

BRB No. 08-0355 BLA

G.C.)	
(Survivor of D.C.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
NATIONAL MINES CORPORATION)	DATE ISSUED: 11/25/2008
)	
and)	
)	
OLD REPUBLIC INSURANCE 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 - Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (06-BLA-5754) of Administrative Law Judge Larry S. Merck rendered 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 found, as stipulated by the parties, that the miner had thirty-two years of coal mine employment. The administrative law judge further found that employer did not contest that the miner had pneumoconiosis that arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Considering the sole issue before him, the administrative law judge found that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4), based on employer's stipulation that the miner had clinical pneumoconiosis. Employer also argues that even if legal pneumoconiosis were established, the administrative law judge erred in finding that the miner's death was hastened by it pursuant to 20 C.F.R. §718.205(c)(2), (5). In response, claimant¹ urges affirmance of the administrative law judge's award of benefits, asserting that employer stipulated to the existence of both clinical and legal pneumoconiosis, and that Dr. Potter's opinion is sufficient to establish that the miner's death was hastened by his pneumoconiosis. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.

¹ Claimant, G.C., is the widow of the miner, D.C., who died on March 25, 1996. Director's Exhibit 11. Claimant filed her survivor's claim for benefits on June 23, 2005. Director's Exhibit 2.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death where the death was caused by complications of pneumoconiosis, or where the irrebuttable presumption of death due to pneumoconiosis is applicable. 20 C.F.R. §718.205(c)(1), (2), and (3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *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). Failure to

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, because the miner was employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Initially, employer argues that the case should be remanded to the administrative law judge to make a definitive determination with respect to pack years of smoking. The administrative law judge noted the differing smoking histories of the miner from various sources, from seventeen to eighteen to forty or fifty years, the latter estimates by Dr. Potter, the treating physician. The administrative law judge stated: “Because the evidence regarding Claimant’s smoking history is somewhat contradictory, I am unable to determine an exact smoking history.” Decision and Order at 3. Since the administrative law judge chiefly relied upon Dr. Potter’s opinion, and not an opinion which might have underestimated the smoking history, we hold that any error in failing to make a specific finding is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer first argues that the administrative law judge erred in treating employer’s stipulation to clinical pneumoconiosis as a stipulation to legal pneumoconiosis, without specifically finding that the medical opinion established legal pneumoconiosis. Additionally, employer contends that the administrative law judge’s reliance of the decision of the United States Court of Appeals for the Sixth Circuit in *Martin v. Ligon Preparation Co.*, was misplaced because 1) *Martin* did not involve a stipulation or a situation where clinical pneumoconiosis was established. Instead, employer contends that it involved conflicting medical opinions on the issue of legal

pneumoconiosis. Employer contends that *Martin* does not authorize the administrative law judge's blurring of the distinctions between clinical and legal pneumoconiosis. Rather, employer contends that *Martin* requires the administrative law judge to determine whether the medical opinion evidence establishes legal pneumoconiosis.

In finding that both clinical and legal pneumoconiosis were established, the administrative law judge noted that employer stipulated to the existence of clinical pneumoconiosis based on the biopsy evidence of record. The administrative law judge went on to say, however, citing *Martin* since clinical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act, a miner with clinical pneumoconiosis necessarily has legal pneumoconiosis as well. Decision and Order at 6 n.4. In response, claimant contends that employer's stipulation to the existence of pneumoconiosis precludes revision after the fact, so that it cannot now argue it only conceded clinical pneumoconiosis when it withdrew issue 5, the existence of pneumoconiosis.

At the hearing, employer's attorney withdrew issue 5, the existence of pneumoconiosis, along with several other issues. Employer's attorney stated: "...as to issue 5, in light of Mr. (sic) Caffrey's opinion, we will withdraw issue 5 and stipulate to the existence of simple pneumoconiosis."³ Tr. At 10-11. In his Decision and Order, the administrative law judge noted that the only issue remaining was death due to

³ Dr. Caffrey submitted a report based on biopsy slides of the left upper and lower lobes; slides from both lobes indicated "simple coal workers' pneumoconiosis with micro and macronodule." Employer's Exhibit 4, p.2.

pneumoconiosis at Section 718.205. Decision and Order at 2. In a footnote, the administrative law judge stated:

Employer primarily relied on the biopsy evidence of record in making its concession that Miner had clinical pneumoconiosis. In *Martin*, the Sixth Circuit held that:

[C]linical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act. *Richardson v. Dir., Office of Workers' Comp. Programs*, 94 F.3d 164, 166 n.2. (4th Cir.1996). Thus, an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis as well. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210 (4th Cir.2000)(noting that [l]egal pneumoconiosis is a much broader category of diseases, which includes but is not limited to medical, or coal workers, pneumoconiosis).

Martin v. Ligon Preparation Co., 400 F.3d 302, 306 (6th Cir. 2005). Accordingly, Claimant has established that Miner had clinical and legal pneumoconiosis.

Employer argues that the administrative law judge failed to make a specific finding as to legal pneumoconiosis, and also argues that the administrative law judge's reliance on *Martin* in finding the existence of legal pneumoconiosis established is misplaced. We disagree that the administrative law judge failed to make a specific finding as to the existence of legal pneumoconiosis, as the above excerpt indicates, the administrative law judge clearly did make such finding. Before we address the administrative law judge's findings on legal pneumoconiosis, we must address claimant's contention that employer's withdrawal of issue 5, *without specifically reserving the issue of legal pneumoconiosis*, precludes raising the issue before the Board. Generally, stipulations under the Act are binding, unless contrary to law. In *Vance v. Eastern*

Associated Coal, 8 BLR 1-68 (1985), claimant protested that the administrative law judge should not have considered the issue of eligibility, as employer had stipulated to the designation of responsible operator. Employer had explicitly reserved this right in its cover letter to the controversion form, thus its right was not waived. *Id.* Employer also argues that the United States Circuit Court of Appeals for the Fourth Circuit held that a stipulation to clinical pneumoconiosis is not a stipulation to legal pneumoconiosis. *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). Employer's reliance on *Fuller* is misplaced; in that case employer stipulated to the existence of pneumoconiosis ("as defined by the Act and regulations") arising out of coal mine employment, but the administrative law judge believed that Section 718.201 defined pneumoconiosis as necessarily involving impairment. Thus, he discredited the medical opinions which concluded that the miner had not been impaired by pneumoconiosis when considering the issue of death due to pneumoconiosis. While the Court lamented the parties' and administrative law judge's failure to distinguish between clinical and legal pneumoconiosis, it did not hold that the employer in that case had stipulated only to clinical pneumoconiosis, or only legal pneumoconiosis, or had not stipulated to both. It held, rather, that a stipulation to the existence of pneumoconiosis is not a stipulation to impairment. Lacking any authority for employer's position, we, therefore, hold that the withdrawal of issue 5, the existence of pneumoconiosis, without reserving the issue of legal pneumoconiosis, precludes raising any issue with respect to pneumoconiosis, at any stage of these proceedings. *See Vance v. Eastern Associated Coal*, 8 BLR 1-68 (1985).

Employer next argues that even if the miner had legal pneumoconiosis, the administrative law judge erred in finding that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2), (5). Specifically, employer contends that the administrative law judge erred in relying on Dr. Potter's opinion to find that pneumoconiosis hastened the miner's death because Dr. Potter did not provide substantial evidence of "hastening" pursuant to the holding of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Eastover Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Further, employer contends that Dr. Potter's opinion was not entitled to controlling weight as the administrative law judge did not explain why Dr. Potter's status as a treating physician afforded his opinion greater weight, or consider Dr. Potter's credentials in light of the other physicians' credentials. Employer also argues that the administrative law judge erred in relying on impermissible reasons to discredit the opinions of Drs. Fino and Broudy that the miner's death was not hastened by pneumoconiosis.

In crediting Dr. Potter's opinion, the administrative law judge acknowledged that Dr. Potter found that lung cancer was the ultimate cause of the miner's death. The administrative law judge, however, also noted that Dr. Potter found that the pre-existing damage to the miner's lungs from coal dust and smoking, made life prolonging cancer treatment more difficult and, thus, hastened the miner's death by cancer. The administrative law judge further noted that while Dr. Potter stated that he could not estimate how much longer the miner would have survived if he had not had

pneumoconiosis, he believed that people with interstitial fibrosis or chronic lung disease have less respiratory reserve and, thus, less capacity to fight off serious problems like cancer or the associated treatment. Claimant's Exhibit 5. In addition, the administrative law judge credited Dr. Potter's opinion because Dr. Potter had been the miner's treating physician for twenty-one years, from 1975 until his death in 1996. The administrative law judge noted that Dr. Potter's treatment records showed that he was intimately familiar with the miner's respiratory condition. The administrative law judge concluded, therefore, that the doctor's opinion was well-reasoned and well-documented as it was supported by his treatment and hospitalization notes, medical reports, deposition, familiarity with the miner's condition and his relationships as the miner's treating physician.

Contrary to employer's argument, the administrative law judge permissibly relied on Dr. Potter's opinion to find that pneumoconiosis hastened the miner's death pursuant to *Williams*. Although Dr. Potter acknowledged that he could not say how much longer the miner would have lived if he had not had pneumoconiosis, Dr. Potter did say that the miner's death from cancer was hastened because he could not undergo life prolonging treatment due to the preexisting damage to his lungs caused, in part, by coal mine employment. Thus, we hold that the administrative law judge permissibly relied on Dr. Potter's opinion to find that the miner's pneumoconiosis hastened his death.

Further, contrary to employer's argument, the administrative law judge permissibly accorded greater weight to Dr. Potter's opinion because he had been the

miner's treating physician for twenty-one years, than to the opinions of Drs. Dahhan and Broudy, who each saw the miner once. The administrative law judge noted that Dr. Potter's opinion was supported by his treatment records, his review of the medical evidence and his deposition testimony and the familiarity he had with the miner's condition, and special relationship he had with the miner as his treating physician for twenty-one years. 20 C.F.R. §718.104(d). Further, contrary to employer's contention, the administrative law judge was aware of the credentials of the physicians when he reviewed the medical opinion evidence.⁴

Contrary to employer's contention, the administrative law judge considered that Drs. Broudy and Dahhan are Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 14, 16. However, he permissibly found that neither physician adequately explained the basis for their opinions that coal dust exposure did not contribute to the miner's obstructive lung disease. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483-84 (6th Cir. 2007). Substantial evidence supports this finding, as Drs. Broudy and Dahhan provided no explanation for their statements that the miner's chronic bronchitis was due to smoking alone and not in combination with coal dust inhalation. Director's Exhibits 6, 7. Employer argues that this finding is inconsistent with *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). In *Williams*, however, the Court found that the treating

⁴ The administrative law judge noted that Dr. Potter was Board-certified in Family Medicine, while Drs. Broudy and Dahhan were Board-certified in Internal and Pulmonary Medicine. Decision and Order at 8, 14, 16.

physician's opinion was insufficiently explained, while in the instant case, the administrative law judge found the treating physician's opinion well-reasoned on the issue of the miner's death as hastened by respiratory illnesses which were aggravated by coal dust exposure. Decision and Order at 10. It was the failure of either Dr. Broudy or Dr. Dahhan to explain why they did not consider whether many years of coal dust exposure might have had some impact on the miner's health, or explain why, in their opinions it was unnecessary to consider coal mine employment at all, which was the administrative law judge's reason for according less weight to these opinions as conclusory and insufficiently justified. Decision and Order 15, 17. Thus the administrative law judge's findings as to the weight of the medical opinions are within his discretion and consistent with the holdings in *Barrett*, and are therefore affirmed.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge