BRB No. 13-0059 BLA

KENNIE H. CHAPMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	DATE ISSUED: 10/30/2013
	)	
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 Remand – Denial of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan, P.S.C.), South Williamson, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Claim (2008-BLA-05576) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed on April 16, 2007,[1] pursuant to the provisions of the Black Lung Benefits Act,

[1] Claimant filed his first application for benefits on August 16, 2001, which was denied by Administrative Law Judge Daniel F. Solomon, in a Decision and Order issued on August 13, 2004, for failure to establish any element of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial until he filed his current subsequent claim. Director's Exhibit 3.

as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The relevant procedural history of the case is as follows: In a Decision and Order dated November 13, 2009, the administrative law judge accepted the parties' stipulation, that claimant worked at least eleven years in coal mine employment, and found, based on the newly submitted evidence, that claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, considering the entire record on the merits of the claim, the administrative law judge determined that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Claimant appealed and the Board vacated the administrative law judge's denial of benefits, as well as his reliance on the parties' stipulation to at least eleven years of coal mine employment, and remanded the case for the administrative law judge to reconsider claimant's entitlement under amended Section 411(c)(4).[2] *Chapman v. Eastern Coal Corp.*, BRB No. 10-0663 BLA, slip op. at 3 (July 28, 2011) (unpub.). The Board instructed the administrative law judge to determine whether claimant worked at least fifteen years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those in an underground mine. *Id.* The Board further instructed the administrative law judge on remand to allow the parties the opportunity to submit additional evidence to address the change in law. *Id.*

On October 11, 2012, the administrative law judge issued his Decision and Order on Remand denying benefits, which is the subject of this appeal. The administrative law judge again determined that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), but because he also found that claimant established less than fifteen years of coal mine employment, the administrative law judge concluded that claimant was not entitled to invoke the amended Section 411(c)(4) presumption. The administrative law judge also found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

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[2] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

On appeal, claimant asserts that the administrative law judge did not evaluate the opinions of his treating physicians, based on the factors set forth at 20 C.F.R. §718.104(d). Employer responds, urging the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that his 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).

Initially, we affirm, as unchallenged by claimant on appeal, the administrative law judge's finding that claimant is unable to invoke the amended Section 411(c)(4) presumption, and his findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Relevant to 20 C.F.R. §718.202(a)(4), claimant asserts that the administrative law judge erred by not performing a proper analysis of the treating physicians' opinions pursuant to 20 C.F.R. §718.104(d)(1)-(4), and by not finding that he established the existence of pneumoconiosis, based on the medical opinion evidence. Contrary to claimant's assertion, however, the administrative law judge specifically determined, pursuant to 20 C.F.R. §718.104(d)(5)[4] that, while Drs. Hussain and

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The regulation at 20 C.F.R. §718.104(d)(5) provides:

> In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, *provided that the weight given to the opinion of the miner's treating physician shall also be based on the credibility of the physician's*

Ammisetty treated claimant, neither physician provided a reasoned opinion sufficient to satisfy claimant's burden of proof.[5] Decision and Order at 7.

The Board is not permitted 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). The Board's circumscribed scope of review requires that a party challenging the Decision and Order explain 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); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *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.

Because claimant does not identify any specific error with regard to the administrative law judge's ultimate conclusion that the opinions of Drs. Hussain and Ammisetty are not reasoned, the administrative law judge's credibility findings are affirmed. *See Cox,* 791 F.2d at 445, 9 BLR at 2-46. Because there are no other medical opinions of record supportive of claimant's burden of proof, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, as claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

> *opinion in light of its reasoning and documentation*, other relevant evidence and the record as a whole.

20 C.F.R. §718.104(d)(5) (emphasis added).

[5] The administrative law judge determined that neither Dr. Hussain, nor Dr. Ammisetty, explained how claimant's exposures to smoking and coal dust exposure contributed to his disabling respiratory disease. Decision and Order at 7.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Claim is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge