

BRB No. 97-0812 BLA

ELKANA ROBINSON )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 TOPPER COAL COMPANY ) DATE ISSUED:  
 )  
 and )  
 )  
 LIBERTY MUTUAL INSURANCE )  
 COMPANY )  
 )  
 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 J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Deron L. Johnson (Boehl Stopher & Graves), Prestonsburg, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (96-BLA-0869) of Administrative Law Judge J. Michael O'Neill 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 in August 1994, was properly adjudicated pursuant

to the permanent regulations at 20 C.F.R. Part 718.<sup>1</sup> After crediting claimant with twenty 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.<sup>2</sup>

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<sup>1</sup>The relevant procedural history of this case is as follows: Claimant filed his claim for Black Lung benefits with the Department of Labor in August 1994. Director's Exhibit 1. The claim was initially denied by the district director on January 25, 1995, Director's Exhibit 18, and again on August 7, 1995, Director's Exhibit 19, and again after an informal conference on November 27, 1995, Director's Exhibit 42. On December 4, 1995, claimant requested a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 26. The case was transferred to the OALJ for a hearing on March 7, 1996. Director's Exhibit 43. Administrative Law Judge J. Michael O'Neill conducted a hearing on the claim in Pikeville, Kentucky, on December 3, 1996. Decision and Order at 2; Hearing Transcript at 1. Judge O'Neill issued his decision on February 28, 1997. Decision and Order at 1.

<sup>2</sup>Inasmuch as the administrative law judge's finding of at least twenty 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).

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'Keefe 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*).

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*.<sup>3</sup>

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<sup>3</sup>Moreover, 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), or 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, noting that all six B-readers' interpretations were credible, and that the four physicians who read the film as negative did not interpret the film read by the other two physicians as positive. Decision and Order at 5. The administrative law judge thus rationally found the x-ray evidence in equipoise. *Id.* Decision and Order at 5. Claimant therefore failed to carry his burden under subsection (a)(1). See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). *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). Under Section 718.202(a)(4), the administrative law judge credited, within his discretion as trier-of-fact, Dr. Broudy's opinion finding no pneumoconiosis, over the opinions of Drs. Baker and Fritzhand, both of whom diagnosed pneumoconiosis, as he found Dr. Broudy's opinion "well-reasoned, documented, comprehensive, and supported by the objective evidence of record." See *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 6.

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Additionally, under Section 718.204(c)(4), the administrative law judge permissibly accorded determinative weight to the opinions of Dr. Broudy and Dr. Fritzhand, both of which found no totally disabling respiratory or pulmonary impairment, because their opinions were better supported by the objective evidence of record, *see Wetzel, supra*, and better reasoned than Dr. Baker's opinion, which found that claimant "could not resume his former coal mine employment." *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1986); Decision and Order at 7; Director's Exhibits 11, 12, 41.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge