

BRB No. 04-0514 BLA

BOYD SIZEMORE)
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 Claimant-Petitioner)
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 v.)
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 LEECO, INCORPORATED) DATE ISSUED: 02/07/2005
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 and)
)
 TRANSCO ENERGY COMPANY)
)
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits of Administrative Law Judge Jeffrey Tureck 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). Claimant filed the instant claim for benefits on May 15, 2001.¹ Director's Exhibit 3. On October 1, 2002, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 35. Claimant requested a hearing, which was held on July 22, 2003. The parties stipulated that claimant worked 23 years in coal mine employment and that claimant had pneumoconiosis. The administrative law judge, however, found that claimant failed to establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he was not totally disabled due to pneumoconiosis based on Dr. Baker's opinion and a proper review of the exertional requirements of his last coal mine job. Claimant's Brief at 2-4, 5-6. Claimant also argues that the administrative law judge erroneously failed to enforce the evidentiary restrictions set forth at 20 C.F.R. §725.414.² Claimant's Brief at 4. Employer, responds urging affirmance of the denial of benefits. Employer's Brief at 4-9. With respect to 20 C.F.R. §725.414, employer specifically argues that all of the medical opinions were properly admitted into the record and considered by the administrative law judge. Employer's Brief at 9-10. The Director, Office of Workers' Compensation Programs, has also filed a statement, which maintains that the administrative law judge committed harmless error in considering medical evidence submitted in conjunction with the miner's prior withdrawn claim.³ Director's Brief at 2. The Director has declined to respond regarding the issue of entitlement. *Id.*

¹ Claimant initially filed a claim for benefits on February 7, 2000, which denied by the district director. Director's Exhibit 1. At claimant's request the case was forwarded to the Office of Administrative Law Judges. *Id.* Prior to the hearing scheduled for April 10, 2001, claimant filed a motion to have his claim withdrawn. *Id.* On March 27, 2001, Administrative Law Judge Joseph E. Kane issued an Order Allowing Withdrawal of the Claim. Director's Exhibit 1.

² Claimant asserts that Dr. Wicker's opinion should not have been admitted into the record. Claimant's Brief at 4-5.

³ The Director, Office of Workers' Compensation Programs, notes that 20 C.F.R. §725.309(d)(1) provides that "[a]ny evidence submitted in conjunction with any prior claim shall be made part of the record in the subsequent claim...." However, the Director also correctly points out that in situations such as the instant case where the earlier claim was withdrawn, the provision would not be applicable as the earlier claim is considered

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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 establish entitlement to benefits in a living miner's claim, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arises out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge properly found that claimant "presented no evidence to establish that he is totally disabled due to pneumoconiosis." Decision and Order at 6. The administrative law judge considered six medical opinions from Drs. Baker, Rosenberg, Hussain, Dahhan, Broudy and Wicker, relevant to the issue of total disability.⁴ Director's Exhibits 1, 10, 11, 12; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3, 4. The administrative law judge correctly noted that none of these physicians opined that claimant had a totally disabling respiratory or pulmonary impairment. Decision and Order at 5-6. Although Dr. Baker opined that claimant should not return to work because he needed to avoid further dust exposure in the mines, the administrative law judge properly found that Dr. Baker's opinion was legally insufficient to carry claimant's burden of proof. Director's Exhibit 10; Claimant's Exhibit 1; Decision and Order at 4-5. Medical opinions which advise against further coal dust exposure, and fail to address claimant's physical capacity to do his usual coal mine employment, do not establish total disability. See *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR

"not to have been filed." 20 C.F.R. §725.306(b) (2000); see *Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-188 (2002)(*en banc*).

⁴ The administrative law judge found that there was no qualifying pulmonary function study or arterial blood gas study evidence, and that the record was devoid of evidence that claimant suffered from cor pulmonale. Thus, the administrative law judge determined that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 4. These findings are affirmed as they are unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).⁵ Furthermore, the administrative law judge properly credited the opinions of Dr. Rosenberg and Hussain, who each examined claimant and specifically opined that he retained the respiratory capacity to perform the exertional duties of his regular coal mine job.⁶ Director's Exhibits 11, 12; Employer's Exhibit 2; Decision and Order at 6-7.

Consequently, in the absence of any medical opinion evidence to establish claimant's total disability, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv). Because claimant was unable to establish total disability, a requisite element of entitlement, *see Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1, we affirm, as supported by substantial evidence, the administrative law judge's denial of benefits pursuant to 20 C.F.R. §718.204(b)(2).⁷

⁵ Because claimant's last coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

⁶ We reject claimant's contention that the administrative law judge failed to consider the exertional requirements of his usual coal mine work. Decision and Order at 2. Furthermore, the administrative law judge did not, as claimant asserts, reject Dr. Baker's opinion on the grounds that it was either undocumented or unreasoned.

⁷ Because we affirm the administrative law judge's determination that Dr. Baker's opinion was insufficient to establish claimant's total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), we decline to address the propriety of the administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge