BRB No. 02-0774 BLA

DOROTHY I. KOCH (Widow of KENNETH KOCH) Claimant-Respondent v. MIDDLEPORT MATERIALS, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/11/2003 DECISION and ORDER

Appeal of the Decision and Order B Award of Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Michelle A. Jones (Krasno, Krasno & Onwudinjo), Pottsville, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Timothy S. Williams (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order B Award of Benefits (02-BLA-0081) of

Administrative Law Judge Paul H. Teitler on a survivor=s claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. ' 901 *et seq*. (the Act).[2] Initially, the administrative law judge credited the miner with Aat least@ ten years of qualifying coal mine employment. Next, the administrative law judge found that the previous finding of Administrative Law Judge Frank D. Marden in the miner=s claim, that the miner had pneumoconiosis, in conjunction with his review of employer=s arguments, continued to establish that the miner suffered from pneumoconiosis arising out of his coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge=s finding that the existence of pneumoconiosis was established, arguing that collateral estoppel does not bar the relitigation of the issue of the existence of pneumoconiosis because a survivor=s claim is not the same as a miner=s claim. Accordingly, employer argues that the administrative law judge erred in finding that Judge Marden=s previous finding of the existence of pneumoconiosis in the miner=s claim was binding in the survivor=s claim. Furthermore, employer contends that the administrative law judge erroneously found that claimant established that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers= Compensation Programs, (the Director) has filed a limited response letter, disagreeing with employer=s contentions regarding the administrative law judge=s application of collateral estoppel. In its reply brief, employer reiterates its challenges to the administrative law judge=s application of collateral estoppel and the administrative law judge=s weighing of the conflicting medical opinion evidence.

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[1] Claimant, Dorothy I. Koch, is the widow of Kenneth Koch, the miner, who died on November 23, 2000. Director=s Exhibit 4. Claimant filed her application for benefits on December 13, 2000. Director=s Exhibit 1.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

The Board=s scope of review is defined by statute. If the administrative law judge=s findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. '921(b)(3), as incorporated into the Act by 30 U.S.C. '932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge=s decision is inconsistent with applicable law because the administrative law judge erroneously found that Judge Marden=s pneumoconiosis determination in the miner=s claim was binding in this survivor=s claim. Employer contends that because the requisite elements of collateral estoppel[3] are not satisfied, *i.e.*, the parties are not the same, the proof is not the same, and the legal standard is not the same, collateral estoppel does not bar employer from relitigating any element essential to establishing entitlement in the survivor=s claim. More specifically, employer asserts that the decisions of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Director, OWCP v. Greenwich Collieries* [*Ondecko*],

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[3] Collateral estoppel forecloses Athe 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).

To successfully invoke the doctrine of collateral estoppel, the party asserting it must establish the following criteria:

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

See Freeman v. United Coal Mining Co. v. Director, OWCP [*Forsythe*], 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994); *N.A.A.C.P., Detroit Branch v. Detroit Police Officers Association*, 821 F.2d 328 (6th Cir. 1989); *Virginia Hospital Association v. Baliles*, 830 F.2d 1308 (4th Cir. 1987), *appeal after remand* 868 F.2d 653, *reh=g denied, certiorari granted in part* 110 S.Ct. 49 (1989), *aff=d Wilder v. Virginia Hospital Association*, 110 S.Ct. 49 (1990).

512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), which were rendered subsequent to Judge Marden=s 1994 decision awarding benefits in the miner=s claim, constitute a change in the law with respect to the standard for establishing the existence of pneumoconiosis under Section 718.202(a).[4]

In response, claimant argues that employer is attempting to relitigate the existence of pneumoconiosis, notwithstanding the fact that employer stipulated to the existence of pneumoconiosis arising out of coal mine employment during the initial proceeding in the

[4] As further support for its argument, employer contends that the Board previously held in *Howard v. Valley Camp Coal Co.*, BRB No. 00-1034 BLA (Aug. 22, 2001)(unpub.) that the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), constituted a change in the law at 20 C.F.R. ' 718.202(a) which barred application of the doctrine of collateral estoppel on the issue of pneumoconiosis in the survivor=s claim. We agree with the Director, Office of Workers= Compensation Programs, however, that *Howard* is distinguishable from this case since the administrative law judge=s finding of pneumoconiosis in the miner=s claim in *Howard* was based on employer=s concession that pneumoconiosis was established under one of the subsections at 20 C.F.R. ' 718.202(a)(1)-(4). The issue was not, therefore, identical to an issue previously litigated, unlike this case, where, the existence of pneumoconiosis in the miner=s claim was found, based on the evidence of record, to be established at Section 718.202(a)(1) and (4). *See Koch v. Middleport Materials, Inc.*, BRB No. 98-0215 BLA (Oct. 26, 1998)(unpub.).

survivor=s claim. Instead, claimant argues that employer agreed at the informal conference held on August 8, 2001 that the miner worked for eleven years in qualifying coal mine employment and that the miner had pneumoconiosis arising out of his coal mine employment and employer failed to raise the existence of pneumoconiosis at the formal hearing on the survivor=s claim on May 15, 2002. Therefore, claimant contends that employer=s stipulation that the miner suffered from pneumoconiosis is binding in this litigation and precludes employer from now contesting the issue.

The Director responds, alleging that collateral estoppel is applicable in this case because the parties are the same, the proof is the same, since no autopsy evidence has been submitted, and the issue, *i.e.*, the existence of pneumoconiosis, is the same. Consequently, the Director argues that the employer is barred from relitigating the existence of pneumoconiosis in this survivor=s claim. Regarding employer=s arguments that the Third Circuit changed the law in *Ondecko* and *Williams*, the Director contends that the Third Circuit had already rejected the true doubt rule in its 1993 decision in *Ondecko*, prior to the Supreme Court=s and Judge Marden=s 1994 decisions, and that Judge Marden did not, in any case, employ the true doubt rule when he rendered his pneumoconiosis finding. Regarding the Third Circuit=s decision in *Williams*, the Director contends that the Third Circuit did not change the law, but merely clarified the appropriate method for weighing the evidence at 718.202(a). Further, the Director contends that, even assuming that *Williams* did change the law, the change has had no impact in this case where Judge Marden=s finding of pneumoconiosis was based on his consideration of both x-ray and medical opinion evidence.

A review of the record reveals that employer has never contested the existence of pneumoconiosis in this survivor=s claim. Pursuant to a Stipulation of Uncontested and Contested Issues dated August 8, 2001, claimant=s counsel, employer=s counsel, and the district director, agreed that the miner worked at least eleven years in coal mine employment, that the miner had pneumoconiosis as defined by the Act, and that the miner=s pneumoconiosis was caused by coal mine employment. Director=s Exhibit 14. Similarly, when the survivor=s claim was transferred to the Office of Administrative Law Judges for a formal hearing, the existence of pneumoconiosis and whether pneumoconiosis arose out of coal mine employment were <u>not</u> checked as contested issues by employer. List of Contested Issues dated November 15, 2001 - Director=s Exhibit 17. Likewise, a review of the hearing transcript shows that when questioned by the administrative law judge regarding the

[5] We agree with the Director that employer=s contention that the decisions in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) preclude application of the collateral estoppel doctrine has no merit since employer has not pointed out how these cases would have changed the finding of pneumoconiosis made by Administrative Law Judge Frank D. Marden in this case.

contested issues to be resolved during the adjudication of the survivor=s claim, employer identified only the length of coal mine employment as an issue to be resolved on adjudication, and did not identify the existence of pneumoconiosis and whether pneumoconiosis arose out of coal mine employment as contested issues. Hearing Transcript at 1-9. Instead, the employer raised these issues for the first time in its post-hearing brief. *See* Decision and Order at 5-6.

It is well established that the district director is required to submit to the administrative law judge a document setting forth the contested and uncontested issues in the claim. 20 C.F.R. ' 725.421(b)(5), (7). The hearing is confined to those issues identified as contested and any other issues raised in writing before by the district director or those issues which are reasonably ascertainable at the district director level and properly raised. *See* 20 C.F.R. ' 725.463(a); *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Thornton v. Director, OWCP*, 8 BLR 1-277, 1-279 (1988); *Simpson v. Director, OWCP*, 6 BLR 1-49, 1-50 (1983). Moreover, the Board has consistently held that a stipulation of fact or concession of an issue by a party is binding upon the parties and the trier-of-fact. *Nippes v. Florence Mining Co.*, 12 BLR 1-108, 1-109 (1985).

In the instant case, the record demonstrates that during the initial proceedings in this survivor=s claim, employer stipulated to the existence of pneumoconiosis and to its arising out of coal mine employment. There is no evidence that employer raised and contested those issues prior to raising them in its post-hearing brief. Accordingly, employer=s failure to contest timely the issues of pneumoconiosis and causality, in effect, constitutes a waiver of its right to contest those issues. *See Armco, Inc. v. Martin*, 277 F.3d 468, 476, 22 BLR 2-334, 2-347 (4th Cir. 2002); *see also United States v. Curtis*, 328 F.3d 141, 144 (4th Cir. 2003); *Harrods Limited v. Sixty Internet Domain Names*, 302 F.3d 214, 225 (4th Cir. 2002). Accordingly, we reject employer=s argument that the doctrine of collateral estoppel is not applicable in this case. *Zeigler Coal Co. v. Director, OWCP*, 312 F.3d 332, 335, BLR , *affm=g Villain v. Zeigler Coal Co.*, BRB No. 00-0451 BLA (Jan. 29, 2001).

Employer next contends that the administrative law judge erred by finding that the miner=s death was due to pneumoconiosis since the only physicians who addressed the cause of death agreed that the immediate cause of death could not be determined based on the evidence of record. Furthermore, employer avers that the administrative law judge impermissibly found that Dr. Fino=s opinion was: biased; antithetical to the Act as based on an assumption that obstructive impairments are never attributable, even in part, to coal dust exposure; contrary to the prevailing view of the medical or scientific community; and not entitled to any credit because it was too speculative. Because, in part, the administrative law

[6] The administrative law judge discounted Dr. Fino=s opinion that the miner=s death was not attributable to worsening lung disease because Dr. Fino relied on claimant=s hearing

judge permissibly discounted Dr. Fino=s opinion as speculative, we need not consider whether the other reasons given for discrediting the opinion were reasonable. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-383 n.4 (1983); *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3rd Cir. 2002); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Director=s Exhibit 13. We, therefore, reject employer=s contention that the administrative law judge erred in rejecting Dr. Fino=s opinion.

Instead, the administrative law judge permissibly found that Dr. Sherman=s opinion, that, based on the severity of the miner=s chronic obstructive pulmonary disease with end stage lung disease, pulmonary function studies indicating severe lung disease, several hospital admissions for end stage lung disease with respiratory failure, and the miner=s usage of mechanical ventilatory support with BIPAP to extend his life, pneumoconiosis was either a direct cause or substantially contributing cause to the miner=s death, was well reasoned, and hence, entitled to dispositive weight as this determination was supported by the record and within the administrative law judge=s discretion as the trier-of-fact. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 10. The administrative law judge=s determination that claimant affirmatively established that pneumoconiosis substantially contributed to the miner=s death is, therefore, supported by substantial evidence and is rational. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

Accordingly, the Decision and Order B Award of Benefits of the administrative law judge is affirmed.

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testimony that she did not notice her husband experiencing difficulty breathing or respiratory problems on the night he died, and therefore, the doctor concluded that because respiratory deaths due to severe lung disease do not cause a peaceful, silent death, the miner=s death was not consistent with respiratory failure. The administrative law judge determined that this was speculative because the miner died while both he and his wife were sleeping. The administrative law judge concluded, therefore, that, because there was no testimony concerning Mrs. Koch=s sleep pattern on the night the miner died, one could just as easily speculate that the miner made noise, but that Mrs. Koch did not hear him because she was asleep. Decision and Order at 10; Hearing Transcript at 43; Dr. Fino=s Deposition at 16.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge