No. 10-1860

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INDIAN MOUNTAIN COAL COMPANY

And

OLD REPUBLIC INSURANCE COMPANY,

Petitioners

v.

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

and

EMILY BOLLING,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

PATRICIA M. NECE
Counsel for Appellate Litigation

BARRY H. JOYNER
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2117
200 Consitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office
of Workers' Compensation Programs

TABLE OF CONTENTS

Page:

TABLE OF CONTENTS (cont'd)

Page:

TABLE OF AUTHORITIES

Cases **Page:**

TABLE OF AUTHORITIES (cont'd)

Cases: **Page:**

TABLE OF AUTHORITIES (cont'd)

Cases: **Page:**

TABLE OF AUTHORITIES (cont'd)

Statutes: **Page:**

Regulations:

TABLE OF AUTHORITIES (cont'd)

Regulations: **Page:**

Rules:

FEDERAL RULES OF APPELLATE PROCEDURE

FEDERAL RULES OF CIVIL PROCEDURE

TABLE OF AUTHORITIES (cont'd)

Other: **Page:**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1860

INDIAN MOUNTAIN COAL COMPANY

and

OLD REPUBLIC INSURANCE COMPANY,

Petitioners

v.

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

EMILY BOLLING,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

---

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

A Department of Labor (DOL) administrative law judge (ALJ) awarded Emily Bolling's claim for survivor's benefits under the

Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, on January 19, 2007.[1] Indian Mountain Coal Company, the mine operator responsible for paying benefits, timely appealed the ALJ's decision to the Benefits Review Board on February 7, 2007. *See* 33 U.S.C. § 921(a), as incorporated by 30 U.S.C. § 932(a) (thirty-day period for appealing ALJ decisions). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated. On February 29, 2008, the Board vacated the ALJ's decision, and remanded the case.

On remand, the ALJ awarded benefits on October 30, 2008. Indian Mountain filed a timely appeal on November 6, 2008. *See* 33 U.S.C. § 921(a), as incorporated. The Board affirmed the ALJ's award of benefits on September 23, 2009. Indian Mountain filed a timely motion for reconsideration of the Board's decision on October

[1] The BLBA was recently amended. 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 Mrs. Bolling's claim was filed in 2003, the amendments have no impact on this case.

23, 2009. *See* 20 C.F.R. § 802.407(a) (thirty-day period for seeking reconsideration of Board decision). The Board denied the motion on June 4, 2010.

Indian Mountain filed a timely petition for review of the Board's decision with this Court on July 27, 2010. *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 Indian Mountain's petition under 33 U.S.C. § 921(c), as incorporated, as the "injury" in this case occurred in Virginia.

STATEMENT OF THE ISSUES

The collateral-estoppel rule bars a party from relitigating an issue decided in a prior final adjudication. It is an affirmative defense that must be asserted and established before the fact-finder, or else it is waived. The asserting party must show that the opposing side was either a party to the prior action or otherwise had "a full and fair opportunity to litigate the issue." Finally, the collateral-estoppel rule does not bar relitigation of an issue where

new evidence that was not previously available is presented in the second action.

1. When notified that Mrs. Bolling had filed a survivor's claim, Indian Mountain submitted a generic response to DOL's district director asserting that her claim was barred by collateral estoppel and res judicata if the miner's lifetime claim for benefits had been denied. Indian Mountain did not further assert this defense before the ALJ (in pre-hearing filings, at the hearing, post-hearing, or on remand) or in two appeals to the Board. Only after receiving an adverse decision from the Board on its second appeal did Indian Mountain assert a collateral-estoppel bar to Mrs. Bolling's claim in a motion for reconsideration. As a matter of law, has Indian Mountain waived this affirmative defense?

2. Mrs. Bolling was not a party to her husband's claim. His claim pertained only to benefits payable until his death and did not involve any benefits payable to his survivors. Has Indian Mountain failed to establish that Mrs. Bolling's husband was her fiduciary in that claim, thus depriving her of "a full and fair opportunity to litigate the issue" in the prior action?

3. Mrs. Bolling based her claim on autopsy evidence, which was

not—and could not have been—available during her husband's claim. Does the introduction of this evidence create an exception to the collateral-estoppel rule in this case?

STATEMENT OF THE CASE

Mrs. Bolling filed a claim for federal black lung benefits with DOL, and an Office of Workers' Compensation Programs' district director determined that she was entitled to benefits. After a hearing requested by Indian Mountain, the ALJ also found that she was entitled to benefits. The company appealed, and the Board vacated the ALJ's decision and remanded the case. On remand, the ALJ once more awarded benefits. Indian Mountain appealed, but the Board affirmed the ALJ's decision. The Board also denied Indian Mountain's motion for reconsideration. Indian Mountain now seeks review by this Court.

STATEMENT OF THE FACTS

Although Indian Mountain summarizes the medical opinion evidence in the record (Petitioner's brief at 6-13), it raises only a procedural issue on appeal: whether an ALJ finding in a lifetime

claim filed by Mrs. Bolling's late husband, Owen Bolling, precludes her entitlement to survivor's benefits.[2] Thus, we will first summarize the proceedings on Mr. Bolling's lifetime claims, and then summarize those on Mrs. Bolling's.

A. Proceedings on Mr. Bolling's Lifetime Claims

Mr. Bolling worked in the mines for nearly 20 years, and never smoked. Joint Appendix (JA) at 49, 71, 83. He filed two claims under the BLBA, both of which were denied. *See* JA at 82, 107, n.2. He filed the first claim in 1979; the Board ultimately affirmed the claim's denial in 1986. *See* JA at 107, n.2. Mr. Bolling appealed, but this Court also affirmed the denial. *Bolling v. Indian Mtn. Coal Co.*, 836 F.2d 545 (Table) (4th Cir. 1987).

Mr. Bolling filed a second claim in 1998. *See* JA at 82; 20 C.F.R. § 725.309. This claim was denied by ALJ Mollie Neal in 2001. JA at 81. She found that Mr. Bolling had clinical pneumoconiosis caused by his coal-mine work, and that he had a

[2] Indian Mountain does not contest its designation as the "responsible operator"—the party liable for paying benefits on Mrs. Bolling's claim. *See* 20 C.F.R. § 725.495.

totally disabling pulmonary impairment.[3] JA at 97, 99-103.

In addition to finding that Mr. Bolling had clinical pneumoconiosis, ALJ Neal "accept[ed] as accurate [medical opinions] that [Mr. Bolling] developed . . . idiopathic pulmonary fibrosis or usual interstitial pneumonitis in late 1997 or early 1998." JA at 99. She did not make a specific finding on the etiology of this condition. But she ultimately discounted two medical reports linking Mr. Bolling's disability to pneumoconiosis because they did not prove that his disabling fibrosis/pneumonitis arose from coal-mine employment (*i.e.*, that it was pneumoconiosis), or that his clinical pneumoconiosis, apart from his

---

[3] To recover on his claim, Mr. Bolling would have had to prove that he had pneumoconiosis, that the pneumoconiosis was caused by his coal-mine work, that he had a totally disabling pulmonary impairment, and that his disability was due to his pneumoconiosis. 20 C.F.R. §§ 718.202-.204; *Daniels Co., Inc., v. Mitchell*, 479 F.3d 321, 336 (4th Cir. 2007). Mr. Bolling established all but the last element, disability causation. 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).

fibrosis/pneumonitis, contributed to his disability. JA at 103-04. Thus, Judge Neal found that Mr. Bolling failed to "establish that his total disability is due to pneumoconiosis due to the absence of a documented and well-reasoned opinion on the issue." JA at 104.

Mr. Bolling appealed Judge Neal's decision, but the Board affirmed the denial in 2002 based on her finding that he failed to establish disability causation. JA at 76, 78-80. Mr. Bolling did not appeal the Board's decision. He subsequently died on May 31, 2003. Director's Exhibit (DX) 9.

B. Proceedings on Mrs. Bolling's Claim

Mrs. Bolling applied for survivor's benefits on October 14, 2003.[4] DX 2. DOL's district director notified Indian Mountain of her claim (20 C.F.R. § 725.407). DX 14. Indian Mountain responded, contesting Mrs. Bolling's entitlement. DX 17. This form response listed several defenses to the claim, including the

[4] To receive survivor benefits under the BLBA, Mrs. Bolling must establish 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).

following:

> 3. If this claimant has been previously determined to be ineligible for benefits under the [BLBA] or if the deceased has been previously determined to be ineligible for benefits under the [BLBA], and any such determination has become final by operat[ion] of law, the instant claim is barred by the doctrines of res judicata and/or collateral estoppel.

DX 17 (operator response) at 2.[5] The response did not identify what issue or issues might be subject to preclusion.

The district director subsequently issued a schedule for the submission of additional evidence (20 C.F.R. § 725.410), in which he noted that Mrs. Bolling would be entitled to benefits based on the evidence then in the record. DX 18. Indian Mountain submitted another form response that included the same language quoted above, along with a general assertion that the company did not waive any issues found in Mr. Bolling's favor on his lifetime claim. DX 20 (operator response) at 2.[6] The district director then

---

[5] The page number refers to the second page of Indian Mountain's response, which is actually the fourth page of DX 17.

[6] The page number refers to the second page of Indian Mountain's response, which is actually the fourth page of DX 20.

issued a proposed decision and order (20 C.F.R. § 725.418), finding that Mrs. Bolling is entitled to benefits. Indian Mountain requested a hearing before an ALJ. DX 21, 22.

The hearing was held before ALJ Pamela Lakes Wood. Indian Mountain did not assert a collateral-estoppel defense in any pre-hearing filing before ALJ Wood, nor did it raise the issue at the hearing. Likewise, it did not raise the issue post-hearing and, in fact, elected not to file a post-hearing brief. *See* JA at 49.

Judge Wood awarded Mrs. Bolling's claim. JA at 47. She found that Mrs. Bolling established all three elements of her claim—that Mr. Bolling had pneumoconiosis, that the disease arose out of his coal-mine work, and that his death was due to pneumoconiosis. JA at 65-69, 71-74. In finding death due to pneumoconiosis, ALJ Wood gave greatest weight to the opinion of Dr. Perper.

Dr. Perper reviewed various medical records, as well as the slides of Mr. Bolling's lung tissue obtained on autopsy and in a biopsy prior to his death. Claimant's Exhibit 3. He described the "morphological pathology of the lungs" as shown in the gross and microscopic autopsy findings as "[t]he golden and ultimate yard stick for determining the presence of coal workers'

pneumoconiosis." *Id.* at 43. Based on his review, Dr. Perper concluded that Mr. Bolling had interstitial pulmonary fibrosis. *Id.* at 42. The physician explained that "idiopathic pulmonary fibrosis" and "usual interstitial pneumonia [*sic*]" were variations of diffuse interstitial fibrosis. *Id.* at 43. Dr. Perper opined that Mr. Bolling's interstitial pulmonary fibrosis was caused by his dust exposure during coal-mine employment, and that the condition was the primary cause of his death. *Id.* at 42-43, 48.

ALJ Wood also considered opinions from Drs. Fino, Castle and Naeye—all submitted by Indian Mountain—who attributed Mr. Bolling's demise to fibrosis/pneumonitis, which they said was unrelated to his coal-mine employment. Employer's Exhibits 4, 6, 8, 9, 11, 12, 14. ALJ Wood gave greater weight to Dr. Perper's opinion than to these contrary opinions because of Dr. Perper's superior credentials and because he personally reviewed and interpreted the pathology evidence. JA at 72-73; *see also* JA at 68-69.

Indian Mountain appealed ALJ Wood's decision, contesting her

finding of death due to pneumoconiosis.[7] In its brief, Indian Mountain challenged Judge Woods' discounting of its evidence, and her finding that Dr. Perper's opinion was entitled to greater weight. Notably, however, the company did not argue that ALJ Wood was precluded from relying on Dr. Perper's opinion because of ALJ Neal's findings in Mr. Bolling's lifetime claim, nor in any other manner assert collateral estoppel as a defense to Mrs. Bolling's claim.

The Board vacated ALJ Wood's decision. JA at 41. It determined that she had committed various errors in discounting the Naeye, Castle and Fino opinions and in crediting Dr. Perper's opinion. JA at 42-45. The Board remanded the case for ALJ Wood to reweigh the conflicting evidence. JA at 42-45.

On remand, Indian Mountain filed a brief arguing that Judge Wood should credit its evidence, but again made no mention of collateral estoppel. In her remand decision, ALJ Wood awarded

[7] Indian Mountain did not challenge ALJ Wood's finding that Mr. Bolling had pneumoconiosis, and the Board affirmed that finding. J.A. at 42, n.2.

benefits. JA at 18. She ultimately found that Mr. Bolling's death was due to pneumoconiosis, again giving greater weight to the opinion of Dr. Perper than to those proffered by Drs. Naeye, Castle and Fino. JA at 36-39.

Indian Mountain appealed for a second time. Once more, the company challenged Judge Woods' discounting of its evidence, and her reliance on Dr. Perper's opinion, but did not in any manner raise collateral estoppel as an issue. This time, however, the Board affirmed ALJ Wood's decision. JA at 6. In doing so, it affirmed her crediting of Dr. Perper's opinion over the contrary opinions. JA at 9-16.

Indian Mountain sought reconsideration of the Board's decision. For the first time since Mrs. Bolling's claim was referred to the Office of Administrative Law Judges in November 2004, Indian Mountain asserted that ALJ Wood could not rely on any medical opinion linking Mr. Bolling's death to interstitial pulmonary fibrosis or usual interstitial pneumonitis in awarding benefits. According to Indian Mountain, such reliance was precluded by ALJ Neal's determination in the miner's lifetime claim that Mr. Bolling failed to prove that condition was related to coal-mine employment

(*i.e.*, was pneumoconiosis). In addition, the company reiterated various challenges to ALJ Wood's reliance on the Perper opinion. The Board denied Indian Mountain's motion without comment. JA at 5.

SUMMARY OF THE ARGUMENT

The Court should affirm the award of benefits on Mrs. Bolling's claim. Indian Mountain contends that the award is barred by collateral estoppel. This argument suffers from three fatal flaws. First, Indian Mountain waived any collateral estoppel defense by not timely raising it. It did not argue and establish the defense before ALJ Wood, and did not raise it in its two appeals to the Board. Second, Indian Mountain cannot establish the elements of collateral estoppel—in particular, that Mrs. Bolling had a full and fair opportunity to litigate the issue. Specifically, Mrs. Bolling was not a party to Mr. Bolling's lifetime claims and Mr. Bolling did not act as her fiduciary during his lifetime claims. Finally, the availability of autopsy evidence in Mrs. Bolling's claim—which had not been available in her husband's lifetime claims, and which is directly relevant to, and especially probative of, the cause of Mr. Bolling's death—creates an exception to the collateral-estoppel rule.

ARGUMENT

Indian Mountain cannot, as a matter of law, establish a collateral-estoppel defense to Mrs. Bolling's claim.

Indian Mountain's sole argument before this Court is that Mrs. Bolling was collaterally estopped from establishing that her husband's pulmonary fibrosis/usual interstitial pneumonitis (which caused his death) arose out of his coal-mine employment and, thus, she cannot prove that his death was due to pneumoconiosis as required by 20 C.F.R. § 718.205.[8] According to Indian Mountain, ALJ Neal found that the fibrosis/pneumonitis did not arise from Mr. Bolling's coal-mine employment during the litigation of his lifetime claim, and Mrs. Bolling (and ALJ Wood) were bound by that determination. In so arguing, Indian Mountain asserts that "[a]ll that [it] seeks is that principles of collateral estoppel apply

---

[8] Indian Mountain alleges no other error in the decisions of ALJ Wood or the Board. A party's "[f]ailure to present or argue assignments of error in opening appellate briefs constitutes a waiver of those issues." *IGEN Int'l, Inc., v. Roche Diagnostics GmbH*, 335 F.3d 303, 308 (4th Cir. 2003) (citing *Edwards v. City of Goldsboro,* 178 F.3d 231, 241 n. 6 (4th Cir.1999) and FED. R. APP. P. 28(a)(9)(A)). Thus, if the Court rejects the company's collateral-estoppel argument, then the decisions below must be affirmed.

defensively as well as offensively." Petitioner's Brief at 19.

We certainly agree that the ordinary principles of collateral estoppel should govern here. And, applying those principles, the Court should reject Indian Mountain's argument for at least three reasons. First, Indian Mountain waived or abandoned any collateral-estoppel defense by not raising and establishing it before ALJ Wood. Second, even if not waived, Indian Mountain cannot establish the defense against Mrs. Bolling because she was not a party to—or otherwise bound by—the prior decision. Finally, even if the company had established all of the elements of a collateral-estoppel defense, the availability of autopsy evidence in Mrs. Bolling's claim—which had not been available during her husband's lifetime claims—creates an exception to the collateral-estoppel rule.

A. Standard of Review

This appeal presents legal issues, which this Court reviews *de novo*. *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 288 (4th Cir. 2007).

B. Indian Mountain waived or abandoned any collateral-estoppel defense.

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.

Moreover, collateral estoppel is an affirmative defense. *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). As a result, a party attempting to invoke collateral estoppel must both plead and prove the elements of the defense. *Blonder-Tongue*, 402 U.S. at 350; *Freeman United*, 20 F.3d at 294; *see also Collins*, 468 F.3d at 217 ("[a] party seeking to rely on the doctrine of collateral estoppel *is obliged to establish five elements*") (emphasis added).

Since collateral estoppel is an affirmative defense, it can be waived or abandoned if not developed and pressed below, even where it is mentioned in initial pleadings or proceedings. *See Southern Pac. Communications Co. v. Am. Tel. & Tel. Co.*, 740 F.2d

1011, 1018 (D.C. Cir. 1984); *see generally* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 2010) § 4405; *cf. Violette v. Smith & Nephew Dyonics, Inc.*, 62 F.3d 8, 11 (1st Cir. 1995) (preemption defense in products-liability suit waived where defendant who pled it "neither developed a record on the issue nor pressed it any fashion before the district court").

This Court has addressed a similar issue involving waiver of a qualified-immunity defense to a suit under 42 U.S.C. § 1983. In *Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000), the defendants' answer to the plaintiffs' complaint raised qualified immunity as an affirmative defense in "a single, cursory sentence on the matter, . . .: 'The . . . defendants are protected by qualified immunity from suit.'" 224 F.3d at 296 (citation omitted).

The defendants then "omitted any mention of qualified immunity from their pre-trial motions, from the presentation of their case during [the] trial, and from their post-trial motion," *id.*, and did not raise it as an issue in their first appeal to the Court. 224 F.3d at 295. Thus, prior to the case being reheard by the district court on remand,

> the notion that qualified immunity might play a role in

> [the] defense was mentioned to the district court only once [in the answer], and, even on that occasion, the defendants failed to provide any explanation as to how or why qualified immunity might apply.

224 F.3d at 296. The district court refused to consider the issue on remand. 224 F.3d at 295. When the defendants appealed for a second time, the Court held that "[u]nder these circumstances, we have no trouble holding that the defendants waived their right to press seriously their claim of qualified immunity for the first time after remand." 224 F.3d at 296.

The facts of this case parallel those in *Sales*, and merit the same result. Indian Mountain did nothing more than mention collateral estoppel as a possible defense in its responses to the notice of claim and schedule issued by the district director—the equivalent of the pleadings stage of a civil suit. The company's entire submission on collateral estoppel consists of the following:

> If this claimant has been previously determined to be ineligible for benefits under the [BLBA] or if the deceased has been previously determined to be ineligible for benefits under the [BLBA], and any such determination has become final by operat[ion] of law, the instant claim is barred by the doctrines of res judicata and/or collateral estoppel.

Once the case was transferred for a hearing, Indian Mountain never

mentioned or pressed the defense, and submitted no evidence or argument to prove the requisite elements. *See Collins*, 468 F.3d at 217. It did not raise collateral estoppel as an issue in its pre-hearing filings before ALJ Wood, or at the hearing. ALJ Wood gave Indian Mountain the opportunity to file a post-hearing brief, but it elected not to—thus, by-passing another opportunity to raise the issue. These actions alone constitute waiver of any collateral estoppel argument. *See Big Horn Coal Co. v. Director, OWCP*, 55 F.3d 545, 550 (10th Cir. 1995) (failure to raise below issue which could have been raised constitutes waiver; issue cannot be raised for the first time on appeal to Board).

Indian Mountain appealed to the Board, but made no mention of collateral estoppel in its brief. *See Armco, Inc., v. Martin*, 277 F.3d 468, 476 (4th Cir. 2002) (issue not properly raised before Board waived on appeal). Likewise, when the Board remanded the case, Indian Mountain filed a brief with ALJ Wood, but did not assert collateral estoppel as a defense to Mrs. Bolling's claim. In this respect, Indian Mountain's inaction was even more egregious than that of the defendants in *Sales*—they at least raised their affirmative defense before the trial court on remand.

When Indian Mountain appealed to the Board for a second time, it again failed to mention or otherwise assert collateral estoppel as a defense. *See Armco*, 277 F.3d at 476. Only when it filed a motion for reconsideration of the second Board decision did Indian Mountain raise collateral estoppel as an issue. This was much too late: "Simply mentioning a possible defense in an opening pleading, without further development in subsequent stages of the proceedings, does not preserve it for [appellate] review." *Bennett v. City of Holyoke*, 362 F.3d 1, 6 (1st Cir. 2004) (citation omitted); *see also Mills v. Marine Repair Serv.*, 22 BRBS 335, 337, n.1 (BRB 1989) (Board will not consider issue raised on reconsideration that was not raised in original appeal). Not surprisingly, the Board found Indian Mountain's tardy assertion of this defense unworthy of comment and summarily denied the motion.

Ordinary principles of collateral estoppel doom Indian Mountain's argument. The Court should hold that Indian Mountain has waived any collateral-estoppel defense in this case.

C. Collateral estoppel does not apply here because Mrs. Bolling was not a party to her husband's claim or otherwise bound by the decision in that prior action.

Even if Indian Mountain had not waived any reliance on collateral estoppel, it still would not prevail as it cannot establish all elements of the defense. 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) 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 Servs. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998). At a minimum, Indian 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.'"[9]

[9] With respect to the other elements, Indian Mountain could only establish "element three" (necessarily decided) and "element four" (cont'd . . .)

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). Mrs. Bolling plainly was not—and could not be—a party to her husband's claim, as "spouses of living miners . . . are not entitled to seek benefits under the [BLBA]." *Collins*, 468 F.3d at 221. Thus, she would ordinarily not be bound by any findings in that claim.

In some circumstances, however, non-parties may be bound under the collateral-estoppel rule. *See Montana v. United States*,

---

(. . . cont'd)
(prior judgment final and valid) with any degree of certainty. As for "element one" and "element two," Judge Neal only found that Mr. Bolling failed to "establish that his total disability is due to pneumoconiosis due to the absence of a documented and well-reasoned opinion on the issue," and did not find that his fibrosis/pneumonitis was not related to his coal-mine employment. Thus, it is not clear that the same issues were present in both actions or that the precise issue now in question was necessarily litigated in the prior action. *See Combs v. Richardson*, 838 F.2d 112, 113 (4th Cir. 1988) (determination of whether issue actually litigated in prior proceeding "must be made with particular care."

440 U.S. at 153-54; *see generally* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 2010) § 4454. Indian Mountain contends that this case involves one of those circumstances. Relying on *Sea-Land Servs., Inc., v. Gaudet*, 414 U.S. 573 (1974) (superseded by statute, as recognized in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)), Indian Mountain contends (albeit obliquely) that Mr. Bolling was acting in a fiduciary capacity for Mrs. Bolling in his claim and, hence, that she is bound by the findings in that claim. Petitioner's Brief at 19-20. The company's reliance on *Gaudet*—which it calls "controlling law in Mrs. Bolling's case"—is misplaced.

Gaudet involved a wrongful-death suit filed by the widow of a deceased longshore worker.[10] The worker had been injured on the

---

[10] Indian Mountain wrongly asserts that *Gaudet* involved "a claim for benefits" under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C §§ 901-50. Petitioner's Brief at 20. *Gaudet* was neither a benefits claim, nor did it arise under the LHWCA. Rather, *Gaudet* was a wrongful-death suit brought under general maritime law. While Section 5(b) of the LHWCA, 33 U.S.C. § 905(b) did create a statutory wrongful-death remedy against vessel owners for the survivors of longshore workers, that provision post-dated the suit in *Gaudet*, and the Supreme Court did not rely on the statute in deciding the case. *See Miles v. Apex* (cont'd . . .)

job, and filed a personal-injury suit against the owner of the vessel on which he was injured, and recovered 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.[11] *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

---

(. . . cont'd)
Marine Corp., 498 U.S. 19, 31, n.1 (1990); *Smallwood v. Am. Trading & Transportation Co.*, 839 F.Supp. 1377, 1383 (N.D. Cal. 1993).

[11] The Court held that the survivors could pursue a wrongful-death suit. 414 U.S. at 578-83. It also held that the survivors could recover for loss of support, services, and society, as well as funeral expenses. 414 U.S. at 584-92.

them in his personal-injury suit. *Id.*

The Supreme Court invoked collateral estoppel to prevent a double recovery. *Id.* Since the extent of the worker's lost future wages had been determined in his personal-injury suit, the court determined 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.[12] 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,

---

[12] *Gaudet* was a 5-4 decision. Indian Mountain suggests that the dissent agreed with the majority in regard to whether the widow was bound under the collateral-estoppel rule. This is not true. The dissent maintained that the widow could not pursue a wrongful-death claim, 414 U.S. at 595-604 (Powell, J., dissenting), and would not have reached the question of what damage remedies were available to her. 414 U.S. at 605. But, in pointing out what he considered the flaws of the majority opinion, Justice Powell strongly criticized what he termed "a novel application of collateral estoppel." 414 U.S at 595, 608-09 & n.21.

> 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. Gaudet, Mr. Bolling was not acting in a fiduciary capacity for his wife in his lifetime claim.[13] *Cf. Ingalls Shipbuilding v. Director, OWCP*, 519 U.S. 248, 261-62 (1997) (in LHWCA traditional workers' compensation claim, employee's survivor is *not* a "person entitled to compensation" for purposes of 33 U.S.C. § 933 prior to employee's death); *Brown & Root, Inc. v. Sain*, 162 F.3d 816, 817, n.2 (4th Cir. 1998) (same); *see also* 20 C.F.R. § 702.241(g) (settlement agreement on LHWCA claim limited "to claims then in existence;" thus, settlement of employee's claim not settlement of survivor's claim). The BLBA provides benefits on lifetime claims only to miners who are totally disabled by pneumoconiosis, not to their

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

spouses or dependents.[14] *See* 30 U.S.C. § 901(a); *Collins*, 468 F.3d at 221. And the miner's entitlement to benefits ceases the month before the month in which he dies. 20 C.F.R. § 725.203(b). Thus, Mrs. Bolling—as Mr. Bolling's survivor—had no protectable interest in his lifetime claim.[15] Hence, he was not her fiduciary in prosecuting that claim.[16]

Indian Mountain posits no other basis for binding Mrs. Bolling to the findings in her husband's claim. Thus, since Mrs. Bolling was not a party to her husband's claim and did not otherwise have "a full and fair opportunity to litigate the issues raised in the

---

[14] In contrast, Mrs. Bolling sought survivor benefits (beginning with the month in which Mr. Bolling died—20 C.F.R. § 725.213(a)). Plainly, Mr. Bolling had no interest in those benefits.

[15] Moreover, if Mr. Bolling had been awarded benefits on his lifetime claim, those benefits would have been augmented on account of his wife and any dependent children. See 20 C.F.R. § 725.520(c). Neither Mrs. Bolling nor any other dependents had any claim on such augmentation, however, as "[d]uring the lifetime of an eligible miner a dependent has no claim to benefits." *Kowaleski v. Director, OWCP*, 879 F.2d 1173, 1175, n.1 (3d. Cir. 1989). In other words, the augmented benefits would have belonged to Mr. Bolling, and Mrs. Bolling would have had no protectable interest in them.

[16] Moreover, unlike in *Gaudet*, there is no danger of a double recovery here, as Mr. Bolling's claim was denied.

previous action," Indian Mountain failed to establish "element five" of collateral estoppel as a matter of law. *See Virginia Hospital Ass'n*, 830 F.2d at 1312. Once again, applying ordinary collateral-estoppel principles, Indian Mountain's argument fails.

D. The availability of autopsy evidence in the present action creates an exception to the collateral-estoppel rule.

Finally, even if Indian Mountain had established all of the elements of collateral estoppel, the rule is nonetheless inapplicable in Mrs. Bolling's claim. The introduction of autopsy evidence in Mrs. Bolling's claim—evidence plainly not available during Mr. Bolling's lifetime claims—would create an exception to the rule and preclude application of the defense.

The Supreme Court has recognized, "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issue." *Montana v. United States*, 440 U.S. at 159. The mere availability of new evidence in a subsequent action by itself, however, does not demonstrate such a change in facts and does not create an exception to the collateral-estoppel rule. *See Saud v. Bank of New York*, 929 F.2d 916, 920 (2d Cir. 1991); *Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir.

1985); *see generally* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 2010) § 4415. Rather, only where evidence could not be discovered or obtained in the prior action even with "due diligence," does new evidence "change[] [the] facts essential to a judgment" and bar a collateral-estoppel defense. *See Saud*, 929 F.2d at 916; *Guerrero*, 774 F.2d at 508.

This Court has not had occasion to address whether the availability of autopsy evidence in a survivor's case operates to deprive factual findings in a prior miner's claim of preclusive effect. Both the Seventh Circuit and the Board, however, have adopted this position. *See Zeigler Coal Co. v. Director, OWCP*, 312 F.3d 332, 334 (7th Cir. 2002); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137, n.2 (BRB 1999). And we urge this Court to adopt it, as well, if it reaches the issue. As noted above, autopsy evidence is simply not available in a miner's claim that is fully adjudicated prior to the miner's death. Nor can it be obtained, no matter how diligent the miner was. Thus, the availability of such evidence creates an exception to the collateral-estoppel rule, and precludes application the defense. *Zeigler Coal*, 312 F.3d at 334; *Hughes*, 21 BLR at 1-137, n.2; *see Saud*, 929 F.2d at 916; *Guerrero*, 774 F.2d at 508.

Allowing an exception to preclusion is particularly appropriate for autopsy evidence. Autopsy evidence can be more probative of the relevant issues (whether a miner had a disease that arose out of coal-mine employment and whether that disease caused or hastened his death) than any other evidence. As the Seventh Circuit has grimly observed, "[d]eath offers a considerably better source of evidence: analysis of the lung tissue removed in an autopsy." *Zeigler Coal*, 312 F.3d at 334; *see also Usery v. Turner Elkhorn Min. Co.*, 428 U.S. 1, 32 (1976) (autopsy can reveal pneumoconiosis not shown on x-ray); *Griffith v. Director, OWCP*, 49 F.3d 184, 187 (6th Cir. 1995) (proper to give greater weight to autopsy evidence); *Peabody Coal Co. v. Shonk*, 906 F.2d 264, 269 (7th Cir. 1990) (same).

Here, both of Mr. Bolling's claims were finally and fully adjudicated prior to his death. Thus, autopsy evidence was not available in those claims. That evidence is now available in Mrs. Bolling's claim. And it is probative of whether Mr. Bolling's pulmonary fibrosis/usual interstitial pneumonitis (which all physicians agree caused his death) arose from his coal-mine employment—*i.e.*, it is relevant to whether that condition falls

within the definition of pneumoconiosis and, by extension, whether his death was due to pneumoconiosis. Thus, the autopsy evidence "changes [the] facts essential to a judgment [and] renders collateral estoppel inapplicable" with respect to the etiology of Mr. Bolling's fatal fibrosis/pneumonitis. *See Zeigler Coal*, 312 F.3d at 334; *Hughes*, 21 BLR at 1-137, n.2.

Indian Mountain contends that the autopsy evidence here does not matter because no physician relied on the autopsy evidence to show that Mr. Bolling's pneumoconiosis progressed subsequent to the denial of his lifetime claim. Petitioner's Brief at 22. This argument is puzzling and inapposite. The progressivity of pneumoconiosis is not at issue in this case.

Rather, the question is whether the autopsy evidence is more probative of the cause or causes of Mr. Bolling's pulmonary condition and death than the evidence available in Mr. Bolling's lifetime claims. And the answer is clearly yes. Indeed, Dr. Perper specifically described autopsy evidence as "[t]he golden and ultimate yard stick for determining the presence of coal workers' pneumoconiosis," Claimant's Exhibit 3 at 43, and even a cursory reading of his opinion shows that he placed great reliance on the

autopsy material (particularly his own review of the autopsy slides) in reaching his conclusions. *See also Griffith*, 49 F.3d at 187 (proper to give greater weight to autopsy evidence); *Shonk*, 906 F.2d at 269 (same). That evidence was not—and could not have been—available in Mr. Bolling's lifetime claims. As a result, under ordinary collateral-estoppel principles, any finding on the etiology of Mr. Bolling's condition from his lifetime claims has no preclusive effect in Mrs. Bolling's claim for survivor benefits.

CONCLUSION

The Director requests that the Court affirm the decisions below awarding benefits on Mrs. Bolling's claim.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

PATRICIA M. NECE
Counsel for Appellate Litigation

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
joyner.barry@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 1) the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 6,486 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and 2) the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in fourteen-point Bookman Old Style font.

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2010, an electronic copy of the Director's brief was served through the CM/ECF system, and paper copies were served by mail, postage prepaid, on the following:

Laura Metcoff Klaus, Esq.
Mark E. Solomons, Esq.
Greenberg Traurig LLP
2101 L Street, N.W.
Washington, D.C. 20037
solomonsm@gtlaw.com
klausl@gtlaw.com

Joseph E. Wolfe, Esq.
Ryan C. Gilligan, Esq.
Wolfe, Williams Rutherford & Reynolds
P. O. Box 625
Norton, VA 24273-0625
jwolfe@wwrrlawfirm.com
rgilligan@wwrrlawfirm.com

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor