

BRB No. 07-0158 BLA

R.A.)
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 Claimant-Petitioner)
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 v.)
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 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 08/30/2007
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 the Decision and Order Denying Benefits (05-BLA-5202) of Administrative Law Judge Alice M. Craft 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 found that the Director, Office of Workers' Compensation Programs (the Director), stipulated to, and the record established, thirty-eight years of coal mine employment. The administrative law judge further found that the parties stipulated that claimant had pneumoconiosis that arose out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge found, however, that claimant failed to establish total respiratory disability. 20 C.F.R. §718.204(b)(2)(i)-(iv). Benefits were, accordingly, denied.

On appeal, claimant contends that the administrative law judge should have found total respiratory disability established at 20 C.F.R. §718.204(b)(2)(iv), based on Dr. Rasmussen's opinion.¹ The Director responds, arguing that the administrative law judge's decision denying benefits should be affirmed.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe 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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).²

¹ The administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² The record indicates that claimant was last employed in the coal mine industry in Kentucky. Director's Exhibits 1, 4. 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 Dr. Rasmussen's opinion establishes total respiratory disability at Section 718.204(b)(2)(iv).³ In support of his argument, claimant contends:

the claimant's usual coal mine work included being a maintenance foreman, motor man, coal loader, and cutting machine operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Rasmussen (who did diagnose a pulmonary impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. [The administrative law judge] made no mention of the claimant's usual coal mine work in conjunction with Dr. Rasmussen's opinion of disability.

Claimant's Brief at 3. 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 rejected. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1889); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988). Moreover, 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

³ Dr. Rasmussen opined that claimant had no significant impairment in lung function based on his review of claimant's medical data. Dr. Rasmussen considered claimant's history, symptoms, and the results of his physical examination and clinical testing. Dr. Rasmussen specifically noted that claimant's last coal mine employment was as an underground mechanic and electrician, which involved carrying tools weighing 50-70 pounds. Dr. Rasmussen further found that: claimant did heavy lifting and pulling of motors and pumps; used sledgehammers and slate bars; and shoveled the belt. Dr. Rasmussen concluded, therefore, that claimant did considerable heavy and some very heavy manual labor. Director's Exhibit 10.

medical evidence of record. *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004). Further, the administrative law judge properly found that total respiratory disability was not established at Section 718.204(b)(2)(iv), based on his consideration of the non-qualifying pulmonary function and blood gas studies, along with Dr. Rasmussen's uncontradicted opinion that claimant retained the respiratory capacity to perform his usual coal mine employment. See 20 C.F.R. §718.204(b)(2); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987), *aff'g on recon.*, 9 BLR 1-195 (1986); see also *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-00, 2-103 (6th Cir. 1983)(credibility findings are left to discretion of fact-finder who must evaluate reasoning of physician in light of objective studies and physical findings). We, therefore, affirm the administrative law judge's finding that claimant failed to establish that he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Since claimant failed to establish total disability at Section 718.204(b)(2)(i)-(iv), a finding of entitlement is precluded.

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