

HELEN LOWDEN )  
(Widow of HOBART H. LOWDEN) )  
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Claimant-Petitioner )  
 )  
v. )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest/ )  
Respondent )

DATE ISSUED:

DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand of George P. Morin, Administrative Law Judge, United States Department of Labor.

Helen Lowden, Dunbar, Pennsylvania, *pro se*.

C. William Mangum (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Supplemental Decision and Order on Remand (89-BLA-341) of Administrative Law Judge George P. Morin denying benefits on a survivor's claim filed pursuant to Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This is the second time this claim has been before the Board. In his first Decision and Order, the administrative law judge found that claimant's husband was not a miner under the Act, and accordingly denied benefits.

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<sup>1</sup>Claimant is the surviving spouse of the miner Hobart H. Lowden, who died on February 17, 1987. Director's Exhibit 8.

On claimant's appeal, the Board vacated the Decision and Order denying benefits, and remanded to the administrative law judge for a reconsideration of the evidence. The Board specifically directed the administrative law judge to redetermine whether claimant's decedent was a miner, and, if so, to consider whether he suffered from pneumoconiosis and whether he died due to the disease. *Lowden v. Director, OWCP*, BRB No. 89-3546 BLA (June 24, 1993) (unpub.); see 20 C.F.R. §§718.202(a); 718.205(c)(2); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir 1989); *Stroh v. Director, OWCP*, 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987).

On remand, the administrative law judge found that Mr. Lowden had been a coal miner for 12 years and three months. Supplemental Decision and Order on Remand at 2. He also ruled that claimant established that the miner suffered from pneumoconiosis and that this disease was derived from the miner's coal mine employment. *Id.*; see 20 C.F.R. §§718.202(a)(1); 718.203(b).<sup>2</sup> The administrative law judge, however, also determined that claimant failed to establish that pneumoconiosis was a substantial contributing cause of the miner's death and denied benefits. 20 C.F.R. §718.205(c)(2). Supplemental Decision and Order on Remand at 8. This appeal followed.

In an appeal filed by a claimant with the assistance of counsel, the Board will consider the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>2</sup>We affirm the administrative law judge's findings regarding the length of the miner's coal mine employment, and pneumoconiosis derived from the miner's coal mine employment, see 20 C.F.R. §§718.202(a)(1); 718.203(b), which are not adverse to claimant, because these findings are unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In deciding that claimant had not established that pneumoconiosis was a substantially contributing cause of the miner's death, the administrative law judge evaluated the medical reports of Dr. Setty, Director's Exhibit 17, Dr. Sinclair, Director's Exhibit 16 and Dr. Silverman, Director's Exhibit 16, each of whom had examined the miner in conjunction with the miner's claim.<sup>3</sup> In addition, the administrative law judge reviewed the post-mortem reports of Dr. Harster, the autopsy prosector, Director's Exhibit 9, Dr. Wecht, Director's Exhibit 17, and Dr. Naeye. Director's Exhibit 11. The latter two physicians reviewed autopsy slides and other post-mortem records.<sup>4</sup> The administrative law judge also addressed the

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<sup>3</sup>Dr. Setty diagnosed severe obstructive and restrictive pulmonary disease associated with chronic hypoxemia. He opined that this condition was "probably" related to coal mine employment. Claimant's Exhibits 7, 7A. Dr. Sinclair diagnosed chronic bronchitis not related to coal mine dust exposure. Director's Exhibit 16. Dr. Silverman diagnosed anthracosilicosis and pulmonary emphysema. Director's Exhibit 16.

<sup>4</sup>Dr. Harster performed an autopsy on the miner that was limited to an examination of the lungs. Director's Exhibit 9(SC). He discovered "anthracotic pigment" in the parenchyma, and, microscopically, detected "interstitial peri-vascular and subpleural pigment deposition with minimal fibrosis." This finding corresponded to a "coal dust macule." *Id.* Dr. Harster continued that

[d]iagnosis of black lung disease is both clinical and pathological. Some authorities call coal dust macules a form of simple coal workers' pneumoconiosis ... Others say these occur in urban dwellers and require more advanced lesions before diagnosing coal workers pneumoconiosis.

Director's Exhibit 9(SC).

Dr. Naeye reviewed the autopsy report and two glass slides containing lung tissue. Dr. Naeye determined that there were no anthracotic micronodules and that the "few smaller deposits of black pigment ... [were] not accompanied by fibrosis, birefringent crystals or focal emphysema." Dr. Naeye further concluded that because the miner did not have pneumoconiosis, that disease could not have contributed to the miner's death. As to the miner's pulmonary disease, Dr. Naeye stated that

the centrilobular emphysema that is present cannot be attributed to occupational exposure ... because the ALFORD scientists have shown that US coal miners, including those with simple coal workers' pneumoconiosis, have no more emphysema than non-

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miners[.]

Director's Exhibit 10(SC).

Dr. Wecht also reviewed microscopic slides, medical records the autopsy reports and other documents. He diagnosed pneumoconiosis, based upon the miner's "occupational, medical, and social history." Dr. Wecht explained in detail his findings upon review of the histological slides, noting that

[t]he microscopic autopsy tissue slides ... show diffuse depositions of black anthracotic pigment in the peribronchiolar and periarteriolar lymphatics. Ruptured alveolar walls, consistent with focal pulmonary emphysema, focal pulmonary fibrosis,

miner's death certificate. Director's Exhibit 8.<sup>5</sup>

The administrative law judge ruled that pneumoconiosis was not a substantially contributing cause of the miner's death, finding that the "weight of the autopsy evidence did not establish that death was due to pneumoconiosis or that pneumoconiosis substantially contributed to the miner's death. Supplemental Decision and Order on Remand at 7-8. He reasoned that Dr. Harster's autopsy report was inconclusive on the issue

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thickening of the pleura with subpleural deposits of anthracotic pigment, and fibroanthracotic macules, are also noted. In addition, examination of the lung tissue under polarized light reveals scattered birefringent crystals, consistent with silica. All these findings in the lungs are compatible with the antemortem history and clinical diagnosis of pneumoconiosis.

Director's Exhibit 17(SC). Dr. Wecht further concluded that pneumoconiosis "was a substantial contributing factor in [the miner's] death." Director's Exhibit 17(SC).

<sup>5</sup>The miner's death certificate lists the immediate cause of death as arteriosclerotic cardiovascular disease - generalized, and notes other significant conditions such as diabetes mellitus and arteriosclerotic obliteration of the distal aorta and both iliac and femoral arteries contributing to death. Director's Exhibit 8.

of whether the miner was afflicted with pneumoconiosis, and thus did not affirmatively establish causation of, or contribution to, the miner's death. *Id.* The administrative law judge was impressed by Dr. Harster's "reluctan[ce] to even make a finding of pneumoconiosis solely on the basis of anthracotic pigment deposits with minimal fibrosis and in the absence of advance lesions, such as nodules or massive fibrosis." *Id.*

Dr. Wecht's opinion was found to be insufficient to establish pneumoconiosis as a substantially contributing cause of the miner's death because of the physician's "fail[ure] to explain the basis of such finding." *Id.* The administrative law judge instead deferred to the opinion of Dr. Naeye, who reviewed the same post-mortem slides, but did not detect the same "birefringent crystals" that had been observed by Dr. Wecht, and which had been a key to the latter's diagnosis of pneumoconiosis.

Upon consideration of the administrative decision on review, and the record as a whole, we are unable to conclude that the administrative law judge's finding that claimant failed to meet her burden of under Section 718.205(c)(2) is not supported by substantial evidence. We thus affirm the administrative law judge's finding that claimant failed to establish causation of death under Section 718.205(c)(2), and thus affirm the Supplemental Decision and Order on Remand.

Claimant bears the burden of establishing that pneumoconiosis was at least a "substantially contributing cause" of the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1003, 13 BLR 2-100, 2-103 (3d Cir. 1989); *see also Grizzle v. Pickands Mather and Company*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Trumbo v. Reading Anthracite Company*, 17 BLR 1-85, 1-87 (1993).

The principal post-mortem medical opinion that pneumoconiosis was involved in the miner's death in any way was that of Dr. Wecht. The administrative law judge, within his discretion as the trier-of-fact, could permissibly discount the opinion of Dr. Wecht as unexplained, and rationally could find that Dr. Wecht offered no detailed analysis as to why the disease substantially contributed to the miner's death.

Moreover, the administrative law judge acted reasonably in citing the conflicting reviewing opinion of Dr. Naeye, who reviewed the same material as did Dr. Wecht, as well as the inconclusive autopsy opinion of Dr. Harster, to decide that claimant simply failed to meet her burden of proof under Section 718.205(c)(2). *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001,

13 BLR 2-100 (3d Cir 1989).

Further, the administrative law judge could rationally determine that the autopsy prosector's report was entitled to great probative weight. See generally *United States Steel Corporation v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982); *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991). Because Dr. Harster did not conclude that pneumoconiosis was involved in the miner's death, the administrative law judge could rationally draw the inference, under Section 718.205(c)(2), that the weight of the autopsy evidence did not establish that pneumoconiosis contributed to the miner's death in any way. See Supplemental Decision and Order on Remand at 7-8.

The administrative law judge is charged with the evaluation and weighing of the medical evidence and may draw appropriate inferences therefrom, see *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); see also *Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 1223, BLR (7th Cir. 1994); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); see also *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, BLR (6th Cir. 1994) (deference to credibility determinations).

In this case, the administrative law judge addressed the reports of Dr. Wecht, Dr. Harster and Dr. Naeye, as well as those opinions of physicians who had examined the miner before death. Because t opinion does not establish that pneumoconiosis hastened the miner's death, are not patently unreasonable, see *Cordero v. Triple A Machine Shop*, 580 F.2d 1335, 8 BRBS 744 (9th Cir. 1978), cert. denied 440 U.S. 911 (1979), and are supported by substantial evidence and contain no reversible error, we must affirm the administrative law judge's finding that pneumoconiosis did not contribute to the miner's death.

Accordingly, the Supplemental Decision and Order on Remand denying benefits is affirmed.

SO ORDERED

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge