

BRB No. 99-0344 BLA

GERALDINE WARD)	
(Widow of GLEN WARD))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
CIRCLE A & G COAL COMPANY)	
)	
and)	
)	
THE TRAVELERS COMPANIES)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Ronnie M. Slone, Prestonburg, Kentucky, for claimant.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1779) of Administrative Law Judge Daniel J. Roketenetz awarding benefits on a survivor's claim 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). The administrative law judge accepted employer's stipulation that the miner had forty-eight years of coal mine employment, and noted that Administrative Law Judge Robert L. Hillyard previously awarded benefits on the miner's lifetime claim based on his findings that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204. The administrative law judge further noted that the Board affirmed Judge Hillyard's decision awarding benefits and that employer did not appeal the Board's decision. Consequently, the administrative law judge held that the doctrine of collateral estoppel barred employer from relitigating the issue of the existence of occupational pneumoconiosis in the survivor's claim. The administrative law judge additionally found that the evidence developed in support of the survivor's claim established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred by applying the doctrine of collateral estoppel to find that the prior determination of pneumoconiosis in the miner's claim was conclusive in the survivor's claim. Employer also alleges that the administrative law judge erred in his weighing of the evidence pursuant to Section 718.205(c)(2). Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

As the administrative law judge noted, Glen Ward was awarded black lung benefits by Judge Hillyard in 1995 and his award became final after employer chose not to appeal the Board's decision affirming the award of benefits. *Ward v. Circle A & G Coal Co.*, BRB No. 96-1382 BLA (Apr. 30, 1997)(unpub.). Mr. Ward died of respiratory failure on October 21, 1996 and Mrs. Ward filed her claim for survivor's benefits on November 18, 1996. Director's Exhibits 1, 8.

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's

claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death in any way. *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Employer first contends that the doctrine of collateral estoppel is inapplicable in this case because *Trumbo, supra*, requires that the administrative law judge in a survivor's claim make a threshold determination on the existence of pneumoconiosis pursuant to Section 718.202(a). Employer's Brief at 6-7. Employer misreads *Trumbo* as a bar to the application of collateral estoppel. In *Trumbo*, the Board held that because the existence of pneumoconiosis is prerequisite to a finding of death due to pneumoconiosis in a survivor's claim, the administrative law judge must first determine whether the existence of pneumoconiosis has been established pursuant to Section 718.202(a) before addressing whether the miner's death was due to pneumoconiosis. *Trumbo*, 17 BLR at 1-87-88. Contrary to employer's assertion, however, the Board said nothing to preclude an administrative law judge from determining that the existence of pneumoconiosis was established pursuant to Section 718.202(a) in a prior proceeding. Here, consistent with *Trumbo*, the administrative law judge made a threshold determination on the existence of pneumoconiosis, specifically, that the existence of pneumoconiosis was previously litigated and decided in the award of the miner's claim for benefits. Therefore, we reject employer's argument that *Trumbo* bars the application of collateral estoppel.

Employer next asserts that the administrative law judge incorrectly applied the doctrine of collateral estoppel to find that employer was barred from relitigating the existence of pneumoconiosis in the survivor's claim. Employer's Brief at 12. "Collateral estoppel forecloses 'the relitigation of issues of fact or law that are identical to issues which have been actually 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 (*en banc*)(1999)(citations omitted, brackets in original). For collateral estoppel to apply in this case, which arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge must find that: (1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior

litigation, (4) the party to be estopped was a party to the prior litigation, and (5) the party to be estopped had a full and fair opportunity to litigate the issue.¹ *Hammer v. INS*, F.3d , 1999 WL 1004987 at 2-3 (6th Cir. 1999); *United States v. Real Property Known and Numbered as 415 E. Mitchell Ave.*, 149 F.3d 472, 476 (6th Cir. 1998).

The administrative law judge properly found that the above elements were met. As the administrative law judge found, the issue of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a), 718.203(b) in this Part 718 survivor's claim is identical to the issue resolved in the miner's Part 718 claim. Additionally, the administrative law judge correctly found that the issue of pneumoconiosis arising out of coal mine employment was litigated, decided, affirmed, and was not further appealed in the miner's claim proceedings. There is no question that the finding of pneumoconiosis arising out of coal mine employment was necessary and essential to a finding of entitlement on the miner's lifetime claim, nor is there any question that employer and its insurance carrier were parties to the prior litigation. Employer has not challenged any of the above findings by the administrative law judge.

With regard to whether employer had a full and fair opportunity to litigate the issue of pneumoconiosis arising out of coal mine employment in the miner's claim, the administrative law judge found that employer was represented and litigated the case through the Board's decision. Employer alleges no deficiency in the prior proceedings. Employer argues, however, that it "submitted new evidence on the existence of pneumoconiosis" in the survivor's claim. Employer's Brief at 12. An exception to the doctrine of collateral estoppel may be warranted where autopsy evidence, which is generally considered to be the most reliable indicator of the presence or absence of pneumoconiosis, was unavailable and could not have been adduced at the time of the adjudication of the miner's claim, but is submitted into the record in the survivor's claim. *Hughes*, 21 BLR at 1-137 n.2.

¹ In setting forth the elements of collateral estoppel, the administrative law judge cited the Seventh Circuit court's opinion in *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994), which enumerates the same requirements contained in the Sixth Circuit court's opinions. Employer has not challenged the administrative law judge's citation to *Freeman*.

This potential exception, however, is inapplicable here. No autopsy evidence was submitted in the survivor's claim. The new evidence employer cites consists of reports by three physicians who reviewed the medical evidence submitted in the miner's claim plus the death certificate and hospitalization records submitted in the survivor's claim.² Employer does not argue that its medical opinions based upon a review of these records are any more reliable diagnostic tools than were available in the miner's claim, in which the miner established the existence of pneumoconiosis by medical opinion evidence pursuant to Section 718.202(a)(4). Therefore, this exception is not applicable and the administrative law judge properly found that the fifth element of collateral estoppel was met.

Since all five collateral estoppel factors have been satisfied, we conclude that the administrative law judge properly applied the doctrine of collateral estoppel to find the existence of pneumoconiosis arising out of coal mine employment established in the survivor's claim pursuant to Sections 718.202(a), 718.203(b). Therefore, we affirm the administrative law judge's finding.

Pursuant to Section 718.205(c)(2), employer challenges the administrative law judge's finding that pneumoconiosis hastened the miner's death. The miner was hospitalized from August 26, 1996 until October 21, 1996. Director's Exhibits 10, 11. The miner entered the hospital complaining of abdominal pain, which proved to be symptomatic of a severely inflamed gall bladder. Director's Exhibit 10. Surgery was performed to remove the diseased gall bladder and the miner was treated for sepsis and respiratory failure. *Id.* Thereafter, the miner developed post-operative shock due to gastrointestinal bleeding and became lethargic and unresponsive, a condition the hospital physicians diagnosed as septic and hypoxic encephalopathy. *Id.* The bleeding was stopped and the miner was stabilized, but he remained unresponsive and developed recurrent respiratory failure. He continued to decline, developed increased pulmonary congestion, and died of respiratory failure on October 21. Director's Exhibit 11.

Dr. Mary Hall, the miner's attending physician at the McDowell Appalachian

² One of those physicians, Dr. Fino, previously reviewed the medical evidence in the miner's claim and submitted a medical opinion that the miner did not have pneumoconiosis. Judge Hillyard considered Dr. Fino's opinion in the miner's claim but accorded it diminished weight.

Regional Healthcare Hospital in McDowell, Kentucky, completed a discharge summary in which she related the course of the miner's treatment and diagnosed several conditions, including septic shock, hypoxemia, encephalopathy, respiratory failure, moderately severe chronic obstructive airway disease, and chronic cor pulmonale. Director's Exhibit 11. Dr. Hall also completed the miner's death certificate, indicating that he died of respiratory failure due to severe chronic obstructive airway disease, and due also to encephalopathy secondary to gastrointestinal bleeding. Director's Exhibit 8. Dr. Hall listed chronic cor pulmonale, coal workers' pneumoconiosis, and gall bladder disease as significant conditions contributing to death, and indicated that no autopsy was performed. *Id.*

Dr. Ballard Wright, who examined the miner in connection with the miner's claim, reviewed the medical evidence submitted in the miner's claim plus the hospital records, death certificate, and the medical opinions submitted by employer in the survivor's claim. Claimant's Exhibit 1. Dr. Wright opined that, but for his pulmonary insufficiency, the miner might have survived his multiple medical problems, and concluded that pneumoconiosis "contributed materially" to the miner's death. Claimant's Exhibit 1 at 2. By contrast, Drs. Renn, Castle, and Fino reviewed the same evidence and concluded that because the miner did not have pneumoconiosis, it played no role in his death. Employer's Exhibits 1-3.

The administrative law judge was persuaded by Dr. Wright's opinion and the death certificate that pneumoconiosis hastened the miner's death. The administrative law judge accorded diminished weight to the opinions of Drs. Renn, Castle, and Fino because he found that the thrust of their opinions was simply that the miner did not have pneumoconiosis, a premise contrary to his finding that occupational pneumoconiosis was established.

Employer contends that the administrative law judge should have discounted the death certificate as unreliable because no autopsy was performed and because there is allegedly "no proof in the record that the physician who completed the death certificate had personal knowledge of the deceased miner." Employer's Brief at 7. Contrary to employer's contention, the record demonstrates that the physician who completed the death certificate, Dr. Mary Hall, was the miner's attending physician during his final hospitalization at the McDowell Appalachian Regional Hospital. Director's Exhibits 8, 11. Additionally, although it has been held that a death certificate is not necessarily a reasoned medical opinion on the cause of death where no autopsy has been performed, *see Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12, 2-21 (3d Cir. 1997); *Risher v. OWCP*, 940 F.2d 327, 331, 15 BLR 2-186, 2-192 (8th Cir. 1991), it does not follow that the administrative law judge must automatically reject any death certificate not based on an autopsy, even if the

certificate was completed by a physician who treated the miner during his final illness. Moreover, the administrative law judge in this case did not rely exclusively on the death certificate but rather found that death due to pneumoconiosis was established based on the combined proof of the death certificate and the medical opinion of Dr. Wright. Therefore, we reject employer's contention.

Employer further asserts that the administrative law judge should have discounted the death certificate because it was rebutted by the medical opinions of Drs. Renn, Fino, and Castle. Employer's Brief at 7-10. Based upon their review of the pertinent records, Drs. Renn, Fino, and Castle opined that coal workers' pneumoconiosis was absent, that no part of the miner's disabling respiratory impairment was related to his coal dust exposure, and that therefore, pneumoconiosis played no role in his death. Employer's Exhibits 1-3. Because the administrative law judge found that the existence of occupational pneumoconiosis was already established, he permissibly discounted the opinions of Drs. Renn, Castle, and Fino because their underlying premise ran counter to the established fact that the miner had pneumoconiosis. See *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993). Therefore, we reject employer's contention.

Employer argues that Dr. Wright's opinion that pneumoconiosis contributed to the miner's death should have been rejected as unreasoned because Dr. Wright did not independently diagnose pneumoconiosis. Employer's Brief at 11. Although it is true that Dr. Wright took the presence of pneumoconiosis as established for purposes of addressing whether it contributed to the miner's death, Claimant's Exhibit 2 at 1-2, employer does not explain why this matters given that the administrative law judge found that the existence of occupational pneumoconiosis was already established by operation of the collateral estoppel doctrine. Furthermore, as to death causation, Dr. Wright made it clear that he based his opinion on his own "review of the medical records and certified copy of the death certificate on Mr. Ward." Claimant's Exhibit 2 at 2. Thus, the administrative law judge acted within his discretion in finding Dr. Wright's opinion "adequately reasoned, adequately documented, and entitled to weight on this issue." Decision and Order at 8; see *Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Therefore, we reject employer's argument.

Finally, Employer asserts that Dr. Wright's opinion is too equivocal to support a finding that pneumoconiosis hastened the miner's death. Employer's Brief at 11. This contention lacks merit, as Dr. Wright stated clearly that he believed that

pneumoconiosis substantially contributed to the miner's death:

Although it is quite clear from the hospital records . . . as well as the death certificate, that the inciting cause of death was complications of gallbladder disease; it is also quite clear that pulmonary insufficiency contributed greatly to Mr. Ward's demise. In my opinion, absent Mr. Ward's pulmonary condition, he might well have survived his other medical problems. Although the exact contribution of coal workers' pneumoconiosis to the underlying pulmonary condition of Mr. Ward is arguable and immeasurable, nonetheless **it is my opinion that coal workers' pneumoconiosis contributed materially to his death.**

Claimant's Exhibit 1 at 2 (emphasis in original). Therefore, we reject employer's contention, and we affirm the administrative law judge's finding pursuant to Section 718.205(c)(2) that pneumoconiosis hastened the miner's death. *See Griffith, supra; Brown, supra.*

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge