

BRB No. 00-0487 BLA

JOSEPH R. HARVEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY CAMP 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.

Christopher Hedges (The Law Offices of Stuart Calwell, PLLC), Charleston, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (1999-BLA-8) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a duplicate 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 found that claimant established thirty-two years of coal mine employment. Claimant filed his original claim on July 22, 1981, and in a Decision and Order dated November 28, 1988, Administrative Law Judge Daniel Lee Stewart found that while claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.

§§718.202(a) and 718.203(b), claimant failed to establish total disability at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 24. Claimant filed the instant duplicate claim on November 21, 1997. Director's Exhibit 1. The administrative law judge found that the evidence submitted with the duplicate claim failed to establish total disability at Section 718.204(c) and, therefore, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were again denied. Claimant appeals, contending that the administrative law judge erred in failing to find that the new evidence established a material change in conditions and totally disabling pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, rational and 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 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*).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in determining whether claimant has established a material change in conditions pursuant to 20 C.F.R. §725.309(d), the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, *Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997).

On appeal, claimant contends that evidence of asthma does not preclude a diagnosis of pneumoconiosis. Rather, claimant contends that his asthma is part of his occupational pneumoconiosis. Claimant further contends that any doubt should be resolved in favor of claimant and that claimant has submitted reliable evidence of totally disabling coal workers' pneumoconiosis and a material change in conditions. Claimant does not, however, assign any specific error to the administrative law judge's finding at Section 718.204(c)(1)-(4).

The Board is not empowered to undertake a *de novo* adjudication of the claim. Rather, the circumscribed scope of the Board's review authority necessarily requires a party challenging the decision below to address that decision and demonstrate why substantial evidence does not support the result reached. A decision contrary to the party's expectations or contrary to some aspect of the record, is not necessarily an erroneous decision. 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. The adequacy of any argument depends on the circumstances of the particular case. An argument framed in terms of the decision below, however, is a threshold requirement for Board review. *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); see *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

In this case, claimant has failed to meet this threshold. While claimant contends generally that he has established total disability, he has not identified with specificity any error in the administrative law judge's weighing of the evidence on total disability or his finding that total disability was not established. The administrative law judge's findings that claimant has failed to establish total disability and a material change in conditions must, therefore, be affirmed. *Cox, supra*; *Sarf, supra*; *Fish, supra*; Claimant's Brief at 3-5; Decision and Order at 9-11.

Further, claimant's argument that a diagnosis of asthma does not preclude a diagnosis of pneumoconiosis as defined by the Act does not address the administrative law judge's finding at Section 718.204(c). See 20 C.F.R. §718.204(c). Likewise, as claimant has already been found to have established the existence of pneumoconiosis in the prior Decision and Order, this argument does not support his argument that he has established a material change in conditions. See *Rutter, supra*. Nor, contrary to claimant's argument, must any doubt be resolved in his favor. Rather, he bears the burden of establishing all elements of entitlement. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge