

JEAN GIBBONS)
(Widow of FREDERICK GIBBONS))
))
Claimant/Responde)
nt)
))
v.)
))
BELTRAMI ENTERPRISES)
))
and)

DECISION AND ORDER

LACKAWANA CASUALTY COMPANY

Employer/Carrier-
Petitionres

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

Party-in-Interest

Appeal of the Decision and Order on Remand - Denying Benefits in the Living Miner's Claim and Awarding Benefits in the Survivor's Claim of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Debra A. Smith (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

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

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

PER CURIAM:

Employer appeals the award of benefits in the survivor's claim¹ in the Decision

¹ Inasmuch as the administrative law judge's denial of benefits in the living miner's

and Order on Remand - Denying Benefits in the Living Miner's Claim and Awarding Benefits in the Survivor's Claim (95-BLA-772) of Administrative Law Judge Ralph A. Romano on a 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).² On

claim is unchallenged on appeal, it is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

²Claimant is Jean Gibbons, widow of the miner, Frederick Gibbons. A summary of the relevant procedural history of this case is as follows:

The miner filed claims for benefits on November 2, 1981, August 29, 1983 and July 1, 1987. Director's Exhibits 1, 21. On October 31, 1986, Administrative Law Judge Edward J. Murty, Jr. accepted the miner's request to withdraw his two earlier claims. Claimant filed her survivor's claim for benefits on January 26, 1994. Director's Exhibit 77. Administrative law judge Paul H. Teitler in a Decision and Order dated June 27, 1989 denied benefits on the miner's claim on the grounds that the miner failed to establish the existence of pneumoconiosis or total respiratory disability. The miner appealed and the Board affirmed the administrative law judge's denial of benefits. *Gibbons v. Beltrami Enterprises, Inc.*, BRB No. 89-2463 BLA (May 4, 1992). The miner requested modification which the district director denied. The miner died on January 8, 1994. The miner's widow filed a claim on January 26, 1994. The living miner's claim and the survivor's claim were subsequently combined. Administrative Law Judge Ralph A. Romano, [hereinafter, the administrative law judge] in an October 20, 1995 Decision and Order, based on a petition for modification pursuant to 20 C.F.R. §725.310, denied benefits in the miner's claim. He awarded benefits in the survivor's claim. With respect to the miner's claim, he credited the miner with thirty-five years of coal mine employment and found the existence of pneumoconiosis arising out of coal mine employment in accordance with the parties' stipulations and employer's concession. The administrative law judge found total respiratory disability, but found that it was not due to pneumoconiosis. Accordingly, he denied benefits on the miner's claim. Turning to the survivor's claim, he awarded benefits pursuant to Section 718.205(c). Claimant appealed the administrative law judge's denial of benefits in the living miner's claim and employer cross-appealed the administrative law judge's award of benefits in the survivor's claim.

The Board affirmed in part, vacated in part, and remanded the case to the administrative law judge for the administrative law judge to reconsider his findings in both the miner's and survivor's claims. *Gibbons v. Beltrami Enterprises*, BRB No. 96-0351 BLA (Jan. 24, 1997)(unpublished). In its remand order regarding the survivor's claim, which on is appeal here, the Board instructed the administrative law judge to consider all the medical opinions in determining if pneumoconiosis caused the miner's death pursuant to the governing holdings in *Lango v. Director, OWCP*, 104 F.3d 573,

remand, the administrative law judge again awarded benefits in the survivor's claim pursuant to 20 C.F.R. §718.205(c).

On appeal employer seeks reversal of the administrative law judge's award of benefits in the survivor's claim. Claimant, in response, urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has elected not to participate on 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 applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

BLR (3d. Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989)

On remand, in making his Section 718.205(c) findings, the administrative law judge incorporated his summary of the medical evidence as set forth in his original Decision and Order and addressed each of the medical opinions as instructed by the Board and assigned his weighing.. He considered the opinions of Drs. Shane, Naeye, Dittman, and Levinson,³ who opined that pneumoconiosis did not contribute to the miner's death, Dr. Bindie, the autopsy prosector, and Dr. Kraynak, who opined that pneumoconiosis contributed to the miner's death⁴. The administrative law judge set forth Dr. Bendie's observations on gross examination which noted, *inter alia*, the presence of moderate to severe anthracosis. Decision and Order at 5. It has been noted that the physician who conducts the autopsy is specially trained to analyze and diagnose the disease process after conducting a post-mortem examination and is qualified to address the cause of death, see generally *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178 (7th Cir. 1992) 16 BLR 2-121 (7th Cir. 1992), and is qualified to address the cause of death. The administrative law judge considered all the medical evidence, provided a reasoned explanation for his preference and exercised his discretion in giving greater weight to the opinion of Dr. Bindie, the autopsy prosector who "concluded that pulmonary emphysema with early coal worker's pneumoconiosis of the left lung [was] a contributory cause of death in addition to chronic respiratory insufficiency due to the absence of the right lung."

³Drs. Shane and Naeye, pathologists, reviewed the nine histologic slides and the autopsy protocol. Dr. Shane also reviewed additional medical evidence. Drs. Dittman and Levinson, pulmonary specialists, who had examined the living miner, reviewed the autopsy protocol and the reports of Drs. Shane and Naeye.

⁴The administrative law judge found that Dr. Cali was unable to determine if pneumoconiosis contributed to the miner's death. He found that Dr. Hertz did not specifically address the issue of whether pneumoconiosis contributed to the miner's death. Decision and Order at 4.

Decision and Order at 5; *See United States Steel Corporation v. Oravetz*, 686 F.2d 197 (3d Cir. 1982)(where the court stated that it is not unreasonable to give more weight to the testimony of the physician who performed the autopsy over the physician who reinterprets an autopsy based on slides); *see generally Railey, supra; Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *but see Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992), *aff'd* 116 F.3d 471 (Table)(3d Cir. 1997). Contrary to employer's implication, the administrative law judge acknowledged the expertise of Drs. Dittman, Shane, Levinson, and Naeye, who opined that claimant's pneumoconiosis did not substantially contribute to the miner's death. [1995] Decision and Order at 8-14. The administrative law judge, however, is not required to credit the physician with the greatest expertise. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, contrary to employer's contention, the administrative law judge reasonably discounted Dr. Shane's opinion on the grounds that it is in conflict with the spirit Act. *See generally Mercatell v. Director, OWCP*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989); *see generally also Robbins v. Jim Walters Resources, Inc.*, 898 F.2d 1478, 13 BLR 2-400 (11th Cir. 1990). The administrative law judge addressed Dr. Shane's opinion that simple pneumoconiosis is an "asymptomatic form of the disease," and implicitly found, *see Pulliam v. Drummond Coal Co.*, 7 BLR 1-229 (1984), the physician's opinion undermined regarding the etiology of the miner's death at Section 718.205(c).⁵ Thus, we affirm the

⁵Dr. Shane stated in his report: "Dr. Bindie lists this very early simple pneumoconiosis as a contributing factor to the patient's demise. I would advise that simple coal worker's pneumoconiosis cannot, by nature of the fact that it is totally asymptomatic, contribute to anyone's demise," Director's Exhibit 104 (Employer's Exhibit 2).

administrative law judge's disinclination to credit Dr. Shane at Section 718.205(c), as within the scope of his discretion. *See Mercatell, supra*. Based on the facts limited to this case, we affirm the administrative law judge's finding that pneumoconiosis contributed to the miner's death at Section 718.205(c) as based on substantial evidence and in accordance with the law. *See generally Lango v. Director, OWCP*, 104 F.3d 573, BLR (3d. Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits in the Living Miner's Claim and Awarding Benefits in the Survivor's Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge