

BRB No. 93-0584 BLA

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| EDWARD C. BARNES |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | DATE ISSUED: _____ |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

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

William Lawrence Roberts, Pikeville, Kentucky, for
claimant.

Matthew P. Levin (Thomas S. Williamson, Jr., Solicitor of
Labor; Donald S. Shire, Associate Solicitor; Rae Ellen
Frank James, Deputy Associate Solicitor; Richard A. Seid
and 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, Acting Chief Administrative Appeals
Judge, SMITH, Administrative Appeals Judge and SHEA,
Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (91-BLA-1429) of
Administrative Law Judge Richard D. Mills 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). The administrative law judge credited claimant
with five years of coal mine employment, concluded that a material
change in conditions was established pursuant to 20 C.F.R. §725.309

*Sitting as a temporary Board member by designation pursuant to the
Longshore and Harbor Workers' Compensation Act as amended in 1984,
33 U.S.C. §921(b) (5) (1988).

and adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ The administrative law judge determined that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs, responds, urging the Board to vacate and remand the administrative law judge's Decision and Order.²

The Board's scope of review is defined by statute. The administrative law judge's finding of fact and conclusions of law must be affirmed if they are rational, supported by substantial evidence, and are 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).

¹ Claimant filed his initial claim for benefits on March 8, 1972 with the Social Security Administration, which was finally denied on September 4, 1975. Director's Exhibit 28. Claimant filed a claim with the Department of Labor on June 4, 1976 which was denied on August 30, 1979. Director's Exhibit 28. Claimant filed a claim on October 12, 1989 which was merged with a claim filed on December 20, 1989. Director's Exhibits 1, 2. The administrative law judge denied the claim on October 30, 1992. The instant appeal followed.

² We affirm, as unchallenged on appeal, the findings of the administrative law judge regarding the length of claimant's coal mine employment, the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and his finding that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must demonstrate 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. Failure of the claimant to establish any of the foregoing elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

We note that the Board's power to review an administrative law judge's Decision and Order is limited. See 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). The Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and demonstrate why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. See 20 C.F.R. §802.211(b); *Cox, supra*; *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish, supra*; *Sarf, supra*. A petitioner who fails to comply with the requisite regulations provides the Board with no basis to reach the merits of an appeal. See *Cox, supra*. In the instant case, claimant generally asserts that several medical opinions discredited by the administrative law judge are well-reasoned and entitled to deference. See Claimant's Brief at 2-4. Claimant, however, has failed to identify any error made by the administrative law judge in his evaluation of the evidence or his application of law pursuant to 20 C.F.R. Part 718. As claimant's counsel has failed to adequately raise or brief any issues arising from the administrative law judge's Decision and Order denying benefits, the Board has no basis upon which to review the decision. Thus, we decline to review the Decision and Order of the administrative law judge. See *Sarf, supra*; *Cox, supra*.

The Director asserts in his response brief that the administrative law judge erred in discrediting the medical opinions of Drs. Clarke, Baker, Meyers and Fritzhand because the physicians based their opinions upon an inaccurate length of coal mine employment history. See Director's Brief at 2; Director's Exhibits 11, 21, 22. The Director further contends that the administrative law judge erred in failing to consider relevant evidence of record. See Director's Brief at 2. We note that the Director's response brief is neither a cross-appeal nor does it provide an alternative basis upon which the Board may affirm the ultimate disposition of the administrative law judge. Pursuant to the regulations found at 20 C.F.R. §802.212, arguments in response briefs must be limited to those which respond to issues raised in petitioner's brief and those in support of the decision below. Other arguments will not be considered by the Board. See 20 C.F.R. §802.212(b); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983); see also *Hansen v. Director, OWCP*, 904

F.2d 364, 17 BLR 2-48 (10th Cir. 1993); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987); *Whiteman v. Boyle Land and Fuel Company*, 15 BLR 1-11 (1991) (*en banc*). Where a party who did not file a petition for review seeks to amend the final order below, those contentions must be raised in the form of a cross-appeal. See 20 C.F.R. §802.201(a)(2). Moreover, although the Director serves as administrator of the Act, he is still bound to follow regulations and proper procedures in raising issues in appeals before the Board. See 30 U.S.C. §932; 20 C.F.R. §§725.481, 802.201, 802.212. In this case, the Director's contentions in his response brief do not support the final order below denying benefits, but seek remand for further consideration of the evidence pursuant to 20 C.F.R. §§718.203(b) and 718.204(c). Director's Brief at 2. Thus, the Director's brief fails to conform to the regulations and is insufficient to provide the Board with an alternative basis upon which to address the administrative law judge's Decision and Order. See 20 C.F.R. §§802.201, 802.212; *Shelesky, supra*; *Whiteman, supra*. Accordingly, we decline to address the Director's contentions raised in his response brief and affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge