BRB No. 04-0192 BLA

DENVER BROCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 07/15/2004
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 (2001-BLA-1072) of Administrative Law Judge Joseph E. Kane 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).[1] The administrative law judge found twelve and one-half years of coal mine

[1] The 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.

employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 2, 6. The administrative law judge, after determining that the instant case was a duplicate claim, noted the proper standard and concluded that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 as the newly submitted x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[2] Decision and Order at 2, 5-8. The administrative law judge also found that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 6. The administrative law judge, however, further determined that the evidence of record was insufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[3] Decision and Order at 8-12. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs, responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.[4]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be

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[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

[3] The record indicates that claimant filed his initial claim for benefits on March 12, 1973, which was denied by the Social Security Administration on July 24, 1978. Director's Exhibit 23. Claimant filed a request for modification which was denied by the Social Security Administration and the Department of Labor and finally denied by the Benefits Review Board on August 26, 1994 as claimant failed to establish any element of entitlement. Director's Exhibit 23; *Brock v. Director, OWCP*, BRB No. 93-1178 BLA (Aug. 26, 1994)(unpub.). Claimant took no further action until he filed a second application for benefits on July 10, 2000, the subject of the instant appeal. Director's Exhibit 1.

[4] The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe 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 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

The Board is not empowered to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as the review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). As we have emphasized previously, the Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and address 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 v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff=g* 7 BLR 1-610 (1984); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Sarf*, 10 BLR 1-119. Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Hix v. Director, OWCP*, 824 F.2d 526, 10 BLR 2-191 (6th Cir. 1987); *Sarf*, 10 BLR 1-119; *Fish*, 6 BLR 1-107.

In the instant case, other than generally asserting that the medical evidence of record was sufficient to establish entitlement to benefits, *see* Claimant's Brief at 2-3, claimant has failed to identify any errors made by the administrative law judge in the evaluation of the evidence and applicable law pursuant to Part 718. Thus, as claimant's counsel has failed to adequately raise or brief any issue arising from the administrative law judge's Decision and Order denying benefits, the Board has no basis upon which to review the decision.[5]

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[5] Moreover, the record indicates that the administrative law judge reasonably accorded less weight to the opinion of Dr. Varghese, the miner's treating physician, as his credentials are not in the record and the physician failed to provide sufficient documentation to support his total disability conclusion. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); Decision and Order at 10-12; Claimant's Exhibit 4. Furthermore, since the determination of whether claimant has a totally disabling respiratory impairment is primarily a medical determination, claimant's testimony alone, under the circumstances of

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

this case, could not alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(5); *Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Anderson*, 12 BLR 1-111; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields*, 10 BLR 1-19; *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985). Thus, the administrative law judge's determination that claimant failed to establish the existence of a totally disabling respiratory impairment is supported by substantial evidence and in accordance with law.