

BRB No. 04-0135 BLA

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| MICHAEL KOLCUN |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | DATE ISSUED: 06/24/2004 |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order and Decision and Order Denying Reconsideration of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James A. Sposito, Scranton, Pennsylvania, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order Denying Reconsideration (2003-BLA-05048) of Administrative Law Judge Janice K. Bullard denying benefits 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). The administrative law judge determined that claimant established nine years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part

718.¹ Decision and Order at 3-8. The administrative law judge, after considering all of the evidence of record, concluded that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204. Decision and Order at 8-13. Accordingly, benefits were denied. Claimant subsequently requested reconsideration and submitted additional evidence. The administrative law judge considered this evidence with the evidence previously submitted and concluded that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order Denying Reconsideration at 3. The administrative law judge further found that the newly submitted evidence did not affect her total disability findings. Decision and Order Denying Reconsideration at 3-4. Accordingly, benefits were again denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.

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 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 in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.² 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

¹Claimant filed his claim for benefits with the Department of Labor on July 9, 2001, which was denied by the district director on August 7, 2002. Director's Exhibits 2, 24. Claimant requested a formal hearing before the Office of Administrative Law Judges which was held on April 8, 2003. Claimant subsequently died on August 16, 2003.

²This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

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 the 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 address 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); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Sarf*, 10 BLR 1-119. 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*, 10 BLR 1-119; *Fish*, 6 BLR 1-107.

In the instant case, other than generally asserting that the medical evidence of record was sufficient to establish entitlement to benefits, *see* Claimant's Brief at 3-7, 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. Thus, as claimant's counsel has failed to adequately raise or brief any issue arising from the administrative law judge's Decision and Order denying benefits, the Board has no basis upon which to review the decision.³

³The administrative law judge properly found that the record does not contain any x-ray, biopsy or autopsy results demonstrating the presence of pneumoconiosis and none of the presumptions set forth therein are applicable to the instant claim. *See* 20 C.F.R. §§718.202(a)(1)-(3), 718.304, 718.305, 718.306; Director's Exhibits 20, 21; Claimant's Exhibit 1; Decision and Order at 8-10; Decision and Order Denying Reconsideration at 2; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). The administrative law judge rationally concluded that the record contained no credible opinion indicating that claimant suffered from pneumoconiosis or that coal dust contributed to any impairment. *See* 20 C.F.R. §718.202(a)(4); *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Lafferty v. Cannerton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Director's Exhibit 12; Claimant's Exhibit 1; Decision and Order at 10-11; Decision and Order Denying Reconsideration at 2-3. Consequently, the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis is supported

Accordingly, the administrative law judge's Decision and Order and Decision and Order Denying Reconsideration denying benefits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

by substantial evidence and is in accordance with law and thus precludes entitlement in the instant case. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).