

BRB No. 97-0606 BLA

RALPH FLANARY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
P & J 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus and W. William Prochot (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-BLA-1497) of Administrative Law Judge Michael P. Lesniak 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). This claim, filed on August 17, 1994, was properly adjudicated pursuant to the permanent regulations at 20 C.F.R. Part 718.¹ After crediting claimant with

¹The relevant procedural history of this case is as follows: claimant filed his claim for Black Lung benefits with the Department of Labor on August 17, 1994. Director's Exhibit 1. The claim was initially denied by the district director on January 26, 1995. Director's Exhibit 31. On February 1, 1995, claimant requested a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 32. The case was transferred to the OALJ for hearing on May 1, 1995. Director's Exhibit 48. Administrative Law Judge Michael

approximately twenty-two years of coal mine employment, the administrative law judge found the evidence of record insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, he denied benefits. Claimant appeals, arguing that the administrative law judge erred in failing to find the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4) and total disability at Section 718.204(c)(4). Employer responds, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.²

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 under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

P. Lesniak conducted a hearing on the claim in Paintsville, Kentucky, on April 25, 1996. Decision and Order at 2; Hearing Transcript at 1. Judge Lesniak issued his decision on January 14, 1997. Decision and Order at 1.

²Inasmuch as the administrative law judge's finding of approximately twenty-two years of coal mine employment, as well as his findings under 20 C.F.R. §§718.202(a)(2)-(3), 718.204(c)(1)-(3) are unchallenged on appeal, they are hereby affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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). The Board has consistently interpreted 20 C.F.R. §802.211 as requiring the party challenging the administrative law judge's decision to do more than merely recite evidence favorable to his or her case; rather, the petitioner must identify any alleged error with specificity. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *see also Fish v. Director, OWCP*, 6 BLR 1-107 (1983). In the case before us, claimant has failed to meet this threshold requirement for invoking the Board's review of the administrative law judge's findings. See 20 C.F.R. §802.211; Claimant's Brief at 1-3. The administrative law judge's findings are consequently affirmed. *See Cox, supra; Sarf, supra; Fish, supra.*³

³Moreover, substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and (a)(4) and the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(4). Under Section 718.202(a)(1), the administrative law judge properly accorded determinative weight to the x-ray interpretations of the most highly qualified physicians, which were overwhelmingly negative. *See Staton v. Norfolk & Western Railway Co.*, 65 F.2d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 5. Under Section 718.202(a)(4), within his discretion as trier-of-fact, the

administrative law judge credited the opinions of Drs. Broudy, Dahhan and Castle, who found no pneumoconiosis, over the opinions of Drs. Vuskovich, Sundaram and Fritzhand, who diagnosed pneumoconiosis as he found the opinions of the former doctors most consistent with the objective medical evidence of record. See *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, under Section 718.204(c)(4), the administrative law judge permissibly accorded determinative weight to the medical opinions of Drs. Broudy, Dahhan and Castle, as supported by Dr. Vuskovich, each of whom found that claimant was not suffering from a totally disabling respiratory or pulmonary impairment, because their opinions were better supported by the objective evidence of record, see *Wetzel, supra*, and were better reasoned than the opinions of Drs. Fritzhand and Sundaram (which diagnosed total disability). See *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1986); Decision and Order at 9; Director's Exhibits 12, 16, 46; Employer's Exhibits 8, 10, 12, 15, 16.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.⁴

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁴Given our disposition of this case, we need not address either the appropriateness or the merits of employer's arguments raised in its response brief, regarding the responsible operator issue.