

BRB No. 98-1657 BLA

ALICE D. NAHODIL )  
(Widow of DANIEL F. NAHODIL )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 DIRECTOR, OFFICE OF WORKERS' ) DATE ISSUED:  
 COMPENSATION PROGRAMS, )  
 UNITED STATES DEPARTMENT OF )  
 LABOR )  
 Respondent ) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-BLA-0621) of Administrative Law Judge Ainsworth H. Brown 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 miner died on June 13, 1996, Director's Exhibit 8, and on June 27, 1996, claimant filed the instant survivor's claim for benefits.<sup>1</sup> The administrative law judge determined that the sole issue was whether coal workers'

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<sup>1</sup> Before he died, the miner was awarded benefits by the district director in 1991 on a living miner's claim filed in 1991. Director's Exhibit 23. In addition, the miner had filed two previous claims that were denied. Director's Exhibit 24. Based on the filing dates in this case, claimant is not entitled to derivative entitlement based on the miner's claim. 20 C.F.R. §§725.1, 725.212; *Smith v. Camco Mining Co.*, 13 BLR 1-17 (1989).

pneumoconiosis caused, substantially contributed to, or hastened the miner's death. 20 C.F.R. §718.205(c); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). The administrative law judge credited the opinion of Dr. Spagnolo and found that the miner's death was not caused by pneumoconiosis. Accordingly, benefits were denied. Claimant appeals, arguing that the administrative law judge erred in failing to award benefits in the survivor's claim based upon the district director's award of benefits in the miner's claim. Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis under Section 718.205(c). Furthermore, claimant argues that the administrative law judge erred in his consideration of the evidence of complicated pneumoconiosis under Section 718.304. The Director, Office of Workers' Compensation Programs (the Director), has submitted a response brief contending that the Director's concessions in the miner's claim are not binding in the survivor's claim, and supporting affirmance of the administrative law judge's denial of benefits.<sup>2</sup>

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).

In order to establish entitlement to survivor's benefits in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, has held that pneumoconiosis should be considered a substantially contributing cause of death if it actually hastened the miner's death. *Lukosevicz, supra*.

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<sup>2</sup> On March 26, 1999, the Board received a request from the Director, Office of Workers' Compensation Programs (the Director), to submit an unpublished Seventh Circuit case, *Consolidation Coal Co. v. Stein*, No. 98-2234 (7th Cir. March 18, 1999), as supplemental authority. We accept the Director's submission of this unpublished case which discusses the probative value of CT scan evidence in diagnosing complicated pneumoconiosis. See generally 20 C.F.R. §802.215.

Claimant argues that in light of the fact that, in the living miner's claim, the district director previously found the miner to be totally disabled based upon complicated pneumoconiosis, claimant is entitled to the irrebuttable presumption of death due to pneumoconiosis in the survivor's claim. Petition for Review at 2; Claimant's Brief at 5; 20 C.F.R. §§718.205(c)(3), 718.304. In response, the Director states that he now concedes that the award of miner's benefits was based on a determination that the miner had complicated pneumoconiosis. Director's Response Brief at 5. The Director also argues, however, that the Director is not bound in the survivor's claim by any concessions that he made in the miner's claim inasmuch as the district director conceded entitlement in the miner's claim without litigation and no judgement was ever rendered. *Id.* at 5. We agree. To successfully invoke the doctrine of collateral estoppel, or issue preclusion, the party asserting it must establish, *inter alia*, that the issue or issues which form the basis of the estoppel were actually litigated and decided on the merits in the prior suit. *Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., Ltd.*, 63 F.3d 1227 (3d Cir. 1995). Inasmuch as the issue of complicated pneumoconiosis was not actually litigated in the miner's claim, the administrative law judge was not bound by the award of benefits in the survivor's claim. *Id.*

Next, claimant argues that the administrative law judge erred in failing to find that the miner's death was due to pneumoconiosis. Claimant argues specifically that the administrative law judge failed to address adequately the opinion of the miner's treating physician, Dr. Wagner. Claimant further contends that because Dr. Spagnolo believed that the miner did not have coal workers' pneumoconiosis, his opinion is incompetent to address the role that pneumoconiosis played in the miner's death. We reject claimant's suggestion that the administrative law judge was required to accord special consideration to the opinion of the miner's treating physician. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Moreover, the administrative law judge was not required to discredit Dr. Spagnolo's report, on the issue of the cause of the miner's death, because the physician did not find that the miner suffered from pneumoconiosis. *See generally Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). In finding that claimant failed to establish that the miner's death was due to pneumoconiosis under Section 718.205(c)(1) and (c)(2), the administrative law judge permissibly credited Dr. Spagnolo's opinion over the opinions of Drs. Kraynak and Wagner because Dr. Spagnolo was "a medical professor and certified pulmonary specialist."<sup>3</sup> *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20

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<sup>3</sup> Dr. Spagnolo found that the miner died from extensive small cell lung cancer most likely due to smoking. He stated that the miner's death was not related to, or hastened by pneumoconiosis. Director's Exhibits 25, 26. Dr. Kraynak found that the miner's coal workers' pneumoconiosis hastened the miner's death. Claimant's Exhibits 9, 11. Dr. Wagner opined that coal workers' pneumoconiosis hastened the miner's death since any fibrosis or scarring lung disease increases an individual's risk of developing lung cancer. Claimant's Exhibit 1.

Dr. Spagnolo is Board-certified in internal medicine, including a subspecialty in pulmonary diseases. He is a professor of medicine at George Washington University School of Medicine. Director's Exhibit 27. Dr. Kraynak is Board-eligible in family medicine and has teaching

(1988); see also *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). We, therefore, affirm the administrative law judge's finding that death due to pneumoconiosis was not established pursuant to Section 718.205(c)(1) and (c)(2).

However, we agree with claimant's contention that the administrative law judge did not properly consider whether the evidence was sufficient to establish the existence of complicated pneumoconiosis and thus invocation of the irrebuttable presumption of death due to pneumoconiosis under Sections 718.205(c)(3) and 718.304. The record contains three x-ray readings by Dr. Smith diagnosing complicated pneumoconiosis. Two of these readings are for a Category "C" opacity, the third reading is for a Category "A" opacity. Claimant's Exhibits 5-7. There is an x-ray reading by Dr. Conrad finding "density of the type A classification." Director's Exhibit 23. Dr. Green made an x-ray diagnosis of complicated pneumoconiosis, but did not provide the requisite classification, and added that the "lack of an underlying reticular nodular pattern on the chest Xray raises some doubt [as] to the diagnosis of a complicated pneumoconiosis." Director's Exhibit 23. Dr. Navani made an x-ray diagnosis of Category "A" complicated pneumoconiosis. Director's Exhibit 23.

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experience as a clinical preceptor in the Department of Family Medicine at the Philadelphia College of Osteopathic Medicine. Claimant's Exhibit 10. Dr. Wagner is a member of the American Academy of Family Physicians. Claimant's Exhibit 2.

Inasmuch as the administrative law judge did not explicitly address whether the foregoing evidence of record is sufficient to establish the existence of complicated pneumoconiosis, we agree with claimant that the administrative law judge's decision on this issue does not comport with the Administrative Procedure Act. We therefore vacate, in part, the administrative law judge's denial of benefits and remand the case for consideration of this issue under Section 718.304. On remand, the administrative law judge must first determine whether the evidence in each category at subsections (a), (b) and (c) tends to establish the existence of complicated pneumoconiosis and then weigh the evidence supportive of a finding of complicated pneumoconiosis against the contrary probative evidence. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Thus, when initially weighing the evidence in each category pursuant to Section 718.304, the administrative law judge must evaluate CT scans pursuant to subsection (c), rather than treating CT scan evidence as x-ray evidence under subsection (a).<sup>4</sup> *Id.*

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, and vacated in part, and remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

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<sup>4</sup> If the administrative law judge finds, on remand, that claimant has established the existence of complicated pneumoconiosis, he must determine whether the pneumoconiosis has arisen out of coal mine employment pursuant to 20 C.F.R. §718.203. As claimant contends, in order to ascertain whether the causality presumption set forth in Section 718.203(b) is available in the present case, the administrative law judge must render a specific finding as to the length of claimant's coal mine employment. We note that if the administrative law judge finds the evidence insufficient to establish the existence of complicated pneumoconiosis and therefore insufficient to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c)(3), benefits are precluded in light of claimant's failure to establish death due to pneumoconiosis. See 20 C.F.R. §718.205(c).

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge