BRB No. 99-1211 BLA

OSIE FOLEY (Widow of LEMUEL FOLEY)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Miner's Benefits [and] Denial of Survivor's Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Earl Hunt (John Earl Hunt Law Offices), Allen, Kentucky, for claimant.

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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Award of Miner's Benefits [and] Denial of Survivor's Benefits (99-BLA-0297) of Administrative Law Judge Thomas F. Phalen, Jr. on both a 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). With regard to the miner's claim, the administrative

law judge credited the miner with eight years of coal mine employment. Although the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), he found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge found the evidence sufficient to establish a "material change in conditions." The administrative law judge also found the evidence sufficient to establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Further, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), and sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(c).[1] However, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

[1]The administrative law judge stated that "[i]t has already been established that [the miner] suffered from pneumoconiosis arising out of his coal mine employment." Decision and Order at 17.

On appeal, the Director contends that the miner's first claim still remains viable. The Director also challenges the administrative law judge's finding that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, the Director challenges the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c). Lastly, the Director challenges the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Claimant[2] responds, urging affirmance of the administrative law judge's award of benefits in the miner's claim.[3] Alternatively, claimant contends that she is entitled to derivative survivor's benefits since the miner's first claim still remains viable.[4]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 Director contends that the miner's first claim still remains viable. We hold that the Director's contention has merit. The pertinent procedural history of this case is as follows: The miner's first claim was filed on December 30, 1981. Director's Exhibit 75. This claim was denied by the Department of Labor (DOL) on May 18, 1983 because the miner failed to establish the existence of pneumoconiosis and total disability. *Id*. The miner filed a second claim on May 3, 1984. Director's Exhibit 16. On May 11, 1984, the DOL informed the miner that it construed his 1984 claim as a request to reopen the 1981 claim and as a request for modification of the 1983 denial of benefits. Director's Exhibit 54. The DOL also advised the miner that his claim would not be reopened unless he submitted clear and convincing evidence that good cause exists for the untimely filing of an appeal of the May 18, 1983 denial

[2]Claimant is the widow of the miner, Lemuel Foley, who died on October 17, 1988. Director's Exhibits 1, 3.

[3]Following the submission of a response brief on behalf of claimant, John Earl Hunt withdrew as attorney of record for claimant.

[4]Inasmuch as the administrative law judge's length of coal mine employment finding, and his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203(c) and 718.205(c) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

of the first claim, or that there has been a change in conditions or a mistake in a determination of fact. *Id*. On June 19, 1984, the miner issued a statement, indicating his belief that he was eligible for black lung benefits. Director's Exhibit 53. Additionally, the miner filed a third claim on January 2, 1986. Director's Exhibit 15.

In his decision, the administrative law judge construed the miner's 1986 claim as a duplicate claim. The administrative law judge stated, "[the miner] filed a second application for benefits on May 3, 1984 and the claim was denied by [the DOL] on May 11, 1984." Decision and Order at 2. The administrative law judge also stated that the miner "also filed a third claim on January 2, 1986." *Id*. Further, the administrative law judge observed that "[i]n this case, the Director denied the [1986] claim on June 11, 1986, and [the miner] appealed on June 26, 1986." *Id*. at 8. The administrative law judge additionally found that the miner's "appeal operates as a modification of his multiple claim filed on January 6, 1986."[5] *Id*. However, contrary to the administrative law judge's finding, the DOL did not issue a denial of benefits on May 11, 1984. Director's Exhibit 54. Rather, the DOL merely requested the miner to advise it of his intent in this case. *Id*. The pertinent regulations provide that "[u]pon his or her own initiative, or upon the request of any party on the grounds of a change in conditions or because of a mistake in a determination of fact, the [district director] may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits." 20 C.F.R. §725.310(a). Since the miner's

[5]The administrative law judge observed that "[t]he provisions of [20 C.F.R.] §725.309(d) apply to duplicate/multiple claims and are intended to provide relief from the traditional notions of *res judicata*." Decision and Order at 9. In *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). The administrative law judge stated, "[a]pplying the *Ross* standard along with the modification provisions of [20 C.F.R.] §725.310, I will review the evidence submitted since the denial of his original claim for benefits." *Id*. The administrative law judge also stated, "[i]f this evidence proves one of the elements of entitlement that formed the basis for the June 11, 1986 denial by the Director, thereby establishing a change in condition or a mistake in determination of fact, the record is sufficient to prove a material change in condition as a matter of law." *Id*.

May 3, 1984 claim was filed within a year of the DOL's May 18, 1983 denial, we hold that the DOL properly construed this claim as a request for modification. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); 20 C.F.R. §725.310. Further, since the DOL did not issue a denial of benefits subsequent to the miner's May 11, 1984 request for modification, the miner's 1986 claim merged into the miner's 1981 claim. 20 C.F.R. §725.310. Hence, since the miner's 1986 claim was improperly construed as a duplicate claim, the administrative law judge should not have considered whether claimant established modification of the miner's duplicate claim. *See* 20 C.F.R. §725.309 and 20 C.F.R. §725.310. Nonetheless, in view of administrative law judge's weighing of the newly submitted evidence on modification at 20 C.F.R. §718.202(a)(4), we hold that the administrative law judge's error in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Next, the Director contends that the administrative law judge erred in finding the newly submitted evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge considered the newly submitted opinions of Drs. Hieronymus, Jurich, Mettu and Sutherland. Whereas Drs. Hieronymus and Jurich opined that the miner suffered from pneumoconiosis, Director's Exhibits 28, 29, 52, Drs. Mettu and Sutherland opined that the miner did not suffer from pneumoconiosis,[6] Director's Exhibits 25, 46, 69. The administrative law judge properly accorded greater weight to the opinion of Dr. Hieronymus than to the contrary opinions of Drs. Mettu and Sutherland because he found Dr. Hieronymus' opinion to be better reasoned and documented.[7] *See Clark*

[6]Drs. Mettu and Sutherland opined that the miner suffered from chronic bronchitis not related to coal dust exposure. Director's Exhibits 25, 49, 69.

[7]The administrative law judge stated that "[t]he medical opinion of Dr. Hieronymus, establishing the existence of pneumoconiosis, is supported by his physical examination findings, symptomology and pulmonary function test results." Decision and Order at 11. The administrative law judge observed that "Dr. Hieronymus discovered decreased breath sounds and expiratory wheezing, clubbing in the extremities; complaints of coughing, dyspnea and chest pain were documented." *Id*. at 11-12. The administrative law judge also observed that "Dr. Hieronymus did not discover any other (mitigating) medical problems which may have contributed to [the miner's] pulmonary condition." *Id*. at 12. In contrast, the administrative law judge stated that "Drs. Sutherland and Mettu, who determined that [the miner] did not have pneumoconiosis, submitted less persuasive medical opinions." *Id*. The administrative law judge observed that "[t]hese physicians diagnosed chronic bronchitis and rejected any causal relation to coal dust exposure;

v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also properly accorded greater weight to the opinion of Dr. Jurich than to the contrary opinions of Drs. Mettu and Sutherland because of Dr. Jurich's status as the miner's treating physician.[8] *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993).

The Director asserts that the administrative law judge erred in relying on the opinion of Dr. Hieronymus because it is based solely on a discredited positive x-ray interpretation. Contrary to the Director's assertion, Dr. Hieronymus based his opinion on a physical examination, smoking and coal mine employment histories and an x-ray. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields, supra*; *Fuller, supra*; *Ogozalek v. Director, OWCP*, 5 BLR 1-309 (1982). An administrative law judge must consider a medical report as a whole, *see Justice v. Island Creek*

---

however, [they] failed to provide an etiology to [the miner's] pulmonary condition." *Id*. The administrative law judge stated, "[a]s Dr. Mettu does not base his opinion on any objective, clinical evidence, I do not find that his reason for eliminating pneumoconiosis is very persuasive." *Id*.

[8]The administrative law judge observed that "Dr. Jurich treated [the miner] from 1980 to 1988. Decision and Order at 12. The administrative law judge stated, "[a]s such, [Dr. Jurich] was more familiar with [the miner's] condition, and the general progression/deterioration of his health." *Id*. Moreover, the administrative law judge stated that "a comparison of medical reports and tests over a long period of time may conceivably provide a physician with a better perspective than the pioneer physician." *Id*.

Coal Co., 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), and may not discredit an opinion merely because it is based on an x-ray interpretation which is outweighed by the other x-ray interpretations of record, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *cf. Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Furthermore, since the administrative law judge considered the coal mine employment history and the smoking history referenced in the medical report of Dr. Hieronymus and yet did not find that Dr. Hieronymus' opinion should be discredited,[9] *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988), we reject the Director's argument that the opinion of Dr. Hieronymus must be discredited because Dr. Hieronymus relied on an inaccurate coal mine employment history and an inaccurate smoking history. Additionally, since the determination of whether a medical opinion is sufficiently documented and reasoned is for the administrative law judge as fact-finder to decide, we reject employer's assertion that the administrative law judge erred in considering Dr. Jurich's opinion because Dr. Jurich provided no information with regard to his belief concerning the extent of the miner's coal mine employment history and smoking history. *See Clark, supra*; *Lucostic, supra*. In the instant case, the administrative law judge observed that "Dr. Jurich causally related [the miner's] chronic obstructive pulmonary disease to coal mine employment in his 1984 and 1986 medical opinion letters." Decision and Order at 12. The administrative law judge stated that "Dr. Jurich treated [the miner] from 1980 to 1988." *Id*. The administrative law judge also stated, "[a]s such, [Dr. Jurich] was more familiar with [the miner's] condition, and the general progression/deterioration of his health." *Id*. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Moreover, since the administrative law judge properly found the newly submitted evidence sufficient to establish the existence of pneumoconiosis

[9]The administrative law judge noted that the miner's "smoking history was quite limited, and none of the physicians deemed it as a factor contributing to his health problems." Decision and Order at 13. The administrative law judge stated that claimant "testified that her husband smoked a long time ago and quit shortly after they got married." *Id*. at 3. The administrative law judge also stated that the miner "smoked about a pack and a half a day." *Id*. Further, the administrative law judge stated that "[t]he record indicates only eight years of qualifying coal mine employment." *Id*. at 13. The administrative law judge observed that Dr. Hieronymus "documented a 14-15 year coal mine employment history and a smoking history of 8-9 years, quitting in the 1950's." *Id*. at 6.

at 20 C.F.R. §718.202(a)(4), we hold that the evidence is sufficient to establish a change in conditions at 20 C.F.R. §725.310. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

The Director further contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c). Specifically, the Director asserts that the administrative law judge erred in weighing the pulmonary function study evidence. The administrative law judge stated, "[w]eighing together all of the relevant evidence, both like and unlike as required by [*Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987)], I find that the weight of the evidence establishes that [the miner] was totally disabled from performing his previous coal mine employment." Decision and Order at 15. The administrative law judge considered the March 29, 1983, February 18, 1986 and June 27, 1986 pulmonary function studies.[10] Director's Exhibits 24, 43, 66, 75. The administrative law judge observed that "Dr. Sutherland invalidated the test he performed on February 18, 1986, due to the results 'correlat[ing] poorly.'" Decision and Order at 14. The administrative law judge also observed that "[t]he [1986] test administered by Dr. Hieronymus was invalidated by a reviewing physician, Dr. Kraman, for sub-optimal effort." *Id*. Nonetheless, the administrative law judge observed that "Dr. Hieronymus did not note any such deficiencies in the test." *Id*. The administrative law judge therefore stated, "[a]s a pulmonary function test should not be invalidated based on a reviewing physician's opinion, over that of one who performs the test, I do credit some weight to the [June 27, 1986] study." *Id*. The Director, however, asserts that the administrative law judge erred in relying on the June 27, 1986 study since Dr. Kraman, who is better qualified than Dr. Hieronymus, opined that this study was invalid. While an administrative law judge may prefer the opinion of a consulting physician over that of an administering physician, he is not required to do so. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Thus, we reject the Director's assertion that the administrative law judge erred in relying on the June 27, 1986 study since it was invalidated by Dr. Kraman.

The Director also asserts that the administrative law judge mischaracterized the March 27, 1983 pulmonary function study. The administrative law judge stated that "the prior pulmonary function test performed on [March 27, 1983] produced

[10]The record indicates that Dr. Mettu was not able to administer a pulmonary function study on August 1, 1988 because of the miner's acute, multiple medical problems, including leukemia and abnormal electrocardiogram. Director's Exhibits 45, 68.

qualifying results." Decision and Order at 14. However, contrary to the administrative law judge's finding, the 1983 study produced non-qualifying values. Director's Exhibit 75. Thus, since the administrative law judge mischacterized the March 27, 1983 pulmonary function study, we vacate the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c), and remand the case for further consideration of all of the relevant evidence. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). A review of the record indicates that the administrative law judge did not consider a qualifying pulmonary function study dated May 16, 1988. Director's Exhibit 6. The Director, citing 20 C.F.R. Part 718, Appendix B, 2(i), asserts that the 1988 study does not conform with the regulatory requirements because it was administered three days after the miner was diagnosed with pneumonia. However, the Director did not raise such an objection at the hearing before the administrative law judge. *See DeFore v. Alabama By-Products Corp.*, 12 BLT 1-27 (1988); *Orek v. Director, OWCP*, 10 BLR 1-51 (1987). Thus, we decline to address the Director's assertion that this study does not conform to the regulatory requirements.

In addition, the Director asserts that the administrative law judge erred in weighing the medical opinion evidence. The administrative law judge stated that "Drs. Hieronymus and Jurich are the only physicians who opined on [the issue of] total disability."[11] Decision and Order at 15. While Drs. Arnett and Sutherland did not render opinions with regard to the issue of total disability, their reports contain physical limitations which may, if credited, and when compared with the exertional requirements of the miner's usual coal mine employment,[12] support a finding of total disability.[13] *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. en banc*, 9 BLR 1-104 (1986). Thus, the administrative law judge must

[11]The Director asserts that the administrative law judge shifted the burden of proof from claimant to the Director with regard to the issue of total disability. Contrary to the Director's assertion, the burden of proof remained with claimant. After finding that the opinions of Drs. Hieronymus and Jurich supported a finding of total disability, the administrative law judge merely stated that "[t]he record is *absent* of a physician's opinion concluding that [the miner] *has* the pulmonary ability to return to his previous coal mine employment." Decision and Order at 15.

[12]The administrative law judge observed that the miner's "last coal mine employment involved rigorous physical activity, as he alleged that his former jobs consisted of shoveling, drilling and loading coal." Decision and Order at 15.

[13]Dr. Mettu opined that the miner suffered from exertional shortness of breath." Director's Exhibits 46, 69.

consider the opinions of Drs. Arnett and Sutherland with regard to the issue of total disability. *See Cornett v. Benham Coal Co.*, No. 99-3469, F.3d , BLR (6th Cir. Sept. 7, 2000); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash, supra*; *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983).

Additionally, the Director asserts that the administrative law judge erred in relying on Dr. Hieronymus' opinion since it was based in part upon an invalid pulmonary function study. Contrary to the Director's assertion, the administrative law judge rationally found the June 27, 1986 study to be valid. *See Brinkley, supra*. Further, since the administrative law judge relied on the opinions of Drs. Hieronymus and Jurich in support of a finding of total disability, by inference, he found the doctors' opinions sufficiently reasoned. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984). Consequently, we reject the Director's assertion that the opinions of Drs. Hieronymus and Jurich are not well reasoned. As observed by the administrative law judge, the opinions of Drs. Hieronymus and Jurich "are substantiated by the [June 27, 1986] pulmonary function test, which produced qualifying results, physical exam findings consisting of wheezing, the existence of rales and rhonchi, and the documented symptomology (e.g. coughing, shortness of breath)."[14] Decision and Order at 15.

[14]We reject the Director's assertion that the administrative law judge erred in considering that the miner was unable to perform a pulmonary function study and an arterial blood gas study because of "multiple medical problems." The administrative law judge simply stated, "I also note that [the miner] was unable to perform, due to his "multiple medical problems," a pulmonary function test and [an] arterial blood gas study (after exercise) during Dr. Mettu's 1988 medical evaluation." Decision and Order at 15. An administrative law judge must weigh the evidence and draw a permissible inference from the evidence. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board

cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Finally, the Director contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Specifically, the Director asserts that the administrative law judge erred in discrediting the opinions of Drs. Mettu and Sutherland because they did not provide an alternate cause for the miner's total disability. The administrative law judge stated, "I also find sufficient evidence to establish the requisite link between total disability and pneumoconiosis." Decision and Order at 16. The administrative law judge observed that "[i]n well-documented and well reasoned opinions, Drs. Hieronymus and Jurich determined that [the miner] was totally disabled due to coal workers' pneumoconiosis." Decision and Order at 16; Director's Exhibits 28, 29, 52. The administrative law judge also observed that "Drs. Sutherland, Mettu, and Marshall, who diagnosed [the miner] with chronic pulmonary conditions, did not give an alternate etiology to [the miner's] disability." Decision and Order at 16; Director's Exhibits 25, 46, 52, 69, 75. However, contrary to the administrative law judge's finding, a doctor is not required to provide an alternate cause of total disability. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), and remand the case for further consideration of the evidence.

If benefits are awarded in the miner's claim, claimant is eligible for derivative entitlement to survivor's benefits since the miner's 1981 claim remains viable. *See Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988); *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989).

Accordingly, the administrative law judge's Decision and Order - Award of Miner's Benefits [and] Denial of Survivor's Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge