BRB No. 04-0364 BLA

NAPOLEON B. NAPIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 01/27/2005
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer-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 Denying Benefits of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenburg Traurig, LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5454) of Administrative Law Judge Stuart A. Levin (the administrative law judge) on a subsequent claim filed April 9, 2001 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). Director's Exhibit 4a. The administrative law judge credited claimant with sixteen years of coal mine employment, and noted that employer conceded at the hearing that claimant is totally disabled due to a pulmonary or respiratory impairment, *see* Decision and Order at 8; *see also* Hearing Transcript at 30. Considering all the evidence of record on the merits of the claim, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[1] Accordingly, benefits were denied.

On appeal, claimant alleges reversible error in the administrative law judge's weighing of Dr. Rasmussen's opinion on the issue of disability causation at 20 C.F.R. §718.204(c). Employer responds in support of the decision below, arguing that claimant offers no reason why the Board should disturb it. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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 rational, supported by substantial evidence, and in accordance with law, they are binding upon this Board and may not be 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 under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203,

[1] The administrative law judge also found that claimant failed to demonstrate, at 20 C.F.R. §725.309(d), that one of the applicable conditions of entitlement had changed since the district director's February 18, 2000 denial of benefits, which was based on claimant's failure to establish any element of entitlement, *see* Director's Exhibit 3. Contrary to the administrative law judge's finding, employer's concession at the hearing that claimant is totally disabled due to a respiratory or pulmonary impairment, meets claimant's burden at 20 C.F.R. §725.309(d). The administrative law judge's error is harmless, however, as he denied benefits based on the sufficiency of the record evidence on the merits of the claim. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits. As previously noted, in the instant case, employer concedes that claimant is totally disabled due to a respiratory or pulmonary impairment. Hearing Transcript at 30.

Claimant asserts that the evidence of record establishes that he has pneumoconiosis, merely setting forth evidence favorable to his case. The Board has consistently interpreted the regulation at 20 C.F.R. §802.210 to require the party challenging the administrative law judge's Decision and Order to do more than merely recite evidence favorable to his case; rather, the party must identify any alleged error with specificity. Otherwise there is no basis for review. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Claimant alleges no specific error in the administrative law judge's finding that the evidence of record fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement. Consequently, we have no basis to review that finding by the administrative law judge. We, therefore, affirm the administrative law judge's finding that pneumoconiosis is not established at 20 C.F.R. §718.202(a), and the denial of benefits. We need not address claimant's challenge to the administrative law judge's weighing of Dr. Rasmussen's opinion on the issue of disability causation at 20 C.F.R. §718.204(c), as a finding of entitlement is precluded.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge