

JUDGES' BENCHBOOK OF THE BLACK LUNG BENEFITS ACT



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CHAPTER 25 Principles of Finality

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Chapter 25

Principles of Finality

I. Appellate decisions

A. Holding vacated

In *Dale v. Wilder Coal Co.*, 8 B.L.R. 1-119 (1985), the Board held that when it “vacates an administrative law judge's decision, be it an award or denial of benefits, it annuls or sets aside that decision rendering it of no force or effect.” The Board further stated that the parties are returned “to the *status quo ante* the administrative law judge's decision.” Specifically, it was determined that “the parties resume the position together with all rights, benefits and/or obligations they had prior to the issuance of the administrative law judge's decision.”

B. Effect of remand

The Fourth Circuit, in *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35 (4th Cir. 1993), holds that a remanded claim is not “final and appealable.” Specifically, the court declined jurisdiction over consolidated widow's and miner's claims where the Benefits Review Board affirmed the denial of widow's benefits but remanded the miner's claim due to a change in the law.

On the other hand, in *Muscar v. Director, OWCP*, 18 B.L.R. 1-7 (1993), the Board held that an administrative law judge is without jurisdiction to transfer a case back to the Board, as it “is only empowered to accept appeals from any party who has been adversely affected by a decision of an administrative law judge or district director,” and therefore, an Judge cannot “return the jurisdiction of any case to the Board.” Under the facts of *Muscar*, the Judge issued an Order on Remand transferring jurisdiction of the case back to the Board stating that, subsequent to the Board's earlier decision of remand, the law changed significantly such that the remand instructions were erroneous.

C. Law of the case

Generally, the “law of the case” principle is discretionary based upon the notion that once an issue is litigated and decided, it should not be relitigated. *United States v. U.S. Smilting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). Thus, in *Brinkley v. Peabody Coal Co.*, 14 B.L.R. 1-147 (1990), the Board held that rebuttal under § 727.203(b) was precluded where it previously affirmed the judge's finding that the employer failed to demonstrate such rebuttal in an earlier decision and no exception to the doctrine was established. *See also Dean v. Marine Terminals Corp.*, 15 B.R.B.S. 394 (1983).

Departure from the “law of the case” doctrine is appropriate, however, where the prior holding is “clearly erroneous” and its continued application would constitute a “manifest injustice.” *Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988) (citing to *Arizona v. California*, 460 U.S. 605 (1983)).

D. Changes in the law

The law in effect at the time the decision is rendered is controlling. *Berka v. North American Coal Corp.*, 8 B.L.R. 1-183 (1985); *Rapavi v. Youghiogheny and Ohio Coal Corp.*, 7 B.L.R. 1-435 (1984). For application of the December 2000 regulatory amendments, see Chapter 5.

E. Effect of multiple motions for reconsideration

In *Midland Coal Co. v. Director, OWCP*, 149 F.3d 558 (7th Cir. 1998), the court held that it did not have jurisdiction to decide an appeal of a black lung claim where Employer filed three motions to reconsider an award of benefits with the Benefits Review Board. In so holding, the court stated the following:

[A] motion for reconsideration filed within 30 days of a decision tolls the time to appeal to this court, and sec. 10(c) of the APA does not apply to the first motion for reconsideration. When the first motion is denied, the original, 'non-interlocutory order' stands, and the loser has 60 days to appeal to the United States Court of Appeals. But what about the second motion for reconsideration?

...

The filing of the second request to reconsider would merely toll the time to appeal the denial of the first request for reconsideration. But because motions for reconsideration are committed to agency discretion, we do not have jurisdiction over internal appeals of such motions.

...

On the final non-interlocutory decision on the merits is appealable to this court. Once 60 days expires after the original decision, or after the first denial of reconsideration, this court has no jurisdiction over an appeal.

The court cited to *Peabody Coal Co. v. Abner*, 118 F.3d 1106, 1108 (6th Cir. 1997) where the Sixth Circuit arrived at the same conclusion.

In *Knight v. Director, OWCP*, 14 B.L.R. 1-166 (1991), the Board held that a second motion for reconsideration, which was filed within 30 days of the decision on reconsideration, but not within 30 days of the original decision and order, was untimely. The Board concluded that, even if the second motion had been timely filed, it improperly raised issues which were not raised in the first motion.

F. Interlocutory appeals

In *Cochran v. Westmoreland Coal Co.*, 21 B.L.R. 1-89 (1998), the administrative law judge issued an order dismissing certain named operators and remanded "the case for a complete medical examination as he found the record void of a complete assessment based on a correct employment history." The Director requested reconsideration to state that, on remand, he should be able to

further investigate the responsible operator issue and Westmoreland Coal should not be dismissed prior to that investigation. The administrative law judge denied the reconsideration request and the Director appealed his interlocutory orders. The Board initially noted that “[a]n order that leaves the question of entitlement on the merits unresolved does not constitute a final appealable order.” It then set forth the factors for the “collateral order exception” as follows: (1) the order must conclusively determine the disputed issue; (2) the order must resolve an important issue separate from the merits of the action; and (3) the order must be effectively unreviewable on appeal from final judgment. Upon consideration of these factors, the Board concluded that the exception applied because the administrative law judge's orders “conclusively determined that Westmoreland was not a potentially responsible operator in this case and have undermined any further investigation concerning the potential liability of ICI.” The Board noted that, if benefits are awarded, then the Director would be precluded from “proceeding against any putative responsible operator which had not been a participant in every stage of the prior adjudication.”

Under the amended regulations, the administrative law judge is prohibited from dismissing or remanding the responsible operator designated by the district director as liable for the payment of benefits. If the administrative law judge concludes that the operator was not properly named, and the miner is found to be entitled to benefits, then the Trust Fund will commence the payment of benefits. For further discussion of this issue, see Chapters 4 and 7.

II. Clerical corrections

In *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993), the Board applied Rule 60(a) of the Federal Rules of Civil Procedure to hold that a clerical mistake may be corrected at any time before an appeal (if any) is docketed or, if an appeal is pending, such a correction may be made with leave of the appellate court. If no appeal is filed, there is no time limit regarding the correcting of a clerical mistake. The Board was careful to note, however, that a clerical error is “one which is a mistake or omission mechanical in nature which does not involve a legal decision or judgment by an attorney and which is apparent on the record.”

III. Res judicata and collateral estoppel

A. Generally

Application of the doctrines of res judicata and collateral estoppel in black lung claims is problematic. Because of the progressively worsening nature of pneumoconiosis, the Act and its implementing regulations permit petitions for modification and multiple claims, except that in a case involving multiple survivor's claims, the regulations at § 725.309 mandate the denial of the second claim based upon the denial of the prior claim since there can be no “material change” in a deceased miner's condition. For further examination of these doctrines in the context of cases involving modification petitions under § 725.310, see Chapter 23, and for multiple claims under § 725.309, see Chapter 24. With regard to responsible operator designations, see Chapter 7. Because the multiple claim provisions at § 725.309 provide relief from ordinary principles of *res judicata* on the basis that the miner's condition has materially worsened due to the progressive nature of pneumoconiosis such that he or she may have a new cause of action, it is more common to encounter problems in applying collateral estoppel, or issue preclusion. Therefore, the elements and

application of collateral estoppel are set forth in more detail here.

B. Collateral estoppel

1. Elements

The following requirements must be satisfied prior to application of collateral estoppel or issue preclusion. The issue to be precluded must be (1) the same as that involved in the prior action, (2) actually litigated in the prior action, and (3) essential to the final judgment in the prior action. Two additional requirements must also be met, (1) the party against whom estoppel is invoked must have been fully represented in the prior litigation, and (2) the parties in both actions must be the same or in privity.

2. Examples of application

a. Losing on an issue, prevailing overall

In a case involving multiple claims under § 725.309, the Board held that the prevailing party in the first claim (which will be either the employer or Director) is entitled to relief from collateral estoppel in a second claim with regard to any adversely decided issues because the party could not appeal such an issue adversely decided in the first claim since the overall decision was in the party's favor. *Sellards v. Director, OWCP*, 17 B.L.R. 1-77 (1993) (although the length of coal mine employment was decided in the first claim and not appealed, the Director was permitted to challenge the finding in the second claim as the first claim was decided in the Director's favor, thus precluding an appeal on the issue of length of coal mine employment). *See also White v. Elrod*, 816 F.2d 1172 (7th Cir. 1987). **[Editor's note:** The Board in *Sellards* did not, however, consider whether collateral estoppel could have been properly applied in light of the fact that the Director, OWCP could have filed a petition for modification under § 725.310 for a “mistake in a determination of fact,” thus ostensibly providing a full and fair opportunity to litigate the issue of length of coal mine employment which, if adversely decided again on modification, could be appealed to the Board and circuit court for review. However, would such an appeal be considered interlocutory in nature, such that the party's due process rights are not satisfied?].

The amended regulations at § 725.309(d)(4) address the findings made in a prior claim and provide the following:

If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. § 725.309(d)(4) (Dec. 20, 2000).

b. Parts 718 and 727

In *Alexander v. Island Creek Coal Co.*, 12 B.L.R. 1-44 (1988), the Board concludes that collateral estoppel only precludes the relitigation of issues arising from the same legal standards and burdens of proof between the same parties or those parties in privity. In this vein, the Board held that the *entitlement* standards under Part 727 are different than those of Part 718 such that collateral estoppel was inapplicable to the issues under consideration.

c. State agency determinations

In *Freeman United Coal Mining Co. v. Director, OWCP*, 20 F.3d 289 (7th Cir. 1994), the court held that collateral estoppel was not available to the employer who argued that a finding by the Illinois Industrial Commission that the miner was only partially disabled due to pneumoconiosis constituted a complete bar to the judge's earlier finding of total disability due to pneumoconiosis. The court noted that “[c]ollateral estoppel, also known as issue preclusion, 'refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the initial action.'” The Seventh Circuit further stated that collateral estoppel is an affirmative defense and the party asserting it has the burden of establishing its propriety. In this case, because the determination of the Illinois Industrial Commission was subsequent to that of the judge, the employer could not use collateral estoppel to bar the judge's finding of total disability.

d. Social Security Administration determinations

In *Wenanski v. Director, OWCP*, 8 B.L.R. 1-487 (1986), the Board held that “[e]xcept as provided by 20 C.F.R. § 410.470, Social Security Administration findings are not binding on the Department of Labor adjudication officer” (citing to *Tackett v. Director, OWCP*, 7 B.L.R. 1-703 (1985)). See also *Reighnouer v. Director, OWCP*, 2 B.L.R. 1-334 (1979); *Beck v. Mathews*, 601 F.2d 376 (9th Cir. 1978). Thus, it was determined in *Wenanski* that SSA's finding that the miner had 30 years of coal mine employment was not binding in a subsequent DOL proceeding.

e. Multiple fee petitions

In *Bennett v. Director, OWCP*, 17 B.L.R. 1-72 (1993), the Board denied counsel's request for an augmented fee due to delay because, as noted by the Board, counsel's petition for fees was granted and fees awarded by the administrative law judge in May of 1988, at which time no request for enhancement based upon delay was made. Moreover, the fee award became final within thirty days because no appeal or motion for reconsideration was filed. The administrative law judge's decision on the merits of the miner's claim was appealed to the Board and subsequently dismissed in May of 1990. The Board noted:

Claimant's counsel contends that the judge erred in failing to award a supplemental fee to compensate for counsel's delay in receiving payment.

. . .

The filing of a supplemental fee petition seeking an additional \$500.00 to account for

delay in payment is tantamount to a collateral attack on a final order. The judge properly denied the motion for supplemental fees.

. . .

Furthermore, as the Director suggests, the supplemental fee petition is, in essence, a request for interest to be paid by the Black Lung Disability Trust Fund.

Id. at 1-73. The Board held that an award of interest against the Fund is not permitted by Act or regulations.

**f. Miner's and survivor's claims --
existence of pneumoconiosis**

In *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134 (1999), coal workers' pneumoconiosis was established in the living miner's claim, although the claim itself was denied. A survivor's claim was subsequently filed and the administrative law judge concluded that principles of collateral estoppel precluded the issue of coal workers' pneumoconiosis from being relitigated in the survivor's claim. The Board, after setting forth the elements of collateral estoppel,¹ held that it did not apply. Specifically, the Board determined that the issue decided in the living miner's claim was not "a critical and necessary part of the judgment in the prior proceeding." The Board reasoned that "[w]hile claimant correctly notes that the existence of occupational pneumoconiosis is an essential element of entitlement in a living miner's claim, the establishment of that element does not support, and thus is not 'essential' to, a judgment denying benefits." The Board further held, with regard to the requirement that the party against whom estoppel is being asserted had a full and fair opportunity to litigate the issue in the previous forum, also may not have been satisfied. It stated that, in a survivor's claim, "where autopsy evidence was not available and could not have been adduced at the time of adjudication of the miner's claim, fairness may warrant such an exception to allow relitigation of the issue of the existence of pneumoconiosis in a survivor's claim."

[**Editor's note:** This decision leaves open the possibility that collateral estoppel may apply where (1) the miner was awarded benefits, and (2) there is no autopsy evidence presented in the survivor's claim.]

Indeed, by unpublished decision in *Young v. Sewell Coal Co.*, BRB No. 98-1000 BLA (Aug. 26, 1999), the Board held that it was error for the administrative law judge to permit Employer to litigate the issue of the existence of pneumoconiosis in a survivor's claim, where the disease was established in the earlier miner's claim. In so holding, the Board stated that collateral estoppel was applicable to the case because both the miner and survivor must establish pneumoconiosis under the same methods at 20 C.F.R. § 718.202(a). The Board noted, in rendering this holding, that Employer "was provided a full and fair opportunity to litigate this issue inasmuch as the survivor's claim does not contain any autopsy evidence which was not available and could not have been adduced at the

¹ The elements are as follows: (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum.

time of the adjudication of the miner's claim. As a result, the claim was remanded for the administrative law judge to determine whether pneumoconiosis hastened the miner's death.

In another unpublished decision, *Villian v. Zeigler Coal Co.*, BRB No. 00-0451 BLA (Jan. 29, 2001), the Board upheld the administrative law judge's application of collateral estoppel to preclude Employer from re-litigating the existence of pneumoconiosis and its etiology in a survivor's claim where a finding of coal workers' pneumoconiosis was made in the prior living miner's claim. Employer had argued that a survivor's claim is analogous to a duplicate claim under § 725.309 as it is decided "entirely independent from the miner's claim." The Board disagreed to state the following:

First, the existence of pneumoconiosis was raised in the present survivor's claim and actually litigated in the prior proceeding on the miner's claim. Second, the determination of the existence of pneumoconiosis was necessary to the previous miner's award of benefits, unlike the denial of benefits in *Hughes*,² inasmuch as the presence of pneumoconiosis pursuant to Section 718.202(a) is a requisite element of entitlement to benefits in a Part 718 case. (citations omitted). Third, the prior proceeding resulted in a final judgment on the merits inasmuch as the Board affirmed Administrative Law Judge Mills' Decision and Order awarding benefits, which employer did not pursue, and the miner's claim was in payment status until his demise. Finally, employer had a full and fair opportunity to litigate this issue in the prior miner's claim. (citation omitted). Additionally, the evidence of record in the instant case contains no autopsy evidence, hence, an exception does not apply. Accordingly, we hold that collateral estoppel, or issue preclusion, applies to the instant survivor's claim, employer is collaterally estopped from relitigating the issue of the existence of pneumoconiosis, and the existence of pneumoconiosis is established as a matter of law. (citations omitted).

Slip op. at 5.

In *Sproles v. Bullion Hollow Coal Co.*, 1995-BLA-2167 (ALJ, June 29, 2001), the ALJ held that Employer was collaterally estopped from re-litigating the issue of whether the miner suffered from pneumoconiosis in a widow's claim. Applying the Board's decisions in *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134 (1999) and *Young v. Sewell Coal Co.*, BRB No. 98-1000 BLA (Aug. 26, 1999) (unpub.), the ALJ determined that because (1) a finding of pneumoconiosis was necessary to the award of benefits on the living miner's claim, and (2) there was no autopsy evidence presented in the survivor's claim, then Employer was barred from re-litigating the presence of the disease. *See also Villain v. Zeigler Coal Co.*, 1998-BLA-703 (ALJ, Dec. 7, 1999).

² The complete citation is *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134 (1999) (en banc).

g. Responsible operator

In *Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997), the Board noted that “Employer correctly argues that the administrative law judge erred in finding that employer could not challenge its designation as the responsible operator because it did not appeal Judge Chao's *Decision and Order* wherein he found that employer was the responsible operator.” The Board held, to the contrary, that “[b]ecause claimant's appeal from Judge Chao's denial of benefits was untimely filed and dismissed by the Board, employer was not an aggrieved party.”

The amended regulations contain new limitations on an operator's opportunity to challenge its designation as the responsible operator. *See* Chapters 4 and 7 for a further discussion of the issue.