

BRB No. 06-0595 BLA

GREG T. SIZEMORE)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 01/31/2007
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent¹) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Leroy Lewis, Hyden, Kentucky, for claimant.

Michelle S. Gerdano (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-5878) of Administrative Law Judge Thomas F. Phalen, Jr., with respect to 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 10.57 years of coal mine employment and considered the claim, filed on

¹ By Order dated October 12, 2006, the Board granted employer's Motion to Dismiss employer and its carrier from this case and revised the caption to substitute the Director as respondent. *See Sizemore v. Director, OWCP*, BRB No. 06-0595 BLA (Oct. 12, 2006) (Order) (unpub.).

December 26, 2001, pursuant to the regulations set forth in 20 C.F.R. Part 718.² The administrative law judge determined that the evidence of record was insufficient to establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2).³ Accordingly, benefits were denied.

On appeal, claimant contends that he established the existence of pneumoconiosis and total disability by x-ray and medical opinion evidence. The Director, Office of Workers' Compensation Programs, responds urging affirmance of the denial of benefits.⁴

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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 pursuant to 20 C.F.R. Part 718, claimant must establish 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. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The Board's circumscribed scope of review requires that the party challenging the Decision and Order below address that Decision and Order with specificity, identifying the errors allegedly made by the administrative law judge and citing evidence and legal

² The administrative law judge properly found that this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Decision and Order at 7; Director's Exhibit 3.

³ The administrative law judge referred to 20 C.F.R. §718.204(c)(1)-(4) in his weighing of the evidence relevant to the issue of total disability. However, as the instant claim was filed after January 19, 2001, the proper regulatory citation is 20 C.F.R. §718.204(b)(2)(i)-(iv). *See* 20 C.F.R. §725.2.

⁴ The parties do not challenge the administrative law judge's decision to credit claimant with 10.57 years of coal mine employment, or his findings pursuant to 718.202(a)(2), (a)(3), and 718.204(b)(2)(i)-(iii). These findings are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

authority that supports these allegations. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). If the party does not satisfy these requirements, the Board cannot address the propriety of the findings set forth in the Decision and Order, but rather must affirm them. *Id.*

In this case, claimant has merely recited evidence favorable to his claim and has not identified any errors made by the administrative law judge in finding that claimant failed to establish the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(b)(2). Because claimant's counsel has failed to adequately raise or brief any issues arising from the administrative law judge's findings at Sections 718.202(a) and 718.204(b)(2), the Board has no basis upon which to review these findings and must, therefore, affirm them. 20 C.F.R. §§802.211(b), 802.301(a); *see Sarf*, 10 BLR at 1-121. In light of our affirmance of the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis and total disability, essential elements of entitlement, we must also affirm the denial of benefits. *Hill*, 123 F.3d 412, 21 BLR 2-192; *Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge