

BRB No. 09-0372 BLA

JAMES W. MOYE)
)
 Claimant-Petitioner)
)
 v.)
)
 MEADOW RIVER COAL COMPANY) DATE ISSUED: 01/19/2010
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2008-BLA-5544) of Administrative Law Judge Daniel L. Leland (the administrative law judge) rendered on a claim filed on May 21, 2003, 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

case involves a request for modification by employer under 20 C.F.R. §725.310(a).¹ After accepting the parties' stipulation to twenty-six years of coal mine employment, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and found that the evidence of record was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge granted employer's request for modification and denied benefits.

On appeal, claimant contends that the administrative law judge violated the evidentiary limitations of 20 C.F.R. §§725.414(a) and 725.310(b) in his consideration of the x-ray evidence at 20 C.F.R. §718.202(a)(1), which in turn affected his consideration of Dr. Zaldivar's opinion concerning the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Carrier responds, urging affirmance of the award of benefits. In his reply brief, claimant reiterates his argument regarding the administrative law judge's consideration of excessive x-ray evidence and also contends that the administrative law judge's consideration of the excess x-ray evidence affected his consideration of the medical opinion evidence on the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.²

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.³ 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).

¹ On November 27, 2006, the Board affirmed in part and vacated in part the December 30, 2005 Decision and Order Awarding Benefits of Administrative Law Judge Daniel L. Leland and remanded the case. On July 16, 2007, Judge Leland issued a Decision and Order on Remand-Awarding Benefits. On October 25, 2007, employer requested modification.

² The Director, Office of Workers' Compensation Programs (the Director), filed a Notice of Appeal in this case on February 11, 2009, but subsequently filed a motion requesting that the Board dismiss his appeal on March 30, 2009. By Order dated April 22, 2009, the Board dismissed the Director's appeal.

³ The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

In order to establish entitlement to benefits in a living miner's claim under 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, 718.201, 718.202, 718.203, 718.204. Failure to establish any 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*).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, authorizes the modification of an award or denial of benefits based, in pertinent part, on a mistake in a determination of fact. Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). In this case, the administrative law judge found that a mistake in a determination of fact was made as he found, after considering all of the medical evidence of record, that it failed to establish pneumoconiosis or total disability at Sections 718.202(a) and 718.204(b). The administrative law judge, therefore, granted employer's request for modification pursuant to Section 725.310 and denied benefits.

At the outset, we note that claimant generally asserts that the administrative law judge's consideration of excess x-ray evidence affected his finding that the medical opinion evidence failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts:

Here, Dr. Zaldivar's opinions are among those to which [the administrative law judge] gave 'great weight in addressing disability.' Therefore, to the extent that the consideration of evidence in excess of evidentiary limits can be said to affect the issues relating to the existence of pneumoconiosis, that same potential effect can run, as in the [administrative law judge's] initial decision, to the issues of disability as affecting issues which are utilized to judge and assess the credibility of opinions as to [claimant's] disability.

Claimant's Reply Brief at 3.

In finding that the medical opinion evidence did not establish total respiratory disability, the administrative law judge found:

Dr. Rasmussen is the only physician who concluded that the miner is totally disabled from a pulmonary standpoint. Dr. Zaldivar, Dr. Dahhan, and Dr. Ghio concluded that the miner does not have a totally disabling pulmonary

impairment and that his mild hypoxemia and mild diffusion capacity impairment are due to his cardiac disease. After weighing the criteria at [Section] 718.204(b)(2), I find that a preponderance of the evidence demonstrates that the miner is not totally disabled.

Decision and Order at 8.

The Board's power to review an administrative law judge's Decision and Order is limited. A petitioner who fails to comply with the requisite regulations provides the Board with no basis to reach the merits of an appeal. The Board has consistently interpreted 20 C.F.R. §802.211 to require the party challenging the administrative law judge's Decision and Order to do more than merely recite evidence favorable to his case; rather, the petitioner must identify any alleged error with specificity. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Dillon v. Duquesne Light Co.*, 6 BLR 1-813 (1984); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

In this case, claimant asserts generally that the administrative law judge's consideration of x-ray evidence in excess of the evidentiary limitations affected the administrative law judge's analysis of the medical opinion evidence on the issue of total disability. Claimant fails, however, to state *how* the administrative law judge's consideration of excess x-ray evidence affected the administrative law judge's finding on total disability. *See* Claimant's Reply Brief at 3. The administrative law judge accorded greater weight to the opinions of three physicians, who found that claimant did not have a totally disabling respiratory impairment, over the sole contrary opinion of a physician who concluded that claimant had a totally disabling respiratory impairment. Decision and Order at 8. Other than generally asserting that the administrative law judge's consideration of the x-ray evidence may affect the administrative law judge's disability findings, claimant has not explained how it does so, or otherwise alleged any specific error in the administrative law judge's analysis of the medical opinion evidence or any other evidence on total disability.⁴ Consequently, claimant has not adequately challenged the administrative law judge's finding on total disability at Section 718.204(b), an essential element of entitlement. We must, therefore, affirm the administrative law judge's denial of benefits on modification and we need not address claimant's argument concerning the administrative law judge's consideration of excess evidence on the issue

⁴ The administrative law judge also found that the pulmonary function study evidence and the blood gas study evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii). Additionally, the administrative law judge found that total disability could not be established at 20 C.F.R. §718.204(b)(2)(iii) because there was no evidence of cor pulmonale in the record.

of pneumoconiosis at Section 718.202(a). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge