

BRB No. 97-1141 BLA

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| IMAGENE EVANS |) | | |
| (Widow of ALLEN EVANS, JR.) |) | | |
| |) | | |
| Claimant-Petitioner |) | | |
| |) | | |
| v. |) | DATE | ISSUED: |
| |) | | |
| SOUTH EAST COMPANY |) | | |
| |) | | |
| Employer-Respondent |) | | |
| |) | | |
| DIRECTOR, OFFICE OF WORKERS' |) | | |
| COMPENSATION PROGRAMS, UNITED |) | | |
| STATES DEPARTMENT OF LABOR |) | | |
| |) | | |
| Party-in-Interest |) | DECISION and ORDER | |

Appeal of the Decision and Order of Daniel Slattery, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Rita Roppolo (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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (96-BLA-1650) of Administrative Law Judge Daniel Slattery denying benefits on a miner's claim and 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). With regard to the miner's claim, the administrative law judge found the evidence insufficient to establish a mistake in a

¹Claimant is the widow of the deceased miner, Allen Evans, Jr., who died on January 14, 1986. Director's Exhibits 1, 4.

determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310.² With regard to the survivor's claim, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits on both claims. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a mistake in a determination of fact or a change in conditions at 20 C.F.R. §725.310. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, (the Director) has filed a Motion to Remand, contending that the administrative law judge erred by failing to consider Dr. Myers' September 5, 1986 medical report. Claimant filed a brief in reply, agreeing with the Director that the administrative law judge erred by failing to consider Dr. Myers' September 5, 1986 medical report.

²The miner filed his claim on September 5, 1979. Director's Exhibit 14. As previously noted, the miner died on January 14, 1986. Director's Exhibits 1, 4. Claimant filed a survivor's claim on February 3, 1986. Director's Exhibit 1. On February 12, 1986, Administrative Law Judge Phillip J. Lesser issued a Decision and Order denying benefits on the miner's claim. Director's Exhibit 14. The bases of Judge Lesser's denial were that employer established rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), and that the evidence was insufficient to establish entitlement to benefits under 20 C.F.R. Part 410, Subpart D. *Id.* In addition, on July 3, 1986, the Department of Labor (DOL) denied benefits on the survivor's claim. Subsequently, claimant filed a letter dated August 4, 1986 with the DOL which indicated an intent to pursue her entitlement to benefits. Director's Exhibit 8. The Board construed claimant's letter as a request for modification, and remanded the case for modification proceedings on the miner's claim and, if reached, for processing of the survivor's claim. *Evans v. South East Coal Co.*, BRB No. 95-1925 BLA (Apr. 18, 1996)(unpublished Order).

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a mistake in a determination of fact or a change in conditions at 20 C.F.R. §725.310. Specifically, claimant argues, and the Director agrees, that the administrative law judge erred by failing to consider all of the relevant medical evidence of record. The administrative law judge stated that “[i]n addition to the evidence upon which Judge Lesser based his decision, there are two documents [the death certificate and Dr. Burki’s medical report] that bear upon the miner’s claim.”³ Decision and Order at 6. However, as argued by claimant and the Director, the administrative law judge failed to consider Dr. Myers’ September 5, 1986 medical report, which contains the doctor’s opinion that the miner “does show evidence of coal workers’ pneumoconiosis...[,] that the silicosis resulted from his entire exposure history[,] and...that this silicosis associated with his obstructive airway disease produced a pulmonary impairment which restricted arduous manual labor.”⁴ Director’s Exhibit 13. While an administrative law judge is not required to accept medical evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. See *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Thus, we vacate the administrative law judge’s finding that the evidence is insufficient to establish a mistake in a determination of fact or a change in conditions at 20 C.F.R. §725.310, and remand the case for further consideration of all of the relevant medical evidence of record pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). See *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 296 (6th Cir. 1994); see also *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); *Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988). If benefits are awarded in the miner’s claim, claimant is eligible for derivative entitlement. See *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989). However, if benefits are not awarded in the miner’s claim, claimant benefits from the miner’s filing date in pursuing her survivor’s claim. See *Pothering, supra*; *Smith, supra*. Therefore, if reached, the administrative law judge must consider the survivor’s claim under the regulations contained in 20 C.F.R. Part 727, and under the regulations contained in 20

³The death certificate lists myocardial infarction and coronary occlusion as the immediate causes of the miner’s death, and history of a stroke as a significant condition contributing to the miner’s death. Director’s Exhibit 4. Dr. Burki opined that the miner did not suffer from an occupational lung disease caused by coal mine employment or a pulmonary impairment. Director’s Exhibit 18.

⁴Dr. Myers opined that the miner’s silicosis did not contribute to his death. Director’s Exhibit 13.

C.F.R. Part 718, if necessary. See *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge