

BRB No. 89-2071 BLA

DONA LOPEZ)
(Widow of LOUIS LOPEZ))
)
 Claimant-Respondent)
)
 v.)
)
 THE PITTSBURG & MIDWAY COAL) DATE ISSUED:
 MINING COMPANY)
)
 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 of Robert J. Brissenden, Administrative Law Judge, United States Department of Labor.

Leroy Pete Goter, Frederick, Colorado, for claimant.

James A. Kent, Jr., Middleburg, Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (88-BLA-792) of Administrative Law Judge Robert J. Brissenden awarding 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 law judge credited the miner with approximately twenty-nine years of qualifying coal mine employment, as stipulated by the parties, and found that although the evidence of record established that pneumoconiosis did not cause or contribute to the miner's

death, the evidence was sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §§718.304(b) and 718.205(c)(3). Accordingly, benefits

*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).

were awarded. On appeal, employer challenges the administrative law judge's findings pursuant to Sections 718.304(b) and 718.205(c). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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

Employer contends that in finding invocation established pursuant to Section 718.304(b), the administrative law judge made an improper equivalency determination between the size of opacities on x-rays and lesions on autopsy, and substituted his own expertise for that of a qualified physician. We agree. Section 718.304(b) provides for invocation of the irrebuttable presumption of death due to pneumoconiosis where the miner suffered from a chronic dust disease of the lung which, when diagnosed by biopsy or autopsy, yields massive lesions in the lung. 20 C.F.R. §718.304(b). The administrative law judge noted that the autopsy prosector reported the presence of anthracosilicosis manifested by extensive micronodular lesions and rare macronodular lesions with a maximum size of 1.1 cm. Decision and Order at 4; Director's Exhibit 9. While the administrative law judge acknowledged that "lesions" are not "opacities," he concluded that since one or more opacities of greater than one centimeter may establish invocation of the presumption at Section 718.304(a), then one or more lesions of greater than one centimeter should establish invocation of the presumption at Section 718.304(b). Decision and Order at 4, 5. The autopsy prosector, however, did not equate the size of the lesions he found at autopsy with the size of opacities found on x-rays, and there is no basis in the record for the administrative law judge to make such a determination. See generally Smith v. Island Creek Coal Co., 7 BLR 1-734 (1985).

The administrative law judge further observed that the regulatory term "massive lesions" is not defined, and that the terms "macro" and "massive" both designate large size, thereby inferring that the "macronodular lesions" found at autopsy could be equated with the "massive lesions" required to establish invocation at Section 718.304(b). Decision and Order at 5. Again, there is no basis in the record for such a determination. See generally Marcum v. Director, OWCP, 11 BLR 1-23 (1987). As the autopsy prosector did not explicitly diagnose large opacities, progressive massive fibrosis or massive lesions, see Willis v. Birchfield Mining Co., 15 BLR 1-59 (1991), nor did he report a finding of complicated pneumoconiosis, see Gruller v. Bethenergy Mines, Inc., 16 BLR 1-3 (1991), the evidence of record herein

is insufficient as a matter of law to support a finding of invocation at Section 718.304, and thereby death due to pneumoconiosis pursuant to Section 718.205(c)(3). Consequently, we reverse the administrative law judge's findings pursuant to Sections 718.304 and 718.205(c)(3). Inasmuch as the administrative law judge found that the miner's pneumoconiosis did not cause or substantially contribute to his death, and the parties have not challenged this finding on appeal, claimant is precluded from entitlement to benefits, and we need not address employer's remaining arguments pursuant to Section 718.205(c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge