BRB Nos. 06-0327 BLA
and 06-0327 BLA-A

WILLIAM H. VANOVER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 01/16/2007
	)	
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 Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6305) of Administrative Law Judge Jeffrey Tureck on a subsequent 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 a cross-appeal in the instant case. The administrative law judge credited claimant with eleven years of qualifying coal mine employment. Adjudicating this subsequent 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), and that claimant, therefore, failed to demonstrate that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final, pursuant to 20 C.F.R. §725.309.[2] 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

[1] Claimant filed an application for benefits on February 6, 1980, which was denied by Administrative Law Judge Ellin O'Shea on September 22, 1987 and affirmed by the Board on appeal. *Vanover v. Island Creek Coal Co.*, BRB No. 87-2966 BLA (Dec. 29, 1989) (unpub.); Director's Exhibit 1. Thereafter, claimant filed a petition for modification and submitted additional evidence and Judge Shea denied modification on May 26, 1993. Subsequently, claimant submitted additional evidence in support of a second petition for modification and, Judge Shea denied benefits on September 1, 1995 and similarly, denied claimant's request for reconsideration on October 19, 1995. Consequently, claimant filed an appeal with the Board. While the appeal was pending, claimant also filed a third petition for modification on November 29, 1995. The Board, therefore, dismissed claimant's appeal and remanded the claim to the district director for further modification proceedings. *Vanover v. Island Creek Coal Co.*, BRB No. 96-0152 BLA (Feb. 23, 1996) (unpub. Order). Administrative Law Judge Daniel J. Roketenetz reviewed claimant's request for modification and denied benefits on June 24, 1998; claimant appealed this denial to the Board and again submitted additional medical evidence. The Board construed claimant's submission of new evidence as a fourth request for modification and remanded the claim for further modification proceedings, *Vanover v. Island Creek Coal Co.*, BRB No. 98-1304 BLA (Feb. 4, 1999) (unpub. Order), and the modification request was subsequently denied by Administrative Law Judge Thomas F. Phalen, Jr. on October 30, 2001. Claimant's failure to appeal Judge Phalen's decision or to further pursue the claim rendered the February 1980 claim finally denied. Claimant's second application, filed on February 18, 2003, is pending herein. Director's Exhibit 2.

[2] The administrative law judge found that the miner's previous claim was denied based on claimant's failure to establish the existence of pneumoconiosis. Decision and Order at 3.

under Section 718.202(a)(1) and (a)(4). In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating his intention not to respond to claimant's appeal. 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 30 U.S.C. §923(b), 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 the holding of the United States Court of Appeals for the Fourth Circuit 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 2, 31, 33, and 38 into the record under the "good cause" exception to the evidentiary limitations set forth in 20 C.F.R. §725.456(b)(1). Claimant has not responded to employer's appeal. The Director responds, contending that the Board has upheld the validity of the evidentiary limitations pursuant to Section 725.414 and has rejected these same arguments in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-51 (2004); therefore, it should do so herein.[3]

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 the administrative law judge failed in crediting Dr. Wiot's superior radiological qualifications without specifying which attribute of Dr. Wiot's professional background warranted according his negative x-ray interpretations greater weight than the positive x-ray interpretations rendered by Dr. Patel, who was similarly qualified. Moreover, claimant contends that the administrative law judge failed to note any flaw in Dr. Patel's radiological qualifications. In addition, claimant asserts that the administrative law judge, contrary to law, erred in finding that Dr. Patel's positive

[3] We affirm the administrative law judge's determination regarding length of coal mine employment because this determination is 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 2.

readings were "impeached" by the opinion of Dr. Rasmussen, as Dr. Patel, who is a dually qualified radiologist, has superior qualifications to those of Dr. Rasmussen, who is a B reader only.

In considering the new x-ray evidence, the administrative law judge found that while Dr. Patel, a Board-certified radiologist and B reader, interpreted three x-ray films taken on March 13, 2003, September 16, 2003, and March 29, 2004 as positive for the existence of pneumoconiosis, Dr. Wiot, also a dually-qualified radiologist, interpreted those same three films as negative for the existence of pneumoconiosis. The administrative law judge further found that Dr. Wiot's negative readings were supported by those of Drs. Repsher and Jarboe, physicians who are B readers and who interpreted x-ray films dated October 15, 2003 and June 23, 2005 respectively, as negative for the existence of pneumoconiosis. The administrative law judge concluded, therefore, that the negative x-ray readings "greatly outweigh[ed]" the positive readings by Dr. Patel based on the fact that Dr. Wiot was "preeminent in the radiological diagnosis of pneumoconiosis," *see* Employer's Exhibit 1, and his negative interpretations were buttressed by the negative readings of Drs. Repsher and Jarboe, who are B readers. This was rational. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *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 4; Director's Exhibit 17; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 3, 32, 34-37. Further, because the administrative law judge's analysis constitutes a qualitative and quantitative analysis of the newly submitted x-ray evidence and his accordance of greater weight to the negative readings of Dr. Wiot, a dually qualified radiologist, as buttressed by the negative readings of B readers, over the positive readings by Dr. Patel, a dually qualified radiologist, was proper, we need not consider whether the administrative law judge also acted properly in according less weight to Dr. Patel's positive x-ray readings based on Dr. Rasmussen's opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Turning to Section 718.202(a)(4), claimant contends that the administrative law judge erred in assigning no probative weight to the opinion of Dr. Rasmussen, who is nationally recognized for his superior expertise in the practice of pulmonary medicine, diagnosing the existence of pneumoconiosis. Claimant contends that the administrative law judge erred in according no probative weight to the opinion of Dr. Rasmussen as biased, based on Dr. Rasmussen's admission that over the years he has been an advocate assisting miners in obtaining benefits for coal mine dust induced lung disease. In addition, claimant asserts that the administrative law judge erred in discounting Dr. Rasmussen's opinion because he based his opinion on Dr. Patel's positive x-ray interpretations.

In considering the newly submitted medical opinion evidence under Section 718.202(a)(4), the administrative law judge found that, of the opinions of Drs. Repsher, Jarboe, and Rasmussen, only Dr. Rasmussen diagnosed the existence of pneumoconiosis. The administrative law judge found that the reliability of the coal workers' pneumoconiosis diagnosis of Dr. Rasmussen was entitled to diminished weight, however, because: Dr. Rasmussen relied, in major part, on Dr. Patel's positive interpretations of chest x-ray films; Dr. Rasmussen believed that claimant was a life-long non-smoker whereas claimant has a thirty-year cigarette smoking history and was, for at least some of this period, a heavy smoker; and Dr. Rasmussen believed that claimant worked in coal mining for seventeen to eighteen years, a duration which was significantly more than claimant's eleven years of actual coal mine employment. The administrative law judge concluded, therefore, that Dr. Rasmussen's diagnosis of pneumoconiosis was not probative. This was rational. *See* 20 C.F.R. §718.202(a)(4); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-649 (6th Cir. 2003); *Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988) (administrative law judge permissibly found physician's opinion "unreasoned" inasmuch as it was based on erroneous coal mine employment history); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Gouge v. Director, OWCP*, 8 BLR 1-307 (1985); Decision and Order at 2, 4; Director's Exhibit 17; Claimant's Exhibits 1, 2.

Contrary to claimant's contention, the administrative law judge did not err in finding that Dr. Rasmussen's opinion was disingenuous because he relied solely on positive x-ray interpretations rendered by Dr. Patel even though he had personally read two of claimant's x-rays as negative and had testified during his deposition that the opacities found by Dr. Patel in claimant's four lower lung zones would be "atypical for coal mine induced lung disease," Employer's Exhibit 30 at 20. We also reject claimant's contention that the administrative law judge was required to accept the x-ray interpretations of Dr. Patel based on his qualifications when considering whether Dr. Rasmussen's medical opinion was reasoned pursuant to Section 718.202(a)(4). *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (crediting of physician's report is credibility determination within purview of administrative law judge); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *see also Kozele*, 6 BLR at 1-382 n.4.

Because the administrative law judge's credibility determinations are rational, we affirm his discrediting of the opinion of Dr. Rasmussen pursuant to Section 718.202(a)(4), and affirm his finding that claimant failed to establish the existence of

pneumoconiosis pursuant to Section 718.202(a)(4). Further, as claimant has failed to establish an element of entitlement previously adjudicated against him, *i.e.*, the existence of pneumoconiosis, we also affirm the administrative law judge's finding that claimant has failed to demonstrate that the applicable condition of entitlement has changed since the date upon which the order denying the prior claim became final, pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

On cross-appeal, employer asserts that the administrative law judge erred in applying the evidentiary limitations set forth in Section 725.414 to exclude Employer's Exhibits 2, 31, 33, and 38 from the record as excessive. Employer argues that the amended regulations, mandating limits on the evidence that parties may file are arbitrary, capricious, and violative of 30 U.S.C. §923(b), the APA, and the Fourth Circuit's holding in *Underwood*, 105 F.3d at 946, 21 BLR at 2-23, which require that all relevant evidence be considered. Employer further contends that this evidence should have been admitted under the "good cause" exception pursuant to Section 725.456(b)(1).

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 reject that portion of employer's argument that Employer's Exhibits 2, 31, 33, and 38 should have been admitted under the "good cause" exception pursuant to Section 725.456(b)(1). Employer fails to set forth any reasons why these exhibits should have been admitted for good cause. In fact, at the formal hearing, employer specifically responded that it did not object to the exclusion of the enumerated evidence as excessive. *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); Employer's Brief in Support of Cross-Appeal at 26; Hearing Transcript at 14, 24, 25, 27. Hence, we affirm the administrative law judge's determination to exclude Employer's Exhibits 2, 31, 33, and 38 because he properly applied the evidentiary limitations set forth in Section 725.414(a)(3) and rationally found that these exhibits were excessive. Decision and Order at 1 n.1.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge