

BRB No. 03-0664 BLA

ANTHONY J. CILIBERTO)
)
 Claimant-Petitioner)
)
 v.)
)
 POPPLE BROTHERS COAL COMPANY)
)
 and)
)
 LACKAWANNA CASUALTY COMPANY) DATE ISSUED:
 06/23/2004)
)
 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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Joseph F. Saporito, Jr. (Saporito, Saporito & Falcone), Pittston, Pennsylvania, for claimant.

William E. Wyatt, Jr. (Fine, Wyatt and Carey, P.C.), Scranton, Pennsylvania, for employer.¹

¹William E. Wyatt, Jr., filed the response brief in this case with the Board on September 16, 2003. By letter dated October 10, 2003, Mr. Wyatt withdrew his representation of employer. On November 3, 2003, Maureen E. Herron filed an entry of appearance on behalf of employer. In an Order dated November 14,

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (02-BLA-0314) of Administrative Law Judge Robert D. Kaplan 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).² This case involves a duplicate claim filed on January 9, 2001.³ After crediting claimant with thirty-seven years of coal

2003, the Board noted Mr. Wyatt's withdrawal and Ms. Herron's entry of appearance, and noted further that the briefing schedule in this case was complete. *Ciliberto v. Popple Brothers Coal Co.*, No 03-0664 BLA (Nov. 14, 2003)(unpublished Order).

²The 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³Claimant filed an initial claim on January 16, 1980. Director's Exhibit 25. In a Decision and Order dated July 18, 1986, Administrative Law Judge Chester Shatz found claimant failed to establish entitlement to benefits under 20 C.F.R. Part 727 (2000), and that entitlement was not established under 20 C.F.R. Part 410, Subpart D. Claimant appealed. The Board affirmed Judge Shatz's findings that entitlement was not established under Part 727 (2000) and Part 410, Subpart D. *Ciliberto v. Popple Brothers*, No. 87-0380 BLA (Aug. 29, 1988)(unpublished). The Board further held that while Judge Shatz should have also considered entitlement under 20 C.F.R. Part 718 (2000), his failure to do so was harmless error since recovery thereunder was precluded in light of Judge Shatz's finding that rebuttal of the interim presumption was established pursuant to 20 C.F.R. §727.203(b)(1) (2000). *Id.*, slip op. at 2.

Claimant took no further action in pursuit of benefits until filing a second claim on February 16, 1996. Director's Exhibit 25. In a Decision and Order dated November 19, 1997, Administrative Law Judge Robert D. Kaplan (the administrative law judge), found the newly submitted evidence insufficient to establish any of the elements of entitlement under 20 C.F.R. Part 718 (2000) and, therefore, insufficient to establish a material change in conditions under 20 C.F.R.

mine employment based upon the stipulation of the parties, the administrative law judge found the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), and the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). Upon considering all of the evidence together under 20 C.F.R. §718.202(a)(1)-(a)(4), however, the administrative law judge found the evidence in equipoise and thus determined that claimant failed to establish the existence of pneumoconiosis. The administrative law judge further found the newly submitted evidence insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), and denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer, by former counsel, has filed a response brief in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating he does not presently intend to participate in this appeal.

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. 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).

We hold that claimant's Petition for Review and brief fails to provide an adequate basis for review of the administrative law judge's Decision and Order. Claimant's brief neither raises any substantive issues nor identifies any specific error on the part of the administrative law judge in determining that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4), total disability under Section 718.204(b)(2)(i)-(iv), and, consequently, a material change in conditions under 20 C.F.R. §725.309 (2000). Claimant merely refers to medical evidence favorable to his claim. We thus affirm the administrative law judge's findings under Sections 718.202(a),

§725.309 (2000). Accordingly, he denied benefits. Claimant appealed. The Board affirmed the administrative law judge's findings and consequent decision denying benefits. *Ciliberto v. Popple Brothers*, BRB No. 98-0476 BLA (Dec. 16, 1998)(unpublished). Subsequently, upon determining that there was no basis to upset the administrative law judge's Decision and Order, the United States Court of Appeals for the Third Circuit denied claimant's Petition for Review of the Board's Decision and Order. *Ciliberto v. Popple Brothers*, No. 99-1118 (3d Cir. Nov. 10, 1999)(unpublished).

718.204(b) and 725.309 (2000), and the consequent denial of benefits. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *see* 20 C.F.R. §§718.202(a), 718.204(b) and 725.309 (2000).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge