BRB No. 01-0486 BLA

JOHN A. KADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-interest	)	DECISION and ORDER

Appeal of the Decision and Order On Remand Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John A. Kade, Bluefield, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order On Remand Denying Benefits (96-BLA-1819) of Administrative Law Judge Richard K. Malamphy rendered 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).[1]

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the

This case is before the Board for the sixth time. The prior history of this case is set forth in its most recent Decision and Order, *Kade v. Consolidation Coal Co.*, BRB No. 99-1251 BLA (Sep. 7, 2000). In that decision, the Board vacated the administrative law judge's denial of modification and his findings regarding claimant's usual coal mine employment. The Board remanded this case for the administrative law judge to decide if he had made a mistake in a determination of fact when he found that claimant's job as a dispatcher was his usual coal mine employment. On remand, the administrative law judge again found that claimant was not entitled to modification as no mistake in a determination of fact had been made in finding that claimant's last usual coal mine employment was as a dispatcher. Accordingly, benefits were denied.

In the instant appeal, claimant generally challenges the findings of the administrative law judge on his usual coal mine employment and the denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must

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Act, the United District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claims, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

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 by 30 U.S.C. §932(a).

Claimant contends generally that the reason he became a dispatcher was because he could no longer perform his duties inside the coal mine because of his pulmonary condition and was advised by a physician to obtain another job. Thus, claimant contends that the administrative law judge erred in finding that he was not totally disabled based on his five years of outside work as a dispatcher as opposed to his thirty-nine years of work inside the coal mines and that the administrative law judge erred when he found no mistake in fact and denied benefits.

Contrary to claimant's contention, his last coal mine job as a dispatcher must be found to be his usual coal mine employment, unless he can establish that he obtained it because of his inability to perform, from a respiratory standpoint, his prior job as a loading operator. 20 C.F.R. §718.204(e)(3); *see Mazgai v. Valley Camp Coal Co.*, 9 BLR 1-200 (1986); *Pifer v. Florence Mining Co.*, 8 BLR 1-153 (1985); *Brown v. Cedar Coal Co.*, 8 BLR 1-86 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124 (1984); *Vargo v. Valley Camp Coal Co.*, 6 BLR 1-1217 (1984); *Mirolak v. Barnes & Tucker Co.*, 6 BLR 1-627 (1983); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534 (1982).

In the instant case, the administrative law judge properly found that claimant did not provide sufficient evidence to support his position that he transferred jobs from loader-operator to dispatcher because of his respiratory condition or because he could not perform his duties as a loading operator. Specifically, the administrative law judge found that the record contained no evidence that claimant "was unable to perform his [prior] loader-operator job," that he was "required to take the easier job," or that he was "[unable] to do the work required of the loader-operator job." Decision and Order at 3 (emphasis in original). Rather, the administrative law judge found that claimant obtained the dispatcher job at his own request as a result of seniority. Decision and Order at 3. The administrative law judge further found that the record did not reflect that the dispatcher job resulted in diminished pay. Decision and Order at 3. Additionally, the administrative law judge found that in 1980 claimant had specifically denied that his job as a dispatcher was based on a change or reassignment due to his respiratory condition. Decision and Order at 3; Director's Exhibit 8. Moreover, the administrative law judge concluded that the record did not support the claimant's allegation that he was advised by physicians to take a lighter job because of his respiratory problems. Decision and Order at 3. Thus, on remand, the administrative law judge acted within his discretion when he concluded that the record did not contain sufficient evidence to support claimant's contention that he transferred to his job as a dispatcher because he was no longer able to perform his job as a loader-operator due to his respiratory condition. 20 C.F.R. §718.204(e)(3)(i)-(iii); *Pifer, supra*. We, therefore, affirm the

determinations of the administrative law judge that, upon further review, the evidence of record did not establish a mistake in his determination that claimant's last job was as a dispatcher and that he was not totally disabled from this job because of a respiratory impairment, as they are supported by substantial evidence. We, therefore, affirm the administrative law judge's denial of modification and his denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge