

BRB No. 01-0685 BLA

ARNOLD L. JENKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KITCHEKAN FUEL CORPORATION	)	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 On Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Tonita M. Foster, Roanoke, Virginia, for claimant.

George L. Partain, Logan, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order On Modification Denying Benefits (00-BLA-0917) of Administrative Law Judge Jeffrey Tureck rendered 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).<sup>1</sup> This case is before the Board for a second time. Claimant filed an application for benefits on November 3, 1995, which the district director

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<sup>1</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

denied on March 13, 1996 and again, after conference on June 25, 1996. *See* Director's Exhibits 1, 28, 37. Following a hearing on the merits, Administrative Law Judge Paul A. Mapes issued a Decision and Order denying benefits on September 22, 1997. *See* Director's Exhibit 49. Judge Mapes credited claimant with six and one-quarter years of coal mine employment and found employer to be the responsible operator. *Id.* Judge Mapes, however, found the evidence of record insufficient both to establish the existence of pneumoconiosis arising out of coal mine employment and to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis. Accordingly, benefits were denied.

Claimant appealed to the Board, which dismissed claimant's appeal and remanded the case to the district director for proceedings on modification inasmuch as claimant had submitted new evidence with his appeal. *See Jenkins v. Kitchekan Fuel Corp.*, BRB No. 98-0149 BLA (Mar. 18, 1998). On remand from the Board, the district director reviewed claimant's new evidence, but denied modification on November 9, 1998. *See* Director's Exhibits 53, 55-57, 63. Claimant timely requested a hearing by letter dated November 17, 1998. *See* Director's Exhibit 64.<sup>2</sup> A hearing was held on January 18, 2001. In considering claimant's modification request, Administrative Law Judge Jeffrey Tureck, (the administrative law judge) credited claimant with six and one-quarter years of coal mine employment based on the parties' agreement at the hearing and the prior findings of Judge Mapes. Since Judge Mapes had found that claimant failed to establish any element of entitlement and inasmuch as claimant contended that he had become totally disabled since the prior hearing, the administrative law judge presumed for the purposes of his decision that claimant suffered from a totally disabling respiratory impairment, and, therefore, considered the evidence of record as to the existence of pneumoconiosis. The administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis and therefore denied benefits. Further, by post-hearing Order dated May 18, 2001, the administrative law judge denied claimant's request to submit new evidence, which the administrative law judge characterized as a request to reopen the record, inasmuch as claimant's request to leave the record open at the hearing had been denied and no new evidence was attached to claimant's motion. Hearing Transcript 5-8.

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<sup>2</sup> In its Order, the Board advised claimant that if he were dissatisfied with the findings of the administrative law judge on modification, his original appeal would be reinstated only upon his request. *Id.* Claimant has not requested reinstatement of his previous appeal; thus, the Decision and Order of Judge Mapes is not before the Board.

On appeal, claimant challenges the findings of the administrative law judge on the length of coal mine employment and the existence of pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter addressing only the impact of the new regulations in this appeal, and contending that they do not affect the outcome of this case.

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 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*).

Claimant first argues that the administrative law judge erred in crediting him with only six and one-quarter years of coal mine employment when there was evidence in the record of additional years of coal mine employment. At the hearing before the administrative law judge on January 18, 2001, however, the parties agreed that claimant had worked six and one-quarter years in coal mine employment. *See* Hearing Transcript at 5. We, therefore, decline to address claimant's argument concerning the length of his coal mine employment. *See Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373, 2-379 (4th Cir. 1996).

Claimant next argues that evidence obtained between October 1995 and January 2000 establishes the existence of pneumoconiosis and that evidence obtained subsequent to the January 2001 hearing on modification establishes the existence of pneumoconiosis, *see* Claimant's Brief at 4-7. Claimant has failed, however, to identify any errors made by the administrative law judge in the evaluation of the evidence and applicable law pursuant to Part 718. The Board is not empowered to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as a review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). 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 and explain why the evidence which supports the result reached is not substantial or why the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g*

7 BLR 1-610 (1984); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Sarf, supra*. 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, supra; Fish, supra*. Thus, as claimant has failed to adequately raise or brief any issues arising from the administrative law judge's Decision and Order denying claimant's request for modification denying benefits, the Board has no basis upon which to review the decision.

As to claimant's argument that the evidence obtained subsequent to the January 2001 hearing on modification establishes the existence of pneumoconiosis and should have been considered by the administrative law judge, we disagree. The administrative law judge did not err when he denied claimant's motion, at the January 18, 2001 hearing, to leave the record open while claimant obtained a new medical examination and report, nor did the administrative law judge err in denying claimant's motion to reopen the record. 20 C.F.R. §456(b)(1)(2000); *see Lynn v. Island Creek Coal Co.*, 13 BLR 1-57 (1989)(*recon. en banc*)(McGranery, J., concurring); *Toler v. Eastern Associated Coal Co.*, 12 BLR 1-49, 1-51 (1988); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-359 (1985); *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1985). In denying claimant's motion the administrative law judge stated that no evidence was identified or attached to the motion, nor did claimant explain why the record should be reopened when the same motion had been made and denied at the hearing. Order Denying Motion to Reopen the Record dated April 3, 2001. The administrative law judge's April 3, 2001 Order Denying Motion to Reopen the Record is therefore affirmed.

Further, because the Board lacks jurisdiction to reopen the record and review evidence not presented to the administrative law judge, evidence submitted by claimant with this appeal will not be considered and is being returned with the Board's decision. *See* 20 C.F.R. §§801.102, 802.301. However, if claimant considers this evidence necessary to the proper adjudication of his claim for benefits, he may, within one year of the final denial of this claim, file a request for modification before the district director and submit any pertinent evidence he has in support of that request. *See* 20 C.F.R. §§802.301(c), 725.310 (2000); *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985); *White, supra*.

Accordingly, the Decision and Order on Modification 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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BETTY JEAN HALL  
Administrative Appeals Judge