

BRB No. 01-0474 BLA

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

Appeal of the Decision and Order - Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

George A. Mills III, Huntington, West Virginia, for claimant.

Lenore S. Ostrowsky (Greenberg Traurig LLP), Washington, D.C., for employer.

Dorothy L. Page (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits (96-BLA-0876 and 00-BLA-0332) of Administrative Law Judge Gerald M. Tierney on a duplicate living 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).² The miner filed a duplicate claim for benefits on March 21, 1995.³ In a Decision and Order dated May 22, 1997, Administrative Law Judge George P. Morin credited the miner with seventeen years of coal mine employment and considered the miner's claim under the applicable regulations at 20 C.F.R. Part 718 (2000). After finding the biopsy evidence submitted in connection with the miner's duplicate claim sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2) (2000), Judge Morin found that the miner established a material change in conditions under 20 C.F.R. §725.309 (2000). Considering

¹Claimant is the surviving spouse of the deceased miner, who died on December 4, 1998. Director's Exhibit 7. The miner's death certificate lists the causes of the miner's death as oat cell carcinoma of the lung, respiratory failure and chronic obstructive pulmonary disease. *Id.*

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 a 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*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

³The miner filed an initial claim on October 19, 1983, which was denied on March 21, 1985 by the district director, who found that claimant did not establish any of the elements of entitlement under 20 C.F.R. Part 718 (2000). *See* 20 C.F.R. Part 718; Director's Exhibit 24. The miner took no further action in pursuit of benefits until filing a duplicate miner's claim on March 21, 1995. Director's Exhibit 1.

the claim on the merits, Judge Morin further found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) (2000) and 718.203(b) (2000), and sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Consequently, Judge Morin awarded benefits. Employer appealed. The Board affirmed Judge Morin's decision awarding benefits in a Decision and Order dated May 27, 1998. *Woodall v. Peabody Coal Co.*, BRB No. 97-1352 BLA (May 27, 1998)(unpublished). Employer then filed a Motion for Reconsideration with the Board. The Board granted employer's motion, but denied the relief requested in an Order dated August 10, 1998. *Woodall v. Peabody Coal Co.*, BRB No. 97-1352 BLA (Aug. 10, 1998)(unpublished Order).

Employer filed an appeal with the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises.⁴ The court vacated Judge Morin's finding that the evidence was sufficient to establish total disability due to pneumoconiosis under Section 718.204(b) (2000). *Peabody Coal Co. v. Director, OWCP [Woodall]*, No. 98-2469 (4th Cir. Nov. 10, 1999)(unpublished); *see* 20 C.F.R. §718.204(c).⁵ The court held that Judge Morin erred by deferring to the opinion of Dr. Ranavaya as an examining physician in a manner inconsistent with the court's holdings in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). *Id.*, slip op. at 6-7. The court thus remanded the case for further consideration of the evidence with regard to total disability causation, and instructed that the administrative law judge could reopen the record for receipt of additional evidence. *Id.*, slip op. at 7.

⁴Because the miner's coal mine employment occurred in West Virginia, the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 an Order dated January 14, 2000, the Board remanded the miner's claim to the Office of Administrative Law Judges for further consideration consistent with the opinion of the United States Court of Appeals for the Fourth Circuit. *Woodall v. Peabody Coal Co.*, BRB No. 97-1352 BLA (Jan. 14, 2000)(unpublished Order). While the miner's claim was pending before the United States Court of Appeals for the Fourth Circuit, the miner died on December 4, 1998, Director's Exhibit 7, and claimant filed a survivor's claim on June 7, 1999, Director's Exhibit 1. In an Order dated February 4, 2000, Administrative Law Judge Thomas M. Burke consolidated the remanded living miner's claim and the survivor's claim.

The case was assigned to Administrative Law Judge Gerald M. Tierney (the administrative law judge), who held a hearing on October 19, 2000. At the hearing, claimant's counsel stated that claimant was waiving her right to an oral hearing and requesting that a decision be made on the record, as claimant was unable to attend the hearing due to illness. Hearing Transcript at 6. In his Decision and Order dated January 26, 2001, the administrative law judge credited the miner with seventeen years of coal mine employment, and properly stated that the regulations at 20 C.F.R. Part 718 apply to the miner's and survivor's claims in the instant case. The administrative law judge found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) and total disability pursuant to Section 718.204(c) (2000). The administrative law judge also found that the presumption that the miner's pneumoconiosis arose from his greater than ten years of coal mine employment was not rebutted pursuant to Section 718.203(b) (2000). The administrative law judge further determined, however, that the evidence of record was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000), and insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits in both the miner's and survivor's claims. On appeal, claimant generally contends that the administrative law judge erred in denying benefits in the miner's and survivor's claims. Employer/carrier responds in support of the administrative law judge's decision denying benefits, and urges the Board to affirm the denial of benefits for claimant's failure to provide a sufficient basis for review of the administrative law judge's findings. The Director, Office of Workers' Compensation Programs, has filed a limited response, noting his belief that the instant case is not affected by any of the revisions to the regulations.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We agree with employer that claimant's Petition for Review and brief fails to provide

an adequate basis for review of the administrative law judge's Decision and Order. Claimant's brief neither raises any substantive issues nor identifies any error on the part of the administrative law judge in determining that the weight of the evidence of record was insufficient to establish that the miner's totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(b) (2000), *see* 20 C.F.R. §718.204(c), and insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) (2000). *See* 20 C.F.R. §718.205(c). Claimant merely refers to medical evidence favorable to her claim. We thus affirm the administrative law judge's findings under Sections 718.204(b) (2000) and 718.205(c) (2000), and the consequent denial of benefits in the miner's and the survivor's claims. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *see* 20 C.F.R. §§718.204(c) and 718.205(c).

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

BETTY JEAN HALL
Administrative Appeals Judge

