BRB No. 01-0260 BLA

JERRY HARDIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING CO., LLC.	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney, PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-BLA-01844) of Administrative Law Judge Stuart A. Levin 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] This case has been before the Board previously. In the

[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 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive

original Decision and Order, the administrative law judge found, and the parties stipulated to, at least twelve years of coal mine employment. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000).[2] Accordingly, benefits were denied. Claimant appealed and the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000) as well as the administrative law judge's weighing of the medical opinion of Dr. Rasmussen. The Board remanded the case for the administrative law judge to reconsider the opinion of Dr. Jabour in conjunction with the opinion of Dr. Hippensteel and to weigh all of the relevant evidence together in accordance with the teaching of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2-(4th Cir. 2000), issued subsequent to the administrative law judge's decision. The court held in *Compton* that although Section 718.202(a) (2000) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease.[3] *Hardin v. U.S. Steel Mining Co.*,

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relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001).

[2]Claimant filed his application for benefits on March 5, 1997. Director's Exhibit 1.

BRB No. 99-0869 BLA (May 12, 2000)(unpublished).

On remand, the administrative law judge concluded that Dr. Jabour's opinion was not well-reasoned or documented and was thus, insufficient to establish the existence of pneumoconiosis. The administrative law judge further concluded that even if that opinion were sufficient to establish the existence of pneumoconiosis, it was outweighed by the opinion of Dr. Hippensteel, because his opinion is better reasoned, better supported by the clinical data and he has superior qualifications. Decision and Order on Remand at 2-3. The administrative law judge further found that upon review of all of the relevant evidence pursuant to *Compton,* claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Decision and Order on Remand at 3. Accordingly, benefits were denied. In the instant appeal, claimant contends that the Board erred in affirming the administrative law judge's weighing of Dr. Rasmussen's opinion in its prior decision and that on remand the administrative law judge made the following errors: in finding that Dr. Hippensteel's opinion was well-reasoned as the physician offered no basis for his statements; in failing to find that claimant established total disability; and that the disability was due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 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

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

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*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Claimant initially contends that the Board erred in affirming the administrative law judge's determination that Dr. Rasmussen's opinion was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). Claimant's Brief at 7. This contention lacks merit as the Board addressed claimant's contentions with respect to Dr. Rasmussen's opinion and the administrative law judge's rational weighing thereof in its prior Decision and Order and thus we decline to reconsider the administrative law judge's weighing of Dr. Rasmussen's opinion pursuant to Section 718.202(a)(4) (2000) as our decision constitutes the law of the case. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Claimant further generally contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4) (2000). The Board is not empowered to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of responsibility between the administrative law judge as the trier-of-fact and the Board as the reviewing tribunal. *See* 20 C.F.R. §802.301(a) (2000); *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 with specificity, demonstrating how substantial evidence does not support the result reached or the way in which the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b) (2000); *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, supra*. 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 *Sarf, supra*; *Fish, supra*.

In the instant case, other than generally asserting that the medical evidence of record was sufficient to establish the existence of pneumoconiosis, *see* Claimant's Brief at 7-8, claimant has failed to identify any errors made by the administrative law judge in the evaluation of Dr. Jabour's medical opinion and applicable law pursuant to Part 718. Thus, as claimant's counsel has failed to adequately raise or brief any issue in the administrative law judge's weighing of Dr. Jabour's opinion, the only evidence supportive of claimant's burden of proof on remand, the Board has no basis upon which to review the decision denying

benefits.[4]

[4]Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a living miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Additionally, we need not address claimant's remaining contentions on appeal as the administrative law judge did not reach these issues in his decision.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge