

BRB No. 04-0564 BLA

THERESA M. DAVIDOVICH)
(Widow of BERNARD DAVIDOVICH))
)
 Claimant-Respondent)
)
 v.)
)
 JEDDO HIGHLAND COAL COMPANY)
)
 and)
) DATE ISSUED: 04/19/2005
 LACKAWANNA CASUALTY COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Daniel A. Miscavige (Gillespie Miscavige), Hazleton, Pennsylvania, for
claimant.

Maureen E. Herron (Marshall, Dennehey, Warner, Coleman & Goggin),
Scranton, Pennsylvania, for employer/carrier.

Sarah M. Hurley (Howard M. Radzely, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-5539) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) 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). Claimant filed for benefits on January 17, 2002. Director's Exhibit 2. The administrative law judge credited the miner with twelve and one-tenth years of coal mine employment. The administrative law judge accepted the stipulation that the only issue to be decided was whether claimant established death due to pneumoconiosis at 20 C.F.R. §718.205(c). Considering the evidence relevant to the issue of death due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law judge accorded less weight to Dr. Dittman's opinion because it conflicted with employer's stipulation that the miner suffered from pneumoconiosis arising out of coal mine employment. The administrative law judge credited the opinion of Dr. Shane, that the miner's death was due in major part to pneumoconiosis, *see* Claimant's Exhibits 1, 2, because he found that it was reasoned and that Dr. Shane had considered all of the miner's conditions. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that "defense counsel made a mistake at the time of the hearing by stating that the only issue to be decided was causation [of death]. Defendant's only medical expert, Dr. Dittman, in fact, testified that the miner did not suffer from pneumoconiosis." Employer's Brief at 2. Employer asserts that Dr. Dittman's opinion is supported by the x-ray and CAT scan evidence. *Id.* Thus, employer argues, the stipulation by employer's counsel at the hearing, that the only issue before the administrative law judge was "causation of death," *see* Hearing Transcript at 5, should be reversed and the case remanded for the administrative law judge to weigh Dr. Dittman's opinion. Employer also argues that the administrative law judge erred in crediting Dr. Shane's opinion because it conflicts with the spirit of the Act. Claimant responds that the administrative law judge properly discredited Dr. Dittman's opinion because it conflicted with employer's stipulation that claimant established the existence of pneumoconiosis arising out of coal mine employment, and that the administrative law judge properly found Dr. Shane's opinion to be reasonable. The Director, Office of Workers' Compensation Programs (the Director), responds and urges the Board to hold employer to its stipulation to the existence of pneumoconiosis arising out of coal mine employment, pursuant to the Office of Administrative Law Judges' Rules of Practice and Procedure. *See* 29 C.F.R. §18.51 (2003). The Director also argues that Dr. Shane's opinion, that *simple* pneumoconiosis does not cause death or disability, does not affect his opinion that the miner's death due to respiratory failure was primarily caused by *complicated* pneumoconiosis. The Director thus argues that the administrative law judge did not err by not rejecting Dr. Shane's opinion as hostile to the Act, as employer contends.

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 this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

Employer seeks a remand of this case to allow employer a second opportunity to address the issues of the existence of pneumoconiosis and whether it arose out of coal mine employment. Employer's Brief at 2. At the hearing, employer's attorney, John J. Notarianni, stated, "The only issue for controversion, Your Honor, is causation of death." Hearing Transcript at 5. The administrative law judge asked, "So you are conceding that the miner had pneumoconiosis... resulting out of his coal mine employment?" Mr. Notarianni responded in the affirmative. *Id.* *See* 20 C.F.R. §§718.202(a); 718.203. Employer contends that this representation by employer's counsel to the administrative law judge at the hearing, was a mistake and thus it should not be bound by it. The Director argues that employer should be bound by its litigation strategy.

Employer's contention lacks merit. The Office of Administrative Law Judges' Rules of Practice and Procedure provide that stipulations received in evidence at the hearing shall be binding on the parties thereto. *See* 29 C.F.R. §18.51 (2003). Employer is bound by its litigation strategy. Moreover, the majority of the Board held in *Nippes v. Florence Mining Co.*, 12 BLR 1-108 (1985)(McGranery, J., dissenting), that stipulations of fact made by a party are binding upon the parties and upon the administrative law judge as the trier-of-fact. *Nippes*, 12 BLR at 1-109. Pursuant to *Nippes*, we hold that employer is bound by its stipulation to the existence of pneumoconiosis arising out of coal mine employment, made at the hearing. We therefore deny employer's request to remand the case.

Employer contends that the administrative law judge erred in according little weight to the opinion of its medical expert, Dr. Dittman. We disagree. The administrative law judge noted Dr. Dittman's opinion that the miner did not have pneumoconiosis and, thus, pneumoconiosis did not contribute to the miner's death. See Employer's Exhibit 2. The administrative law judge permissibly found Dr. Dittman's opinion "problematic" with respect to the issue of death due to pneumoconiosis, because it conflicted with employer's stipulation to the existence of pneumoconiosis arising out of coal mine employment. See *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); Decision and Order at 6. Further, at his deposition, Dr. Dittman testified that if, hypothetically, the miner did have pneumoconiosis, it would have been too mild to have contributed to, or hastened, death. Employer's Exhibit 3. The administrative law judge rationally found that this response was tantamount to a reiteration of Dr. Dittman's unequivocal opinion that there could be no reasonable diagnosis of pneumoconiosis. *Soubik*, 366 F.3d at 234, 23 BLR at 2-98-99. Consequently, the administrative law judge permissibly found Dr. Dittman's opinion on the issue of death due to pneumoconiosis entitled to diminished weight. *Id.*

Employer next contends that the administrative law judge erred in crediting the opinion of Dr. Shane because it is in "conflict with the spirit of the Act," where Dr. Shane testified that simple coal workers' pneumoconiosis is not disabling and would not cause death. See Claimant's Exhibit 2 at 8-9. With regard to the issue of whether the miner's death was due to pneumoconiosis, Dr. Shane opined that complicated coal workers' pneumoconiosis, with associated progressive massive fibrosis, was the major contributing factor in death, which was due to respiratory failure. Claimant's Exhibits 1, 2 at 15-17, 19-21. The administrative law judge found that Dr. Shane's opinion was reasoned and well explained. Decision and Order at 6. Employer also asserts that the administrative law judge should have accorded little weight to Dr. Shane's opinion because his diagnosis of complicated pneumoconiosis is contrary to the evidence of record. The Director responds that Dr. Shane's diagnosis of complicated pneumoconiosis, and his opinion regarding the role it played in the miner's death, remains valid and unaffected by his opinion that simple pneumoconiosis is not disabling and would not cause death.

In the instant case, the administrative law judge stated:

Dr. Shane testified he did not believe that simple CWP would cause death. (CX 2 at 8-9)[.] However, he testified that at the end of the miner's life, he had complicated CWP that "triggered into the fibrotic response." (CX 2 at 21-22)[.] The physician again explained that the miner's history of pulmonary deterioration was typical of that caused by pneumoconiosis rather than by smoking. (CX 2 at 22-23)[.]

Decision and Order at 5. In weighing the evidence at 20 C.F.R. §718.205(c), the administrative law judge permissibly found that Dr. Shane “provided a reasoned opinion that considered all of the miner’s medical conditions as well as his smoking history. I find Dr. Shane’s explanation of the manner in which pneumoconiosis contributed to the miner’s death persuasive,” Decision and Order at 6. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997). Employer cites no medical evidence in support of its argument that Dr. Shane’s offending opinion, that simple pneumoconiosis is not disabling and would not cause death, *see* Claimant’s Exhibit 2 at 8-9, affects his opinion regarding the cause of this miner’s death. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987)(hostility to Black Lung Benefits Act rule, under which physician’s opinion is given little weight due to his alleged hostility to premises of Act, only comes into play when physician’s diagnosis is affected by his subjective opinions about pneumoconiosis that are contrary to congressional determinations implicit in provisions of Act). We thus reject employer’s argument. Moreover, Dr. Shane acknowledged that his diagnosis of complicated pneumoconiosis was not based on x-ray, biopsy or autopsy evidence, Claimant’s Exhibit 2 at 21-22, but on the miner’s symptomatology and consistent deterioration due to progressive massive fibrosis. *Id.* at 15-17, 19-22. We thus find no error in the administrative law judge’s crediting of Dr. Shane’s opinion to find death due to pneumoconiosis established at 20 C.F.R. §718.205(c) in this case.

Based on the foregoing, we affirm the administrative law judge’s finding that claimant met her burden to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c), as it is supported by substantial evidence and is in accordance with law.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge