

BRB No. 00-0207 BLA

SALLY K. BOSSART )  
(Widow of DONALD BOSSART) )  
 )  
 Claimant-Petitioner )  
 v. )  
 )  
 DIRECTOR, OFFICE OF WORKERS' ) DATE ISSUED:  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Sally K. Bossart, Scottdale, Pennsylvania, *pro se*.

Rita Roppolo (Henry L. Solano, 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order on Remand (98-BLA-1007) of Administrative Law Michael P. Lesniak denying benefits on a miner's claim and 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). The miner's claim is before the Board for the second time. Initially, applying the regulations

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<sup>1</sup>Claimant is Sally K. Bossart, widow of Donald Bossart, who filed her claim for benefits on September 24, 1997. Director's Exhibit 40. The miner's first claim for benefits, filed on March 7, 1985, was finally denied on April 14, 1986. Director's Exhibit 11. The miner's second claim was filed on July 26, 1989. Director's Exhibit 1.

at 20 C.F.R. Part 718, on the miner's claim, Administrative Law Judge George P. Morin, credited the miner with four years and three months of coal mine employment and noted the parties' stipulation to total respiratory disability. Director's Exhibit 29 at 1, 5. Additionally, Judge Morin found that the miner established a material change in conditions pursuant to 20 C.F.R. §725.309(d) and failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 29 at 2-3, 9-12. Accordingly, benefits were denied on the miner's claim.

The miner appealed to the Board. Director's Exhibit 30. On appeal, the Board affirmed the administrative law judge's length of coal mine employment finding. Director's Exhibit 34 at 2-3. Additionally, the Board granted the request of the Director, Office of Workers' Compensation Programs (the Director), and remanded this case for the development of a complete, credible pulmonary evaluation pursuant to 20 C.F.R. §§725.405, 725.406. Director's Exhibit 34 at 3-4. The Board summarily denied the miner's Motions for Reconsideration on January 22, 1996 and April 2, 1996. Director's Exhibits 35, 37.

The miner died on April 6, 1996. Director's Exhibit 44. Claimant notified the Board of the miner's death on April 15, 1996. Director's Exhibit 38. In response, the Board notified claimant that she may file a petition for modification.<sup>2</sup> Director's Exhibit 39. Thereafter, claimant filed her survivor's claim.

Administrative Law Judge Michael P. Lesniak (hereinafter, the administrative law judge) noted that the Director stipulated to eight years of coal mine employment. Hearing Transcript at 13; Decision and Order at 3. On the miner's claim, the administrative law judge considered the old and new evidence and found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. Decision and Order at 11-12. The administrative law judge also found that

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<sup>2</sup>The district director processed the survivor's claim as a petition for modification of the miner's claim and as a separate survivor's claim. However, as Judge Michael P. Lesniak notes, because the Board had vacated Judge Morin's denial of the miner's claim, there was no denial of this claim as required by 20 C.F.R. §725.310(a). Therefore, the miner's duplicate claim is still viable, and the survivor's claim cannot also be treated as a petition for modification of the miner's duplicate claim.

claimant established total respiratory disability, but failed to establish that the miner's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order at 13-14. Accordingly, benefits on the miner's claim were denied. On the survivor's claim, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order at 14-15. Accordingly, benefits on the survivor's claim were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits on the miner's and survivor's claims. The Director has filed a motion to affirm the denial of benefits in the survivor's claim and remand the miner's claim.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). 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).

Initially, the administrative law judge issued an order denying claimant's motion for a directed verdict on the miner's duplicate claim. Claimant noted that when the miner's claim was before the Board, it vacated the denial and remanded this case to the district director for a complete, credible pulmonary examination; the Director delayed providing the examination, and the miner subsequently died. Therefore, claimant contended that the Director should be estopped from defending his claim because the Director's failure to provide an examination of the miner prior to his death prevented her from presenting the evidence necessary to establish entitlement to benefits.

Considering this issue in light of *Lane Hollow Coal Co. v. Director, OWCP, [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), the administrative law judge found that claimant had not established that sanctions in the form of a directed verdict or default judgment are appropriate remedies on the facts of this case. Order Denying Claimant's Motion for a Direct [*sic*] Verdict at 5. Citing 20 C.F.R. §802.406, the administrative law judge noted that the miner's filing of two motions for reconsideration of the Board's decision delayed the Board's decision from becoming final.<sup>3</sup> Order Denying Claimant's Motion for a

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<sup>3</sup>On July 28, 1994, the Board affirmed in part and vacated and remanded in part Judge Morin's denial of benefits. Director's Exhibit 34. The miner filed two Motions for Reconsideration, which the Board denied on January 22, 1996 and April 2, 1996. Director's Exhibits 35, 37. The miner died on April 6, 1996. Director's Exhibit 44.

Direct [*sic*] Verdict at 4. The administrative law judge further stated that claimant produced no evidence showing that the Director failed to comply with the Board's order or that the Director "was under obligation to perform a duty during the pendency of the motion for reconsideration." *Id.* Therefore, the administrative law judge found "no fault on the part of the Director and no sanctionable conduct in this case."<sup>4</sup> Order Denying Claimant's Motion for a Direct [*sic*] Verdict at 5. Inasmuch as the administrative law judge's finding that the Director exhibited no sanctionable conduct in this case is rational, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*), we affirm it. *See generally C&K Coal Co. v. Taylor*, 165 F.3d 254, 21 BLR 2-523 (3d Cir. 1999); *Venicassa v. Consolidation Coal Co.*, 137 F.3d, 197, 21 BLR 2-277 (3d Cir. 1998).

Regarding the miner's claim, the administrative law judge stated that this "case was remanded [by the Board] for further development of medical evidence, based upon the lack of a complete and credible pulmonary examination." Decision and Order at 12. The administrative law judge also stated that due to the miner's death, further development of the record is no longer possible and that therefore, he must decide the case on the current record. *Id.* Based on this record, the administrative law judge denied benefits in the miner's claim. Decision and Order at 11-14. In his Motion to Remand the Miner's Claim, which is currently before the Board, the Director requests that the administrative law judge's denial of the miner's claim be vacated and the case remanded for further evidentiary development. Director's Motion to Remand at 6-7. The Director acknowledges that while a physical re-examination is no longer possible, "it is still possible to have the existing medical data evaluated and all the issues pertaining to the status of the miner's pulmonary condition answered" based on the available medical information. Director's Motion to Remand at 6.

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<sup>4</sup>The administrative law judge stated that he was mindful that the miner had been without counsel and probably unaware of his ability to file a motion to compel the Director to schedule a pulmonary examination. Order Denying Claimant's Motion for a Direct [*sic*] Verdict at 5. The administrative law judge also noted that he found no evidence in the record that the Director or the Board was informed that the miner's "medical condition was deteriorating or of the need for an expedited pulmonary evaluation." Order Denying Claimant's Motion for a Direct [*sic*] Verdict at 5.

The record reflects that the Board previously ordered that this case be remanded to the district director for further evidentiary development, Director's Exhibit 34, and that this directive is still unsatisfied. Therefore, we grant the Director's request, vacate the denial of benefits in the miner's claim, and remand this case to the district director to provide claimant with a complete, credible pulmonary evaluation as required by the Act. See 20 C.F.R. §§725.405, 725.406; *Hall v. Director, OWCP*, 14 BLR 1-51, 1-54 (1990)(*en banc*); see also *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); see generally *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Additionally, we instruct the district director that while a physical re-examination of the miner is not possible, the United States Department of Labor must provide claimant with a physician's evaluation of the existing medical data addressing the issues of entitlement pursuant to 20 C.F.R. §§718.202, 718.203, 718.204.

Regarding the survivor's claim, pursuant to Section 718.205(c), the administrative law judge found that "there is no evidence that pneumoconiosis contributed to the Miner's death in any way." Decision and Order at 15. As the administrative law judge correctly stated, pneumoconiosis is not mentioned on the death certificate,<sup>5</sup> no autopsy was performed, and no physician opined that the miner's death was in any way related to coal workers' pneumoconiosis or any occupational lung disease. *Id.* Therefore, we hold that the administrative law judge permissibly found that claimant failed to establish that the miner's death was due to pneumoconiosis inasmuch as there is no medical evidence in the record to support claimant's burden of proof at Section 718.205(c). Decision and Order at 15; see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *Maddaleni v. Director, OWCP*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Inasmuch as we affirm the administrative law judge's Section 718.205(c) finding,<sup>6</sup> that

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<sup>5</sup>The miner's death certificate indicates that the immediate cause of death was cardiac arrest together with "A.S.H.D.-G.A.S." Director's Exhibit 44.

<sup>6</sup>We hold harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), any error the administrative law judge may have made in finding eight years of coal mine employment inasmuch as a finding of a longer length of coal mine employment would not benefit claimant in establishing that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), an element of entitlement needed to support her claim, see *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); see also *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

claimant failed to establish that the miner's death was due to pneumoconiosis, *see Lukosevicz, supra*; *see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), a requisite element of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *see also Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993), we also affirm his denial of benefits on the survivor's claim.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits on the miner's claim is vacated and this case is remanded to the district director for further proceedings consistent with this opinion, and the administrative law judge's Decision and Order on Remand denying benefits on the survivor's claim is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge