

BRB No. 05-0934 BLA

WILLIAM JOHN EISENMAN)	
(Dependent Adult Child of EDGAR E.)	
EISENMAN, deceased))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 05/31/2006
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

James D. Muirhead, Hackensack, New Jersey, for claimant.

Rita Roppolo (Howard M. Radzely, 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 (04-BLA-6802) of Administrative Law Judge Robert D. Kaplan denying benefits 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). Claimant is the son of the miner, Edgar E. Eisenman, who died on October 11, 1982. Director's Exhibit 1. Based on a claim filed on May 23, 1975, the miner received black lung disability benefits until his death.¹ Director's Exhibit 1.

¹ The record indicates that the miner's coal mine employment occurred in Pennsylvania. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction

Thereafter, the miner's widow was awarded survivor's benefits from December 12, 1982, until her death in 2003. Director's Exhibits 1, 3. Both benefit awards were augmented on behalf of claimant based on Social Security Administration documentation that he was receiving disability benefits since July 24, 1974, due to the effects of polio. On November 20, 2003, claimant filed this claim for benefits, alleging entitlement on his own behalf as the disabled adult child of the deceased miner. Director's Exhibit 2.

The administrative law judge noted that the parties conceded all elements of entitlement except that claimant was totally disabled prior to the age of twenty-two. Decision and Order at 2; Director's Exhibit 30; Hearing Transcript at 8-10. The administrative law judge found that although claimant suffered significant physical impairment due to the effects of childhood polio, the record did not establish that he became disabled prior to attaining the age of twenty-two, as required by 20 C.F.R. §725.221. Specifically, the administrative law judge found that, beginning just after his twenty-second birthday, which was on February 4, 1966, claimant engaged in substantial, gainful activity for seven years in an insurance adjuster's office. The administrative law judge found from claimant's performance of substantial, gainful employment shortly after attaining the age of twenty-two that claimant was not disabled prior to age twenty-two. The administrative law judge therefore determined that claimant did not carry his burden to establish that he was disabled before reaching age twenty-two. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find that claimant was totally disabled prior to the age of twenty-two. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of benefits. The Director argues that the administrative law judge properly denied benefits because even had claimant established his disability prior to age twenty-two, the finding that he thereafter engaged in substantial, gainful employment precludes his entitlement because he did not remain continuously disabled.

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).

of the United States Court of Appeals for the Third Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

We agree with the Director that the administrative law judge properly denied benefits. A child of a deceased miner is entitled to benefits if the relationship and dependency requirements are met. 20 C.F.R. §725.218(a). An unmarried adult child satisfies the dependency requirement if the child is under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), that began before the child attained age twenty-two. 30 U.S.C. §902(g); 20 C.F.R. §§725.209(a)(2)(ii), 725.221. The Social Security Act defines “disability” as “the inability to engage in substantial gainful activity by reason of any medically demonstrable physical or mental impairment.” 42 U.S.C. §423(d)(1)(A); *Tackett v. Director, OWCP*, 10 BLR 1-117, 1-118 (1987). Where “a child’s entitlement is based on disability,” the child’s entitlement ends the month before “the first month in no part of which such individual is under a disability.” 20 C.F.R. §725.219(b)(5). A child must remain continuously disabled in order to be entitled to benefits under the Act. *Kidda v. Director, OWCP*, 7 BLR 1-202, 1-205-06 (1984), *aff’d*, 769 F.2d 165, 8 BLR 2-28 (3d Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986).

In the case at bar, substantial evidence supports the administrative law judge’s finding that claimant engaged in substantial gainful activity from 1966 to 1974. The administrative law judge considered documentary evidence and testimony that claimant was employed during that time in the insurance adjusting office of Victor Miller. Although claimant argued to the administrative law judge and argues on appeal that the job was nonproductive employment that was merely an act of charity by Mr. Miller, the administrative law judge found that the record demonstrated that claimant “was performing typical clerical work” in an office setting.² Decision and Order at 6. The

² As summarized by the administrative law judge, claimant testified that “his work at Miller consisted of putting files ‘together,’ ‘close the file in a ledger,’ and handling mail. T 27.” Decision and Order at 4. The administrative law judge also considered claimant’s testimony that “he was actually performing some type of clerical work the majority of the time that he was present at work at the Miller office. T 41.” Decision and Order at 4-5. The administrative law judge also summarized claimant’s December 14, 2004 letter describing his job duties:

[Claimant] described his job . . . as receiving the mail from Mr. Miller, appending the mail to the appropriate file, placing the file on the desk of the proper adjuster, opening and closing files, and “marking them in proper ledgers.” He also made cards for new files, made up new files, and filed the cards. He marked cards “closed” and filed them, “pulled diariied files” and placed them on the desks of appropriate adjusters. Claimant . . . stuffed envelopes with the day’s mail and filed away the files that had been worked on. Claimant also answered telephones and forwarded the calls to the “proper adjuster.”

administrative law judge also considered claimant's Social Security earnings record documenting earnings from 1966 through 1974.³ Decision and Order at 4; Director's Exhibit 34. Based on this evidence, the administrative law judge found that claimant's job was not "make-work" or an "act of charity," but "constitute[d] substantial gainful activity." Decision and Order at 6. The administrative law judge determines the weight and credibility of the evidence, and we conclude that substantial evidence supports his finding that claimant engaged in substantial gainful activity. See *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Piccin v. Director, OWCP*, 6 BLR 1-616, 1-618 (1983). We therefore affirm the administrative law judge's finding.

Because the administrative law judge found that claimant engaged in substantial gainful activity during his years of employment, claimant does not meet the requirements for entitlement to benefits as a disabled adult child:

Even assuming that [claimant] had established his disability prior to age 22, he did not remain so continuously disabled as to be precluded from engaging in substantial gainful employment. This being so, [claimant] has failed to satisfy the statutory requirements for children's benefits.

Kidda, 769 F.2d at 168, 8 BLR at 2-33 (footnotes omitted). Because claimant did not remain continuously disabled, he is not entitled to benefits under the Act. We therefore affirm the administrative law judge's determination that claimant is not entitled to benefits. Consequently, we need not address claimant's arguments that the administrative law judge erred in finding that he did not establish that he was disabled before age twenty-two.⁴

Decision and Order at 5.

³ Although claimant contends that his earnings in 1966, 1967, and 1968 were not significant, he states that he had "significant earnings" beginning in 1969. Claimant's Brief at 6.

⁴ Claimant has submitted to the Board a Certification of Extract from Records from the Social Security Administration. The Board cannot consider new evidence on appeal. 20 C.F.R. §802.301(b).

Accordingly, the administrative law judge' 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