

BRB No. 00-0656 BLA

THOMAS MILLER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
FIDERAK TRUCKING)	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 of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Debra A. Smith (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

Paul K. Paterson (Mascelli & Paterson), Scranton, Pennsylvania, for employer.

Timothy S. Williams (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-01026) of Administrative Law Judge Ralph A. Romano denying benefits 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 The administrative law judge found that the instant case was a request for modification and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.² Decision and Order at 1, 2, 4. The administrative law judge, noting the proper modification standard, considered together the newly submitted and prior evidence of record and concluded that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or total disability pursuant to 20 C.F.R. §718.204(2000) and thus, neither a mistake in fact nor a change in conditions was established pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 4-13. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to find modification established based upon the x-ray and medical opinion evidence of record. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that she will not participate in this appeal.

¹The 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.

²Claimant filed his claim for benefits on March 27, 1991, which was finally denied on September 13, 1994, as the evidence failed to establish any element of entitlement. Director's Exhibits 1, 46, 54. Claimant filed a modification request, the subject of the instant appeal, on May 25, 1995. Director's Exhibit 55.

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 and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which the parties have responded asserting that the regulations at issue will not affect the outcome of the instant case.³ Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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 (2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

The Board is not empowered to undertake a de novo adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as the review tribunal. See 20 C.F.R. §802.301(a) (2000); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). 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 and explain why the evidence which supports the result reached is not substantial or how the Decision and Order is contrary to law. See 20 C.F.R. §802.211(b) (2000); *Sarf, supra*; *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465

³Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

(1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. See *Sarf, supra*; *Fish, supra*.

In the instant case, other than generally asserting that the medical evidence of record was sufficient to establish entitlement to benefits, *see* Claimant's Brief at 3-8, claimant has failed to identify any errors made by the administrative law judge in the evaluation of the evidence and applicable law pursuant to Part 718. Thus, as claimant's counsel has failed to adequately raise or brief any issue arising from the administrative law judge's Decision and Order denying benefits, the Board has no basis upon which to review the decision.⁴

⁴The administrative law judge properly considered the newly submitted evidence and rationally concluded, based upon the superior qualifications of the readers, that the x-ray evidence was in equipoise and thus insufficient to meet claimant's burden of proof. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Moreover, the administrative law judge permissibly accorded greater weight to Dr. Levinson's opinion, that claimant does not have pneumoconiosis or a totally disabling respiratory impairment, as it is supported by the opinion of Dr. Mariglio and the objective evidence of record. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986);

Budash v. Bethlehem Mines Corp., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Thus, the administrative law judge's determination that the newly submitted evidence is insufficient to establish modification is rational and in accordance with law. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON
Administrative Appeals Judge