

BRB No. 05-0268 BLA

WALLACE GLENN RICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LESLIE RESOURCES, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 08/31/2005
	)	
ZURICH AMERICAN INSURANCE	)	
GROUP	)	
	)	
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5700) of Administrative Law Judge Joseph E. Kane 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 involves a claim filed on May 23, 2001.<sup>1</sup> After crediting claimant with nine years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3).<sup>2</sup> The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board 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).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).<sup>3</sup> Claimant's statements neither raise any substantive issue nor

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<sup>1</sup>Claimant filed an earlier claim on April 20, 2000. Director's Exhibit 1. In a Proposed Decision and Order dated November 3, 2000, the district director denied benefits. *Id.* Claimant subsequently filed a motion to withdraw his claim. *Id.* In a Proposed Decision and Order dated April 11, 2001, the district director granted claimant's request, holding that if no party filed an objection within thirty days, the claim would be deemed withdrawn and "considered not to have been filed." *Id.* There is no indication that any party filed an objection within the thirty day time period.

Claimant filed the instant claim on May 23, 2001. Director's Exhibit 3.

<sup>2</sup>The administrative law judge did not address whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

<sup>3</sup>Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge did not address whether the evidence

identify any specific error on the part of the administrative law judge in determining that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).<sup>4</sup> We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). However, because there is no evidence of cor pulmonale with right-sided congestive heart failure, a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii) is precluded.

<sup>4</sup>We note that the administrative law judge properly found that the record does not contain any medical opinion evidence supportive of a finding of total disability. Decision and Order at 8. Dr. Hussain opined that claimant did not suffer from any pulmonary impairment. Director's Exhibit 13. Dr. Dahhan, the only other physician to address the extent of claimant's pulmonary impairment, opined that:

[Claimant] retains the respiratory capacity to continue his previous coal mining work or [a] job of comparable physical demand with no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal mine dust or coal workers' pneumoconiosis.

Employer's Exhibit 3.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge