BRB No. 01-0125 BLA

DAVID E. STEPP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PRICE COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED:
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (1997-BLA-1808) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a petition for modification of a duplicate claim[1] filed

[1]Claimant's first claim, filed on January 10, 1990, was deemed abandoned by order dated March 15, 1990. Director's Exhibit 60. Claimant filed a duplicate claim on December 5, 1994 that was denied on June 1, 1995. Director's Exhibits 1, 26. By letter dated June 4, 1996, claimant informed the Department of Labor that he was unable to file a timely appeal due to heart surgery. Director's

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).[2] The administrative law judge credited claimant with

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Exhibit 34. Claimant reiterated his intent to keep his claim open in a statement dated June 12, 1996. Director's Exhibit 36. Initially, claimant's request was considered as a statement of intent to file a new claim, but subsequently it was considered as a request for modification. Director's Exhibits 35, 37. Claimant's petition for modification was denied and the case was transmitted to the Office of Administrative Law Judges on August 13, 1997. Director's Exhibit 61.

[2]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 20 C.F.R. Parts 718, 722, 725, and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the

twenty-one years of coal mine employment and found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4) (2000), or the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally argues that the medical opinion evidence is sufficient to establish all of the elements of entitlement, and that the administrative law judge failed to accord proper weight to the opinions of claimant's treating physicians. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a brief in response to claimant's appeal.[3]

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duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order on July 27, 2001 requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). On August 10, 2001, the Board issued an Order rescinding its July 27, 2001 order.

[3]We affirm as unchallenged the administrative law judge's finding of twenty-one years of coal mine employment, as well as his findings that the weight of the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.§718.202(a)(1)-(3) (2000), or total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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 (2001); *Gee v. W.G. Moore & Sons,* 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In challenging the administrative law judge's Decision and Order, claimant alleges that the administrative law judge failed to give proper weight to the opinions of his treating physicians, Drs. Caintic and Sundaram. The administrative law judge correctly found that this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. Decision and Order at 5; *see* Director's Exhibit 1; *Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*). The United States Court of Appeals for the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). The administrative law judge acknowledged the status of Drs. Caintic and Sundaram as claimant's treating physicians. Decision and Order at 16. However, because the administrative law judge found, and we affirm as unchallenged, that the opinions of Drs. Caintic and Sundaram were not sufficiently reasoned or documented, the administrative law judge was not required to accord greater weight to their opinions based upon their status as claimant's treating physicians. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Halsey v. Richardson*, 441 F.2d 1230, 1236 (6th Cir. 1971); *Tedesco v. Director, OWCP,* 18 BLR 1-103 (1994); *Skrack v. Island Coal Co.,* 6 BLR 1-710 (1983); Decision and Order at 16, 20.

Moreover, the administrative law judge reasonably found the opinions of better qualified physicians, Drs. Broudy and Fino,[4] better supported by the objective medical evidence of record, than the opinions of Drs. Sundaram and Caintic regarding whether claimant suffered from pneumoconiosis and a totally disabling pulmonary impairment. 20 C.F.R. §§718.202(a)(4); 718.204(c)(4) (2000)[5]; *Clark v. Karst-Robbins Coal Co.* 12 BLR 1-149 (1988) (*en banc*); *McMath*

[4]The administrative law judge found, and we affirm as unchallenged, that Drs. Fino and Broudy are better qualified as they are Board-certified in internal medicine and pulmonary diseases whereas the record does not reflect that Drs. Caintic and Sundaram possess any special qualifications. Decision and Order at 17, 20.

[5]The administrative law judge applied the total disability regulation set forth at 20 C.F.R.

v. Director,OWCP, 12 BLR 1-6 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 17, 20. In addition, claimant merely cites evidence that may be favorable to his case. He has failed to identify any reversible error on the part of the administrative law judge in considering the relevant medical evidence under Sections 718.202(a) and 718.204(c) (2000). Claimant's statements amount to little more than a request to reweigh the evidence, which is beyond the Board's scope of review. *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Anderson v. Valley Camp of Utah, Inc*,12 BLR 1-111 (1989); *Sarf v. Director, OWCP*, 10 BLR 1-110 (1987). As the administrative law judge's findings are supported by substantial evidence and within his discretion, we affirm denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

§718.204(c)(2000). After the revision of the regulations, the total disability regulation is now set forth at 20 C.F.R. §718.204(b)(2) (2001).