BRB No. 99-0406 BLA

IRENE DOTSON (Widow of TERRY M. DOTSON) Claimant-Petitioner v. VANHOOSE COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Irene Dotson, Stopover, Kentucky, *pro se.*

Richard Davis (Arter & Hadden LLP), Washington, D.C., for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (95-BLA-1048) of Administrative Law Judge Robert L. Hillyard on a miner's claim as well as 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).[1] On April 17, 1980 the miner filed a claim for benefits. Director's

[1] This case arises within the jurisdiction of the United States Court of Appeals for

Exhibit 46. This claim was denied by the district director on October 25, 1980. *Id*. The miner filed a second claim in August, 1990. Director's Exhibit 47. This claim was denied by the district director on January 16, 1991. *Id.* at 26. In November, 1992 the miner filed a third claim.[2] Director's Exhibit 1. On June 23, 1993 the miner died. Director's Exhibit 27. In October, 1993 claimant filed a survivor's claim. Director's Exhibit 22. The administrative law judge found that the miner worked for three years and nine months in coal mine employment. Decision and Order at 6. With respect to the miner's claim, the administrative law judge found that the evidence was insufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 13-14. Further, the administrative law judge found that the evidence was insufficient to establish that the miner was totally disabled due to a respiratory or pulmonary impairment at the time of his death, *see* 20 C.F.R. §718.204(c). Decision and Order at 14. With regard to the survivor's claim, the administrative law judge again found that the evidence was insufficient to establish the existence of pneumoconiosis. *Id.* at 15. In addition, the administrative law judge found that the miner's death was not due to pneumoconiosis under 20 C.F.R. §718.205(c). Decision and Order at 15-16. The administrative law judge also noted that the presumption contained in 20 C.F.R. §718.304 does not apply. Decision and Order at 16. Accordingly, benefits were denied on both the miner's claim and the survivor's claim. Claimant appeals, arguing generally that the administrative law judge erred in denying benefits. Employer/carrier has submitted a response brief advocating affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a response addressing the merits of this case.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by

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the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] Since we affirm the administrative law judge's denial of benefits in the duplicate miner's claim on the merits, we hold that the administrative law judge's error in not making a material change in conditions finding in the duplicate miner's claim is harmless. *See* 20 C.F.R. §725.309; *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address the miner's claim. With regard to Section 718.204(c)(1), the administrative law judge accurately found that the sole pulmonary function study of record was not qualifying for total disability under the regulations.[3] Director's Exhibit 47 at 46; Decision and Order at 15. Therefore, we affirm the administrative law judge's finding that the pulmonary function study evidence was insufficient to establish the existence of total disability pursuant to Section 718.204(c)(1).

At Section 718.204(c)(2), the administrative law judge found that the results of the arterial blood gas studies were not qualifying under the regulations. Decision and Order at 15. The administrative law judge noted the results of eight arterial blood gas studies. *Id*. at 9. None of these studies produced qualifying values. Director's Exhibits 5, 20, 28, 47. In addition, the record contains the results of four blood gas studies that were not noted by the administrative law judge. Three of these studies produced non-qualifying values. Director's Exhibit 15 at 4, 10, 54. One of these studies was qualifying. Director's Exhibit 15 at 11. We hold that the administrative law judge's error in failing to consider these blood gas studies is harmless, inasmuch as the overwhelming weight of the blood gas study evidence supports the administrative law judge's determination that the evidence is insufficient to establish total disability under Section 718.204(c)(2). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988). Therefore, we affirm the administrative law judge's subsection (c)(2) finding.

The administrative law judge did not make a finding regarding Section 718.204(c)(3). We hold, however, as a matter of law, that the evidence is insufficient to establish total disability pursuant to Section 718.204(c)(3) since there is no medical evidence that the miner suffered from cor pulmonale with right sided congestive heart failure.

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

With regard to Section 718.204(c)(4), the administrative law judge found that although Dr. Fritzhand stated that the miner does not appear capable of performing work as a miner, he did not attribute this total disability to a respiratory or pulmonary impairment. The administrative law judge correctly stated that Dr. Fritzhand specifically attributed the miner's total disability to complications arising from his insulin dependent diabetes mellitus. Decision and Order at 15; Director's Exhibit 47 at 44. While Dr. Fritzhand additionally diagnosed dyspnea secondary to excessive cigarette consumption, Director's Exhibit 47 at 44, he specifically stated, "There is no pulmonary diagnosis." *Id.* at 44. Thus, since there is no medical opinion of record diagnosing total respiratory or pulmonary disability,[4] we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to Section 718.204(c)(4).

With respect to the survivor's claim, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995), inasmuch as none of the medical evidence of record links the miner's death to pneumoconiosis. The administrative law judge correctly recognized that Dr. Chang noted that the cause of death was multifactorial, but that Dr. Chang did not include the miner's coal mine employment as one of the factors. Decision and Order at 15; Director's Exhibits 20, 28. The administrative law judge correctly found that Drs. Lane and Caffrey stated that the miner's death was not contributed to or hastened by pneumoconiosis. Director's Exhibit 43; Employer's Exhibit 1.[5] The administrative law judge also accurately noted that Dr. Espiritu, who signed the death certificate, listed brain stem infarct as the immediate cause of death and did not attribute the miner's death to exposure to coal dust. Director's Exhibits 19, 20, 27.[6] The administrative law judge properly noted that 20 C.F.R. §718.304 was not applicable to the facts of this case.

Since we affirm the administrative law judge's finding that the evidence was

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[4] Dr. Lane stated that there was little evidence about the miner's pulmonary function. Dr. Lane added that there was no evidence that the miner had an impairment arising from coal mine employment. Director's Exhibit 43, Report at 4. Dr. Caffrey stated that the miner does not have coal workers' pneumoconiosis or any other occupational pneumoconiosis, so those disease entities could not have disabled him. Director's Exhibit 43; Employer's Exhibit 1, Report at 4.

[5] Dr. Lane stated that death was not related to coal workers' pneumoconiosis, and was in no way hastened by coal workers' pneumoconiosis which the miner did not have. Director's Exhibit 43.

[6] The district director listed a Dr. Hutchins as reviewing autopsy slides and concluding that death was not related to pneumoconiosis in any way. Director's Exhibit 45.

insufficient to establish a totally disabling respiratory or pulmonary impairment or death due to pneumoconiosis, we decline to address the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis, since total disability is a prerequisite for entitlement in a miner's claim, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987), and death causation is a prerequisite for entitlement in a survivor's claim. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993).[7]

[7] The administrative law judge properly found that the presumptions at 20 C.F.R. §§718.305 and 718.306 are not applicable to the facts of this case. Decision and Order at 14; 20 C.F.R. §718.305(e); Director's Exhibits 1, 19, 20, 27. We therefore affirm these findings by the administrative law judge.

Accordingly, the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge