He reasoned that because the miner had received interim benefits from the Trust Fund, "an award or denial of benefits by Judge Miller would dictate the Director OWCP's recourse. Because Judge Miller awarded benefits, the Director, OWCP is entitled to seek reimbursement of previously paid benefits from Employer." *Id*.

Nowhere in ALJ's Colwell's reasoning does he mention, let alone rely on, section 725.465(d).

Last, ALJ Colwell reaffirmed Judge Miller's finding of complicated pneumoconiosis, thus upholding the award.

9. The Board's Affirmance of the Award of Miner's Benefits (Sept. 27, 2012)

Eastern appealed the decisions of Judge Miller and Judge Colwell to the Board. Just as it failed in *three* opportunities before the ALJs, Eastern again neglected to challenge the validity of section 725.465(d) in its opening Petition for Review and brief to the Board. R 50-74. Instead, it argued that the Director – although a party-in-interest – did not have the authority to step into the shoes of the

claimant and pursue the claim when the claimant did not want to.[17] *Id*. at 14. The Board rejected this argument for three reasons:

> The regulations specifically provide that the Director is a party to all black lung claims; that the Secretary of Labor may, as appropriate, exercise subrogation rights in any case where benefits payments have been made by the Trust Fund; and that a claim in which a miner had been paid interim benefits from the Trust Fund cannot be dismissed, absent the Director's motion or written agreement. *See* 20 C.F.R. §§ 725.360(a), 725.465(d), 725.602(b); *Boggs v. Falcon Coal Co.*, 17 BLR 1-62 (1992).

JA 10.

The Board also rejected Eastern's argument that collateral estoppel applied to foreclose the finding of pneumoconiosis in the miner's claim. JA 13-14. The Board held that one of the elements of collateral estoppel was not met; namely, that the miner, against whom collateral estoppel was being asserted, did not have a full and fair opportunity to litigate the issue of pneumoconiosis in the widow's claim. The Board also affirmed the findings that Eastern was the responsible operator and that the miner suffered from complicated pneumoconiosis.[18] JA 13,17.

On October 31, 2012, Eastern filed a timely motion for reconsideration. In it, Eastern only marginally expanded its discussion of section 725.456(d)'s

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[17] Eastern's reply brief to the Board contains one sentence alleging that section 725.465 violates the APA's mandate of ALJ independence (with no legal citation) and is not authorized by the BLBA. R. 28 (Eastern's April 19, 2012 Reply Brief at 3).

[18] Before the Board, Eastern did not challenge ALJ Miller's alternative finding that the miner suffered from totally disabling legal pneumoconiosis.

validity. R.3 (Eastern's Motion for Reconsideration at 4). In any event, the Board did not address the argument and summarily denied the motion. JA 6.

SUMMARY OF THE ARGUMENT[19]

Eastern challenges the validity of the Secretary's regulation, 20 C.F.R. § 725.465(d), that preserves the Director's opportunity to recoup expenditures from the Black Lung Disability Trust Fund. Specifically, Eastern contends that the regulation violates the Administrative Procedure Act's grant of decisional independence to ALJs. This argument is not properly before the Court. Eastern did not raise it before the ALJs and so waived it. In addition, the ALJs did not rely on the regulation in allowing the miner's claim to proceed. Thus, the regulation's supposed coercive effect played no role whatsoever in the ALJs' decisionmaking.

[19] Eastern devotes four sentences in a footnote (Pet. Br. 18 n.4) to challenging Judge Miller's finding that the miner suffered from complicated pneumoconiosis, but does not press this argument as a separate point on appeal or with sufficient specificity to warrant this Court's considerations. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999) ("Failure to comply with the specific dictates of [Federal Rule of Appellate Procedure 28(a)(9)(A)] with respect to a particular claim triggers abandonment of that claim on appeal."); *see* Fed. R. App. Proc. 28 (a)(9)(A),(B) (requiring the argument section of appellant's opening brief to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies" and "for each issue, a concise statement of the applicable standard of review"). In any event, Eastern does not now, nor has it ever, challenged ALJ Miller's alternative finding supporting entitlement, namely, that the miner suffered from totally disabling legal pneumoconiosis. Accordingly, if this Court rejects Eastern's challenge to 20 C.F.R. § 725.465(d) and its collateral estoppel argument, the award of benefits must be affirmed.

Regardless, Eastern is wrong that section 725.465(d) impermissibly interferes with an ALJ's decisional independence. *By statute*, the Director is a party to all black lung proceedings *and* is required to pay benefits before a claim is finally awarded. Section 725.465(d) simply ensures a complete adjudication of the Director's interests in cases where he has a direct financial stake by virtue of having paid interim benefits. Importantly, section 725.465(d) does not mandate *how* an ALJ decides those interests, but only that they are determined.

Eastern also argues that the miner's award in this case is barred by collateral estoppel. This argument suffers from two fatal flaws. First, Eastern waived its collateral estoppel defense by not raising it until after ALJ Miller fully adjudicated the miner's claim. Second, Eastern cannot establish all the elements of collateral estoppel. In particular, it has not shown that either the miner or the Director had a full and fair opportunity to litigate the issue of the existence of pneumoconiosis in the widow's claim. Specifically, the deceased miner obviously was not a party to his wife's survivor's claim, and she did not act as his fiduciary in prosecuting her claim. The Director, although a party in the widow's claim, did not have a full and fair opportunity to litigate the finding of no pneumoconiosis because ALJ Tureck's denial was consistent with the Director's own finding of no entitlement. The Director, as a prevailing party in the claim, lacked any incentive to appeal the denial, regardless of the grounds given.

ARGUMENT

A. Standard of Review

This appeal presents legal issues that this Court reviews *de novo*. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010). Such review is tempered by deference principles. The Director's interpretation of the BLBA and its implementing regulations is entitled to substantial deference unless plainly erroneous or, in the case of regulations, inconsistent with the BLBA. *See generally Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993). A properly promulgated regulation is presumptively valid so long as it is "reasonably related to the purposes of the enabling legislation." Consequently, Eastern faces a difficult task to demonstrate that a regulation is invalid. *Harman Mining Co. v. Director, OWCP*, 826 F.2d 1388, 1390 (4th Cir. 1987) *citing Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

B. Eastern's challenge to section 725.465(d) is not properly before the Court.

Eastern argues that the ALJs refused to dismiss the miner's claim as abandoned pursuant to 20 C.F.R. § 725.409(a)(3) because the ALJs were impermissibly required to obtain the Director's consent under section 725.465(d). Although section 725.456(d) is valid, *infra* Argument C, Eastern's legal challenge to the regulation is not properly before the Court.

As an initial matter, Eastern has not raised, and did not raise below, a

cognizable basis for dismissing the miner's claim for cause under section 725.465. It asserts (Pet. Br. at 8-9) that the miner abandoned the claim, relying on the Department's abandonment regulation, 20 C.F.R. § 725.409. But section 725.409 governs *district director* adjudications of claims, not *ALJ* adjudications. 20 C.F.R. § 725.409(a) ("a claim may be denied at any time *by the district director* by reason of abandonment where the claimant fails…"); s*ee also* 20 C.F.R. Subpart E ("Adjudication of Claims by the District Director"); *Wellmore Corp. v,. Stiltner*, 81 F.3d 490, 497 (4th Cir. 1996) (section 725.409 provides the district director "with a specific mechanism to deal with a claimant's refusal to attend an informal conference").

Instead, section 725.465 (within 20 C.F.R. Subpart F "Hearings") governs ALJ dismissals for cause. That section authorizes dismissal on three grounds: where the claimant fails to attend a hearing or comply with a lawful order, or where the claim has been finally adjudicated and no new evidence is submitted. 20 C.F.R. §§ 725.465(a)(1)-(3). Neither Eastern nor the ALJs below asserted that any of these reasons warranted dismissal of the miner's claim. And in fact none apply here.[20] In any event, Eastern did not even contend that the miner's claim was

[20] It could be argued, hypothetically, that the miner's failure to designate the CT scan evidence on remand constituted a failure to comply with a lawful order. *See* JA 89. But no party – including Eastern – responded to that order, and the ALJ reasonably overlooked the parties' omission, because as the ALJ himself observed, the case was "otherwise ready for decision." JA 89. Eastern's suggestion (Pet. Br.

abandoned until after the ALJ had awarded it. By then, Eastern was too late.

Even assuming "abandonment" could be a reason to dismiss under section 725.465, section 725.465(d)'s validity is not properly before the Court. Eastern first argued that the regulation impermissibly infringes on the ALJ decisional independence in a *reply brief before the Board*, and therefore failed to timely raise the issue. *E.g.*, *U.S. v. Jones*, 667 F.3d 477, 484 n.7 (4th Cir. 2012) (failure to raise argument before trial court waives issue on appeal). Indeed, Eastern's neglect is especially problematic because it failed to alert the ALJs -- the very adjudicators whose independence was allegedly compromised and who could have timely assessed its correctness.[21]

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at 8) that the final denial in the *widow's* separate survivor's claim satisfies the third ground in section 725.465 is misguided. Subsection 725.465(a)(3) speaks to the prior final adjudication of the claim for which dismissal is sought, not an adjudication of a different claim. Eastern's overbroad reading of the subsection (a)(3) simply makes no sense, and would entirely supplant the usual rules for claim and issue preclusion.

[21] Eastern's delay is particularly inexplicable because it *ignored* ALJ Miller's *show cause order* directing it to inform him of its position whether the miner's claim should proceed, and did not raise the abandonment issue until after ALJ Miller awarded benefits. JA 46, 53, 86-87. Thus, the fact of the matter is that Eastern acquiesced in the adjudication of the miner's claim on the merits. Stated alternatively, it was unreasonable for it to argue that the claim had been abandoned after ALJ Miller had taken the time and effort to decide it. At one point, appellate counsel for Eastern (its counsel here) seemed to offer as an excuse for ignoring ALJ's Miller's show cause order that the order had not been served on it. JA 37-38. But the Director's review of the record indicates that appellate counsel never filed an appearance with ALJ Miller as required by 20 C.F.R. § 725.362(a), and all papers were properly served on Eastern's counsel of record, Paul Frampton,

Perhaps as a consequence of Eastern not raising the issue, the ALJs did not in fact rely on section 725.465(d) in deciding to adjudicate the miner's claim on the merits. ALJ Miller was clearly aware of the procedural history of the case and described the Director's position on abandonment, but made no overt ruling or gave any explanation for going forward. JA 52-53. ALJ Colwell likewise did not rely on, or feel bound by, section 725.465(d) in upholding ALJ Miller's decision to adjudicate the case on the merits. Rather, ALJ Colwell found it "*proper*" to consider the Director's "*request*" for an adjudication on the merits because it would "dictate the Director['s] recourse" in seeking recoupment of interim benefits paid. JA 22. Thus, section 725.465(d) – and any infringement it supposedly caused -- played no part in the ALJ decisions below. In effect then, Eastern is wrongly asking this Court to issue an advisory opinion on a subject that would in no way change the ALJ decisions below.

C. Section 725.465(d) does not conflict with the APA.

Eastern claims section 725.465(d) is invalid because it interferes with the ALJ's independent decision-making authority under the APA. But section 725.465(d) does no such thing. It merely ensures that a claim will be fully adjudicated on the merits -- without dictating the final result -- where, as here, the

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Esquire, *see* DX 23 (notice of controversion) and Eastern itself. No one claimed *they* did not receive the proper papers.

Trust Fund and the employer are the real parties in interest, and the outcome no longer concerns the claimant.

As detailed *supra* at 6, the Trust Fund is required to pay interim payments on claimant awards, and may then obtain reimbursement, including any interest thereon, from the liable operator when it declines to pay them. 26 U.S.C. § 9501(d)(1)(A)(ii); 30 U.S.C. §§ 932(j)(1), 934(b)(1); 20 C.F.R. § 725.522(a), .602. But the Director's right to enforce reimbursement against an operator depends on the existence of a final award. 30 U.S.C. 934(b)(2), (b)(4). Thus, Eastern and the Director are the real parties in interest here.[22] *Midland Coal Co. v. Director, OWCP [Luman]*, 149 F.3d 558, 560 n.1 (7th Cir. 1998) *overruled on other grounds Saban v. U.S. Dept. of Labor*, 509 F.3d 376 (7th Cir. 2007) (in a claim in which the Trust Fund has paid interim benefits, where the miner and his widow have died and her estate is closed, the real parties in interest are the employer and the DOL); *Old Ben Coal Co. v. Battram*, 7 F.3d, 1273, 1275 (7th Cir. 1993) (employer and DOL remain interested parties in a case where the Trust Fund has

[22] Ironically, although the widow indicated in 2008 that she did not want to pursue the miner's claim, she now has an important interest in seeing it finalized. This is so because the ACA restored her right to automatic derivative benefits in 2010, Pub. L. No. 111-148, § 1556(b) (2010), and she would be entitled to BLBA benefits if the Court affirms the miner's award and her remarriage ends. 20 C.F.R. § 725.213(c); *Union Carbide Corp. v. Richards,*721 F.3d 307, 317 (4th Cir. 2013) (ACA's restoration of automatic entitlement applies to widow's subsequent claims).

paid interim benefits, despite deaths of the miner and his wife).

Section 725.465(d) simply accounts for the reality that the Director and operator may be the only real parties in interest in cases where interim benefits have been paid and reimbursement will be sought. By giving the Director approval rights before a claimant's inaction can cause a summary dismissal for cause, section 725.465(d) merely requires that adjudications on the merits occur when needed. It thus ensures that the Director "as a party to the litigation, receives a complete adjudication of his interests," 65 Fed. Reg. 80005, and allows him the opportunity to recoup Trust Fund payments from either the employer or the claimant, depending on the final disposition. *Boggs v. Falcon Coal Co.*, 17 BLR 1-62, 1-66 (BRB 1992).

Eastern contends that section 725.465(d) violates the APA because it impermissibly "cabins an ALJ's discretion by requiring the Director's consent in order to dismiss a claim." Pet. Br. 9. Specifically, Eastern alleges that the regulation runs afoul of section 554(d) of the APA, which prohibits employees of the agency from supervising, directing or otherwise interfering with an ALJ's obligation to render a decision in an impartial manner.[23] 5 U.S.C. §§ 554(d)(2),

[23] In pertinent part, section 554(d)(2) of the APA provides that an ALJ may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency." 5 U.S.C. § 554(d)(2).

556(b). Contrary to Eastern's contention, section 725.465(d) does not violate the APA.

One of the main purposes of the APA is "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41-45 (1950). To that end, the APA provides that an ALJ cannot be subject to supervision or direction by any agency employee with investigative or prosecutorial functions, and employees engaged in investigatory or prosecution efforts on behalf of an agency in a given case may not participate in the adjudication of the case. 5 U.S.C. § 554(d)(2). The clear purpose of this section is to separate the investigative and prosecutorial functions from the adjudicative function. *Utica Packing Co. v. Block*, 781 F.2d 71, 76 (6th Cir. 1986). In order to prove such an improper comingling of functions, it must be shown that the final decision was affected. Stein, Mitchell, Mezines, ADMINISTRATIVE LAW (2003) §33.02[3]; *see also Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 694 (9th Cir. 1949) (in adjudications under the APA, "the separation of judge and litigant necessary for a minimum of fairness is in that portion of the decisional process involved in actually making the decision.").

At the outset, it is readily apparent that section 725.465(d) neither interferes

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In pertinent part, section 556(b) of the APA provides "[t]he functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner." 5 U.S.C. § 556(b).

with an ALJ's ability to render an impartial decision nor affects the final decision itself. Section 725.465(d) does not direct the ALJ to rule in the Secretary's favor or for any particular party. Rather, it only requires *some* final determination on the merits when a claimant fails to timely act and the Trust Fund has paid interim benefits.

In *Boggs*, the Board carefully considered and rejected the identical APA challenge to section 725.465(d) that Eastern raises here. The Board recognized that APA section 554(d) is intended to prevent the parties from influencing an ALJ's legal conclusions or factual determinations. 17 BLR at 1-65. But the Board further understood that "the broad mandate of the APA must be synthesized with the specific requirements of the [BLBA]." *Id*. It observed that the BLBA makes (a) the Director a party to all claims; (b) the Trust Fund secondarily liable for the payment of interim benefits when the operator refuses; and (c) the operator responsible for reimbursing the Trust Fund. Balancing these concerns, the Board correctly ruled that section 725.465(d), rather than unduly limiting the ALJ's decisional independence, reasonably preserves the right of the Trust Fund to recoup its expenditures from the ultimately-liable party. 17 BLR at 1-66.

Eastern does not so much object to the Board's reasoning as argue that *Boggs* is no longer good law in light of *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), which it claims "rejected the Director's argument that it had

the authority to deviate from the APA." Pet. Br. at 10. But this argument is meritless. As discussed above, section 725.465(d) does not interfere with an ALJ's decisional independence and thus does not deviate from the APA. *Boggs*, 17 BLR at 1-66. Moreover, the *Greenwich Collieries* court did not decide whether the BLBA authorized the Secretary to displace the APA by regulation. The Court "assum[ed] *arguendo*" the correctness of the Director's position on this score, but held that the language of the regulation at issue, 20 C.F.R. § 718.3, could not "fairly be read as authorizing the true doubt rule and rejecting the APA's burden of proof provision"; therefore, the court held that the ambiguous regulation did not overcome any presumption that the APA's burden of proof provisions apply to adjudications under the BLBA. 512 U.S. at 271. By contrast, as explained above, section 725.456(d) reasonably and directly implements the Act's statutory provisions dictating the payment of interim benefits and their reimbursement.

Employer asserts (Pet. Br.at 10) that "the fact that the Director is a party in black lung adjudications does not make it a special party or in any way confer on him the responsibilities of an ALJ or the power to preclude judicial findings unless agency consent is obtained." But Eastern has it backwards. By virtue of section 725.465(d), the Director is requesting the issuance of *full* administrative findings, not precluding them. Moreover, once the Trust Fund pays interim benefits, it is subrogated to the rights of the claimant, 20 C.F.R. § 725.602(b), and thus may seek

a determination on the merits under that basis as well.

In addition, Eastern's reliance on *Director, OWCP v. Newport News Shipbldg & Dry Dock Co. [Harcum]*, 514 U.S.122 (1995), is misplaced. *Harcum* addressed whether the Director had standing to seek court of appeals review in a Longshore Act claim as a "person adversely affected or aggrieved" by a Board decision under section 21(c) of the Longshore Act, 33 U.S.C. § 921(c).[24] In concluding that the Director lacked standing, the Court contrasted the Longshore Act's silence on the Director's participation in Longshore Act claims with the BLBA's grant of party status in any proceeding relative to a claim for benefits. 514 U.S. at 129 ("the United States Code displays throughout that when an agency in its governmental capacity *is* meant to have standing, Congress says so," citing *inter alia* 30 U.S.C. 932(k)). Moreover, *Harcum* concerned the Director's standing when acting in his administrative or governmental capacity, not as here when he has a direct financial interest in the case. Last, *Harcum* addressed the Director's standing to appeal to the courts of appeal, not his right to participate at the ALJ level, *see* 20 C.F.R. § 725.360(a)(5) (making the director a party to all

[24] Section 21(c) provides in relevant part: "Any person adversely affected or aggrieved by a final order of the Board may obtain review of that order in the United States court of appeals." 33 U.S.C. § 921(c). Unlike the Longshore Act, Congress expressly made the Director a party to all black lung proceedings. It would be odd, to say the least, that Congress, having made the Director a party, requiring him to pay interim benefits, and allowing him to obtain reimbursement, would prevent him from vindicating that right.

proceedings), or for that matter before the Board. *See* 33 U.S.C. § 921(b)(3) (authorizing the Board to hear any party's appeal raising a substantial question of law or fact). In short, *Harcum* has no relevance here.

Finally, Eastern argues that even if section 725.465(d) is valid, the Director unreasonably withheld his consent to dismiss the miner's claim because the Director did not investigate the possibility of recovering an "overpayment" from the miner's estate. Pet. Br. at 10-11. Before ALJ Colwell, however, Eastern categorically claimed any such recovery was impossible: "Mr. Vest is no longer alive and therefore cannot repay any interim benefits. *Nor is there an estate from which such benefits may be recovered.*" JA 27 (emphasis added). Certainly, Eastern cannot now fault the Director for failing to engage in an investigation that it knows would be fruitless. Regardless, if the miner's award is affirmed, the Director may not collect an overpayment for sums properly paid to the miner. Rather, Eastern must reimburse the Director those amounts. *See supra* at 9 n.10.

In view of the foregoing, the Court should reject Eastern's argument that 20 C.F.R. § 725.465(d) is invalid.

D. Eastern waived its collateral estoppel defense.

Eastern also argues that the miner's award was barred by collateral estoppel based on ALJ Tureck's prior denial of the widow's claim, which came nearly three months before the miner's award. But Eastern did not raise its collateral estoppel

defense until *after* ALJ Miller awarded the miner's claim. Eastern thus waived the defense by failing to timely raise it.

Collateral estoppel is a judge-made rule providing that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits on a different cause of action involving a party to the prior litigation." *Collins v. Pond Creek Min. Co.*, 468 F.3d 213, 217 (4th Cir. 2006) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). The rule applies in administrative litigation. *Collins*, 468 F.3d at 217.

Because collateral estoppel is an affirmative defense,[25] a party may waive it when it has not been properly and timely asserted. *Georgia Pacific Consumer Products, LP v. Von Drehle Corporation*, 710 F.3d 527, 533 (4th Cir. 2013) (even when a preclusion defense is not available at the outset of a case, a party may waive such a defense arising during the course of litigation by waiting too long to assert the defense after it becomes available). The defense must be raised at the "earliest possible moment" or, at the very least, at the "first reasonable opportunity" after the rendering of the decision having the preclusive effect, or the defense is waived. *See Georgia Pacific*, 710 F.3d at 533-534, *citing Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 47 (2d. Cir. 1983); *Home Depot, Inc. v.*

[25] *See Blonder-Tongue Labs., Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313, 350 (1971); *Freeman United Coal Min. Co. v. OWCP*, 20 F.3d 289, 294 (7th Cir. 1994); *cf.* Fed. R. Civ. P. 8(c).

Guste, 773 F.2d 616, 620 n.4 (5th Cir. 1985); *Aetna Cas. & Sur. Co. v. Gen. Dynamics Corp.*, 968 F.2d 707, 711 (8th Cir. 1992).

Regardless, a party intending to rely on collateral estoppel "certainly [may not raise] the defense after the Court has already issued its opinion." *Southern Pacific Communication Co. v. American Telegraph and Telephone Co.*, 567 F.Supp. 326, 329 (D.D.C. 1983), *aff'd* 740 F.2d 1011 (D.C. Cir. 1984). The reason for this rule is clear. A tardy assertion of the defense does not protect the parties from re-litigating a matter that has already been decided and does not promote judicial economy by preventing needless litigation; thus, frustrating two of the three purposes of collateral estoppel. *See Southern Pacific*, 567 F.Supp. at 330.

Here, Eastern did not assert its collateral estoppel defense at the earliest opportunity, or even at the first reasonable opportunity. ALJ Tureck denied survivor's benefits on November 3, 2008, and Eastern did not notify ALJ Miller of the decision until January 30, 2009 – almost three months later – and only after ALJ Miller had awarded benefits. Eastern's trial counsel in both the miner and widow's claims was the same, so there was no excuse for the delay. Most importantly, Eastern's complete failure to raise the defense until after ALJ Miller's award undercuts its very purpose –to relieve the court and parties of having to relitigate already-decided issues. *See Southern Pacific Communications Co. v. American Telephone and Telegraph Co.*, 740 F.2d 1011, 1019 (D.C. Cir. 1984)

(when time and expense of relitigating issues has already been borne by the parties and the court, it does not unduly burden litigants to require them to have raised collateral estoppel defense earlier). The Court should therefore refuse to consider Eastern's argument that the miner's award was barred by collateral estoppel.

E. Collateral estoppel does not apply here because Mr. Vest was not a party to his wife's claim or otherwise bound by the decision in that prior action.

Even if Eastern did not waive its collateral estoppel defense, it still cannot prevail on it because its elements have not been established here. As set forth by this Court, those elements are:

> (1) that the issue sought to be precluded is identical to one "previously litigated" ("element one"); (2) that the issue was actually determined in the prior proceeding ("element two"); (3) that the issue's determination was a critical and necessary part of the decision in the prior proceeding" ("element three"); (4) and that the prior judgment is final and valid ("element four"); and (5) that the party against whom collateral estoppel is asserted "had a full and fair opportunity to litigate the issue in the previous forum" ("element five").

Collins, 468 F.3d at 217 (quoting *Sedlack v. Braswell Serv. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998). Eastern cannot establish "element five" – "that the party against whom collateral estoppel is asserted 'had a full and fair opportunity to litigate the issue in the previous forum.'"

As the Court has stated,

> Collateral estoppel ordinarily applies only against persons who were parties to the prior suit, because as a general rule,

> nonparties will not have had a full and fair opportunity to litigate the issues raised in the previous action.

Virginia Hospital Ass'n v. Baliles, 830 F.2d 1308, 1312 (4th Cir. 1987) (citing *Blonder-Tongue*, 402 U.S. at 329). The deceased miner plainly was not - and could not be - a party to his widow's survivor's claim. Thus, he would ordinarily not be bound by any findings in that claim.

In some circumstances, however, non-parties may be collaterally estopped. *See Montana v. United States*, 440 U.S. at 153-54; *see generally* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 2010) § 4454. Eastern contends that because the miner and widow were in "a fiduciary relationship," this is one of those circumstances. Pet. Br. at 20, citing *Sea-Land Servs., v. Gaudet*, 414 U.S. 573 (1974) (superseded by statute as recognized in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)).[26] The company's reliance on *Gaudet* is misplaced.

Gaudet involved a wrongful-death suit filed by the widow of a deceased longshore worker. The worker had been injured on the job, and filed a personal-injury suit against the owner of the vessel on which he was injured, and recovered

[26] Eastern also asserts that "element five" is met here because "Mrs. Vest had a full and fair opportunity to litigate her prior claim." Pet. Br. at 19. But this is not the correct inquiry. Eastern is seeking to estop the miner and the Director from establishing pneumoconiosis in the miner's claim. Thus, the focus must be whether the miner and the Director (as the parties against whom collateral estoppel is being asserted) had a full and fair opportunity to litigate the issue in the widow's claim (the "prior claim").

damages that included a lost-wages component. He subsequently died from his injuries.

The primary issues in *Gaudet* were 1) whether the widow could maintain a wrongful-death action under general maritime law when the worker had already recovered for his injuries in his own personal-injury suit, and 2) if so, what damage remedies were available to the widow. *See* 414 U.S. at 574, 583-84. In considering the scope of damages available to the widow, the Supreme Court was faced with a potential double recovery with respect to the loss of the worker's future wages. 414 U.S. at 592. Such lost wages would be recoverable by the widow as part of her loss-of-support damages, but the worker had already recovered for them in his personal-injury suit. *Id*.

The Supreme Court invoked collateral estoppel to prevent a double recovery. *Id*. Since the worker's lost future earnings had been ascertained in his personal injury suit, the court ruled that the widow was bound by that determination under the collateral-estoppel rule and could not recover for the lost future wages in her wrongful-death action. 414 U.S. at 592-94. The court recognized that the widow was not a party to the personal-injury suit, but held that she was nonetheless bound because the worker had acted as her fiduciary in the personal-injury suit. 414 U.S. at 594. Both the worker and the widow had an interest in the lost future wages at the time of the personal-injury suit and, therefore,

> The decedent [worker] act[ed] in a fiduciary capacity to the extent that he represent[ed] his widow's interest in that portion of his prospective earnings which, but for his wrongful death, [she] had a reasonable expectation of his providing for [her] support.

Id.

Unlike Mr. Guadet, the widow was not acting in a fiduciary capacity for the miner in pursuing her own separate survivor's claim.[27] Congress provided for survivor claims, not to compensate for the miner's lost wages during his lifetime, but "as deferred compensation for the suffering endured by [the miner's] dependents by virtue of his illness. . . .And . . . the benefits serve an additional purpose: The miner's knowledge that his dependent survivors would receive benefits serves to compensate him for the suffering he endures." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 25 (1976). As such, a survivor's claim may be brought only after the miner's death. 30 U.S.C. § 901(a); *Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-19 n. 4 (BRB 1989); *cf. Pothering v. Parkson Coal Co.*, 861 F.2d 1328 (3d Cir. 1988) (observing that the only type of claim that a miner may file is one for disability, not one for his own death). And accordingly, survivor benefits begin with the month in which the miner dies. 20 C.F.R. § 725.213(a). (By comparison, the miner's benefits cease the month before the month his death. 20 C.F.R. § 725.203(b).) Plainly, the miner had no protectable interest in his

[27] A "fiduciary" is "[a] person who is *required* to act for the benefit of another person . . . ." BLACK'S LAW DICTIONARY (9th ed. 2009) (emphasis added).

widow's survivor's claim, and she was not his fiduciary in prosecuting her claim.

Eastern posits no other relationship, besides a fiduciary one, binding the miner to the findings in the widow's claim. Because he was not a party to his widow's claim and did not otherwise have a full and fair opportunity to litigate the issues raised in it, Eastern has failed as a matter of law to establish "element five" of collateral estoppel. *See Virginia Hospital Ass'n*, 830 F.2d at 1312.

Eastern also has failed to establish that *the Director* was collaterally estopped in the miner's claim by the findings in the widow's. And as discussed above, *supra* at 27, it is the Director, not the miner, that is Eastern's real party opponent in this proceeding. In fact, Eastern's opening brief makes no argument whatsoever that the Director was collaterally estopped in the miner's claim. It has thus waived *another* issue before this Court. *U.S. v. Hudson*, 673 F.3d 263, 268 (4th Cir. 2012).

In any event, the Director did not have a full and fair opportunity to litigate Judge Tereck's denial of the widow's claim. Like the ALJ, the district director determined that the widow was not entitled to benefits, albeit on slightly different grounds, and so paid her no interim benefits. (ALJ Tureck found no pneumoconiosis; the Director ruled the miner's death was not due to the disease.) Having reached identical conclusions, the Director had no cause to appeal the ALJ's denial. *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993)

citing *Standefer v. United States*, 447 U.S. 10, 23 (1980) ("under contemporary principles of collateral estoppel" the unavailability of appellate review "strongly militates against giving" a judgment preclusive effect); *United States v. Salemo*, 81 F.3d 1453, 1464 (8th Cir. 1988) ("the inability of a party to appeal from an adverse determination in the prior proceeding is a major factor to be considered [in determining whether there was a full and fair opportunity].").

Certainly, under these circumstances, the Director was not aggrieved by the denial and thus lacked any incentive to appeal to it. *Arkansas Coal, Inc. v. Lawson*, ---F.3d---, 2014 WL 67349 (6th Cir. 2014) (collateral estoppel did not bar reconsideration of responsible operator determination when prior claim was denied on the merits); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1993 WL 42264, at *2 (BRB 1993) (recognizing that Director was not aggrieved party and could not fully litigate, *i.e.*, appeal, claimant's status as miner in prior denied claim); *Banner v. U.S.*, 238 F.3d 1348, 1354 (Fed. Cir. 2001) (incentive to litigate a factor in the "full and fair opportunity" element. In sum, the Director had no reason or incentive to appeal Judge Tureck's finding of no pneumoconiosis in the widow's claim, and so, was not collaterally estopped by it in the miner's.

CONCLUSION

The Director requests that the Court affirm the decisions below awarding benefits on the miner's claim. The ALJs were correct to adjudicate his claim on the merits in order to determine the Director's recourse for the repayment of interim benefits, and Eastern's request to dismiss the claim for abandonment came far too late – the claim had already been awarded. Eastern likewise waived its collateral estoppel defense by waiting to raise it until after the award had issued. In any event, the defense does not apply to either the miner or the Director because neither had a full and fair opportunity to litigate the denial of the widow's claim.

Respectfully submitted,

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REQUEST FOR ORAL ARGMENT

The Director does not oppose Eastern's request for oral argument.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 10,611 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2014, an electronic copy of this brief was served through the CM/ECF system on the following:

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