

BRB No. 06-0419 BLA

BOBBY R. COOTS )  
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 Claimant-Petitioner )  
 )  
 v. ) DATE ISSUED: 09/28/2006  
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 LEECO, INCORPORATED )  
 )  
 and )  
 )  
 TRANSCO ENERGY COMPANY )  
 )  
 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 – Denying Benefits of Joseph E. Kane,  
Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (05-BLA-5518) of  
Administrative Law Judge Joseph E. Kane rendered on a subsequent 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).<sup>1</sup> The instant claim is governed by the regulations that took effect on January 19, 2001 as it was filed on January 31, 2002. Director's Exhibit 3. After crediting claimant with twenty-three years of coal mine employment, the administrative law judge found that claimant did not establish a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), the element of entitlement previously adjudicated against him.<sup>2</sup> Accordingly, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement since the date upon which claimant's prior claim became final pursuant to 20 C.F.R. §725.309(d), and denied benefits. On appeal, claimant challenges the administrative law judge's findings pursuant to Section 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, did not file a response brief.<sup>3</sup>

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 evidence insufficient to establish a totally disabling pulmonary impairment pursuant to Section 718.204(b)(2)(iv) because, claimant argues, the newly submitted opinions of Drs. Baker and Hussain support claimant's position that he is totally disabled. Claimant contends that the administrative law judge erred in not taking into account the exertional requirements of his usual coal mine employment pursuant to the holding in *Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6<sup>th</sup> Cir. 2000), and erred in finding him not totally disabled since pneumoconiosis is a progressive and irreversible disease. Drs. Baker, Hussain, Broudy, and Repsher each rendered an opinion regarding claimant's pulmonary disease. Dr. Baker

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<sup>1</sup> Claimant filed his first claim on November 13, 1995, and it was denied on April 9, 1996 because the evidence was insufficient to establish total disability. Director's Exhibit 1. Subsequently, this claim was held in abeyance pending action on claimant's state workers' compensation claim. *Id.* However, the claim was administratively closed on June 25, 1997. *Id.*

<sup>2</sup> The administrative law judge found moot the issue of whether claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c) since the administrative law judge did not find total disability at 20 C.F.R. §718.204(b). Decision and Order at 16.

<sup>3</sup> The administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 13-14.

categorized the extent of claimant's pulmonary impairment as "no impairment," while Dr. Hussain categorized it as "moderate," but both physicians checked the "yes" box indicating that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibits 11 at 5; 12 at 5. Like Drs. Baker and Hussain, Drs. Broudy and Repsher concluded that claimant retains the respiratory capacity to perform coal mine employment. Employer's Exhibits 2 at 38-39; 3 at 3; 4 at 9. Thus, all of the newly submitted medical opinions concluded that claimant has the respiratory capacity to perform coal mine employment. The administrative law judge found the evidence insufficient to establish total disability at Section 718.204(b)(2)(iv) based on the opinions of Drs. Baker, Broudy, and Hussain because all three opinions were supported by the newly submitted objective studies, which were all nonqualifying, and because Dr. Broudy considered the opinions of the other physicians. Decision and Order at 15-16. The administrative law judge gave little weight to Dr. Repsher's opinion.

We affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish that claimant has a totally disabling pulmonary impairment pursuant to Section 718.204(b)(2)(iv). Any error in the administrative law judge's failure to apply the holding in *Cornett, supra*, is harmless, where both Drs. Baker and Hussain opine that claimant can perform his coal mine employment, and there is no contrary medical evidence. See *Larioni v. Director, OWCP*, 6 BLR 1-710 (1983). Additionally, we reject claimant's contention that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

In light of our affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to establish a totally disabling pulmonary impairment pursuant to Section 718.204(b)(2)(i)-(iv), the element of entitlement previously adjudicated against claimant, we affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). Thus, the administrative law judge's denial of benefits under 20 C.F.R. Part 718 is affirmed. See *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-54 (6<sup>th</sup> Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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

SO ORDERED.

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