

BRB No. 87-1289 BLA

MARGIE L. SUTTON)
(Widow of JOHN SUTTON))

Claimant-Petitioner)

v.)

BADGER COAL COMPANY)
DATE ISSUED:
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 Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Margie L. Sutton, Elkins, West Virginia, pro se.

Stacy V. Killen (Jackson & Kelly), Charleston, West Virginia, for respondent.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and MARCELLINO, Administrative Law Judge.*

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (86-BLA-5310) of Administrative Law Judge Edward J. Murty, Jr. 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

*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) (1988).

et seq. (the Act). The miner filed for benefits on February 10, 1981, and died on December 14, 1984. Claimant filed a survivor's claim on January 31, 1985. Both claims were considered pursuant to the regulations found at 20 C.F.R. Part 718. The administrative law judge credited the miner with twenty-three years of coal mine employment and found that employer stipulated to the existence of pneumoconiosis which arose from his coal mine employment. The administrative law judge then determined that claimant failed to establish that the miner was totally disabled or that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied on the miner's and the survivor's claims. Employer responds in support of the administrative law judge's Decision and Order and the Director, Office of Workers' Compensation Programs, did not respond.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. Stark v. Director, OWCP, 9 BLR 1-36 (1986). We 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).

Upon considering the evidence pursuant to 20 C.F.R. §718.204(c)(1)-(c)(3), the administrative law judge determined that the record contains three pulmonary function studies and four blood gas studies, none of which produced qualifying results. See Director's Exhibits 16, 18, 44. Also, there is no evidence of cor pulmonale with right sided congestive heart failure in the record. As a result, the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(c)(3) is affirmed as supported by substantial evidence.

The administrative law judge next considered the medical opinion evidence of record, which consists of two medical reports and several discharge summaries from the miner's hospital care that were prepared prior to the miner's death in 1984, pursuant to 20 C.F.R. §718.204(c)(4). None of the hospital records indicate that the miner was totally disabled, and the report of Dr. Piccirillo concludes that claimant is able to perform his usual coal mine employment. See Director's Exhibits 17, 29, 44. However, the administrative law judge did not discuss the opinion of Dr. Thompson, in which it is noted that the miner had mild pneumoconiosis and was limited to walking one mile and climbing one flight of stairs. See Decision and Order at 3; Director's Exhibit 17. As the record indicates that the miner's usual coal mine employment involved walking the belt, carrying cable and shoveling spillage and

timber, this report is relevant to the issue of total disability. See Hearing Transcript at 11; McMath v. Director, OWCP, 12 BLR 1-6 (1988). As a result, we hereby vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(4) and remand the case to him for consideration of Dr. Thompson's opinion and the exertional requirements of the miner's usual coal mine employment pursuant to 20 C.F.R. §718.204(c)(4). See also Defore v. Alabama By-Products Corp., 12 BLR 1-27 (1988).

In addressing the survivor's claim pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the evidence relevant to the cause of the miner's death, which consists of an autopsy report, death certificate, and three medical reports. The final diagnoses of the autopsy report are 1)lungs with apparent bronchiogenic carcinoma metastatic to chest wall 2)emphysema of superior lobes of lungs with bullae of left apex 3)pulmonary anthracosis and silicosis with nodular silica islets and 4)pulmonary fibrosis with fibrous pleural adhesions and fibrocalcific alterations. See Director's Exhibit 44. The death certificate, which was completed by Dr. Rose, lists the immediate cause of death as respiratory failure due to metastatic carcinoma of lung. See Director's Exhibit 43. Drs. Calfrey and Hansbarger reviewed the miner's medical records and concluded that the miner's pneumoconiosis did not contribute to his demise. See Director's Exhibit 44. Dr. Rose stated, in a letter dated October 31, 1986, that the miner had pneumoconiosis. The doctor, however, did not state that the pneumoconiosis contributed to or caused the miner's death. See Claimant's Exhibit 1. The record also contains a second copy of Dr. Rose's October 31, 1986 letter, which includes a handwritten note stating that the miner's pneumoconiosis "was substantially a contributing factor in his death." See Claimant's Exhibit 1. The administrative law judge permissibly discredited the handwritten portion of Dr. Rose's letter as it is an unreasoned and undocumented opinion. See Decision and Order at 4; Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987). As a result, the administrative law judge's findings in regard to Dr. Rose's report are affirmed as they are supported by substantial evidence.

The administrative law judge then considered the remaining evidence of record relevant to this issue, and determined that claimant failed to establish a connection between the miner's death and his pneumoconiosis. See Decision and Order at 4. However, subsequent to the issuance of the administrative law judge's Decision and Order in this case, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that it would adopt the standard enunciated by the United States Court of Appeals for the Third Circuit in Lukosevicz v. Director, OWCP, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989), which holds that any condition that actually hastens the miner's death is a substantially

contributing cause of death for purposes of 20 C.F.R. §718.205. Shuff v. Cedar Coal Co., No. 91-2572 F.2d , BLR (4th Cir. Jun. 18, 1992). As the Fourth Circuit has only recently issued the Shuff standard, neither the administrative law judge nor the parties herein considered how the application of the intervening law would affect the instant case. Consequently, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.205(c) and remand the case for application of the Shuff standard. See Lynn v. Island Creek Coal Co., 12 BLR 1-146 (1989); see also Tackett v. Benefits Review Board, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). It is further noted that the determination of whether to re-open the record on remand, in light of this intervening law, is within the province of the administrative law judge. See 20 C.F.R. §725.456(e); Lynn, *supra*; see also Tackett, *supra*.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

FRANK J. MARCELLINO
Administrative Law Judge