

BRB No. 06-0944 BLA

V.C. )  
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 Claimant-Petitioner )  
 )  
 v. )  
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 MAJESTIC MINING, INCORPORATED ) DATE ISSUED: 07/26/2007  
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 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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Jerome R. Novobilski, Clay, West Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-00019) of Administrative Law Judge Jeffrey Tureck (the administrative law judge) 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). The administrative law judge properly noted that the instant case involves a modification request of the denial of a duplicate claim. The administrative law judge determined, after considering all of the evidence of record, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the element of entitlement previously adjudicated

against him.<sup>1</sup> Decision and Order at 2-6. The administrative law judge, therefore, found that claimant failed to establish modification pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 6. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to award benefits. Claimant contends that he has submitted evidence that establishes the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to the instant appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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; *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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge denying benefits is rational, supported by

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<sup>1</sup> Claimant filed an initial claim on January 8, 1972. That claim was denied by the Department of Labor (DOL) on June 26, 1981. Director's Exhibit 28. Claimant filed a second claim on January 29, 1986, which was finally denied by the Benefits Review Board on August 10, 1993. Director's Exhibit 28. Claimant filed a third claim on December 14, 1995. Administrative Law Judge Clement J. Kennington initially awarded benefits on that claim on July 9, 1998. Director's Exhibits 1, 40. Following several appeals to the Board, decisions by the administrative law judge, and remands of the case by the Board, however, Judge Kennington ultimately denied benefits on March 13, 2003. See Director's Exhibits 41, 51, 57, 58, 78, 85, 88, 100, 101, 103. Claimant subsequently requested modification of the denial. The request was denied by the district director on October 6, 2004. Director's Exhibits 114, 116. Claimant requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 117.

substantial evidence and in accord with law.<sup>2</sup> After considering all the relevant evidence, the administrative law judge rationally determined that claimant failed to establish that a mistake in a determination of fact had been made when this claim was denied because claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a).<sup>3</sup> See *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The Board’s circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and address why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. See 20 C.F.R. §802.211(b) (2000); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff’g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (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*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109.

In the instant case, other than citing favorable evidence and generally asserting that the Decision and Order of Administrative Law Judge Clement J. Kennington dated October 17, 2001, finding the existence of pneumoconiosis established and awarding benefits, was affirmable, *see* Claimant’s Brief at 2-8, claimant has failed to identify any specific errors made by the administrative law judge in his Decision and Order on modification.<sup>4</sup> Thus, as claimant has failed to adequately challenge the findings of the

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<sup>2</sup> The record indicates that the miner was last employed in the coal mine industry in West Virginia. Director’s Exhibits 4, 28; Decision and Order at 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup> Administrative Law Judge Jeffrey Tureck (the administrative law judge) noted that claimant does not allege that his condition has changed subsequent to the prior denial of benefits on his claim. See 20 C.F.R. §725.310 (2000).

<sup>4</sup> The administrative law judge examined and discussed all of the relevant evidence of record as it relates to the existence of pneumoconiosis and permissibly concluded that the evidence failed to carry claimant’s burden of proof pursuant to Section 718.202(a). Decision and Order at 5-6; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). Reviewing the evidence previously considered, the

administrative law judge in his Decision and Order denying benefits on modification, the Board has no basis upon which to review those findings.

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administrative law judge correctly found that no mistake in determination of fact was made in the Decision and Order denying benefits of Administrative Law Judge Clement J. Kennington. Decision and Order at 5; *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Considering the evidence submitted after that denial, the administrative law judge rationally found that the x-ray evidence was insufficient to establish claimant's burden of proof at Section 718.202(a)(1) as the x-ray interpretations did not contain any findings of pneumoconiosis. Director's Exhibit 114; Decision and Order at 5; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Although not specifically addressed by the administrative law judge, claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3) since the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305 and 718.306 are inapplicable because there is no evidence of complicated pneumoconiosis in the record, this claim was filed after January 1, 1982 and the claim is not a survivor's claim. *See* 20 C.F.R. §§718.304, 718.305(e), 718.306; Director's Exhibit 1. Moreover, the administrative law judge rationally found that the new opinions of Drs. Stewart and Boggs, were entitled to little probative value and thus insufficient to meet claimant's burden of proof, as the physicians did not explain the basis for their conclusions. *See* 20 C.F.R. §718.202(a)(4); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 5-6; Director's Exhibit 114.

Accordingly, the administrative law judge's Decision and Order denying benefits on modification 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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BETTY JEAN HALL  
Administrative Appeals Judge