

BRB No. 01-0908 BLA

LENORA SANDERS)
(Widow of JUNIOR B. SANDERS))
)
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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

M. Katrina Muse, St. Augustine, Florida, for claimant.

Jeffrey S. Goldberg (Eugene Scalia, 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, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (99-BLA-1296 and 99-BLA-1297) of Administrative Law Judge Richard K. Malamphy denying benefits on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹Claimant is the surviving spouse of the deceased miner who died on August 20, 1998. Director's Exhibit 37.

amended, 30 U.S.C. §901 *et seq.* (the Act).² The instant case involves a duplicate

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No.

miner's claim filed on March 10, 1997³ and a survivor's claim filed on January 8, 1999. The administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). The administrative law judge also found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim. On appeal, claimant contends that because the Department of Labor conceded that the miner was partially disabled, she is entitled to partial benefits in the miner's claim. Claimant also asserts that the miner died due to lung cancer caused by his coal mine employment. Claimant also challenges the administrative law judge's finding regarding the length of the miner's coal mine employment. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

00-3086 (D.D.C. Aug. 9, 2001).

³The relevant procedural history of the instant case is as follows: The miner initially filed a claim for benefits with the Social Security Administration (SSA) on February 16, 1973. Director's Exhibit 32. The SSA denied the claim on July 18, 1973. *Id.* The Department of Labor denied the claim on May 28, 1981. *Id.* There is no evidence that the miner took any further action in regard to his 1973 claim.

The miner filed a second claim on March 10, 1997. Director's Exhibit 1.

In his adjudication of the miner's 1997 duplicate claim, the administrative law judge considered whether the evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Before making such a finding, the administrative law judge should have initially addressed whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).⁴ *Lisa Lee Mines v. Director*,

⁴Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). The miner's 1973 claim was denied because the miner failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 32-21. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of total disability.

OWCP [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). However, to the extent that we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability, the administrative law judge's failure to make an initial finding pursuant to 20 C.F.R. §725.309 (2000) constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

The administrative law judge, in his adjudication of the miner's claim, considered all of the evidence of record and found that it was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000).⁵ Inasmuch as no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see* 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 5-9.

Claimant, however, argues that because the Director did not contest the fact that the miner was partially disabled, she is entitled to "a minimum of partial benefits." Claimant's Brief at 2. Claimant accurately notes that the Director did not identify "partial disability" as a contested issue on Form CM-1025. *See* Director's Exhibit 49. However, the issue of "partial disability" is relevant only in the context of the Section 411(c)(5) presumption. *See* 30 U.S.C. §921(c)(5). This section provides that in the case of a miner who died on or before March 1, 1978 who was employed for twenty-five years or more in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner whose claims have been filed prior to June 30, 1982 are entitled to the payment of benefits unless "it is established that at the time of death such miner was not partially or totally disabled due to pneumoconiosis." *See* 30 U.S.C. §921(c)(5); 20 C.F.R. §718.306. Because the claims in the instant case were filed after June 30, 1982, claimant is not entitled to the Section 411(c)(5) presumption.

Although Section 725.309 has been revised, these revisions only apply to claims filed after January 19, 2001.

⁵The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability, we affirm the administrative law judge's denial of benefits in the miner's claim under 20 C.F.R. Part 718. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

We now turn our attention to the survivor's claim. Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁶ See 20 C.F.R. §§718.1, 718.202,

⁶Section 718.205(c) provides that:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

(5) Pneumoconiosis is a “substantially contributing cause” of a miner’s death if it hastens the miner’s death.

20 C.F.R. §718.205(c).

Claimant contends that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis. Dr. Wilson completed the miner's death certificate, attributing the miner's death to "adenocarcinoma of the rectum with lung [metastases]." Director's Exhibit 37. Because Dr. Wilson did not attribute the miner's lung cancer to his coal mine employment, the death certificate is insufficient to establish that the miner's death was due to pneumoconiosis. Although two physicians, Drs. Husain and Sadowski, attributed the miner's lung cancer to his coal mine employment,⁷ *see* Director's Exhibits 34, 38, the administrative

⁷In a letter dated June 2, 1998, Dr. Husain stated that:

[The miner] has had a 30-year-old exposure to coal mine work and this history, along with a chest x-ray and pulmonary function test, **suggest** evidence of coal workers' pneumoconiosis. Since he is a non-smoker, this **may very well be** the cause for his lung cancer.

Director's Exhibits 34, 38 (emphasis added).

law judge acted within his discretion in finding that the opinions of these physicians were too speculative to support a finding that claimant's lung cancer was due to his coal dust exposure. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 10. There is no other evidence of record supportive of a finding that the miner's death was due to pneumoconiosis. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis.⁸ 20 C.F.R. §718.205(c).

In a letter dated June 10, 1998, Dr. Sadowski stated that:

[The miner] was first seen in my office on January 21, 1993. After diagnostic testing he was found to have adenocarcinoma of the colon. It is my medical opinion that patient's lung cancer is not directly related to the colon cancer. He does have a past history of numerous years of working in the coal mines, which **suggest** the primary cause of the lung cancer. Let me also add he does not have history of tobacco smoking.

Director's Exhibits 34, 38 (emphasis added).

⁸Inasmuch as no party challenges the administrative law judge's finding that the evidence is insufficient to establish claimant's entitlement to the Section 718.304 presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); see 20 C.F.R. §718.304.

We finally note that claimant challenges the administrative law judge's length of coal mine employment determination. However, inasmuch as the length of the miner's coal mine employment is not a determinative factor in the administrative law judge's denial of the instant claims, the administrative law judge's error, if any, in his determination of the length of the miner's coal mine employment, is harmless. *Larioni, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge