

BRB No. 08-0816 BLA

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 Claimant-Petitioner )  
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 v. )  
 )  
 BLEDSOE COAL CORPORATION ) DATE ISSUED: 06/30/2009  
 c/o JAMES RIVER SERVICES COMPANY )  
 )  
 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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (07-BLA-5853) of Administrative Law Judge Janice K. Bullard (the administrative law judge) denying benefits on a claim filed on August 15, 2006 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). The administrative law judge accepted the parties' stipulation that claimant established 17 years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-

(4).<sup>1</sup> The administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).<sup>2</sup> Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4). Claimant also challenges the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.<sup>3</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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<sup>1</sup> Because she found that claimant did not establish the existence of pneumoconiosis, the administrative law judge did not address the issue of whether the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.

<sup>2</sup> In addition, because she found that claimant did not establish the existence of pneumoconiosis or total disability, the administrative law judge did not address the issue of whether total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c).

<sup>3</sup> Because the administrative law judge's findings that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>4</sup> The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibit 3. Accordingly, this case 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*).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that the exertional requirements of claimant's usual coal mine employment must be compared with a physician's assessment of claimant's respiratory impairment and that it would be error for the administrative law judge to find that claimant could perform his usual coal mine employment without considering the physical requirements of such work. The record consists of the reports of Drs. Rasmussen and Broudy.<sup>5</sup> Dr. Rasmussen observed that claimant's pulmonary function and arterial blood gas studies indicated that claimant had essentially normal lung function, and opined that he retained the pulmonary capacity to perform his last regular coal mine job. Director's Exhibit 16. Dr. Broudy opined that claimant does not have any significant respiratory impairment due to any cause and that he retained the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Director's Exhibits 18, 21 (Dr. Broudy's Deposition at 10-11). The administrative law judge determined that "[t]he unanimous opinion of all of the physicians of record is that [c]laimant could perform his previous coal mine work." Decision and Order at 11. Hence, the administrative law judge found that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Because Dr. Rasmussen opined that claimant had "essentially normal lung function," Director's Exhibit 16, and Dr. Broudy opined that claimant did not "[have] any significant...respiratory impairment," Director's Exhibit 18, and both Drs. Rasmussen and Broudy opined that claimant retained the respiratory capacity to perform his usual coal mine work or comparable work,<sup>6</sup> Director's Exhibits 16, 18, 21, the administrative

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<sup>5</sup> The record also consists of treatment records from Kentucky River Community Care. Director's Exhibit 19. The administrative law judge stated that "[t]hese records contain no diagnosis of any lung condition, nor contain any objective studies or lung examination findings." Decision and Order at 8. Claimant does not challenge the administrative law judge's findings with regard to the treatment records.

<sup>6</sup> In a Description of Coal Mine Work form, claimant described the duties of his job for Bledsoe Coal Company from October 2005 to May 31, 2006 as "maintenance, power moves, belt setup, roof bolter, ran scoop, cleaned section, and ran rock duster." Director's Exhibit 4.

Describing claimant's coal mine employment, the administrative law judge stated that "[c]laimant testified that he worked in underground coal mining as a roof bolter for the majority of the time." Decision and Order at 3.

Dr. Rasmussen, in considering claimant's coal mine employment from 1980 to May 2005, noted that: "[claimant] initially was a roof bolter. He did so for about 19

law judge was not required to make a comparison of the physicians' opinions with the exertional requirements of claimant's usual coal mine employment. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with the physicians' disability assessments.

In addition, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled, because pneumoconiosis is a progressive and irreversible disease. The record contains no credible medical evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(i)-(iv); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Thus, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Because the administrative law judge properly found that the medical evidence did not establish total disability, claimant is unable to establish an essential element of entitlement under 20 C.F.R. Part 718.<sup>7</sup> *See* 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

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years. He was a scoop operator as well. He was on other jobs except miner operator. He was required to bend bolts. He hung heavy electrical cable, [and] set timbers when pillaring[.] [He] did dead work as well[,] including moving, cleaning and splicing the belt. He unloaded supplies." Director's Exhibit 16.

Dr. Rasmussen, in considering claimant last coal mine employment, noted that: "[claimant's] last job was that of dead work crew and scoop operator. He loaded and unloaded supplies. He cleaned up. He rock dusted. He made belt and power moves. Thus, he did considerable heavy and very heavy manual labor." *Id.*

Dr. Broudy noted that "[claimant] started working as a welder for Christopher Steel in Hazard for about a year before he began working as an underground coal miner where he worked for 25.5 years. Nineteen years was running a roof bolter. The rest was on various other types of equipment. His last employer was Bledsoe Coal Company for whom he worked 3.5 years until he stopped on May 1, 2006." Director's Exhibit 18.

<sup>7</sup> In view of our disposition of this case at 20 C.F.R. §718.204(b), we need not address claimant's contentions with regard to the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) and (4).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge