

BRB No. 10-0105 BLA

SHELBY J. BLANKENSHIP )  
(Widow of CLINTON BLANKENSHIP) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 HARMAN MINING CORPORATION ) DATE ISSUED: 10/28/2010  
 )  
 and )  
 )  
 TRAVELERS INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2007-BLA-5500) of Administrative Law Judge Pamela Lakes Wood, rendered on modification of a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).<sup>1</sup> Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with thirty-four years of coal mine employment, based on the parties' stipulation. The administrative law judge found that claimant<sup>2</sup> established the existence of pneumoconiosis, based on the doctrine of collateral estoppel.<sup>3</sup> Consequently, the administrative law judge found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. On the merits, the administrative law judge found that claimant established the existence of both clinical and legal pneumoconiosis, based on the doctrine of collateral estoppel.<sup>4</sup> The

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<sup>1</sup> As employer and the Director, Office of Workers' Compensation Programs, correctly assert, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant filed her survivor's claim prior to January 1, 2005.

<sup>2</sup> Claimant is the widow of the miner, who died on June 30, 2004. Director's Exhibit 12. The miner filed a claim on September 29, 1995, and was awarded benefits by the district director on May 16, 1996. Administrative Law Judge's Exhibit 2. Claimant filed her survivor's claim on July 28, 2004. Director's Exhibit 2. It was denied by a claims examiner on June 30, 2005. Director's Exhibit 31. Claimant filed a request for modification on June 16, 2006. Director's Exhibit 34.

<sup>3</sup> Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have actually been determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (*en banc*), *citing Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994); *see Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998).

<sup>4</sup> In discussing the issue of pneumoconiosis on the merits, the administrative law judge noted that "[a]t the time the [miner's] claim was granted, the regulations did not discuss medical or legal pneumoconiosis separately; hence, the award was based upon a finding of 'a severe chronic respiratory disease diagnosed as coal workers' pneumoconiosis, as the term is defined in the Act and the Regulations pertaining thereto.'" Decision and Order at 16. Nonetheless, the administrative law judge found that both clinical and legal pneumoconiosis were established, as she noted that it was determined that the disabling obstructive impairment was caused, in part, by coal mine dust exposure.

administrative law judge also found that claimant established that the miner's clinical and legal pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203. Further, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established the existence of pneumoconiosis based on the application of the doctrine of collateral estoppel. Employer also challenges the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, stating that he will not file a substantive response in this case, unless requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>5</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order 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. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *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 caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. Death will also be considered due to pneumoconiosis if the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

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*Id.*

<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

Employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis. Specifically, employer argues that the administrative law judge erred in applying the doctrine of collateral estoppel to establish the existence of pneumoconiosis in the survivor's claim because the issue was never actually litigated in the miner's claim, given that employer agreed to pay benefits in that claim prior to a hearing. Employer's Brief at 5. Employer maintains that, because it accepted the district director's finding that the miner was entitled to benefits, it stipulated to a finding that the existence of pneumoconiosis was established in the miner's claim. Employer's contention has merit.

To successfully invoke the doctrine of collateral estoppel in this case, claimant must establish the following criteria:

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

*Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 218-219, 23 BLR 2-394, 2-403-406 (4th Cir. 2006); *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (*en banc*). A fact established by stipulation or concession may not be given collateral estoppel effect in a subsequent proceeding because "the issue was not actually litigated." *Justice v. Newport News Shipbuilding & Drydock Co.*, 34 BRBS 97, 98 (2000).

The administrative law judge determined that claimant appropriately invoked the doctrine of collateral estoppel to establish the existence of pneumoconiosis in the survivor's claim,<sup>6</sup> as the existence of pneumoconiosis was established in the miner's

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<sup>6</sup> A formal hearing was held in this case on December 4, 2007. Subsequent to the hearing, the administrative law judge raised the issue of the applicability of the doctrine of collateral estoppel, *sua sponte*. By Order dated March 18, 2009, the administrative law judge ordered that the parties submit their positions on whether, and to what extent, the doctrine of collateral estoppel applied in this case. Employer was the only party that responded to this Order. Employer asserted that claimant waived the issue of collateral estoppel in her case by failing to assert its protections at the hearing or in her written

claim and there was no autopsy evidence or major change in the law related to that issue. Decision and Order at 11-12. In addition, the administrative law judge found that claimant did not waive her right to rely on the doctrine of collateral estoppel in this case, as employer was on notice of its potential applicability, based on the findings in the district director's January 9, 2007 Proposed Decision and Order granting claimant's request for modification and awarding survivor's benefits, and on the administrative law judge's March 18, 2009 and July 6, 2009 orders. *Id.* at 13; Director's Exhibit 48. The administrative law judge therefore found that, by virtue of the doctrine of collateral estoppel, claimant established the existence of pneumoconiosis in this case. Decision and Order at 13.

Contrary to the administrative law judge's finding, claimant did not appropriately invoke the doctrine of collateral estoppel to establish the existence of pneumoconiosis in the survivor's claim. *Hughes*, 21 BLR at 1-137; *Justice*, 34 BRBS at 98. The parties did not actually litigate the issue of the existence of pneumoconiosis in the miner's claim. Rather, employer, through its carrier, accepted liability as the responsible operator after it was notified of the miner's claim, and agreed to pay benefits after the Department of Labor determined that the miner was entitled to them.<sup>7</sup> Administrative Law Judge's

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closing argument. By Order dated July 6, 2009, the administrative law judge again ordered the parties to submit their positions on the issue of the application of the doctrine of collateral estoppel in this case. Claimant responded to this Order, arguing that the doctrine of collateral estoppel was applicable in the survivor's claim, thus barring the relitigation of the issue of pneumoconiosis.

<sup>7</sup> The pertinent procedural history of the miner's claim is as follows: As discussed *supra*, the miner filed his claim on September 29, 1995. Administrative Law Judge's Exhibit 2. By Notice of Claim dated October 20, 1995, a claims examiner advised employer that the Department of Labor received a claim for benefits from the miner. *Id.* In an Operator Response dated October 24, 1995, employer, through its carrier, accepted liability in this case, indicating that it was the responsible operator within the meaning of the Act. *Id.* Employer also noted that it reserved the right to controvert the responsible operator issue if later equivalent employment was discovered. *Id.* By Notice of Initial Finding dated February 21, 1996, a claims examiner found that the miner was entitled to benefits. *Id.* In a letter dated April 1, 1996, a claims examiner advised the miner that the Department of Labor determined that he was entitled to benefits and that employer agreed to voluntarily pay benefits. *Id.* Additionally, by a Proposed Decision and Order Award of Benefits dated April 1, 1996, the district director determined that the miner was entitled to benefits, and ordered employer to pay him all of the benefits that he was due and to provide him with all of the reasonable and necessary medical treatment that was required for his pneumoconiosis. *Id.* By Agreement to Pay Benefits dated May 10, 1996, employer agreed to pay benefits in the miner's claim. *Id.* In a letter dated May 16, 1996,

Exhibit 2. Because the miner's entitlement to benefits was established by employer's concession, the issue of pneumoconiosis was not actually litigated in the miner's claim. Consequently, a required element of collateral estoppel was not established. *See Collins*, 468 F.3d at 217, 23 BLR at 2-401; *Justice*, 34 BRBS at 98; *see also Otherson v. Department of Justice*, 711 F.2d 267, 274 (D.C. Cir. 1983)("[W]hen a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been 'actually litigated' and thus is not a proper candidate for issue preclusion."); *Restatement (Second) of Judgments* §27 comment e. Thus, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis, based on the application of the doctrine of collateral estoppel, and remand the case to the administrative law judge for further consideration of the evidence.

At the outset, on remand, the administrative law judge must determine whether the evidence is sufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *Jessee v. Director, OWCP*, 5 BLR 723, 18 BLR 2-26 (4th Cir. 1993). If the administrative law judge finds that the evidence establishes a mistake in a determination of fact at Section 725.310, then she must consider whether the evidence on the merits is sufficient to establish the existence of pneumoconiosis at Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge must reconsider whether the evidence on the merits is sufficient to establish that the pneumoconiosis arose out of coal mine employment at Section 718.203, if reached. Further, if reached, the administrative law judge must reconsider whether the evidence on the merits is sufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93.

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a claims examiner advised the miner that the Department of Labor determined that he was entitled to benefits and that employer agreed to voluntarily pay benefits. *Id.* In addition, in a decision dated May 16, 1996, the district director determined that the miner was entitled to benefits, and ordered employer to pay him all of the benefits that he was due and to provide him with all of the reasonable and necessary medical treatment that was required for his pneumoconiosis. *Id.*

Accordingly, the administrative law judge's Decision and Order Granting Benefits is vacated and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge