

BRB No. 12-0522 BLA

JERRY M. HUNLEY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BROWNIES CREEK COLLIERIES/ SEABOARD SURETY COMPANY)	DATE ISSUED: 06/14/2013
)	
Employer-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 Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (2004-BLA-6575) of Administrative Law Judge Robert B. Rae (the administrative law judge)

rendered on a subsequent claim filed on May 15, 2003,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case is on appeal to the Board for the second time. Pursuant to an appeal by claimant, the Board vacated the administrative law judge's Decision and Order awarding benefits and remanded the case for further consideration. The Board affirmed the administrative law judge's finding that the existence of legal pneumoconiosis was not established, but instructed the administrative law judge to reconsider whether the new x-ray or medical opinion evidence established the existence of clinical pneumoconiosis and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §718.202(a) and 725.309(d). The Board further instructed that, if the administrative law judge found a change in an applicable condition of entitlement established pursuant to Section 725.309(d), he must then consider the claim on the merits, weighing all of the evidence of record. *Hunley v. Brownie Creek Collieries*, BRB No. 10-0641 BLA (June 22, 2011) (unpub.). On remand, the administrative law judge again accepted the parties' stipulation that claimant had at least ten years of coal mine employment. Considering the newly submitted evidence, the administrative law judge found that it established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1) and (4), and, therefore, found that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d). Considering all of the evidence of record, the administrative law judge found that the existence of clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1) and (4), that claimant was entitled to the presumption that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), that a totally disabling respiratory impairment was established pursuant to 20 C.F.R. §718.204(b), and that the total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, accordingly, awarded benefits.

On appeal, employer contends generally that the administrative law judge erred in finding that the evidence establishes that claimant's total disability is due to clinical pneumoconiosis pursuant to Section 718.204(c). Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the

¹ Claimant filed two previous claims. Director's Exhibit 1. The first claim, filed on April 16, 1986, was denied by the district director on September 11, 1986, because claimant did not establish any of the elements of entitlement. *Id.* The second claim, filed on October 4, 1988, was denied by an administrative law judge on July 21, 1993, because claimant did not establish that he suffered from pneumoconiosis. *Id.* Thereafter, claimant filed two requests for modification, which the district director denied on October 30, 1996, and on November 7, 1997. *Id.* There is no indication that claimant took any further action in regard to his 1988 claim.

Director), responds, urging affirmance of the administrative law judge's Decision and Order.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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and 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, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

The only issue before the Board is whether the administrative law judge properly found that Dr. Baker's opinion established that claimant's total disability is due to clinical pneumoconiosis on the merits pursuant to Section 718.204(c). When this case was first before the administrative law judge, the administrative law judge found that claimant failed to establish the existence of either clinical or legal pneumoconiosis. The administrative law judge further found that because claimant did not establish pneumoconiosis he could not show that his disability was due to pneumoconiosis. *Hunley*, BRB No. 10-0641, slip. op. at 20-21. On remand, the administrative law judge found that clinical pneumoconiosis was established and that it "is a substantially contributing cause of [claimant's] totally disabling respiratory...impairment." Decision and Order at 19. Specifically, the administrative law judge gave "Dr. Baker's medical

² The administrative law judge's findings of clinical pneumoconiosis arising out of coal mine employment, total disability and a change in an applicable condition of entitlement have been established pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b) and 725.309, respectively, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

opinion the greatest weight...based on his well documented and well reasoned medical report and opinion.”⁴ Decision and Order at 19.

The Board’s limited 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.⁵ See 20 C.F.R. §§802.211(b), 802.301(a); *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). Employer has failed to do so in this case. Employer fails to point to any specific error in the administrative law judge’s finding that Dr. Baker’s opinion establishes that claimant’s disability is due to clinical pneumoconiosis.⁶ See *Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. We affirm, therefore, the administrative law judge’s finding that disability causation was established pursuant to Section 718.204(c).

⁴ Dr. Baker’s opinion is based on a physical examination, objective testing, symptoms and claimant’s occupational and smoking histories. Dr. Baker found that claimant had clinical pneumoconiosis due to his coal mine employment, he was totally disabled and that “a significant cause” of his disability is his coal workers’ pneumoconiosis. Claimant’s Exhibit 3.

⁵ 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 v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

⁶ The arguments employer makes on appeal regarding the medical opinion evidence go to whether that evidence supports a finding of legal pneumoconiosis pursuant to 20 C.F.R. §§718.201; 718.202(a)(4), and not whether clinical pneumoconiosis caused or significantly contributed to his total disability pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge