

BRB No. 08-0501 BLA

T.C.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LEFT BEAVER COAL COMPANY)	DATE ISSUED: 04/01/2009
)	
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 - Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenburg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (07-BLA-5046) of Administrative Law Judge Larry S. Merck rendered on a subsequent 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). The administrative law judge credited claimant with at least twenty years of qualifying coal mine employment, and adjudicated this subsequent claim, filed on October 20, 2005, pursuant to the provisions at 20 C.F.R. Part 718. 20 C.F.R. §725.309(d). The administrative law judge found that claimant’s prior claim was denied for failure to establish any element of entitlement. Considering the evidence developed since the previous denial of benefits, the administrative law judge

found that it established that claimant was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, thus, that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).¹ Turning to all of the evidence of record, the administrative law judge found that it established a totally disabling respiratory impairment at Section 718.204(b)(2), but that it failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's finding that the evidence failed to establish entitlement under the Act. Claimant contends: Dr. Baker made "a finding of chronic obstructive pulmonary disease"; "the blood gas studies show impairment"; Dr. Baker's opinion "establishes causation with respect to the etiology of any [severe] impairment"; and "Dr. Mettu provides further objective evidence of a reduction in ... pulmonary capacity." Claimant's Brief at 2. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response.

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.² 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, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

¹ When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also 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 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because claimant failed to establish any element of entitlement. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing one of those elements, in order to have the case considered on the merits. 20 C.F.R. §725.309(d)(2), (3).

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Decision and Order at 5, 7; Director's Exhibit 3 at 3.

totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish 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*).

Claimant's brief fails to identify with specificity any substantive error of law or fact made by the administrative law judge in his weighing of the evidence. Claimant merely recites evidence that he believes is favorable to his claim. Consequently, the Board has no basis upon which to review the administrative law judge's findings. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We, therefore, affirm the administrative law judge's finding that the evidence of record fails to establish entitlement. Consequently, we must affirm the administrative law judge's denial of benefits.

Accordingly, the Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge