

BRB No. 07-0477 BLA

G.N.)
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 Claimant-Petitioner)
)
 v.)
)
 LESLIE RESOURCES INCORPORATED)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 01/18/2008
)
 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 – Denial of Benefits of Larry S. Merck,
Administrative Law Judge, United States Department of Labor.

Leroy Lewis (Law Office of Phillip Lewis), Hyden, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2006-BLA-5252)
of Administrative Law Judge Larry S. Merck on a subsequent 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 twenty-eight years of qualifying coal mine employment as stipulated by the parties, and adjudicated this subsequent claim, filed on October 1, 2001, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that, because the weight of the newly submitted evidence was insufficient to establish any of the requisite elements of entitlement under 20 C.F.R. §§ 718.202, 718.203, 718.204,¹ claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the newly submitted medical evidence insufficient to establish all of the requisite elements of entitlement. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.² 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant generally asserts that the opinion of Dr. Baker, the other medical evidence of record, claimant's testimony, and his history of exposure are sufficient to establish entitlement to benefits. However, the Board is not empowered to engage in a *de*

¹ Claimant's initial claim, filed on April 16, 1973, was deemed abandoned. Director's Exhibit 1. The regulations provide that "denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Consequently, the administrative law judge correctly noted that claimant could meet his burden under 20 C.F.R. §725.309(d) by establishing any of the requisite elements of entitlement. Decision and Order at 7.

² The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

novus adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as trier-of-fact, and the Board as a 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 demonstrate 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); *Sarf*, 10 BLR at 1-120; *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision.

In the instant case, claimant generally asserts that the evidence shows that he is totally disabled by pneumoconiosis arising out of coal mine employment. See Claimant's Brief at 3-4. Employer correctly asserts, however, that claimant has failed to identify any errors made by the administrative law judge in the evaluation of the evidence and the applicable law pursuant to 20 C.F.R. Part 718. Thus, as claimant's counsel has failed to adequately raise or brief any issues arising from the administrative law judge's Decision and Order – Denial of Benefits, the Board has no basis upon which to review the decision. See *Slinker*, 6 BLR at 1-466; *Fish*, 6 BLR at 1-109. Consequently, we decline to review the administrative law judge's Decision and Order, and we affirm his denial of benefits.

Accordingly, the administrative law judge's Decision and Order — Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge