

BRB No. 07-0501 BLA

E.A.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
GATLIFF COAL COMPANY)	DATE ISSUED: 02/26/2008
)	
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 – 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-5661) 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). The administrative law judge credited claimant with twenty years of qualifying coal mine employment pursuant to the parties' stipulation, and adjudicated this subsequent claim, filed on March 29, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that claimant's previous claim had been denied on the ground that the evidence was

insufficient to establish that claimant was totally disabled.¹ The administrative law judge found that the new evidence submitted in support of this subsequent claim was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and therefore, claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's threshold disability finding pursuant to Section 718.204(b)(2)(iv).² Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response in this appeal.³

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the opinion of Dr. Rasmussen constitutes substantial evidence upon which the administrative law judge could rely to support a finding of total disability. Claimant's Brief at 3. Claimant asserts specifically that the administrative law

¹ Claimant's original claim for benefits, filed October 26, 2001, was administratively denied on February 13, 2003. Director's Exhibits 1-160, 1-4.

² Claimant's counsel cites to 20 C.F.R. §718.204(c) as the applicable regulation for addressing whether claimant established total disability. We note that 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that total disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1-158.

judge should not have rejected the opinion of Dr. Rasmussen for the reasons provided, but instead should have compared the exertional requirements of claimant's usual coal mine employment with Dr. Rasmussen's assessment of disability. Claimant's Brief at 3-4. Claimant further contends that, since pneumoconiosis has been proven to be a progressive and irreversible disease, and a considerable amount of time has passed since claimant's initial diagnosis of pneumoconiosis, it can be assumed that claimant's condition has worsened and adversely affected his ability to perform his usual coal mine employment or comparable and gainful work. Claimant's Brief at 4. Claimant's arguments are without merit.

Dr. Rasmussen examined claimant on June 21, 2004 and noted that claimant worked as an electrician, operated equipment, and "carried tools weighing 50-70 pounds" and performed "considerable heavy and some very heavy manual labor." Director's Exhibit 13. Dr. Rasmussen stated that claimant retains the pulmonary capacity to perform his last regular coal mine job and suffers only a mild loss of resting lung function, and discussed his diagnosis in relation to the underlying tests he performed. Director's Exhibit 13.

The administrative law judge accurately noted that claimant's employment included heavy manual labor, and after reviewing Dr. Rasmussen's report, permissibly determined that it was well-reasoned, well-documented, and consistent with the probative objective testing of record. Decision and Order at 2, 9. In light of Dr. Rasmussen's opinion that claimant retained the capacity to perform his regular coal mine employment; his knowledge of the miner's usual duties; and his diagnosis of a mild impairment, the administrative law judge permissibly found that the doctor's opinion is insufficient to establish total respiratory disability. Decision and Order at 9; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). Claimant's argument that he must be assumed to be totally disabled because pneumoconiosis is a progressive and irreversible disease is rejected, as an administrative law judge's findings of total disability must be based on the medical evidence of record. 20 C.F.R. §725.477(b); *White*, 23 BLR at 1-7 n.8. As the administrative law judge's findings with regard to Dr. Rasmussen's opinion are supported by substantial evidence, and as claimant has not challenged the administrative law judge's determination that the remaining medical opinions of Drs. Broudy and Rosenberg also did not establish total disability, we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). Consequently, we affirm the administrative law judge's finding that this subsequent claim must be denied because claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d)(2), (3). See *White*, 23 BLR at 1-7.

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

BETTY JEAN HALL
Administrative Appeals Judge