

BRB No. 97-1463 BLA

JULIA PEHUR)
(Widow of PAUL PEHUR))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
)
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Jack R. Heneks, Jr., Uniontown, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand (91-BLA-2015) of Administrative Law Judge Mollie W. Neal 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). This survivor's claim is before the Board for the fourth time. In her prior decisions, the administrative law judge credited the miner with six months of qualifying coal mine employment and adjudicated this survivor's claim pursuant to 20 C.F.R. Part 718. The administrative law judge also found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(2), but that claimant failed to

establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). In *Pehur v. Director, OWCP*, BRB No. 95-0965 BLA (Sept. 27, 1996)(unpub.), the Board's most recent Decision and Order, we vacated and remanded the case for reconsideration of the length of the miner's coal mine employment upon consideration of the miner's duties in light of *Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988) and *Sexton v. Mathews*, 538 F.2d 88 (4th Cir. 1976). The Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.203(c) and instructed the administrative law judge to consider entitlement pursuant to 20 C.F.R. §410.490 if she again found less than ten years of coal mine employment.

On remand, the administrative law judge found that the miner's duties did not meet the function test, again found only six months of coal mine employment and found no entitlement pursuant to 20 C.F.R. Parts 727 and 718 and 20 C.F.R. §410.490. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in her length of coal mine employment determination and asserts that she is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge's computation of time spent in coal mine employment will be upheld where it is based on a reasonable method of calculation and is supported by substantial evidence in the record considered as a whole. *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). The administrative law judge, in the instant case, rationally determined that claimant established only six months of qualifying coal mine employment. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge found six months of coal mine employment established based on the Director's concession. The administrative law judge also permissibly found that the evidence of record did not establish that the miner worked at the tipple or loaded coal onto the lorry and, thus, the miner's duties were not sufficient to constitute qualifying coal mine employment as described in *Hanna, supra* and

Sexton, supra. In so finding, the administrative law judge thoroughly analyzed the affidavits and claimant's testimony and rationally concluded that the miner's duties did not include work at the tippie, but instead involved work at the coke ovens, which is not covered employment under the Act. *Hanna, supra, Sexton, supra*; see *Fox v. Director, OWCP*, 889 F.2d 1037, 13 BLR 2-156 (11th Cir. 1989); *Trull v. Director, OWCP*, 7 BLR 1-380 (1984); Decision and Order on Remand at 2-5. Further, it is within the administrative law judge's discretion as the trier-of-fact to make credibility determinations with respect to the testimony and documentary evidence of record concerning the miner's employment history. *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Consequently, the administrative law judge's finding of six months of coal mine employment is affirmed as it is supported by substantial evidence and is based on a reasonable method of calculation. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Vickery, supra*.

Finally, as the administrative law judge found only six months of qualifying coal mine employment, claimant is not entitled to any presumptions with respect to whether the miner's pneumoconiosis arose out of coal mine employment. Inasmuch as the administrative law judge concluded that there is no credible medical evidence that the miner's pneumoconiosis arose out of coal mine employment or that the miner's death was due to pneumoconiosis arising out of coal mine employment and claimant does not challenge these determinations, the administrative law judge's findings of no entitlement pursuant to 20 C.F.R. Part 727, 20 C.F.R. Part 718 and 20 C.F.R. §410.490 are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge