

BRB No. 00-0850 BLA

HOWARD CARR	)		
	)		
Claimant-Petitioner	)		
	)		
v.	)		
	)		
CATHERINE ENTERPRISES,	)	DATE	ISSUED:
	)		
INCORPORATED	)		
	)		
and	)		
	)		
	)		
WHITE RIDGE COAL COMPANY	)		
	)		
and	)		
	)		
	)		
WEST VIRGINIA COAL WORKERS'	)		
COMPENSATION FUND	)		
	)		
Employers/Carrier-	)		
Respondents	)		
	)		
DIRECTOR, OFFICE OF WORKERS'	)		
COMPENSATION PROGRAMS, UNITED	)		
STATES DEPARTMENT OF LABOR	)		
	)		
Party-in-Interest	)	DECISION and ORDER	

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

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

Robert Weinberger (West Virginia Coal-Worker's Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Jeffrey S. Goldberg (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1083) of Administrative Law Judge John C. Holmes denying benefits on a request for modification 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).<sup>1</sup> This case is on appeal to the Board for the second time.<sup>2</sup> Following a hearing on May 21, 1997, Administrative Law Judge Edith Barnett (Judge Barnett) issued a Decision and Order on September 23, 1997. Director's Exhibit 76. Judge Barnett credited claimant with fourteen years of coal mine employment and dismissed Island Creek Coal Company as the responsible operator after determining that Catherine Enterprises and Mountain Top Fuel (Catherine Enterprises) were the same company and claimant's last employer. *Id.* Judge Barnett also determined that the officers of Catherine may be liable for benefits as Catherine was not insured and out of existence; however, if the officers were financially incapable of paying benefits, the Black Lung Disability Trust Fund would be liable for benefits. *Id.* On the merits, Judge Barnett found the evidence of record insufficient to establish the existence of pneumoconiosis. Accordingly, benefits were denied. *Id.* In the first appeal, the Board affirmed Judge Barnett's findings on the length of coal mine

---

<sup>1</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup> Claimant filed his initial application for benefits on January 19, 1995. Director's Exhibit 1.

employment, on the designation of responsible operator, and that the existence of pneumoconiosis was not established as supported by substantial evidence and accordingly affirmed the denial of benefits. *See Carr v. Island Creek Coal Co.*, BRB No. 98-0120 BLA (Oct. 6, 1998), Director's Exhibit 84.

Claimant timely filed a request for modification on November 13, 1998 which the district director granted by Proposed Decision and Order dated April 19, 1999 and corrected Proposed Decision and Order dated May 7, 1999. Director's Exhibits 85, 96, 103. Because of Judge Barnett's death, the instant case was assigned to Administrative Law Judge John C. Holmes (the administrative law judge), who held a hearing on modification and issued a Decision and Order dated May 10, 2000. After reviewing Judge Barnett's findings, the administrative law judge credited claimant with fourteen years of coal mine employment, dismissed White Ridge Coal Company from the proceedings, and found that the Black Lung Trust Fund was responsible for benefits as Catherine Enterprises, the responsible operator, had been dissolved and its corporate officers were unable to pay any claim. In any case, however, the administrative law judge noted that the responsible operator issue was moot in light of the denial of benefits. Considering the evidence on the merits, the administrative law judge found it insufficient to establish the existence of pneumoconiosis and accordingly, denied benefits.

On appeal, claimant requests that the case be remanded to the administrative law judge for reconsideration pursuant to the decision of the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000) which held that evidence relevant to the existence of pneumoconiosis must be weighed together rather than separately.<sup>3</sup> The West

---

<sup>3</sup> By Order dated July 6, 2000, the Board accepted claimant's Motion for Remand as his petition for review and brief and ordered response briefs to be filed within thirty days from the receipt of the Board's Order.

Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Virginia Coal Workers' Pneumoconiosis Fund (carrier) as insurer of White Ridge Coal Company and Catherine Enterprises has responded, contending that claimant has not challenged the administrative law judge's finding regarding the responsible operator issue and further contends, based on the absence of insurance coverage at the time of claimant's employment by Catherine Enterprises, the carrier should not be held liable for the payment of benefits and should be dismissed as a party to this claim. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the denial should be affirmed.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed for the duration of the lawsuit, 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 claims, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by Order issued on March 9, 2001, to which the Director and carrier have responded. In a brief dated March 26, 2001, the Director asserts that the regulations at issue in the lawsuit do not affect the outcome of this case, however the carrier asserts, in a brief dated March 14, 2001, that the expanded definition of pneumoconiosis will affect the outcome of this case. Based on the briefs submitted by the parties and our review of the instant case, however, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

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 disturbed. 33 U.S.C. §921(b)(3), as incorporated 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 pursuant to 20 C.F.R. Part 718, claimant must prove 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 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 a reviewing 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 demonstrate that the evidence does not support the result reached or that 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, 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 this case must be remanded for reconsideration under *Compton*, *see* Claimant's Brief at 2, 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. Moreover, as the Director contends, because the administrative law judge found the weight of the evidence at each subsection insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), remand under *Compton* would serve no purpose. *Compton, supra*. Thus, 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.

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

SO ORDERED.

---

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

---

NANCY S. DOLDER  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge