

BRB Nos. 07-0760 BLA  
and 07-0760 BLA-A

J.T. )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 CEDAR CITY ENERGIES )  
 )  
 and )  
 )  
 KY COAL PRODUCERS S-I FUND ) DATE ISSUED: 06/16/2008  
 )  
 Employer/Carrier-Respondents )  
 Cross-Petitioners )  
 )  
 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.

Wes Addington (Appalachian Citizens Law Center, Inc.), Whitesburg,  
Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for  
employer.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank  
James, Acting 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  
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order - Denying Benefits (2005-BLA-5298) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge credited the miner with twelve years of coal mine employment, and determined that this case involved a second request for modification of the district director's denial of this claim, filed on September 16, 2002. Applying the regulatory provisions at 20 C.F.R. Part 718, the administrative law judge found that the district director had made no mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge further found the weight of the evidence insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310, and denied benefits.

Claimant appealed, and subsequently withdrew his appeal prior to filing a brief with the Board.<sup>1</sup> Employer, nonetheless, urges affirmance of the denial of benefits and cross-appeals,<sup>2</sup> contending that the administrative law judge erred in his application of 20 C.F.R. §725.414 to exclude relevant medical evidence from the record. Specifically, employer challenges the administrative law judge's finding that evidence pre-dating claimant's second modification request was inadmissible. Employer's Brief at 6. The Director, Office of Workers' Compensation Programs, agrees with employer that the fact that the evidence pre-dated the miner's request for modification is not a bar to admissibility, but considers the administrative law judge's evidentiary ruling to be harmless error, should the Board affirm the denial of benefits. Director's Brief at 1-2.

Because claimant has withdrawn his appeal in this case, the administrative law judge's denial of benefits is affirmed, and we therefore decline to address employer's arguments on cross-appeal.

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<sup>1</sup> Claimant filed an appeal on June 4, 2007, and counsel filed claimant's Motion to Withdraw His Appeal on August 16, 2007, which the Board granted on September 24, 2007.

<sup>2</sup> Employer requests the Board to reverse the administrative law judge's finding that some of employer's evidence was inadmissible, but concedes that its arguments on cross-appeal are rendered harmless if the Board affirms the administrative law judge's denial of benefits. Employer's Brief at 2, 14.

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