BRB No. 99-0611 BLA

JAMES A. THACKER	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
ENDURO COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Respondent	)	
	)	
RIVER HURRICANE COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

David H. Neeley (Neeley & Reynolds Law Offices, P.S.C.), Prestonsburg, Kentucky, for employer/carrier, Enduro Coal Company/Kentucky Coal Producers' Self-Insurance Fund.

Laura Metcoff Klaus (Arter & Hadden), Washington D.C., for employer/carrier, River

Hurricane Coal Company/Old Republic Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Modification - Denial of Benefits (98-BLA-0581) of Administrative Law Judge Robert L. Hillyard on a modification request of a duplicate 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*. This case is before the Board for the third time. The administrative law Judge found that the medical evidence established that claimant was totally disabled from a respiratory impairment pursuant to 20 C.F.R. §718.204(c), and that, therefore, claimant's condition had worsened such that a change in conditions was established pursuant to 20 C.F.R. §725.310(a). The administrative law judge then weighed all of the evidence of record, and concluded that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1) and (4) and that claimant's disability is due to pneumoconiosis pursuant to Section 718.204(b). Employer, Enduro Coal Company, in response, asserts that the administrative law judge's Decision and Order is supported by substantial evidence and, accordingly, urges affirmance. Employer, River Hurricane Coal Company, also responds, and asserts that the administrative law judge's Decision and Order is supported by substantial evidence, that the administrative law properly dismissed River Hurricane Coal Company as a party, and, accordingly, urges

[1]Claimant is James A. Thacker, the miner, who has filed two applications for benefits with the Department of Labor.

affirmance. The Director, Office of Workers' Compensation Programs, (the Director), has filed a letter indicating that he will not participate in the instant appeal.[2]

The relevant procedural history of this claim is as follows: claimant filed his first application for benefits with the Department of Labor (DOL) on December 10, 1971, which was denied by DOL on June 27, 1980. Director's Exhibit 81. Claimant took no further action, and the denial became final. Claimant thereafter filed his second application for benefits with DOL on October 18, 1988. Following a hearing, Administrative Law Judge Richard K. Malamphy issued a Decision and Order denying benefits under 20 C.F.R. Part 718 on July 20, 1992. Director's Exhibit 99. Claimant appealed to the Board, and the Board affirmed the administrative law judge's denial. *Thacker v. Enduro Coal Co.*, BRB No. 92-2304 BLA (Oct. 22, 1993)(unpub.). Director's Exhibit 108. Claimant's motion for reconsideration filed with the Board was denied. Director's Exhibit 109. *Thacker v. Enduro Coal Co.*, BRB No. 92-2304 BLA (Oct. 4, 1994)(unpub.)(Order on Motion for Reconsideration). Director's Exhibit 112. On a petition for modification, the administrative law judge denied benefits in a Decision and Order dated November 24, 1995. Director's Exhibit 155. On appeal, the Board affirmed the administrative law judge's denial. *Thacker v. Enduro Coal Co.*, BRB No. 96-0505 BLA (June 7, 1996)(unpub.). Director's Exhibit 163. Claimant's subsequent request for modification was denied by Administrative Law Judge Robert L. Hillyard in a Decision and Order dated February 26, 1999. Claimant then filed the instant appeal with the Board.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2] We affirm as unchallenged on appeal the administrative law judge's findings that the evidence establishes 22 years of qualifying coal mine employment, that the employer, Enduro Coal Company, is the putative responsible operator, that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), - (3) and that the evidence establishes total respiratory disability pursuant to Section 718.204(c). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The administrative law judge initially found that the evidence of record failed to establish the existence of pneumoconiosis at Section 718.202(a), and found that although the evidence demonstrated that claimant was totally disabled, it failed to establish that claimant's total disability was due to pneumoconiosis at Section 718.204(b). Initially, the administrative law judge found that the x-ray interpretation evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant, in his brief, challenges the administrative law judge's finding at Section 718.202(a)(1), but fails to allege any error with respect to the administrative law judge's finding thereunder. The Board's circumscribed scope of review requires a party challenging the Decision and Order below to 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. *See* 20 C.F.R §802.211(a). *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Cox v. Benefits Review Board* 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1991)*; Fish v. Director, OWCP*, 6 BLR 1-107 (1983). In the instant case, claimant fails to identify any error made by the administrative law judge in his evaluation of the x-ray evidence pursuant to Section 718.202(a). Thus, as claimant's counsel has failed to adequately raise or brief the issue, the Board has no basis upon which to review the decision. We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Claimant challenges the administrative law judge's finding that the medical opinion evidence of record fails to establish the existence of pneumoconiosis at Section 718.202(a)(4). Claimant asserts that the administrative law judge did not give proper weight to the opinions of claimant's treating physicians, Drs. Sutherland and Sundaram, stating that claimant is suffering from pneumoconiosis. We disagree. An administrative law judge is not required to credit the opinion of a treating physician where he provides valid reasons for discrediting them. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1989). *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). In this case, the administrative law judge permissibly gave greater weight to the opinions of Drs. Broudy, Fino, Branscomb and Anderson, that claimant does not suffer from pneumoconiosis, over the contrary opinions of Drs. Sutherland, Sundaram and Raschella[3] on the ground that the former opinions were better supported by the objective

[3]Dr. Raschella also diagnosed chronic obstructive pulmonary disease/black lung.

data of record, *see Wilt v. Wolverine Mining Co.,* 14 BLR 1-70 (1990); *Rafferty v. Jones & Laughlin Steel Corp.,* 9 BLR 1-231 (1987*),* and because he found them to be better explained,[4] *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc)*; Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); Decision and Order at 25-27. We, therefore, affirm the administrative law judge's determination that the preponderance of the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(4) as it is supported by substantial evidence. We further affirm the administrative law judge's finding that the record as a whole is insufficient to establish the existence of pneumoconiosis at Section 718.202(a). As this finding precludes entitlement pursuant to the Part 718 regulations, *see Trent, supra; Perry, supra,* we affirm the administrative law judge's denial of benefits.[5]

Accordingly, the administrative law judge's Decision and Order on Modification - Denial of Benefits on Remand is Affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Director's Exhibits 137, 139. Claimant, however, is not challenging the administrative law judge's determination to give less weight to the opinion of Dr. Raschella. *See Coen, supra; Skrack, supra*.

[4]The administrative law judge found that the x-rays relied on by Dr. Sundaram have been reread as negative by physicians with higher qualifications. In addition, physicians with higher qualifications reviewed the same evidence available to Dr. Sundaram and disagreed with his conclusions. Further, the administrative law judge found that Drs. Sundaram and Sutherland did not address the effects of claimant's significant smoking history which was found by several physicians to be the cause of claimant's pulmonary and respiratory problems.

[5] It is unnecessary to address claimant's contentions pursuant to Section 718.204(b) in light of our disposition of the instant case. *See Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge