

BRB No. 05-0287 BLA

JAMES BLEVINS BARRETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CROCKETT COLLIERIES,	)	
INCORPORATED	)	
	)	
and	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	DATE ISSUED: 07/26/2005
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James Blevins Barrett, Grays Knob, Kentucky, *pro se*.

Ann F. Batterton (Clark & Ward), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (2001-BLA-0278) of Administrative Law Judge Joseph E. Kane 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 case is before the Board for the second time. In his original Decision and Order, the administrative law judge adjudicated the instant duplicate claim pursuant to 20 C.F.R. Part 718, based on claimant’s March 3, 2000 filing date.<sup>1</sup> He credited claimant with twenty-five years of coal mine employment based on a stipulation of the parties. The administrative law judge then weighed the newly submitted evidence and determined that it was insufficient to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment and, thus, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).<sup>2</sup> Accordingly, benefits were denied.

Claimant appealed the administrative law judge’s denial of benefits to the Board. In a Decision and Order issued May 13, 2003, the Board vacated the administrative law judge’s denial of benefits and remanded the case to the administrative law judge for further consideration. *Barrett v. Great Western Coal, Inc.*, BRB No. 02-0568 BLA (May 13, 2003)(unpub.). The Board vacated the administrative law judge’s weighing of the medical opinions at Section 718.202(a)(4) and remanded the case for him to reassess the medical opinions of Drs. Baker and Dahhan regarding the existence of pneumoconiosis.<sup>3</sup> *Barrett*, slip op. at 5-6. In addition, the Board remanded the case for the administrative law judge to reconsider the pulmonary function study and medical opinion evidence to determine whether the evidence is sufficient to establish a total respiratory disability

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<sup>1</sup> Claimant filed his initial claim for benefits on September 25, 1991. Director’s Exhibit 32. This claim was denied by the district director on March 12, 1992, based on his determination that claimant failed to establish any of the elements of entitlement under 20 C.F.R. Part 718. Director’s Exhibit 32. No further action was taken on this claim.

<sup>2</sup> The amendments to the regulations at 20 C.F.R. §725.309 do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2(c).

<sup>3</sup> The Board affirmed the administrative law judge’s finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(3). *Barrett v. Great Western Coal, Inc.*, BRB No. 02-0568 BLA, slip op. at 4 (May 13, 2003)(unpub.).

pursuant to Section 718.204(b). *Barrett*, slip op. at 7-10. Consequently, the case was remanded for the administrative law judge to determine whether the newly submitted evidence established a material change in conditions pursuant to Section 725.309(d) (2000) and, if so, whether the record as a whole established entitlement to benefits on the merits.

On remand, the administrative law judge found that the newly submitted medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and, thus, established a material change in conditions pursuant to Section 725.309(d) (2000). Decision and Order on Remand at 12. The administrative law judge then considered all of the evidence of record, old and new, and found that the medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 13. He further found that the medical evidence of record established a totally disabling respiratory impairment due to pneumoconiosis. Decision and Order on Remand at 15-17. Accordingly, the administrative law judge awarded benefits.

On appeal, employer generally challenges the administrative law judge's award of benefits. Employer generally contends that the administrative law judge erred in weighing the medical opinions of Drs. Baker and Dahhan. The Director, Office of Workers' Compensation Programs (the Director), in response to employer's appeal, urges affirmance of the administrative law judge's findings as within a reasonable exercise of his discretion and as supported by substantial evidence. Claimant has not responded to this appeal.<sup>4</sup>

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. 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR

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<sup>4</sup> The parties do not challenge the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(c), 718.204(b)(2)(i)-(iii) and 718.204(c). These findings are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

1-26 (1987).<sup>5</sup> Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

On remand, the administrative law judge found that the medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), based on his finding that Dr. Baker's opinion is well reasoned and documented and establishes that claimant's chronic obstructive lung disease was due to both cigarette smoking and coal dust exposure. Decision and Order on Remand at 10. The administrative law judge found that this opinion outweighs the contrary opinion of Dr. Dahhan, that claimant does not suffer from pneumoconiosis. Decision and Order on Remand at 11. Consequently, the administrative law judge found that claimant established the existence of pneumoconiosis and also a material change in conditions. Decision and Order on Remand at 12. With regard to the element of total respiratory disability, the administrative law judge found that the record contains four pulmonary studies, of which two were non-conforming and invalidated, but the remaining two studies yielded qualifying results. Decision and Order on Remand at 14-15. He further found that the two blood gas studies yielded non-qualifying values. Decision and Order on Remand at 15. Weighing the medical opinion evidence, the administrative law judge found that Dr. Baker's opinion that claimant has a moderate impairment and does not have the capacity to perform his usual coal mine employment is well reasoned and documented and, therefore, accorded it determinative weight. Decision and Order on Remand at 16. The administrative law judge credited this opinion over the contrary opinion of Dr. Dahhan, which he found was entitled to little probative weight as the physician did not provide "clear, well explained medical conclusions regarding Claimant's respiratory capacity." Decision and Order on Remand at 16. In addition, the administrative law judge found that Dr. Dahhan failed to compare claimant's respiratory capacity with the exertional requirements of his usual coal mine employment in opining that claimant was not totally disabled as required by *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Decision and Order on Remand at 16. The administrative law judge then weighed all of the relevant evidence and found that the weight of the evidence established a totally disabling respiratory impairment. Decision and Order on Remand at 17.

In challenging the above findings, employer contends generally that the evidence of record is not sufficient to establish entitlement to benefits. However, the Board is not authorized to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of authority between the administrative law judge as trier-of-

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<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. Decision and Order on Remand at 8; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 32.

fact, and the Board as a reviewing tribunal.<sup>6</sup> See 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). 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 with specificity and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is contrary to law. See 20 C.F.R. §802.211(b); *Sarf*, 10 BLR at 1-120; *Cox*, 791 F.2d at 446, 9 BLR at 2-47; *Slinker v. Peabody Coal Co.*, 6 BLR 1-465, 1-466 (1983); *Fish*, 6 BLR at 1-109. A petitioner who fails to comply with the requisite regulations provides the Board with no basis to reach the merits of an appeal. *Id.*

In this case, employer generally asserts that the administrative law judge erred in the weight he accorded Dr. Baker's opinion. Employer's Brief at 4-7. Employer, however, fails to adequately brief with specificity any error made by the administrative law judge in his evaluation of the evidence or in his application of the law pursuant to 20 C.F.R. Part 718. Thus, as employer has failed to adequately raise or brief any issues arising from the administrative law judge's award of benefits, the Board has no basis upon which to review the decision. Thus, we decline to review the Decision and Order of the administrative law judge and we affirm the administrative law judge's award of benefits. See *Sarf*, 10 BLR at 1-121.

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<sup>6</sup> The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge