BRB No. 99-0783 BLA

ROBERT MOSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Gregory C. Hook (Hook and Hook), Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-BLA-422) of Administrative Law Judge Richard A. Morgan 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). At the hearing, the parties stipulated to thirty years of coal mine employment, that there was one dependent, and that employer was the responsible operator. In this duplicate claim, the administrative law judge determined that claimant's prior claim had been finally denied on December 20, 1990 and that the newly submitted evidence demonstrated total disability, the element previously decided against claimant, and was,

therefore, sufficient to demonstrate a material change in conditions at 20 C.F.R. §725.309.[1] Applying the regulations at 20 C.F.R. Part 718, and considering all the evidence on the merits, the administrative law judge found the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c), insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b) and insufficient to establish that claimant's totally disabling respiratory impairment arose out of coal mine employment at 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant generally challenges the denial of benefits by the administrative law judge. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.[2]

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[1] Claimant filed his initial application for benefits on September 12, 1988 which the district director denied on January 26, 1989. *See* Director's Exhibit 27. Following a hearing on the merits, Administrative Law Judge Robert G. Mahony issued a Decision and Order on December 20, 1990. *Id*. Judge Mahony credited claimant with thirty years of coal mine employment, and based on the filing date of the claim, applied the regulations at 20 C.F.R. Part 718. *Id*. Judge Mahony found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) and denied benefits. *Id*.

[2] We affirm the findings of the administrative law judge on the length of coal mine employment, on dependency, and on the designation of employer as the responsible operator based on the parties' stipulations to these issues at the hearing. *See Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996). We also affirm the administrative law

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 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 living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The Board is not required to undertake a *de novo* adjudication of the evidence. 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 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, supra*; *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 its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf, supra*; *Fish, supra*.

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judge's determination that claimant demonstrated a material change in conditions at 20 C.F.R. §725.309 and his finding that claimant established the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

On the merits of the instant case, claimant asserts that since the record contains positive x-ray findings of pneumoconiosis by physicians retained by the Department of Labor, qualifying pulmonary function studies, and the opinion of Dr. Levine which supports a finding of the existence of coal workers' pneumoconiosis and total disability, the evidence of record is sufficient to establish the existence of pneumoconiosis and total disability. *See* Claimant's Brief at 2-3. Claimant has failed, however, to identify with specificity any errors made by the administrative law judge in the evaluation of the evidence and the applicable law pursuant to 20 C.F.R. §§718.202(a) and 718.204(c).[3] Thus, as claimant's counsel has failed to adequately raise or brief arguments and identify errors arising from the administrative law judge's findings on these issues, the Board has no basis upon which to review the administrative law judge's findings at Sections 718.202(a) and 718.204(c), *Cox, supra*; *Sarf, supra*; *Slinker, supra*; *Fish, supra*, and must affirm the administrative law judge's denial of benefits as claimant has failed to establish essential elements of entitlement. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry, supra*.[4]

[3]In the instant case, the administrative law judge acted within his discretion when he found the weight of the x-ray evidence negative for pneumoconiosis based on the qualifications of the physicians who interpreted the x-rays. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1- 149 (1989)(*en banc*). As the record does not contain any biopsy evidence, claimant cannot meet his burden of proof at 20 C.F.R. §718.202(a)(2). Additionally, the administrative law judge properly found in this living miner's claim that claimant was not entitled to the presumptions at 20 C.F.R. §718.202(a)(3) as the administrative law judge permissibly found the only x-ray diagnosing complicated pneumoconiosis equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); 20 C.F.R. §§718.304, 718.305, 718.306.

As the trier of fact, the administrative law judge acted within his discretion in finding the medical opinions of Drs. Renn, Fino and Bellotte, which state that claimant does not suffer from any pulmonary disease acquired during his years of coal mine employment, the most probative based on their qualifications. *See Clark, supra*. Thus, the administrative law judge properly found that the weight of the most credible medical evidence was insufficient to establish the existence of pneumoconiosis and to show that pneumoconiosis was a contributing cause of claimant's totally disabling respiratory impairment. *See* 20 C.F.R. §§718.202(a)(4), 718.204(b). The denial of benefits by the administrative law judge is, therefore, affirmed.

[4] Claimant does contend generally that the administrative law judge erred in finding that claimant had a 35 year smoking history of approximately 1 and 1/2 packs per day and that this erroneous finding adversely affected the administrative law judge's finding that claimant failed to establish that his total disability arose out of coal mine employment. In light of our finding that the existence of pneumoconiosis and total disability were not

established, however, error, if any, in the administrative law judge's causation finding would be harmless and we will not address that issue. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge