BRB No. 97-1300 BLA

BEATRICE DOTSON (Widow of THURMAN DOTSON)	)	
Claimant-Petitioner	)	
v.	)	
VIRGINIA ENERGY COMPANY	)	DATE ISSUED: _____
and	)	
LIBERTY MUTUAL 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 On Remand of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Beatrice Dotson, Hurley, Virginia, *pro se*.

John C. Johnson (Gentry Locke Rakes & Moore), Roanoke, Virginia, for employer/carrier.

Jennifer U. Toth (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order On Remand (95-BLA-0223) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) denying benefits on a deceased 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).[1] The

[1]This case's procedural history is set forth in the Board's Decision and Order in *Dotson v. Virginia Energy Co.*, BRB No. 96-0608 BLA (Oct. 30, 1996)(unpub.) To reiterate briefly, the Board, in *Dotson v. Virginia Energy Co.*, BRB No. 87-661 BLA (Sept. 27, 1989), affirmed Administrative Law Judge Victor J. Chao's denial of benefits. Judge Chao found that claimant established the existence of pneumoconiosis, but failed to establish total disability under 20 C.F.R. Part 718 in the deceased miner's claim or death due to pneumoconiosis in the survivor's claim. By letter dated January 19, 1990, claimant contacted the office of the district director. The district director, who considered claimant's letter to be a request for modification, never made a determination on the merits of this request. Claimant filed a new claim on January 28, 1994, Director's Exhibit 1, which was denied by the district director. Claimant requested a hearing, which was held before Administrative Law Judge Michael P. Lesniak (the administrative law judge.) The administrative law judge denied claimant's 1994 claim under 20 C.F.R. §725.309(d) as a duplicate

administrative law judge found that claimant failed to establish modification pursuant to 20 C.F.R. §725.310. The administrative law judge also found that claimant failed to establish total disability under 20 C.F.R. §718.204(c) in the deceased miner's claim or that the miner's death was due to pneumoconiosis under 20 C.F.R. §205(c) in the survivor's claim. Accordingly, benefits were denied.

Employer/carrier (employer) responds to claimant's *pro se* appeal, urging affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand the case, contending that the administrative law judge committed reversible error by failing to determine whether the physical limitations listed in Dr. Berry's medical report, when compared to the exertional requirements of the deceased miner's usual coal mine employment, are sufficient to establish total disability in the deceased miner's claim. Employer has not responded to the Director's Motion.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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 administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by 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).

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survivor's claim. Accordingly, benefits were denied.

Claimant appealed. The Board agreed with the contention of the Director, Office of Workers' Compensation Programs, that the administrative law judge erred in denying claimant's 1994 filing on procedural grounds without addressing claimant's 1990 request for modification. *Dotson v. Virginia Energy Co.*, BRB No. 96-0608 BLA (Oct. 30, 1996)(unpub.) The Board held that claimant's 1990 letter is properly considered a request for modification, and vacated the administrative law judge's denial of benefits. The Board remanded the case for consideration of claimant's request for modification in both claims under 20 C.F.R. §725.310.

The Director seeks a remand of the case for reconsideration of the evidence relevant to the issue of total disability at Section 718.204(c)(4). The administrative law judge noted that the findings made by Administrative Law Judge Victor J. Chao (Judge Chao), namely that the evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a), but does not establish total disability under Section 718.204(c) or that the miner's death was due to pneumoconiosis, had been affirmed by the Board. The administrative law judge indicated that although claimant does not agree with these conclusions, there is no mistake in a determination of fact under Section 725.310. The administrative law judge next found that no new "documentary evidence" was submitted subsequent to Judge Chao's denial of the claims and the Board's affirmance thereof, *see* Decision and Order On Remand at 3. He determined that the only additional evidence is claimant's testimony at the hearing before the administrative law judge.[2]

The administrative law judge then considered the objective studies of record and Dr. Berry's medical report under Section 718.204(c). He found that the record contains no objective test which resulted in qualifying values under Section 718.204(c)(1) or (c)(2). He further found that there is no medical opinion that the miner suffered from cor pulmonale with right sided congestive heart failure under Section 718.204(c)(3). The administrative law judge also found that no physician stated that the miner had a totally disabling respiratory impairment under Section 718.204(c)(4), and indicated, "In order to meet the criteria for modification set forth in [*Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995)], this tribunal has reviewed the previous report of Dr. Berry, the only medical report of record besides the death certificate." Decision and Order On Remand at 4. The administrative law judge weighed Dr. Berry's medical report and found, "Dr. Berry diagnosed mild to

[2]The administrative law judge erred in so finding. Dr. Berry's medical report was the only medical opinion of record when the claims were originally considered by Judge Chao in 1986. *See* Director's Exhibit 26 at 169. The clinical progress notes contained at Director's Exhibit 11 and the reports of Drs. Salton and Gomez, Director's Exhibits 12 - 14, were submitted in connection with claimant's request for modification, *see* Director's Exhibit 27.

moderate chronic obstructive pulmonary disease, bronchitis, and asthma, all of which were related to coal mine employment, but did not conclude that these conditions caused total disability." *Id.* The administrative law judge thus found that claimant failed to establish, by a preponderance of the evidence, that the miner was totally disabled due to pneumoconiosis under Section 718.204.

The administrative law judge next found that claimant failed to meet her burden to establish that the miner's death was caused by pneumoconiosis or that pneumoconiosis contributed to or hastened the miner's death in any way, since he found no competent medical evidence which links the miner's death to pneumoconiosis. Specifically, the administrative law judge noted the *hastening death* standard set forth 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),[3] and noted that the miner's death certificate lists the cause of death as cardiac arrhythmia due to congestive cardiomyopathy, Director's Exhibit 9. Accordingly, benefits were denied.

In support of his Motion to Remand, the Director argues that although the administrative law judge correctly noted that Dr. Berry did not affirmatively state that the miner was totally disabled from a pulmonary standpoint, the administrative law judge failed to recognize that Dr. Berry listed physical limitations which may be due to the miner's pulmonary disease, Director's Exhibit 26 at 231. The Director asserts that if the administrative law judge determines that these physical limitations

[3]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). The administrative law judge's reference to the decision of 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) is harmless as the United States Court of Appeals for the Fourth Circuit adopted *Lukosevicz* in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

constitute Dr. Berry's independent assessment of the miner's condition, he should compare the limitations with the exertional requirements of the deceased miner's usual coal mine employment as a car dropper at the tipple to determine whether the miner was totally disabled. The Director thus seeks a remand of the case for reconsideration of Dr. Berry's report, along with the medical reports of record rendered by Drs. Salton and Gomez. The Director further asserts that if total disability is established on remand in the deceased miner's claim, invocation of the presumption provided at 20 C.F.R. §718.305 would be established, and, if not rebutted, claimant would then be entitled to benefits in the miner's claim, and automatically as a survivor, without having to establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §725.212.

Initially, we affirm the administrative law judge's denial of benefits in the separate survivor's claim, inasmuch as the evidence of record is insufficient to meet claimant's burden under *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). The only relevant evidence is the miner's death certificate which does not mention pneumoconiosis and indicates that the miner's death was due to coronary conditions. Accordingly, entitlement to benefits in the instant case can be awarded only through a finding of entitlement in the deceased miner's claim.

We vacate the administrative law judge's finding that claimant failed to establish total disability in the deceased miner's claim under Section 718.204(c). The record contains evidence which, if fully credited, is sufficient to establish total disability under Section 718.204(c)(4), and a finding of total disability at Section 718.204(c) based on the totality of the relevant evidence, would meet claimant's burden on modification at Section 725.310 under *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In this regard, we note that the administrative law judge, in considering claimant's request for modification, mischaracterized Dr. Berry's report as "the only medical report of record besides the death certificate." Decision and Order On Remand at 4. As discussed *supra* at n.2, claimant submitted medical evidence in support of her request for modification, including the medical opinions of Drs. Salton and Gomez. Thus, the record, as it now stands, is as follows: In his April 20, 1981 report of the miner's physical examination Dr. Berry diagnosed, *inter alia*, "COPD. Mild to moderate," which he related to the miner's thirty-six years of coal mine employment. Director's Exhibit 26 at 229. The "Medical Assessment" section of Dr. Berry's report lists the miner's physical limitations. *Id*. By report dated December 2, 1980, Dr. Gomez diagnosed pneumoconiosis, chronic obstructive lung disease, chronic bronchitis, lateral ischemia and anteroseptal infarct. Director's Exhibit 13. Dr. Gomez discussed the miner's most recent coal mine employment on the tipple and as a coal car dropper, and further opined,

> Because of the objective, physical-science and x-ray results being consistent with his heart and lung condition, he is totally disabled and permanently unable to perform any arduous labor which involves his coal mining duties. Mr. Dotson should not be exposed to any more of the dust related environment of coal mining because his chronic obstructive lung disease is a chronic, progressive, and irreversible condition. This patient is totally and permanently disabled to do any gainful employment.

Director's Exhibit 13. Dr. Gomez reiterated his diagnosis and findings by letter dated November 13, 1984. Director's Exhibit 14. Dr. Salton, in his report dated November 11, 1980, indicated that the miner's x-ray showed advanced pneumoconiosis. Director's Exhibit 12. Dr. Salton also detailed medication the miner was then given for symptomatic relief of his cough and shortness of breath. *Id.* The record also contains clinical progress notes which include an Impression of pneumoconiosis 1/1 T dated October 28, 1980. Director's Exhibit 11. On remand, the administrative law judge must address the record in its totality in determining the issues of modification and claimant's entitlement to benefits under the Act. *See Jessee, supra.*

In this regard and in light of the fact that it appears that claimant did not proffer certain medical evidence, including the 1980 reports of Drs. Gomez and Salton and the 1984 report of Dr. Gomez, until the case was considered in conjunction with claimant's 1990 request for modification, the administrative law judge must also consider, if reached, whether a reopening of the case on modification under Section 725.310 would render justice under the Act. *See McCord v. Cephas,* 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). If, on remand, the administrative law judge finds that claimant has established modification under Section 725.310, and has met her burden to establish total disability under Section 718.204(c) on the merits of the deceased miner's claim, the administrative law judge must then consider claimant's entitlement to benefits pursuant to the rebuttable presumption provided at 20 C.F.R. §718.305.

Accordingly, the administrative law judge's Decision and Order On Remand is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The Director's Motion to Remand is therefore granted.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge