

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." Said differently, "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 the Board "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. The Board reasoned that an administrative law 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

1. Generally

The "law of the case" principle is discretionary and is based on the notion that once an issue is litigated and decided, it should not be re-litigated. *United States v. U.S. Smelting, 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 in the claim and no exception to the doctrine was established. *See also Dean v. Marine Terminals Corp.*, 15 B.R.B.S. 394 (1983). Exceptions to application of the "law of the case" doctrine include a change in an underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or demonstrating that the Board's initial holding resulted in manifest injustice. *C.C. v. Westmoreland Coal Co.*, BRB Nos. 07-0359 BLA and 07-0359 BLA-A (May 29, 2008).

2. Clearly erroneous, "law of the case" inapplicable

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)).

3. Petitions for modification, "law of the case" inapplicable

By unpublished decision in *Mitchell v. Daniels Co.*, BRB Nos. 01-0364 BLA and 03-0134 BLA (Feb. 12, 2004) (unpub.), *aff'd*, 479 F.3d 321 (4th Cir. 2007), the Board held that the "law of the case" doctrine does not apply to a modification proceeding; rather, all judicially determined facts, including length of coal mine employment and designation of the proper responsible operator, must be reviewed *de novo* on modification.

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).

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 the 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.

. . .

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 that were not raised in the first motion.

F. Interlocutory appeals, criteria for accepting

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 the designated responsible operator. 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 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, 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

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.

B. Multiple claims under 20 C.F.R. § 725.309

The multiple claim provisions at 20 C.F.R. § 725.309 (2000) and (2008) provide relief from ordinary principles of *res judicata* on the basis that the miner's condition has worsened due to the progressive nature of pneumoconiosis. Thus, it is critical that the adjudicator make the threshold determination of whether the claimant has established an element of entitlement previously adjudicated against him or her *prior* to adjudicating the entire claim on the merits.

C. Prior claim untimely, *res judicata* bars subsequent claim

In *Stolitz v. Barnes and Tucker Co.*, 23 B.L.R. 1-93 (2005), the Board held that the district director's denial of a prior claim on grounds that it was untimely filed under 20 C.F.R. § 725.308 "is *res judicata* and its effect is to bar the filing of the instant subsequent claim." Under the facts of the case, Claimant filed a subsequent claim asserting that the district director incorrectly concluded that his prior claim was untimely. Citing to *Hughes v. Clinchfield*

Coal Co, 21 B.L.R. 1-134 (1999) (en banc), the administrative law judge held that collateral estoppel did not apply to preclude relitigation of the timeliness of the miner's prior claim since the miner "did not have a full and fair opportunity to litigate the issue in the previous forum." The Board disagreed and concluded that "claimant did, in fact, have a full and fair opportunity to litigate the timeliness issue before the district director but did not take advantage of the opportunity." As a result, the Board concluded that the subsequent claim was barred and it vacated the administrative law judge's award of benefits.

IV. Collateral estoppel

A. Factors to consider

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. Additionally, (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.

B. Losing on an issue, prevailing overall

In a case involving a multiple claim under 20 C.F.R. § 725.309 (2000), 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. This is because the employer or Director, who prevailed in the first claim, could not appeal any adversely decided issue since the overall decision was in the party's favor.

For example, in *Sellards v. Director, OWCP*, 17 B.L.R. 1-77 (1993), the administrative law judge adjudicating a miner's second claim adopted the findings of fact made by another administrative law judge in the first claim, *to wit*, that the claimant worked as a "miner" and established ten years of coal mine employment in the first claim¹. The Board agreed with the Director that the adoption of these findings this constituted error and reasoned:

The doctrine of *res judicata* generally has no application in the context of a duplicate claim, as the purpose Section 725.309(d) is to provide relief from the principles of *res judicata* to a miner whose physical condition worsens over time. (citation omitted). In addition, as the Director has noted, one of the criteria that must

¹ Note that the Board refers to "*res judicata*." However, in context, the Board appears to address "collateral estoppel."

be met before the doctrine can be applied is that the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. (citation omitted). The Director was not able to fully litigate the issue of whether the miner was a coal miner, as the Director was not adversely affected by the prior Decision and Order denying benefits and, therefore, did not have standing to appeal the administrative law judge's finding that the labor performed by claimant constituted qualifying coal mine employment. (citations omitted). Thus, we vacate the administrative law judge's finding that claimant established at least ten years of coal mine employment and remand the case to the administrative law judge for further consideration of this issue.

Id. at 1-78. See also *White v. Elrod*, 816 F.2d 1172 (7th Cir. 1987).

**C. Stipulation in prior claim,
effect of in subsequent claim**

The amended regulations at 20 C.F.R. § 725.309(d)(4) (2008) 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) (2008).

**D. Parts 718 and 727,
collateral estoppel inapplicable**

In *Alexander v. Island Creek Coal Co.*, 12 B.L.R. 1-44 (1988), the Board held that collateral estoppel only precludes the re-litigation 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 concluded that the *entitlement* standards under Part 727 are different than those of Part 718 such that collateral estoppel was inapplicable.

**E. Subsequent state agency determinations,
collateral estoppel inapplicable**

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 administrative law 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 administrative law judge's finding of total disability.

F. Social Security Administration findings, collateral estoppel generally inapplicable

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 *Reightnouer 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 of 30 years of coal mine employment was not binding in the subsequent Department of Labor proceeding.

G. Miner's and survivor's claims, existence of pneumoconiosis

For a discussion of the effect of stipulations in the miner's claim on a survivor's claim, see Chapter 11.

1. Parklane Hosiery factors

a. Generally

The Board and some circuit courts have utilized the Supreme Court's analysis in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) to determine whether collateral estoppel may be applied in a survivor's claim to preclude relitigation of an issue decided in a successful miner's claim. The factors are as follows: (1) whether the claimant could easily have joined in the earlier proceeding; (2) whether the employer had an incentive in the prior action to have defended the action fully and vigorously; (3) whether the employer has ever obtained a ruling that the miner did not suffer from pneumoconiosis; and (4) whether procedural opportunities are available to the employer in the survivor's claim that were unavailable in the proceeding involving the miner's claim.

b. Application of factors

In *Collins v. Pond Creek Mining Co.*, 468 F.3d 213 (4th Cir. 2006), the Fourth Circuit analyzed the *Parklane Hosiery* factors and determined that collateral estoppel could be applied in the survivor's claim to bar re-litigation of the existence of coal workers' pneumoconiosis. First, the court noted that the survivor could not have joined the proceeding involving her husband's claim because "spouses of living miners with pneumoconiosis are not entitled to seek benefits under the Act." Second, the court found that Employer had incentive to present a vigorous defense in the miner's claim and there was no finding subsequent to the award of benefits in the miner's claim that he did not suffer from coal workers' pneumoconiosis. Finally, the court concluded that no procedural opportunities were available to Employer in the survivor's claim, which were not also available to it in the earlier miner's claim. Consequently, application of offensive non-mutual collateral estoppel to preclude re-litigation of the existence of coal workers' pneumoconiosis in the survivor's claim would not be "unfair" to Employer.

c. No opportunity to fully litigate, "unfair" to apply collateral estoppel

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."

2. Miner's claim denied, collateral estoppel inapplicable

In *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134 (1999), the Board held that litigation of presence of coal workers' pneumoconiosis is not precluded in survivor's claim where the miner's claim was denied.

3. Collateral estoppel *may* apply if miner's claim awarded and no autopsy evidence

In *Collins v. Pond Creek Mining Co.*, 22 B.L.R. 1-229 (2003), *rev'd. on other grounds*, 468 F.3d 213 (4th Cir. 2006), the Board held that, generally, an employer is collaterally estopped from re-litigating the issue of whether pneumoconiosis is present in the survivor's claim if (1) there is a prior decision awarding benefits in a miner's claim, and (2) no autopsy is submitted in

conjunction with the survivor's claim. The Fourth Circuit cited to *Ziegler Coal Co. v. Director, OWCP*, 312 F.3d 332, 334 (7th Cir. 2002) and agreed that "a coal miner's widow seeking survivor's benefits under the Black Lung Act may generally rely on the doctrine of offensive nonmutual collateral estoppel to establish that, as a result of his work in the mines, her deceased husband had developed pneumoconiosis." See also *Polly v. D & K Coal Co.*, 23 B.L.R. 1-77 (2005).

In *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332 (7th Cir. 2002), the court held that an employer is collaterally estopped from re-litigating the existence of coal workers' pneumoconiosis in a survivor's claim where the miner was awarded benefits based on a lifetime claim and no autopsy evidence is presented in the survivor's claim. In this vein, the court noted the following:

Not all kinds of black lung are progressive; the milder forms of the condition do not get worse over time unless the miner inhales more dust. Yet unless pneumoconiosis sometimes goes into remission, there is no reason to hold a new hearing on the question whether a person who had that condition during life also had it at death. Zeigler does not offer us (and did not introduce before the agency) any medical evidence suggesting that black lung can be cured.

. . .

Radiologists frequently disagree about the interpretation of x-ray films; only for the most serious forms of the disease are the opacities indicative of pneumoconiosis easy to distinguish from opacities with other causes. Death offers a considerably better source of evidence: analysis of the lung tissue removed in an autopsy. The Benefits Review Board therefore has created an autopsy exception to the rule of issue preclusion. Both a mine operator and a survivor are allowed to introduce autopsy evidence in an effort to show that the determination made during the miner's life was incorrect.

As a result, the court held that, because no autopsy evidence was submitted in the survivor's claim, Employer was collaterally estopped from re-litigating the issue of whether the miner suffered from coal workers' pneumoconiosis.

4. *Williams and Compton*, applicability of collateral estoppel

In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3rd Cir. 1997) and *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the Third and

Fourth Circuits held that pneumoconiosis cannot be established by any one of the methods set forth at 20 C.F.R. § 718.202(a) (2008); rather, all types of evidence must be weighed together to determine whether the disease exists. This engendered some conflict regarding whether collateral estoppel could be applied in a survivor's claim filed after issuance of *Williams* and *Compton* using a finding of pneumoconiosis in the successful miner's claim filed prior to issuance of these opinions.

In *Collins v. Pond Creek Mining Co.*, 468 F.3d 213 (4th Cir. 2006), the court concluded that collateral estoppel was applicable under such circumstances. The court noted that *Compton* "left unaltered the legal definition of pneumoconiosis, the methods by which a claimant may establish the existence of pneumoconiosis, and the statutory requirement that a claimant must prove that the coal miner developed pneumoconiosis by a preponderance of the evidence." As a result, the court concluded that the legal standard had not been changed and collateral estoppel could be applied in a survivor's claim to preclude re-litigation of the existence of coal workers' pneumoconiosis.

5. Miner's claim awarded under 20 C.F.R. Part 725 (2000), effect of

By unpublished decision in *Lester v. Royalty Smokeless Coal Co.*, BRB Nos. 06-0640 BLA and 06-0640 BLA-A (Mar. 27, 2007) (unpub.), the Board held that it is proper to apply collateral estoppel regarding the issue of pneumoconiosis where the miner's claim was awarded under regulations in effect prior to 2000, but the survivor's claim was filed after January 19, 2001 such the evidentiary limitations at 20 C.F.R. § 725.414 (2008) were in effect. In footnote 6 of its opinion, the Board stated:

As noted by the administrative law judge, there were changes in the law since Judge Brenner's decision in the living miner's claim, based on the new regulations that became effective on January 19, 2001. (reference omitted). However, contrary to the administrative law judge's finding, the new evidentiary limitations at 20 C.F.R. § 725.414, and the amendment to the definition of pneumoconiosis at 20 C.F.R. § 718.201, did not change the method of proving pneumoconiosis under 20 C.F.R. § 718.202(a)(1)-(4).

Slip op. at 6, fn. 6.

6. Stipulation of pneumoconiosis in miner's claim binding in survivor's claim

In *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996), the

Director stipulated to the existence of coal workers' pneumoconiosis in the living miner's claim.² The court held that it was error, therefore, for the administrative law judge to find that the record did not support a finding of the disease in the survivor's claim. The court further stated that the stipulation was binding even though presence of the disease was not "manifest from the medical records." The court then remanded the case to the administrative law judge for a determination of whether coal workers' pneumoconiosis hastened the miner's death.

² In *Short v. Arch of West Virginia*, BRB No. 02-0857 BLA (Sept. 16, 2003) (unpub.), the Board held that a stipulation of pneumoconiosis by Employer in the miner's claim should not be accorded collateral estoppel effect in the survivor's claim because the issue was not actually litigated. In so holding, the Board cited to *Otherson v. Department of Justice*, 711 F.2d 267, 274 (D.C. Cir. 1983) wherein the circuit court held that "when a particular fact is established not by judicial resolution but by stipulation of the parties, the fact has not been 'actually litigated' and thus is not a proper candidate for issue preclusion." The Board did not cite to the Fourth Circuit's contrary conclusion in *Richardson*.