BRB Nos. 06-0146 BLA
and 06-0146 BLA-A

STANLEY SMITH	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 08/16/2006
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-6622) of Administrative Law Judge Daniel J. Roketenetz on a claim[1] 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). Employer has filed both a response brief and a cross-appeal in the instant case. The Director, Office of Workers' Compensation Programs (the Director), has submitted letters in response to both the appeal and cross-appeal. The administrative law judge credited claimant with at least twenty-six years of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Section 718.202(a)(1), (a)(4) and total respiratory disability under Section 718.204(b)(2)(iv). Claimant additionally contends that because the administrative law judge discredited the medical opinion regarding disability of Dr. Simpao, a physician who examined him at the behest of the Department of Labor, the Director has failed to provide claimant with a complete and credible pulmonary examination as required by Section 413(b) of the Act, 30 U.S.C. §923(b), to substantiate his claim. In response, employer urges affirmance of the denial of benefits. The Director responds, arguing that he has satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation as required by the Act.

On cross-appeal, employer argues that, while the ultimate decision denying benefits in this case is rational and supported by substantial evidence, that portion of the administrative law judge's decision limiting employer's exhibits pursuant to 20 C.F.R. §725.414 should be overruled because the newly promulgated regulations that impose limitations on the evidence each party is permitted to submit are arbitrary, capricious, and violative of Section 923(b) of the Act, the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), and of the holding in *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), which require that all relevant evidence be considered. In addition, employer argues that the administrative law judge erred in failing to admit Employer's Exhibits 11 and 12 into the record under the "good cause" exception to the evidentiary limitations set forth in 20 C.F.R. §725.456(b)(1). Claimant did not respond. The Director responds, contending that the Board has upheld the validity of the evidentiary limitations pursuant to Section 725.414 and has rejected these

[1] Claimant, Stanley Smith, filed an application for benefits on January 14, 2002. Director's Exhibit 2.

same arguments in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-51 (2004); therefore, it should do so here.[2]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first contends that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). Claimant contends that in so doing, the administrative law judge relied almost solely on the qualifications of the physicians and the numerical superiority of the negative x-ray interpretations. Claimant contends that the administrative law judge is not required either to defer to a physician with superior qualifications or to accept as conclusive the numerical superiority of the x-ray interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the x-ray evidence.

In considering the x-ray evidence, the administrative law judge found that the chest x-ray film of February 26, 2002 was read: positive for pneumoconiosis by Dr. Simpao, a physician with no radiological qualifications; for quality only by Dr. Sargent, a Board-certified radiologist and B-reader; and negative for pneumoconiosis by Dr. Wiot, a Board-certified radiologist and B-reader. The administrative law judge concluded, therefore, that this x-ray was negative for the existence of pneumoconiosis. Turning to the x-ray film dated February 5, 2003, the administrative law judge found that Dr. Baker, a B-reader, read the x-ray as positive, but that because Dr. Wiot, a Board-certified radiologist and B-reader, read the x-ray as negative, he considered the x-ray to be negative. Regarding the February 16, 2004 x-ray film, the administrative law judge found it to be positive because, even though it was read as negative by Dr. Rosenberg, a B-reader, it was read as positive by Dr. Alexander, a Board-certified radiologist and B-reader. The administrative law judge found that a November 10, 2004 chest x-ray was read as negative by Dr. Repsher.[3] Ultimately, the administrative law judge concluded that, after considering the qualifications of the physician/readers, there were three

[2] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §718.202(a)(2)-(3) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4, 7.

[3] The record contains information indicating that Dr. Repsher is a B-reader. Employer's Exhibit 3.

negative x-rays and only one positive x-ray. Decision and Order at 7. The administrative law judge concluded, therefore, that a preponderance of the negative x-ray interpretations by better qualified physicians did not establish the existence of pneumoconiosis. Accordingly, as the administrative law judge conducted both a qualitative and quantitative assessment of the x-ray evidence, we affirm his finding at Section 718.202(a)(1) and reject claimant's arguments. 20 C.F.R. §718.202(a)(1);[4] *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995) ("administrative factfinders must not rely solely on the quantity of readings on one side or the other, 'without reference to a difference in the qualifications of the readers'…"); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1994); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6-7. In addition, we reject claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence inasmuch as claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal that he engaged in a selective analysis of the x-ray evidence. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004).

Claimant also contends that the administrative law judge erred in finding that Dr. Baker's reasoned and documented opinion did not establish the existence of pneumoconiosis. Claimant contends that the administrative law judge erred in rejecting Dr. Baker's opinion because it was based on his positive x-ray interpretation and an administrative law judge may not discredit the opinion of a physician whose report is based on a positive x-ray interpretation merely because it is contrary to the weight of the other x-ray evidence of record or because the record contains subsequent, negative x-ray interpretations. Moreover, claimant contends that inasmuch as the interpretation of medical data is for medical experts and Dr. Baker's finding of pneumoconiosis was based on a thorough physical examination, claimant's medical and work histories, a chest x-ray, and pulmonary function and arterial blood gas studies, it was error for the administrative law judge to interpret medical tests and substitute his own conclusions for those of the physician.

In considering the medical opinion evidence at Section 718.202(a)(4), the administrative law judge found that the opinions of Drs. Rosenberg and Repsher, that claimant did not have clinical or legal pneumoconiosis, and the opinion of Dr. Simpao, that he did, were well-documented and reasoned. Decision and Order at 12. The administrative law judge found, however, that even though Dr. Baker conducted

[4] Section 718.202(a)(1) provides, in pertinent part, "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration *shall* be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a)(1) [emphasis added].

objective testing and performed a physical examination of claimant, Dr. Baker's diagnosis of pneumoconiosis was undermined by his exclusive reliance on his positive x-ray reading and claimant's history of coal dust exposure and by his failure to indicate how his physical examination findings and objective tests supported his diagnosis of clinical pneumoconiosis. Accordingly, the administrative law judge properly determined that Dr. Baker's diagnosis of clinical pneumoconiosis was neither well-reasoned nor well-documented. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (determination as to whether physician's report is sufficiently reasoned and documented is credibility matter for administrative law judge); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 11; Director's Exhibit 11.

Similarly, the administrative law judge also found Dr. Baker's diagnosis of chronic bronchitis based on claimant's employment history insufficient to establish the existence of legal pneumoconiosis inasmuch as, when indicating that "the patient's disease" was the result of coal dust exposure, Dr. Baker did not specify whether the "disease" he referred to was pneumoconiosis or chronic bronchitis and Dr. Baker referred to abnormal x-rays when responding to the question regarding the cause of claimant's respiratory disease. Consequently, the administrative law judge properly determined that Dr. Baker's opinion as to the existence of legal pneumoconiosis was inconclusive and unreasoned. *See* 20 C.F.R. §§718.201, 718.202(a)(4); *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-148 (1984); Decision and Order at 12; Director's Exhibit 11. Accordingly, having properly rejected Dr. Baker's opinion regarding the existence of clinical and legal pneumoconiosis, the administrative law judge rationally found that the documented and reasoned opinions of Drs. Rosenberg and Repsher, that claimant did not have clinical or legal pneumoconiosis, outweighed the opinion of Dr. Simpao, the only physician who rendered a documented and reasoned opinion finding the existence of both clinical and legal pneumoconiosis. Decision and Order at 9-10, 12; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (administrative law judge as factfinder should decide whether physician's report is sufficiently reasoned and documented); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-85; *Clark*, 12 BLR at 1-149; *Lucostic*, 8 BLR at 1-46; Decision and Order at 12; Employer's Exhibits 1-4. Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence pursuant to Section 718.202(a)(4).

Next, claimant contends that because the administrative law judge found the disability opinion of Dr. Simpao, the physician who conducted claimant's pulmonary evaluation at the behest of the Department of Labor, to be incredible as it was inconsistent, the Director failed to provide claimant with a complete, credible pulmonary examination sufficient to substantiate his claim. In response, the Director asserts that the Act requires him only to provide claimant with a complete and credible examination. The Director avers that inasmuch as the administrative law judge accorded some weight to Dr. Simpao's disability opinion, albeit "little weight," and he accorded greater weight to the opinions of Drs. Rosenberg and Repsher, which he found to be reasoned and documented, the Director did not abdicate his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. The Director further contends that, even if Dr. Simpao's disability opinion had been rejected as without any probative value, there is no need to remand this case since claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, and benefits would, accordingly, be precluded. We agree. Inasmuch as we have affirmed the administrative law judge's finding that the existence of pneumoconiosis has not been established, we need not determine whether claimant received a credible pulmonary evaluation. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *see also Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1992), *alj decision summarily aff'd*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992) (court retained jurisdiction); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Finally, in the interest of judicial economy, we address employer's cross-appeal. Employer asserts that the administrative law judge erred in applying the evidentiary limitations set forth in Section 725.414 to exclude the x-ray readings contained in Employer's Exhibits 11 and 12[5] from the record and in failing to admit these interpretations under the "good cause" exception pursuant to Section 725.456(b)(1). Employer argues that the amended regulations mandating limits on the evidence that parties may file are arbitrary, capricious, and violative of Section 923(b) of the Act, of the APA, and of the holding in *Underwood*, 105 F.3d at 946, 21 BLR at 2-23, which all require that all relevant evidence be considered. We disagree. The Board has held that the provision set forth in Section 725.414 is valid and does not contravene the Act or controlling precedent and, in this case, employer has advanced no compelling argument in support of altering the Board's holding on this issue. *See Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*). Similarly, we also reject that portion of employer's argument that Employer's Exhibits 11 and 12 should have been admitted under the "good cause" exception pursuant

[5] Employer's Exhibits 11 and 12 consist of two x-ray interpretations rendered by Dr. Halbert, a Board-certified radiologist and B-reader, who interpreted the chest x-ray films dated February 15, 2004 and November 10, 2004. Employer's Exhibits 11, 12.

to Section 725.456(b)(1) inasmuch as employer fails to state with specificity why the administrative law judge's conclusion is contrary to law and employer has not otherwise raised any specific legal or factual challenge to the administrative law judge's determination that employer failed to demonstrate good cause. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); Decision and Order at 6 n.5, n.6; Employer's Brief in Support of Cross-Appeal at 25. Hence, we affirm the administrative law judge's determination to exclude Employer's Exhibits 11 and 12 because he rationally found that these exhibits were in excess of the evidentiary limitations set forth in Section 725.414(a)(3).

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a) as this finding is rational, contains no reversible error, and is supported by substantial evidence. Inasmuch as claimant has failed to satisfy his burden to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits. 20 C.F.R. §718.202(a); *see Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*).[6]

[6] Our affirmance of the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a) precludes the need to address claimant's arguments with respect to the total respiratory disability at Section 718.204(b). *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge