

BRB Nos. 05-0609 BLA
and 05-0609 BLA-A

CILLIS GENE LANKFORD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTOVER MINING COMPANY)	
)	
and)	
)	
UNDERWRITERS SAFETY AND CLAIMS)	DATE ISSUED: 02/16/2006
)	
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.

Robert M. Estep (Estep & Estep), Tazewell, Tennessee, for claimant.

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

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

PER CURIAM:

Claimant¹ appeals, and employer cross-appeals, the Decision and Order - Denying Benefits (03-BLA-0136) of Administrative Law Judge Joseph E. Kane on modification of a miner's duplicate 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).² Initially, the administrative law judge noted the parties' stipulation to eight years of coal mine employment, 2003 Hearing Transcript at 11. Decision and Order at 16. The administrative law judge found that employer is collaterally estopped from relitigating the issue of the existence of pneumoconiosis. *Id.* at 18. After consideration of all of the evidence of record, the administrative law judge found no mistake in a determination of fact in Administrative Law Judge Clement J. Kichuk's decision. *Id.* at 17-18. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that all of the evidence of record failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 20. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find established total disability due to pneumoconiosis pursuant to Section 718.204. Claimant's Brief at 6-8. On cross-appeal, employer asserts that the administrative law judge erred by failing to conduct a *de novo* review of the evidence regarding the existence of pneumoconiosis and by finding that employer was collaterally estopped from relitigating the existence of pneumoconiosis. Employer's Brief on Cross-Appeal at 13-17. Employer responds to claimant's appeal, urging affirmance of the administrative law

¹Claimant is Cillis Gene Lankford, the miner, whose first claim for benefits, filed on July 29, 1981, was finally denied on February 18, 1983. Director's Exhibit 16. Claimant's second claim for benefits was filed on November 12, 1987. Director's Exhibit 2. After numerous appeals and remands of claimant's second claim, on September 17, 2001, the United States Court of Appeals for the Sixth Circuit denied claimant's appeal of the Board's affirmance of Administrative Law Judge Clement J. Kichuk's denial of benefits. Director's Exhibit 79. Claimant's third claim for benefits, filed on March 25, 2002, was treated as a request for modification, which the district director denied and claimant requested a formal hearing. Director's Exhibits 81, 90, 91.

²The 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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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. 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).

To establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a 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*).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Clarke, Reinoso, Baker, and Dr. Dahhan.⁴ Decision and Order at 20. The administrative law judge accorded greater weight to Dr. Dahhan's opinion, over the contrary opinions of Drs. Clarke, Reinoso, and Baker because he found that Dr. Dahhan was the only physician to discuss the miner's pulmonary capacity in conjunction with his ability to perform the duties of his previous coal mine employment or similar work. *Id.* In claimant's brief before the Board, he sets forth the evidence in the record relevant to Section 718.204(b)(2)(iv) and the administrative law judge's findings therein, but does not identify with specificity any error made by the administrative law judge in his consideration of the evidence regarding total respiratory disability. He merely asserts that he is, *inter alia*, totally disabled. Since claimant has failed to provide a basis upon

³We affirm, as unchallenged on appeal, the administrative law judge's findings that, based on all the evidence of record, claimant failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴Dr. Clarke found claimant to be totally and permanently disabled due to pneumoconiosis. Dr. Reinoso agreed with Dr. Clarke that claimant suffers from a ventilatory impairment. Dr. Baker opined that claimant has a Class II impairment which does not fall in the disability range, but because claimant should avoid further coal dust exposure he is disabled from performing coal mine employment. Dr. Dahhan found that claimant is not totally disabled from performing his previous coal mine employment. Director's Exhibits 3, 21, 89; Claimant's Exhibit 1; Employer's Exhibit 1.

which the Board may review the administrative law judge's weighing of the medical evidence regarding total respiratory disability, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b) based on all of the medical evidence in the record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of the foregoing, it is unnecessary for us to address employer's challenge, on cross-appeal, to the administrative law judge's application of the doctrine of collateral estoppel to the issue of the existence of pneumoconiosis in a claim before the administrative law judge on a petition for modification. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

REGINA C. McGRANERY
Administrative Appeals Judge