

BRB No. 07-0183 BLA

L.P.)	
(Widow of C.P.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
AMHERST COAL COMPANY, C/O)	
ACORDIA EMPLOYERS SERVICE)	
)	
Employer-Petitioner)	DATE ISSUED: 11/30/2007
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Allison B. Moreman (Jackson & Kelly, PLLC), Lexington, Kentucky for employer.

Richard A. Seid (Jonathan L. Snare, Acting Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand – Award of Benefits (2002-BLA-5238) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), with respect to 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).¹ This is the second time that this case has been before the Board. In his initial Decision and Order, the administrative law judge denied benefits on the ground that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, he did not reach the issue of whether the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Upon considering claimant's appeal and employer's cross-appeal, the Board vacated the denial of benefits and remanded the case for consideration of whether the doctrine of collateral estoppel foreclosed relitigation of the issue of the existence of pneumoconiosis.² [*L.P.*] *v. Amherst Coal Co.*, BRB Nos. 05-0576 BLA and 05-0576 BLA-A (Jan. 30, 2006)(unpub.), slip op. at 3. The Board also instructed the administrative law judge to consider whether to reopen the record on remand to permit the admission of additional evidence pursuant to 20 C.F.R. §725.414 or upon a showing of good cause under 20 C.F.R. §725.456(b)(1). *Id.* at 5.

In his Decision and Order on Remand, the administrative law judge determined that, based upon the finding of legal pneumoconiosis set forth in the award of benefits in the miner's claim, collateral estoppel precluded employer from contesting the issue in the survivor's claim. The administrative law judge admitted the evidence submitted by the parties on remand with the exception of Dr. Sundaram's deposition testimony, which was proffered by employer. Upon considering the evidence relevant to the cause of the miner's death, the administrative law judge determined that claimant established that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c)(2), (5). Accordingly, benefits were awarded.

Employer argues in the present appeal that the administrative law judge erred in applying the doctrine of collateral estoppel to the finding of legal pneumoconiosis rendered in the award of benefits in the miner's claim. Employer also contends that the administrative law judge erred in excluding Dr. Sundaram's deposition and in discrediting the opinions of Drs. Jarboe and Ghio under Section 718.205(c). Claimant

¹ The miner died on March 4, 2001. Director's Exhibit 3. Claimant, the miner's surviving spouse, filed an application for survivor's benefits on March 26, 2001. *Id.*

² In a Decision and Order issued by Administrative Law Judge Ralph W. Musgrave, the miner was awarded benefits on a claim filed on March 14, 1985. Director's Exhibit 1 (ALJ Decision and Order dated July 31, 1990). Judge Musgrave determined that although the x-ray and medical opinion evidence were insufficient to establish the existence of clinical pneumoconiosis, the medical opinion evidence was sufficient to prove that the miner's respiratory impairment was caused, in part, by coal dust exposure, thereby establishing that the miner had legal pneumoconiosis. *Id.* at 6, 12.

has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in which he urges the Board to reject employer's allegation of error regarding the administrative law judge's application of collateral estoppel in this case.

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 applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We will first address the evidentiary issue raised by employer. In response to the administrative law judge's order allowing the admission of additional evidence on remand, employer submitted a document in the format of the Office of Administrative Law Judge's Black Lung Evidence Summary Form, in which it designated the deposition testimony of Dr. Sundaram as "Cross-Examination Evidence."³ Unmarked Administrative Law Judge's Exhibit. The administrative law judge determined that because employer was not entitled to rebut material contained in Dr. Sundaram's records regarding his treatment of claimant, Dr. Sundaram's deposition testimony was not admissible. Decision and Order on Remand at 6. Employer maintains that pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), it has the right to cross-examine Dr. Sundaram about the conclusions that he expressed in his treatment records. Employer's allegation of error is without merit.

The administrative law judge held correctly that Section 725.414(a)(4) does not permit the parties to submit evidence in response to items contained in the treatment records.⁴ See 20 C.F.R. §725.414(a)(3)(ii), (a)(4). To the extent that the evidentiary

³ The Black Lung Evidence Summary Form used by the Office of Administrative Law Judges does not contain a category labeled "Cross Examination Evidence."

⁴ The terms of 20 C.F.R. §725.414(a)(4) provide:

Notwithstanding the limitations in paragraphs (a)(2) and (a)(3) of this section, any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence.

20 C.F.R. §725.414(a)(4).

limitations appear to conflict with the APA, the Board has held that, pursuant to the Act and Section 556(d) of the APA, the Department of Labor has the authority to promulgate regulations defining “the nature and extent of the proofs and evidence” 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a); Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3338, 3358 (Jan. 22, 1997) and providing “for the exclusion of irrelevant, immaterial, or unduly repetitious evidence” as “a matter of policy,” 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); 62 Fed. Reg. at 3359. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*); *see also Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007); *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002). Thus, Section 725.414(a)(4) is a valid regulation that was applied correctly by the administrative law judge.⁵

Employer next challenges the administrative law judge’s application of the doctrine of collateral estoppel to preclude employer from relitigating the issue of the existence of legal pneumoconiosis under Section 718.202(a). Employer asserts that collateral estoppel cannot be applied in this case, as the criteria for adjudicating survivor’s claims differs from those relevant to a miner’s claim. Employer also maintains that because substantial new evidence regarding the existence of pneumoconiosis was developed subsequent to the award of benefits in the miner’s claim, it cannot be precluded from contesting this issue in the survivor’s claim. The Director urges the Board to reject employer’s allegations of error.

Collateral estoppel, or issue preclusion, forecloses relitigation in a subsequent action of an issue that was decided in the initial action. *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 908 (6th Cir. 2001); *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir. 1997)(*en banc*) (quoting *Detroit Police Officers Ass'n v. Young*, 842 F.2d 512, 515

⁵ We also reject employer’s allegations that the administrative law judge should have considered Dr. Sundaram’s deposition testimony on remand because claimant did not object to its admission during the hearing held on March 24, 2004 and the administrative law judge referred to Dr. Sundaram’s deposition when weighing the evidence relevant to the existence of pneumoconiosis in his first Decision and Order. Claimant’s failure to object is of no significance, as the evidentiary limitations cannot be waived. *Smith v. Martin County Coal Corp.*, 23 BLR 1-71 (2004). In addition, because the administrative law judge reopened the record on remand and reconsidered the status of the previously submitted evidence, the findings in his initial Decision and Order as to the admissibility of the evidence became moot.

(6th Cir. 1987)).⁶ Collateral estoppel is properly applied when the following criteria are met:

- (1) the precise issue raised in the present case was raised and actually litigated in the prior proceeding;
- (2) determination of the issue was necessary to the outcome of the prior proceeding;
- (3) the prior proceeding resulted in a final judgment on the merits; and
- (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

See N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass'n, 821 F.2d 328 (6th Cir. 1987); *see also Zeigler Coal Co. v. Director, OWCP [Villain]*, 311 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). Even when these criteria are met, collateral estoppel may not be invoked “where controlling facts or legal principles have changed significantly, or where the circumstances of the case justify an exception to general estoppel principles.” *Detroit Police Officers Ass'n*, 824 F.2d at 515; *see also Polly v. D&K Coal Co.*, 23 BLR 1-77, 1-83 (2005).

We hold that there is no merit to the arguments raised by employer regarding the presence of the requisite criteria in this case. Although employer is correct in stating that miner’s and survivor’s claims are independent causes of action, the existence of pneumoconiosis is an element of entitlement in both claims and is governed by precisely the same regulation – 20 C.F.R. §718.202(a) – which sets forth the means by which the existence of pneumoconiosis can be established. We also reject employer’s contention, that the application of collateral estoppel conflicts with the provision of the Act requiring that all relevant evidence be addressed in considering the merits of a claim. *See* 30 U.S.C. §923(b). As indicated above, this mandate is subordinate to regulations and legal principles that facilitate the efficient adjudication of claims under the Act. The application of collateral estoppel in black lung claims has been recognized, therefore, in a number of cases and is not forestalled by the requirement that all relevant evidence be considered in black lung claims. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23

⁶ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. Director’s Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

BLR 2-394 (4th Cir. 2006); *Villain*, 311 F.3d 332, 22 BLR 2-581; *Polly*, 23 BLR at 1-83; *Hughes*, 21 BLR at 1-137.

Employer's argument, that the development of more credible evidence regarding the existence of pneumoconiosis bars the application of issue preclusion, is relevant to whether the "circumstances of [this] case justify an exception to general estoppel principles," *i.e.*, whether the use of collateral estoppel in this case would be unfair. *Detroit Police Officers Ass'n*, 824 F.2d at 515. In considering the issue of collateral estoppel, the administrative law judge restricted his analysis to the criteria that must be met before issue preclusion can be applied. He did not address, therefore, the fairness exception in any manner. Accordingly, we must vacate the administrative law judge's finding that collateral estoppel bars employer from relitigating the existence of pneumoconiosis and remand the case to the administrative law judge for consideration of whether an exception to the doctrine of issue preclusion exists in this case. *Polly*, 23 BLR at 1-83.

We will now address the administrative law judge's consideration of the merits of entitlement pursuant to Section 718.205(c). Upon weighing the relevant medical reports, the administrative law judge credited the opinions in which Drs. Sundaram and Younes identified pneumoconiosis as a contributing cause of the miner's death. Decision and Order on Remand at 11-12; Director's Exhibits 14-17, 29; Employer's Exhibit 7. The administrative law judge determined that the opinions in which Drs. Ghio and Jarboe stated that neither pneumoconiosis nor coal dust exposure played a role in the miner's death were entitled to little weight, as the physicians "did not address the fact that the miner had already been found totally disabled due to pneumoconiosis." Decision and Order on Remand at 12, 13; Employer's Exhibits 22, 24. Based upon these findings, the administrative law judge found that claimant established that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c).

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Ghio and Jarboe because they did not assume that the miner's pneumoconiosis was totally disabling. Employer's contention has merit. In assessing the opinions of Drs. Ghio and Jarboe, the administrative law judge essentially gave collateral estoppel effect to the determination in the miner's claim that the miner's pneumoconiosis was totally disabling. Issue preclusion cannot be applied to this finding, however, as the first criterion – the precise issue raised in the present case was raised and actually litigated in the prior proceeding – is not satisfied. *See Detroit Police Officers Ass'n*, 821 F.2d at 328; *see also Villain*, 311 F.3d at 332, 22 BLR at 2-581; *Hughes*, 21 BLR at 1-134. Because the present case involves a survivor's claim, the issue for decision is not whether the miner was totally disabled due to pneumoconiosis, but rather whether pneumoconiosis caused, substantially contributed to, or hastened the miner's death under Section 718.205(c). 20 C.F.R. §718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR

1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Thus, we vacate the administrative law judge's finding that claimant satisfied her burden of proof at Section 718.205(c) and remand the case to the administrative law judge for reconsideration of the opinions of Drs. Ghio and Jarboe. We note that if the administrative law judge determines on remand that employer is precluded from relitigating the existence of legal pneumoconiosis, the salient inquiry under Section 718.205(c) is the extent to which Drs. Ghio and Jarboe based their opinions, that claimant does not have a totally disabling respiratory or pulmonary impairment, upon a determination that the miner suffered no respiratory condition related to coal dust exposure, as this would conflict with the finding of legal pneumoconiosis in the miner's claim. *See slip op.* at 2 n.2.

Accordingly, the Decision and Order on Remand – Award of Benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, J., concurring and dissenting:

I concur in the majority's decision, except insofar as the majority has directed the administrative law judge to consider whether the circumstances of the present case warrant an exception to the application of the doctrine of collateral estoppel to the finding of pneumoconiosis set forth in the award of benefits in the miner's claim. I would hold, as a matter of law, that the fairness exception is not available, as the lung biopsy evidence, upon which employer specifically relies, is not the type of "highly reliable evidence" contradicting the finding of pneumoconiosis in the miner's claim that the courts have recognized as justifying an exception to the application of collateral estoppel. *See Zeigler Coal Co. v. Director, OWCP [Villain]*, 311 F.3d 332, 334, 22 BLR 2-581, 2-583 (7th Cir. 2002).

Dr. Bush, who reviewed the biopsy evidence on behalf of employer, stated that because the tissue slide that he examined contained no lung substance, a diagnosis of coal workers' pneumoconiosis could neither be confirmed nor ruled out. Employer's Exhibit 5. In addition, in the 1990 Decision and Order awarding benefits in the miner's claim, Judge Musgrave determined that although the x-ray and medical opinion evidence were insufficient to establish the existence of clinical pneumoconiosis, the medical opinion evidence was sufficient to prove that the miner's respiratory condition was caused, in part, by coal dust exposure, thereby establishing that the miner had legal pneumoconiosis. Director's Exhibit 1 (1990 ALJ Decision and Order at 6, 11-12). The biopsy evidence does not conflict, therefore, with the findings rendered in the miner's claim regarding the existence of legal pneumoconiosis. Accordingly, I would affirm the administrative law judge's decision to apply the doctrine of collateral estoppel to bar employer from relitigating the issue of the existence of pneumoconiosis in this case.

BETTY JEAN HALL
Administrative Appeals Judge