

BRB No. 04-0352 BLA

GEORGE BERDAR)
)
 Claimant-Petitioner)
)
 v.)
)
 NEW WARWICK MINING COMPANY) DATE ISSUED: 11/16/2004
)
 and)
)
 THE FIRE & CASUALTY COMPANY OF)
 CONNECTICUT)
)
 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Daniel L. Chunko (Chunko Law Firm), Washington, Pennsylvania, for claimant.

Christopher Pierson (Burns White & Hickton), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (02-BLA-5397) of Administrative Law Judge Michael P. Lesniak on a subsequent claim¹ filed pursuant to

¹ This claim, filed on October 22, 2001, is considered a “subsequent claim for benefits” because it was filed after January 19, 2001 and more than one year after the

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 forty-seven years of coal mine employment,² as stipulated by the parties. The administrative law judge also found that the medical evidence submitted since the prior denial of benefits failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Specifically, the administrative law judge correctly noted that all of the newly submitted x-ray readings are negative, there is no autopsy or biopsy evidence in the record, the presumptions referred to at 20 C.F.R. §718.202(a)(3) are not applicable, and none of the three physicians rendering new medical opinions diagnosed either legal or clinical pneumoconiosis. Thus, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibits 14, 18, 21, 23, 24, Employer's Exhibit 1; Decision and Order at 5-7. The administrative law judge also found that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Specifically, the administrative law judge correctly noted that all the newly submitted pulmonary function studies and all the newly submitted blood gas studies resulted in non-qualifying values, *see* 20 C.F.R. §718.204(b)(2)(i), (ii), there is no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, *see* 20 C.F.R. §718.204(b)(2)(iii), and none of the newly submitted medical opinions contained a diagnosis of a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b)(2)(iv). Director's Exhibits 14-16, 21, 23, Employer's Exhibit 1; Decision and Order at 8-9. The administrative law judge thus determined that claimant failed to meet his burden to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Decision and Order at 9. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in his analysis of the medical evidence relevant to the issues of the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b), respectively. Employer responds, urging affirmance of the administrative law judge's

final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3. Claimant's prior application for benefits, filed on March 10, 1998, was denied on February 16, 2000 by Administrative Law Judge Richard A. Morgan because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action on this prior claim.

² The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 4-10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief 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'Keefe 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Administrative Law Judge Richard A. Morgan denied claimant's prior claim because he failed to establish both the existence of pneumoconiosis and a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant must submit new evidence establishing the existence of pneumoconiosis or total disability due to a respiratory or pulmonary impairment in this claim in order to meet his burden at 20 C.F.R. §725.309(d). 20 C.F.R. §725.309(d)(2), (d)(3).

Board review is properly invoked when the appealing party assigns specific allegations of legal or factual error in the administrative law judge's decision. Failure to do so precludes review and requires the Board to affirm the decision below. *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); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Claimant initially contends that the administrative law judge erred in finding that "claimant's condition of pneumoconiosis did not arise out of his coal mine employment" and in failing to give deference to the opinions of claimant's physicians. Claimant's Brief at 1. Claimant further states that "[a] review of the medical records supplied by Claimant and the U.S. Department of Labor reveal that Claimant was diagnosed with coal workers' pneumoconiosis and severe chronic obstructive pulmonary disease." Claimant's Brief at 2. With respect to claimant's contention that the administrative law judge erred in finding that claimant's pneumoconiosis did not arise out of his coal mine employment,

we note that the administrative law judge did not reach this issue in his Decision and Order. Claimant's argument is thus unavailing. *See* Decision and Order at 5-7. Moreover, claimant's assertion that the record contains medical evidence supportive of a finding of coal workers' pneumoconiosis and severe chronic obstructive pulmonary disease, does not fulfill his duty to identify any error with specificity or to raise and brief any issues arising from the administrative law judge's findings. 20 C.F.R. §802.211(a), (b); *Cox*, 791 F.2d at 446, 9 BLR at 2-47. We thus hold that claimant fails to invoke the Board's review of the administrative law judge's findings and, therefore, the Board is compelled to affirm the denial of benefits. *Sarf*, 10 BLR at 1-121. Consequently, we affirm the denial of benefits based on the administrative law judge's finding that the evidence submitted since the prior denial fails to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment and, therefore is insufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d).³

³ The administrative law judge's denial of benefits is supported by substantial evidence. The newly submitted evidence consists of four negative x-ray readings, three non-qualifying pulmonary function studies, three non-qualifying blood gas studies, and medical reports from three physicians, none of whom diagnosed pneumoconiosis or a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §§718.202(a)(1), (a)(4), 718.204(b)(2)(i), (ii), (iv); Director's Exhibits 14-16, 18, 21, 23, 24, Employer's Exhibit 1. Specifically, Dr. Schauble opined, in his initial report dated December 12, 2001, that there was "no radiographic evidence of occupationally acquired pneumoconiosis," and that claimant's pulmonary function studies were entirely normal, that he had dyspnea on exertion which may be due to cardiac disease, but that there was no evidence of any respiratory impairment due to occupationally acquired pneumoconiosis. Director's Exhibit 21. In a supplemental report dated February 27, 2002, Dr. Schauble similarly opined that there was no evidence of occupationally acquired lung disease, no evidence of any respiratory impairment due to coal mine employment, and no significant obstruction or restriction was seen on any pulmonary function or blood gas study. Director's Exhibit 23. Dr. Basheda, in a report dated December 28, 2001, opined that there was no evidence of pneumoconiosis, that claimant had high blood pressure, possible asthma and possible valvular heart disease, but that his pulmonary function studies showed no obstruction. Director's Exhibit 14. Dr. Fino, in a report dated October 25, 2002, opined that claimant had neither legal nor clinical pneumoconiosis and was neither partially nor totally disabled from a respiratory standpoint. Employer's Exhibit 1.

The Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge