

BRB No. 07-0759 BLA

L.A.)
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 Claimant-Petitioner)
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 v.)
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 LESLIE RESOURCES, INCORPORATED) DATE ISSUED: 03/20/2008
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 and)
)
 ZURICH AMERICAN INSURANCE)
 GROUP)
)
 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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird & 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 (2006-BLA-05355) of Administrative Law Judge Ralph A. Romano with respect to 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). Based on the parties' stipulation, the administrative law judge credited claimant with twenty-seven years of coal mine

employment and adjudicated this claim, filed on March 1, 2005, pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the evidence was insufficient to establish that claimant suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), or that claimant is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1) and (a)(4) and 718.204(b)(2)(iv).¹ Employer has responded, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response unless requested to do so by the Board.

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.² 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).

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 that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties, and the evidence of record, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to

¹ In alleging that the administrative law judge erred by not finding that he is totally disabled, claimant references the regulation at 20 C.F.R. §718.204(c). Claimant's Brief at 5-6. We note, however, that under the revised regulations, Section 718.204(c) is the regulation pertaining to disability causation, while 20 C.F.R. §718.204(b)(2) is the regulation pertaining to total respiratory or pulmonary disability. 20 C.F.R. §718.204(b)(2), (c).

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

Section 718.204(b)(2). With respect to the administrative law judge's determination that claimant did not prove that he is suffering from a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2)(i)-(iii), we affirm this finding, as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 11, 12.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Rasmussen, Broudy, and Dahhan. Decision and Order at 12-13. Dr. Rasmussen examined claimant on May 19, 2005, and obtained a chest x-ray, a pulmonary function study, a blood gas study, and an EKG. Director's Exhibit 13. Dr. Rasmussen opined that claimant has no significant loss of lung function and retains the pulmonary capacity to perform his last coal mine employment. *Id.* Dr. Broudy examined claimant on October 18, 2005, and procured a chest x-ray, a CT scan of the chest, a pulmonary function study, and a blood gas study. Employer's Exhibit 3. Dr. Broudy indicated in his report that claimant retains the ability to perform his previous coal mining job or similarly arduous labor. *Id.* Dr. Dahhan examined claimant on July 27, 2006, and obtained a chest x-ray, a pulmonary function study, a blood gas study, and an EKG. Employer's Exhibit 1. Dr. Dahhan also reviewed claimant's medical records. Based upon this data, Dr. Dahhan indicated that claimant had no respiratory impairment and could continue to work in his usual coal mine job. *Id.*

After reviewing these medical opinions, the administrative law judge concluded that they did not support a finding of total disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 13. Claimant contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work to Dr. Rasmussen's diagnosis of a pulmonary impairment. Claimant's Brief at 6. We disagree.

Contrary to claimant's contention, Dr. Rasmussen did not diagnose a pulmonary impairment, but rather found that claimant does not suffer from any significant loss of lung function. Director's Exhibit 13. Because none of the physicians of record opined that claimant has a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant did not establish total disability based upon the medical opinion evidence under Section 718.204(b)(2)(iv).³ *Cornett v. Benham*

³ We also reject claimant's argument that he is now totally disabled due to pneumoconiosis, because pneumoconiosis is a progressive disease and "a considerable amount of time has passed since the initial diagnosis of pneumoconiosis." Claimant's Brief at 6-7. An administrative law judge's findings regarding the issue of total disability cannot be based upon assumptions; they must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Coal, Inc., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Youghiogeny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246, 19 BLR 2-123, 2-127 (6th Cir. 1995). We also affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), based upon a weighing of all of the evidence relevant to total disability. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); Decision and Order at 13.

Because we have affirmed the administrative law judge's finding that the medical evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2), an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In light of this disposition of claimant's appeal, we need not reach claimant's arguments concerning the administrative law judge's findings with respect to the other elements of entitlement.

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