BRB No. 00-1205 BLA

HERBERT LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
L. PARTIN COAL COMPANY	)	
D/B/A H. L. PARTIN	)	
	)	
Employer-Respondent #1	)	
	)	
and	)	
	)	
NAVISTAR	)	
	)	
and	)	
	)	
NAVISTAR INTERNATIONAL	)	
	)	
Employer/Carrier-Respondent #2	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order--Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Crockett Carter, Harlan, Kentucky, for claimant.

H. Kent Hendrickson (Rice & Hendrickson), Harlan, Kentucky, for Navistar.

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

PER CURIAM:

Claimant appeals the Decision and Order--Denial of Benefits (2000-BLA-0100) of Administrative Law Judge Thomas F. Phalen, Jr. rendered 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).

[1] Claimant's application for benefits filed on May 6, 1977 was denied by an administrative law judge on May 6, 1985 because the medical evidence failed to establish either the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment, and thus, did not establish invocation of the interim presumption of total disability due to pneumoconiosis. Director's Exhibit 51 at 19, 229; *see* 20 C.F.R. §727.203(a)(2000). Upon consideration of claimant's appeal, the Board affirmed the denial of benefits on April 15, 1987. Director's Exhibit 15 at 1.

On December 3, 1997, claimant filed the present application for benefits, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d)(2000). The District Director of the Office of Workers' Compensation Programs denied the claim and claimant requested a hearing, which was held by Judge Phalen on April 20, 2000. Director's Exhibits 10, 13.

The administrative law judge credited claimant with fourteen and one-quarter years of coal mine employment, he found that Navistar is the responsible operator, and concluded that the medical evidence developed since the prior denial did not establish the existence of pneumoconiosis or that claimant is totally disabled.

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[1] The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, 145 F.Supp.2d 1 (D.D.C. 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Because the administrative law judge found that the new evidence did not establish any element of entitlement previously decided against claimant, the administrative law judge concluded that claimant did not demonstrate a material change in conditions as required by 20 C.F.R. §725.309(d)(2000). *See Tennessee Consol. Coal Co. v. Kirk*, --- F.3d ---, 2001 WL 1012089, *4 (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

On appeal, claimant contends generally that he is entitled to benefits. Claimant further asserts that the provision of the Act prohibiting the acceptance of attorney's fees for the representation of claimants, except as such fees are approved by the Department of Labor, violates claimant's due process rights. Employer has not responded to claimant's petition for review, and the Director, Office of Workers' Compensation Programs (the Director), has declined 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 supported by substantial evidence, is rational, and is in accordance with law. 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).

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 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).

The administrative law judge first considered the three readings of two chest x-rays taken since the prior denial. Director's Exhibits 8, 9, 50. Because the new chest x-rays were unanimously read as negative for pneumoconiosis by physicians qualified as Board-certified radiologists and B-readers, the administrative law judge found that the new x-ray evidence did not establish the existence of pneumoconiosis. The administrative law judge next considered the reports of two physical examinations conducted since the prior denial, in which both Dr. Mitchell Wicker and Dr. A. Dahhan concluded that claimant does not have pneumoconiosis. Director's Exhibits 8, 50. The administrative law judge found these medical reports "well documented and reasoned," and concluded that the new medical opinion evidence did not establish the existence of pneumoconiosis. Decision and Order at 10. Turning to the element of total respiratory disability, the administrative law judge correctly found that the pulmonary function and blood gas studies administered since

the previous denial were non-qualifying,[2] Director's Exhibits 8, 50, and noted accurately that Dr. Wicker and Dr. Dahhan concluded that claimant is not totally disabled by a respiratory or pulmonary impairment. *Id*. Finding their opinions to be "well documented and reasoned," and "bolstered by the objective medical data," the administrative law judge concluded that the new medical evidence did not establish the element of total disability. Decision and Order at 12. Because the new evidence established neither the existence of pneumoconiosis nor total disability, the administrative law judge found that a material change in conditions was not established and that benefits must therefore be denied pursuant to 20 C.F.R. §725.309(d)(2000). *See Ross, supra*.

On appeal of the foregoing findings, claimant, by counsel, avers generally that he is totally disabled. Claimant's Brief at 1-2. However, the Board is not authorized to undertake a de novo adjudication of the claim. To do so would upset the carefully allocated division of authority between the administrative law judge as trier-of-fact, and the Board as a reviewing tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). 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 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); *Cox, supra*; *Slinker v. Peabody Coal Co*., 6 BLR 1-465, 1-466 (1983); *Fish, supra*; *Sarf, supra*. A petitioner who fails to comply with the requisite regulations provides the Board with no basis to reach the merits of an appeal. *See Cox, supra*. In the instant case, claimant generally asserts that he is entitled to benefits. Claimant's Brief at 1-2. Claimant, however, fails to identify any error made by the administrative law judge in his evaluation of the evidence or in his application of the law pursuant to 20 C.F.R. Part 718. Thus, as claimant's counsel has failed to adequately raise or brief any issues arising from the administrative law judge's denial of the claim for benefits, the Board has no basis upon which to review the decision. Thus, we decline to review the Decision and Order of the administrative law judge and we affirm the administrative law judge's denial of benefits. *See Sarf, supra; Cox, supra*.

We reject claimant's argument that the provisions of the Act and regulations governing attorney's fees violate claimant's due process rights, because claimant has not submitted evidence that claimants cannot obtain representation and that the alleged unavailability of qualified attorneys is caused by the Department of Labor's regulation of fees. *See United States Department of Labor v. Triplett*, 494 U.S. 715,

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[2] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

723, 110 S.Ct. 1428, 1433, 13 BLR 2-364, 2-367 (1990); *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 105 S.Ct. 3180 (1985).

Accordingly, the administrative law judge's Decision and Order--Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge