

BRB No. 90-0599 BLA

MARIE E. CARPENTER)
(Widow of MORGAN CARPENTER))
)
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 on Remand of Robert L. Hillyard,
Administrative Law Judge, United States Department of Labor.

Marie E. Carpenter, Vienna, Ohio, pro se.

Marta Kusic (Marshall J. Breger, 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
BONFANTI, Administrative Law Judge.*

SMITH, Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel, the
Decision and Order on Remand (84-BLA-1795) of Administrative Law Judge Robert
L. Hillyard 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

The miner filed a claim for benefits on April 7, 1980, and died on December 11, 1984. Claimant, the miner's widow, filed for benefits on October 2, 1985. On April 13, 1987, the administrative law judge determined that claimant did not establish that the miner's disability or death was due to pneumoconiosis and that the evidence does not establish that the miner's death was significantly related to or aggravated by pneumoconiosis. Accordingly, benefits were denied on both the miner's and the survivor's claims. Claimant thereafter appealed, and in its first Decision and Order in this case, the Board affirmed the administrative law judge's denial of the miner's claim, but vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.205 and remanded the case for further findings on the survivor's claim. Carpenter v. Director, OWCP, BRB No. 87-1109 BLA (Feb. 22, 1989)(unpub.) On remand, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that the miner's death was caused by complications of pneumoconiosis. Accordingly, benefits were denied. The Director, Office of Workers' Compensation Programs responds in support of the administrative law judge's Decision and Order on Remand.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

In order to be entitled to benefits in a survivor's claim, filed after January 1, 1982, the evidence must establish that the miner's death was due to pneumoconiosis, and not due to a medical condition unrelated to pneumoconiosis. 20 C.F.R. §718.205(c); Neeley v. Director, OWCP, 11 BLR 1-85 (1988). Pursuant to Section 718.205(c), death would be considered to be due to pneumoconiosis where the cause of death was significantly related to or significantly aggravated by pneumoconiosis. See Foreman v. Peabody Coal Co., 8 BLR 1-371 (1985). Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that it would adopt the standard enunciated 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), which holds that any condition that actually hastens the miner's death is a substantially contributing cause for purposes of 20

C.F.R. §718.205. Shuff v. Cedar Coal Co., No. 91-2572 F.2d , BLR (4th Cir. Jun. 18, 1992). As the Fourth Circuit has only recently issued the Shuff standard, neither the administrative law judge nor the parties herein considered how the application of the intervening law would affect the instant case. Consequently, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.205(c) and remand the case for application of the Shuff standard. See Lynn v. Island Creek Coal Co., 12 BLR 1-146 (1989); see also Tackett v. Benefits Review Board, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). It is further noted that the determination of whether to re-open the record on remand, in light of this intervening law, is within the province of the administrative law judge. See 20 C.F.R. §725.456(e); Lynn, supra; see also Tackett, supra.

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

SO ORDERED.

ROY P. SMITH,
Administrative Appeals Judge

I Concur:

REGINA C. McGRANERY
Administrative Appeals Judge

BONFANTI, Administrative Law Judge, dissenting:

I respectfully dissent from the majority opinion. I would hold that the administrative law judge permissibly found that the opinion of Dr. Dineen is entitled to little weight because it was based on a history of sixteen to eighteen years of coal mine employment, while the administrative law judge found only five years of coal mine employment. See Decision and Order on Remand at 2; Addison v. Director, OWCP, 11 BLR 1-68 (1988). The administrative law judge further permissibly discredited the report of Dr. Dineen because he did not discuss the miner's eleven years of employment in steel mills, where the miner was exposed to smoke, gas, and fumes, as well as the miner's one year of employment at Standard Slag, where he was exposed to lime dust. See Decision and Order on Remand at 2; Boyd v. Director, OWCP, 11 BLR 1-39 (1988); Tucker v. Director, OWCP, 10 BLR 1-35 (1987). Additionally, I would hold that the administrative law judge permissibly

accorded the opinion of Dr. Brodell little weight because Dr. Brodell made no mention of the miner's other industrial exposures and because he did not mention the coal mine employment history upon which he was relying in rendering his opinion. See Decision and Order at 9; D&O on Remand at 3; Addison, supra; Boyd, supra; Tucker, supra. The administrative law judge's findings on the evidence in this case are based upon substantial evidence and affirmable. Applying Shuff will not change the result. I would, therefore, affirm the administrative law judge's Decision and Order denying benefits.

RENO E. BONFANTI
Administrative Law Judge