

BRB No. 92-2177 BLA

JULIA PEHUR )  
(Widow of PAUL PEHUR) )

)  
Claimant-Petitioner )

)  
v. )

)  
) DATE ISSUED:  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

)  
Respondent ) DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Jack R. Heneks, Jr., Uniontown Pennsylvania, for claimant.  
Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (91-BLA-2015) of Administrative Law Judge Mollie W. Neal 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 is before the Board for the second time. The miner died on January 22, 1975 and claimant filed a survivor's claim on January 30, 1975. This claim was denied by the district director on September 14, 1975. Claimant thereafter requested a formal hearing, but the district director denied reconsideration of the claim on March 20, 1980. On July 14, 1980, claimant sent a letter to the Department of Labor indicating a change in counsel and submitting an autopsy report. Director's Exhibit 14. No action was taken on this letter. Claimant then filed a second claim on February 1, 1982 which was found to have merged with the first claim by Administrative Law Judge George P. Morin, who also denied the second claim as a duplicate claim pursuant to 20 C.F.R. §725.309. On appeal, the Board held that the first claim was never finally

denied and that the second claim merged with the first claim. The Board further held that a letter filed by claimant in July 1980 constituted a request for modification which kept the first claim open. The Board then vacated the Decision and Order denying benefits and remanded the claim to the district director for consideration of the merits of the merged claim under the applicable regulations as of the date of

filing of the initial claim. See *Pehur v. Director, OWCP*, BRB No. 87-1309 BLA (Aug. 29, 1988)(unpub.). On remand, Administrative Law Judge Mollie W. Neal considered the claim pursuant to 20 C.F.R. Part 718 and found that claimant failed to establish that the miner was a coal miner within the meaning of the Act. Accordingly, benefits were denied. Subsequent to the issuance of the Decision and Order, Administrative Law Judge Neal issued an Order Rescinding Decision and Order on the grounds that her decision failed to address the six months of coal mine employment stipulated to by the Director, Office of Workers' Compensation Programs (the Director). See Decision and Order at 2. Administrative Law Judge Neal issued a revised Decision and Order in which she found that the miner had six months of coal mine employment and that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge then found that claimant failed to establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in determining the amount of the miner's coal mine employment and in finding that the miner's pneumoconiosis did not arise from coal mine employment. The Director has chosen not to respond to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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).

On appeal, claimant contends that the administrative law judge erred in failing to consider the miner's above ground work at the coal mine and coke plant as coal mine employment. The record contains numerous affidavits from the miner's co-workers, as well as testimony from claimant, which describe the miner's work duties. In her Decision and Order, the administrative law judge credited all of the affidavit evidence and claimant's testimony and found that the weight of the evidence demonstrates that the miner's coal mine employment was as a coke oven worker, except for the six months of underground coal mine employment stipulated to by the Director. See Decision and Order at 6-7. The administrative law judge then found that the miner had only six months of qualifying coal mine employment, and that his work as a coke oven worker is not coal mine employment within the meaning of the Act. See Decision and Order at 8. We note, however, that the record contains credited evidence that the miner worked "with the coal at the lorry by getting it ready for the coke ovens, sizing it and loading it onto and into the coke ovens." See Claimant's Exhibit 3; Decision and Order at 6-7; see also Director's Exhibit 24 at 24-25. In *Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988), the

United States Court of Appeals for the Third Circuit, the circuit in which this claim arises, cited *Sexton v. Mathews*, 538 F.2d 88 (4th Cir. 1976), in holding that a barge worker's duties were qualifying coal mine employment. In *Sexton*, the United States Court of Appeals for the Fourth Circuit held that a miner's job of shoveling coal from the tipple into the lorry fell within the statutory definition of the work of preparing coal. The Court further stated that:

It is of no consequence that the loaded coal was destined for the coke ovens. The danger of inhaling coal dust is neither lessened nor aggravated by the ultimate use of the coal. Since loading coal at a coal mine is considered a part of preparing coal, we perceive no sound reason for excluding the loading of coal at a mine simply because it is to be hauled to a coke oven.

See *Sexton*, 538 F.2d at 89.

In the present case, as there is evidence that some of the miner's job duties included sizing coal, shoveling coal into the lorry and getting coal ready for coke ovens, it appears that the miner may have qualifying coal mine employment in addition to the previously mentioned six months. See *Hanna, supra*. In light of the reasoning of the Court in *Hanna*, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for the administrative law judge to reconsider the evidence of record and make further findings as to the length of the miner's coal mine employment, and to reconsider claimant's entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718. See *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989); *Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge