

BRB No. 92-0174 BLA

MOLLIE RUTH BESS )  
(Widow of JOHN F. BESS) )

)  
Claimant-Petitioner )

)  
v. )

)  
SEWELL 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 Revised Decision and Order of George P. Morin, Administrative Law Judge, United States Department of Labor.

Mollie Ruth Bess, Fenwick, West Virginia, *pro se*.

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

Before: , Acting Chief Administrative Appeals Judge, and ,  
Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals, without the assistance of counsel, the Decision and Order (87-BLA-2721) of Administrative Law Judge George P. Morin denying benefits on a 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 case involves a duplicate claim issue. The miner filed a claim for benefits on October 27, 1971 which was denied on March 7, 1979 because the miner was doing his usual coal mine employment before July 1, 1973 and the record contained no evidence of complicated pneumoconiosis or that his work circumstances had changed. The miner filed a second claim for benefits on October 2, 1984. The miner died on May 3, 1985. Claimant filed a survivor's claim on May 3, 1986. Based on the date of filing of the claims, the administrative law judge considered the claims pursuant to 20 C.F.R. Part 718 and determined that the miner established at least thirty-nine plus years of coal mine employment. The administrative law judge then found that the miner established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge then found that the miner failed to establish total disability pursuant to 20 C.F.R. §718.204(c) and that claimant failed to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis substantially contributed to his death pursuant to 20 C.F.R.

§718.205. Accordingly, benefits were denied on both the miner's and the survivor's claims. Claimant appeals these denials. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

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).

Initially, it is noted that the administrative law judge erred in failing to determine whether the miner established a material change in conditions pursuant to §725.309. However, any error is harmless as the record contains evidence which, if credited, could change the prior administrative result. See *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990).

Regarding the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge properly found that the record contains one pulmonary function study which is non-qualifying pursuant to 20 C.F.R. §718.204(c)(1). See Director's Exhibit 12; Decision and Order at 8. The administrative law judge also properly found that the record contains no blood gas study evidence and no evidence of cor pulmonale with right sided congestive heart failure. See Decision and Order at 9. As a result, the administrative law judge's findings that the miner failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) are affirmed as they are supported by substantial evidence.

Pursuant to 20 C.F.R. §718.204(c)(4), the administrative law judge considered

the medical opinion evidence of record which consists of hospital records, three physicians' opinions, an autopsy report and a death certificate. See Director's Exhibits 10-12; Employer's Exhibits 1-3. Upon considering this evidence, the administrative law judge properly determined that the only opinion which addressed the degree of the miner's disability was the report of Dr. Caffrey which stated that the miner's pneumoconiosis would not have disabled him prior to his death. See Decision and Order at 9; Employer's Exhibit 2. The administrative law judge then permissibly determined that the preponderance of the medical opinion evidence did not establish that the miner was totally disabled prior to his death. See Decision and Order at 10; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) *aff'd*, 9 BLR 1-104 (1986). As a result, the administrative law judge's finding that the miner failed to establish total disability pursuant to Section 718.204(c)(4) is affirmed as it is supported by substantial evidence. Further, as the miner has failed to establish total disability, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge's denial of benefits on the miner's claim is affirmed. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Regarding claimant's survivor's claim, the administrative law judge considered all of the medical opinion evidence of record pursuant to Section 718.205. Dr. Gomez, in the miner's death certificate, stated that pneumoconiosis was a significant condition contributing to death. See Director's Exhibit 10. Drs. Harnsberger and

Caffrey, the only other physicians who rendered opinions as to the cause of the miner's death, both stated that pneumoconiosis in no way contributed to the miner's demise. See

Director's Exhibit 11; Employer's Exhibits 1-3. The administrative law judge permissibly found that the preponderance of the medical opinion evidence does not establish that the miner's death was due to pneumoconiosis or that pneumoconiosis substantially contributed to his death. See Decision and Order at 10; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Lafferty, supra*. As a result, the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis substantially contributed to the miner's death and the administrative law judge's denial of benefits on the survivor's claim are affirmed as they are supported by substantial evidence.

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

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

## Administrative Appeals Judge