BRB No. 00-1128 BLA

CLAYTON MAYNARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ADDINGTON MINING, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA	)	
	)	
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.

Sherri P. Brown (Ferreri & Fogle), Lexington, Kentucky, for employer.

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1129) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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).[1] The administrative law judge found the evidence of record sufficient to establish thirty years of qualifying coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 4. The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) (2000). Decision and Order at 5-11. Accordingly, benefits were denied. On appeal, claimant contends that the opinion of Dr. Sundaram is sufficient to establish the existence of pneumoconiosis and that claimant is totally disabled pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4) (2000). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

[1]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.

[2]Claimant filed his claim for benefits on February 28, 1997. Director's Exhibit 1.

[3]The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(3) (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on May 21, 2001, to which employer and the Director have responded asserting that the outcome of this case will not be affected by the revised regulations. Claimant has not responded to the Board's order.[4] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

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 (2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 21, 2001, is construed as a position that the challenged regulations will not affect the outcome of this case.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. With respect to 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4) (2000), claimant contends that the administrative law judge erred in failing to accord proper weight to the opinion of Dr. Sandaram. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Moreover, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating or attending physician. *Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, a physician's opinion based upon his own tests and observations, or the review of other objective test results, may be substantial evidence in support of an administrative law judge's findings. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel, supra*. Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence as it relates to the existence of pneumoconiosis and total disability and permissibly concluded that the weight of the credible evidence fails to carry claimant's burden pursuant to Sections 718.202(a)(4) and 718.204(c)(4) (2000).[5] Decision and Order at

[5]There are four relevant medical opinions in the record. Dr. Sundaram opined that claimant suffered from pneumoconiosis and that from a pulmonary standpoint, claimant was not physically able to perform his usual coal mine employment. Director's Exhibit 31; Claimant's Exhibits 1, 2. Drs. Wright and Fritzhand diagnosed pneumoconiosis but concluded that claimant had sufficient pulmonary capacity to perform the work of a coal miner. Director's Exhibits 9, 28. Dr. Jarboe, who is board-certified in internal medicine and pulmonary disease, opined that claimant does not have an occupationally acquired pulmonary impairment and that he retains the pulmonary ability to perform his previous coal mine work. Director's Exhibit 23.

7-11; Director's Exhibits 9, 23, 28, 31; Claimant's Exhibits 1, 2; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge, in the instant case, properly considered the relevant evidence of record and permissibly accorded the opinions, that claimant does not have pneumoconiosis and suffers no impairment due to coal dust exposure and could perform his last coal mining job, greater weight as they were better reasoned, documented, supported by the objective evidence of record and possessed superior credentials.[6] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order at 8-11; Director's Exhibits 9, 23, 28, 31; Claimant's Exhibits 1, 2. Additionally, although claimant alleges that Dr. Sundaram is the miner's treating/attending physician, the administrative law judge has provided valid reasons for finding his opinion entitled to less weight.[7] *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Wetzel, supra*; Decision and Order at 9, 11.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Trent, supra*; *Perry, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish that claimant has pneumoconiosis or is totally disabled, claimant has not met his burden of proof on all the elements of entitlement. *Clark, supra*; *Trent, supra*; *Perry, supra*. The administrative law judge is empowered to weigh the medical

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[6]Although the administrative law judge failed to specifically note that Dr. Sundaram appears to be the miner's treating physician, a remand is not required as the administrative law judge permissibly questioned the reliability of this opinion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Decision and Order at 8-9, 11; Claimant's Exhibit 2; Hearing Transcript at 13.

[7]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. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Furthermore, since the determination of whether claimant has pneumoconiosis or a totally disabling respiratory impairment is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's finding. *Anderson, supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(c) (2000) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis and total disability, requisite elements of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge