BRB No. 12-0560 BLA

JOSEPH PALUMBO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/23/2013
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Christopher J. Szewczyk, Scranton, Pennsylvania, for claimant.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (2010-BLA-05049) of Administrative Law Judge Adele H. Odegard, rendered on a subsequent claim filed on March 28, 2006, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This subsequent claim is before the Board for a third time.[1] Most recently, the Board vacated the administrative law judge's findings at

[1] We incorporate the detailed procedural history set forth in *Palumbo v. Director, OWCP,* BRB No. 11-0167 BLA, slip op. at 1 n.1, 2 (Nov. 30, 2011) (unpub.).

20 C.F.R. §718.204(b)(2)(i), and her determination that claimant failed to establish total disability because the administrative law judge failed to consider the July 30, 2009 pulmonary function study.[2] *Palumbo v. Director, OWCP,* BRB No. 11-0167 BLA, slip op. at 6 (Nov. 30, 2011) (unpub.). The Board instructed the administrative law judge to reconsider her findings on total disability and the length of claimant's qualifying coal mine employment[3] to determine whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[4] and, if so, to determine whether employer rebutted the presumption. *Id*. at 7. Alternatively, if claimant established total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge was instructed to determine whether claimant also established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

After reconsidering the evidence on remand, the administrative law judge noted that the Board upheld her finding that claimant had at least fourteen years of coal mine employment, and found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b). She therefore determined that claimant is not entitled to the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4). The administrative law judge further found that claimant did not establish total disability due to pneumoconiosis pursuant 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

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[2] The Board affirmed, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant established "at least" fourteen years of coal mine employment and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, based on the parties' stipulation that claimant suffers from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. *Palumbo,* BRB No. 11-0167 BLA, slip op. at 3 n.4.

[3] The Board specifically instructed the administrative law judge to "determine whether Dr. Levinson's statement describing the severity of claimant's impairment reflects a documented and reasoned opinion of no total disability, taking into consideration the exertional requirements of claimant's usual coal mine employment." *Palumbo,* BRB No. 11-0167 BLA, slip op. at 6.

[4] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

On appeal, claimant challenges the administrative law judge's determination that he failed to establish that he is totally disabled. The Director Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits. The Director asserts that claimant does not challenge the administrative law judge's analysis of the medical evidence, but instead cites his testimony as proof of disability. The Director maintains that the administrative law judge's conclusion that claimant failed to establish total disability is supported by substantial evidence and in accordance with the law.

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The Board's limited scope of review requires that a party challenging the Decision and Order below address that Decision and Order with specificity and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is contrary to law. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119-20 (1987); *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*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109.

Following the Board's instructions, the administrative law judge reconsidered the pulmonary function study and medical opinion evidence and found, after weighing together all of the relevant medical evidence of record, that claimant failed to establish a totally disabling respiratory or pulmonary impairment for invocation of the presumption

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

at amended Section 411(c)(4). Decision and Order Denying Benefits on Remand at 4, 6-7. She further determined that claimant is not totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Although claimant asserts that the administrative law judge erred "in the evaluation of the medical evidence in determining the relevant issues in this case," he argues only that he provided sufficient hearing testimony to establish that he is totally disabled. Claimant's Brief [at 3, 4] (unpaginated).

Initially, we reinstate our prior holding and reject claimant's suggestion that the administrative law judge erred by not finding that claimant established total disability based upon his testimony at the hearing that he is unable to perform his usual coal mine work from a respiratory or pulmonary standpoint.[6] 20 C.F.R. §718.204(d); *see Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Palumbo,* slip op. at 3-4. Based on our review of claimant's brief, we agree with the Director that claimant does not identify specific errors made by the administrative law judge in weighing the medical evidence. We, therefore, affirm the administrative law judge's findings that the evidence did not establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b), and that claimant is not entitled to the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. Since total disability at 20 C.F.R. §718.204(b), is an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[6] Claimant argues that, "perhaps most relevantly, [he] testified that his symptoms have progressed since his hearing in July of 2003 in that it is more difficult to breathe and to recuperate from any physical exertion. . . . [and] that not only would he be unable to perform any of his past coal mine work, but also that he could not perform any work comparable thereto due to his existing breathing impairment." Claimant's Brief at [6] (unpaginated).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge