

BRB No. 88-0120 BLA

DOROTHY WASMUCKY)
(Widow of STANLEY WASMUCKY))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

George A. Yavorek, Scranton, Pennsylvania, for claimant.

Dorothy L. Page (Robert P. Davis, 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, the United States Department of Labor.

Before: BROWN and DOLDER, Administrative Appeals Judges, and NEUSNER, Administrative Law Judge.*

PER CURIAM:

Claimant, the surviving spouse, appeals the Decision and Order (86-BLA-2003) of Administrative Law Judge Alfred Lindeman denying 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

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited the miner with ten and one-quarter years of qualifying coal mine employment, but found that claimant failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings pursuant to Section 718.205(c). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.¹

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

¹ The administrative law judge's findings with regard to length of coal mine employment are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant maintains that the death certificate and the records from the Veterans Administration Medical Center (VAMC), supported by claimant's testimony, establish death due to pneumoconiosis under Section 718.205(c). This claim arises within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit, which holds that pursuant to Section 718.205(c), the evidence must establish that pneumoconiosis was at least a substantially contributing cause of death. See Lukosevicz v. Director, OWCP, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989). The administrative law judge noted that the VAMC records pertaining to the miner's last hospitalization included a diagnosis of anthracosilicosis, and that the death certificate listed anthracosilicosis under "other significant conditions - conditions contributing to death but not related to [immediate] cause", i.e. undifferentiated lung cancer with metastases. Decision and Order at 3; Director's Exhibits 10, 11. The administrative law judge further noted, however, that the VAMC records indicated that all treatment was directed to the miner's lung cancer and related complications, and that the entries relative to anthracosilicosis were merely incidental. The administrative law judge determined that the x-rays of record either were interpreted as negative for pneumoconiosis or did not mention pneumoconiosis; the findings from three biopsies and three pap smears during the miner's hospitalization did not

mention pneumoconiosis; and Dr. Naeye, a reviewing pathologist, found no evidence of pneumoconiosis on two biopsy slides of the miner's lung tissue. Decision and Order at 3, 4; Director's Exhibits 11-13. Consequently, the administrative law judge found that the medical record shows the possible existence of pneumoconiosis, but is silent as to any effect it may have had on the miner's death, and that absent affirmative documentation, claimant failed to meet her burden of establishing death due to pneumoconiosis pursuant to Section 718.205(c). The administrative law judge's findings pursuant to Section 718.205(c) are based on substantial evidence and are consistent with the standard enunciated in Lukosevicz, supra, and we hereby affirm them.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge