

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3249

WILLIAM JOHN EISENMAN,
(Dependent Adult Child of Edgar E. Eisenman, deceased),

Petitioner

v.

DIRECTOR , OFFICE OF WORKERS' COMPENSATION PROGRAMS

On Appeal from a Decision and Order
of the Benefits Review Board
(BRB No. 05-0934 BLA)

Submitted Under Third Circuit LAR 34.1(a)
September 28, 2007

Before: AMBRO, JORDAN and ROTH, Circuit Judges

(Filed : October 26, 2007)

OPINION

AMBRO, Circuit Judge

Petitioner William John Eisenman is the son of a mine worker who contracted pneumoconiosis. His father received benefits under the Black Lung Benefits Act, 30

U.S.C. § 901–44, until his death in 1982. His mother also received benefits under the Act until her death in 2003. Eisenman subsequently sought benefits under 30 U.S.C. § 922(a)(3) as the disabled child of a miner who died from pneumoconiosis. The Office of Workers’ Compensation Programs (“OWCP”) determined that Eisenman was ineligible for benefits on the ground that his disability, in a legal sense, was not continuous from a time before he reached the age of 22. An Administrative Law Judge denied benefits and the Benefits Review Board of the U.S. Department of Labor affirmed. Eisenman then petitioned our court for review. We have jurisdiction pursuant to 30 U.S.C. § 932(a), which incorporates 33 U.S.C. § 921(c), because the deceased mine worker’s mine employment occurred in Pennsylvania. We deny the petition for review.

Eisenman contracted acute anterior poliomyelitis in 1948 at the age of four. The disease left him with significant physical impairments in his arms, legs, and back. He attended a grammar school for the orthopedically handicapped, a non-specialized high school, and the Kessler Institute for Rehabilitation. In 1967, Victor Miller, Inc. Independent Insurance Adjusters (“Miller”) hired him after an apparently successful three-month trial period. For his job, Eisenman performed tasks such as driving himself to work, filing, making ledger notations, sorting and delivering mail, and answering telephones occasionally. He worked for Miller each weekday, usually from 9 a.m. to 4 p.m., for seven years until he was laid off in 1974 for economic reasons. Eisenman has not had regular employment since.

Edgar Eisenman, William’s father, worked as a miner for the Jeddo-Highland Coal

Company from 1941 to 1954 and was diagnosed with pneumoconiosis in 1975. The Office of Workers' Compensation Programs granted Edgar disability benefits from the Black Lung Disability Trust Fund in 1979 (dating them back to April 1975). Edgar's benefits were augmented for his wife Dorothy and his dependent sons Philip and William (the petitioner in this case). After Edgar's death in 1982, Dorothy continued to receive benefits under 30 U.S.C. § 922(a)(2) at a level augmented for Philip and William. After Dorothy died in 2003, William Eisenman sought to receive benefits under 30 U.S.C. § 922(a)(3).

The OWCP denied Eisenman's claim for benefits on the ground that he had not established disability before the age of 22 under the meaning of 20 C.F.R. § 725.221, which incorporates the definition of disability (though with a different age requirement) of 42 U.S.C. § 423(d)(1)(A). In particular, the OWCP found that Eisenman was not disabled before the age of 22 because he had engaged in "substantial gainful employment," *id.* § 423(d)(2)(A), from the ages of 23 to 30. After a hearing, Administrative Law Judge Robert D. Kaplan affirmed the OWCP's decision. The Benefits Review Board affirmed Judge Kaplan's decision, and Eisenman petitions our Court for review of that ruling.

Eisenman makes two arguments. First, he maintains that the relevant OWCP regulations violate the equal protection guarantee contained in the Fifth Amendment of our Constitution. Second, he contends that even if the regulations are constitutional, the OWCP's order was not supported by substantial evidence. We find both arguments

unpersuasive.

We apply plenary review to questions of law presented by the Benefits Review Board's decision. *C & K Coal Co. v. Taylor*, 165 F.3d 254, 255 (3d Cir. 1999). The Board held that Eisenman was not continuously disabled because he engaged in "substantial gainful activity during his years of employment." Benefits Review Board Op. at 4. Eisenman argues that requiring continuous disability for payment of black-lung benefits treats him unequally compared to others similarly situated. *See Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954); *U.S. v. Pollard*, 326 F.3d 397, 406 (3d Cir. 2003).

The parties agree that this regulation is subject to rational basis review. We must determine whether a " 'plausible policy reason' " exists for treating children of miners who are not continuously disabled differently in the statutory scheme for awarding black-lung benefits. *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 107 (2003) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

The alleged equal-protection violation stems from a comparison between disabled children of miners and two other groups: first, spouses and children receiving benefits under the Black Lung Benefits Act who get married and then become unmarried; and, second, Social Security disability claimants who return to work and then cease working. These two comparison groups are eligible for a reinstatement of benefits. But children of deceased miners who are not continuously disabled, from an age younger than 22 onward, are ineligible for such a reinstatement. *See* 20 C.F.R. § 725.209, .219, .221. This disparity in treatment, Eisenman maintains, has no rational basis and violates the Fifth

Amendment.

This argument fails for two reasons. First, the Director has supplied plausible explanations for this distinction, which we may consider as part of our rational-basis review. *See Ramsgate Court Townhome Ass’n v. West Chester Borough*, 313 F.3d 157, 160 (3d Cir. 2002) (“We are free to consider any conceivable legislative purpose so long as it reasonably could have been entertained by the legislature.”). We first consider Congress’s decision with respect to the first comparison group, deceased miners’ spouses or children who become married and then unmarried. A period of financial independence may suggest a lower degree of need, whereas a period of marriage may not imply any alleviation of the disability or any possibility of financial independence. Appellee’s Br. at 14–15. With respect to the second group, Social Security disability claimants, it is plausible that Congress wished to favor primary claimants (wage earners) over secondary claimants (miners’ children). *Id.* at 15–16. Moreover, disabled children who have a period of gainful employment could have Social Security disability claims of their own.

Second, in requiring continuous disability for the payment of black-lung benefits, the OWCP has applied our Court’s precedent in *Kidda v. Director, Office of Workers’ Compensation Programs*, 769 F.2d 165 (3d Cir. 1985) (requiring a continuous period of disability under 30 U.S.C. §§ 902(g), 922(a)(3)). Eisenman’s equal-protection claim is an attempt to upset the precedent of *Kidda* from a different angle. We see no reason to overturn *Kidda*, which based its interpretation of the statute on a careful reading of the legislative history. For the foregoing reasons, Eisenman’s Fifth-Amendment argument

cannot succeed.

Eisenman also disputes Administrative Law Judge Kaplan's finding that he was not continuously disabled. We must " 'independently review the record and decide whether the judge's findings are supported by substantial evidence.' " *Lango v. Dir.*, *OWCP*, 104 F.3d 573, 576 (3d Cir. 1997) (quoting *Kowalchick v. Dir.*, *OWCP*, 893 F.2d 615, 619 (3d Cir. 1990)).

Eisenman did present evidence that his physical impairments date back to a young age and that his work for Miller was "light" in the sense of not being physically taxing. Appellant's Br. at 23. But Eisenman's substantial-evidence argument fails because of a legal misunderstanding. The Director does not dispute that Eisenman has suffered the effects of polio, in the form of serious physical impairments, since the age of four. One might say in a colloquial sense that he is "disabled." But the issue, under the Black Lung Benefits Act and OWCP regulations, is whether Eisenman was "continuously disabled," *Kidda*, 769 F.2d at 165, in the legal sense of being unable to engage in "substantial gainful employment." See 20 C.F.R. § 725.221; 42 U.S.C. § 423(d)(1)(a). Ample evidence in the record demonstrates that Eisenman's job with Miller was substantial and gainful: he earned over \$5,000 in 1972; he worked every weekday; he held the job for seven years; and he performed common clerical tasks. Under the statute and the regulations, that is enough to demonstrate that Eisenman's disability for black-lung-benefits purposes was not continuous. Administrative Law Judge Kaplan's finding was supported by substantial evidence.

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Because the statute and OWCP regulations do not violate the Fifth Amendment, and because the Benefits Review Board's decision was based on substantial evidence, we deny the petition for review.
