

BRB No. 89-1459 BLA

BETHEL SMALSKE
(Widow of JOHN SMALSKE))

)
Claimant-Respondent)

)
v.)

)
USX CORPORATION)
) DATE ISSUED:
Employer-Petitioner)

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

)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of Gerald M. Tierney,
Administrative Law Judge, United States Department of Labor.

Russell B. Korner, Jr. (U.M.W.A., District 4), Masontown, Pennsylvania, for
claimant.

Martha R. Conley (USX Corporation), Pittsburgh, Pennsylvania, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order (88-BLA-0088) of Administrative
Law Judge Gerald M. Tierney awarding benefits 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). The miner filed a claim for benefits on

November 9, 1976.¹ The administrative law judge noted that the

*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).

¹The miner subsequently died on October 11, 1986.

miner's claim was denied on February 27, 1980 and that the miner was given sixty days to submit new evidence. The miner submitted new evidence and requested additional time to submit other evidence. There was, however, no response to the miner's request. The administrative law judge therefore determined that the 1976 claim is still active, and adjudicated the claim under 20 C.F.R. Part 727. The administrative law judge found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded on the miner's claim. On the basis of the award in the miner's claim, the administrative law judge also found the survivor entitled to benefits. On appeal, employer contends that the administrative law judge's finding that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) is not supported by substantial evidence.² Claimant responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not responded in this case.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 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).

The U.S. Court of Appeals for the Third Circuit, wherein jurisdiction for this case arises, has held that the party opposing entitlement must establish that the miner's pneumoconiosis is not a contributing cause of total disability, in order to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). See Bernardo v. Director, OWCP, 790 F.2d 351, 9 BLR 2-26 (3d Cir. 1986). Pursuant to 20 C.F.R. §727.203(b)(3), the administrative law judge considered the miner's death certificate and three physician's opinions. The death certificate states that the immediate cause of the miner's death was cardio pulmonary arrest due to arterio-sclerotic heart disease. The death certificate further lists remote brain stem stroke, diabetes mellitus and coal worker's pneumoconiosis with focal emphysema

²The administrative law judge's finding of invocation pursuant to 20 C.F.R. §727.203(a)(1) and his finding that employer failed to establish rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(1), (2) and (4) are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

as contributing to death but not related to immediate cause. See Director's Exhibit 11. On October 11, 1986 Dr. Grossman performed an autopsy and reported that "the mild macular and micronodular coal worker's pneumoconiosis with focal emphysema may have contributed to the congestive heart failure." See Director's Exhibit 13. On February 23, 1987 Dr. Naeye reviewed the autopsy report and the lung tissue slides and stated that "[t]he pneumoconiosis is also too mild to have contributed in any way to his death." See Director's Exhibit 14. On July 3, 1987 Dr. Wecht reviewed the medical records and autopsy slides and stated:

It is further my professional opinion that Mr. Smalske's coal worker's pneumoconiosis, which was the basis for his chronic obstructive pulmonary disease, was a substantial contributing factor in his death...It should be emphasized that the disease process of coal worker's pneumoconiosis, which was a substantial contributing factor in Mr. Smalske's death, had manifested itself through various clinical signs and symptoms for several years preceding this gentleman's terminal illness and death.

Director's Exhibit 20.

Employer contends that the administrative law judge's reliance on the reports of Drs. Grossman and Wecht was improper as Dr. Grossman's report was equivocal, and Dr. Wecht's report was not based on the doctor's examination of the autopsy slides. See Employer's Brief at 5. The administrative law judge noted that Dr. Wecht reviewed the slides and then permissibly found Dr. Wecht's opinion to be the most persuasive since Dr. Wecht is Board-Certified in Pathology, while the credentials of the other physicians are unknown. See Decision and Order at 4; Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989). The administrative law judge further properly stated that Dr. Wecht's opinion is also consistent with claimant's testimony about the miner's breathing problems and with Dr. Grossman's opinion that pneumoconiosis may have contributed to claimant's congestive heart failure. See generally Bernardo, supra; Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987). He also permissibly found Dr. Naeye's opinion to be inconsistent with the two other physicians, as well as with the qualifying arterial blood gas studies of record. See Director's Exhibit 28; Decision and Order at 4; Lafferty, supra. Thus, the administrative law judge's finding that employer did not establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) is supported by substantial evidence in the record and is affirmed.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge