BRB Nos. 07-0421 BLA
and 07-0421 BLA-A

R.S.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	DATE ISSUED: 01/30/2008
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, 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, and employer cross-appeals, the Decision and Order - Denying Benefits (04-BLA-5864) of Administrative Law Judge Larry W. Price rendered 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). Claimant filed this claim on June 24, 2002. Director's Exhibit 3. The administrative law judge credited claimant with twenty years of coal mine employment,[2] and found that the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). Upon review of the entire record, however, the administrative law judge found that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the existence of pneumoconiosis was not established by x-ray or medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1),(4). Employer responds in support of the administrative law judge's denial of benefits. Employer has filed a cross-appeal, contending that the administrative law judge erred in excluding medical evidence as in excess of the evidentiary limitations of 20 C.F.R. §725.414. The Director, Office of Workers' Compensation Programs (the Director), responds substantively only to employer's cross-appeal, and asserts that employer's argument should be rejected.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson*

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[1] Claimant's first claim, filed on August 21, 1984, was finally denied on December 16, 1996, because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge determined that claimant's recent x-rays were more probative of his current condition, and therefore focused on the readings of four x-rays that were submitted in the current claim.[3] Dr. Baker, who is a B reader, read claimant's July 26, 2002 x-ray as positive for pneumoconiosis, while Dr. Wiot, who is a Board certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis.[4] Director's Exhibits 10, 28. Dr. Dahhan, a B reader, read the September 6, 2003 x-ray as negative for pneumoconiosis, while Dr. Vuskovich, who is also a B reader, read the same x-ray as positive for pneumoconiosis. Employer's Exhibit 1; Claimant's Exhibit 4. Dr. Forehand, a B reader, interpreted the February 16, 2004 x-ray as positive for pneumoconiosis while Dr. Wiot read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 12. Finally Dr. Repsher, a B reader, read the March 11, 2004 x-ray as negative for pneumoconiosis, while Dr. Baker read the same x-ray as positive for pneumoconiosis. Employer's Exhibits 3, 10; Claimant's Exhibit 3.

Based on these readings, the administrative law judge noted that the equally qualified B readers differed as to whether claimant's x-rays reflected pneumoconiosis, whereas the better qualified reader, Dr. Wiot, read claimant's x-rays as negative for pneumoconiosis. Decision and Order at 12-13. Based upon Dr. Wiot's superior radiological qualifications, the administrative law judge's found that claimant failed to establish the existence of pneumoconiosis by x-ray pursuant to Section 718.202(a)(1). Decision and Order at 13. The administrative law judge based his finding upon a proper qualitative analysis of the x-ray readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); Decision and Order at 12-13; Director's Exhibits 10, 11, 28; Employer's Exhibits 1, 3, 10, 12; Claimant's Exhibits 2-4. On appeal, claimant states that the positive readings by Drs. Baker and Forehand supported a finding of pneumoconiosis. However, claimant identifies no specific error in the administrative law judge's analysis of the x-ray readings, which is supported by substantial evidence. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1). *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*,

[3] On appeal, no party challenges the administrative law judge's decision to focus primarily on the more recent evidence of claimant's condition.

[4] Dr. Barrett, a Board certified radiologist and B reader, interpreted the July 26, 2002 x-ray for its film quality only. Director's Exhibit 11.

791 F.2d 445, 447, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge failed to accord proper weight to the opinion of claimant's treating physician, Dr. Baker. Claimant's contention lacks merit. The administrative law judge considered the opinions of Drs. Baker, Forehand, Dahhan, and Repsher.[5] Dr. Baker diagnosed claimant with coal workers' pneumoconiosis, as well as chronic obstructive pulmonary disease, chronic bronchitis, and hypoxia due to both smoking and coal dust exposure. Director's Exhibit 10; Claimant's Exhibits 9, 12, 13; Employer's Exhibit 5. Dr. Forehand diagnosed claimant with an obstructive impairment due to both smoking and coal dust exposure. Claimant's Exhibits 2, 14; Employer's Exhibit 6. By contrast, Drs. Dahhan and Repsher concluded that claimant does not have coal workers' pneumoconiosis or any lung disease arising out of coal mine employment, but suffers from impairments due to smoking, congestive heart failure, and obesity. Employer's Exhibits 1, 3, 10, 11.

In examining the reasoning behind the medical opinions, the administrative law judge noted that Drs. Baker and Forehand concluded that claimant's pulmonary impairment is due to both coal mine employment and smoking because both etiologies can cause such an impairment, while Drs. Dahhan and Repsher focused on claimant's pulmonary function and blood gas study results, and explained why their fluctuating values were inconsistent with a disease related to coal mine employment, but were consistent with claimant's smoking history and heart condition. Decision and Order at 13-14. Additionally, the administrative law judge noted that Drs. Dahhan and Repsher had reviewed claimant's hospital and treatment records, including those of claimant's cardiologist, in formulating their opinions. The administrative law judge considered further that Dr. Dahhan explained that claimant's loss of thirty pounds over the period of testing supported his opinion that obesity also played a role in claimant's pulmonary impairment.

Contrary to claimant's contention, when weighing Dr. Baker's opinion, the administrative law judge permissibly found that Dr. Baker's opinion was not entitled to special weight as that of the treating doctor, because Dr. Baker was not privy to all of the health records that were reviewed by Drs. Dahhan and Repsher.[6] *See* 20 C.F.R.

[5] The administrative law judge noted that Drs. Baker, Dahhan, and Repsher are Board-certified in Internal Medicine and Pulmonary Disease, and that Dr. Forehand is Board-certified in Pediatrics and Allergy and Immunology. Decision and Order at 7.

[6] The administrative law judge noted that Dr. Baker testified by deposition that he did not have a lot of data regarding claimant's heart condition and that he needed a better

§718.104(d)(5). Additionally, the administrative law judge permissibly found that Dr. Baker did not provide adequate documentation to support his opinion that claimant's lung disease may have caused his heart disease, and that there may be a synergistic effect between claimant's coal mine employment and cigarette smoking, both of which the administrative law judge found would be "equivocal connections."[7] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); Decision and Order at 14; Claimant's Exhibits 9, 12, 13; Director's Exhibit 10, Employer's Exhibit 5.

Additionally, the administrative law judge permissibly accorded less weight to Dr. Forehand's opinion because Dr. Forehand did not indicate that he had access to claimant's hospital and treatment records, and because Dr. Forehand is not Board-certified in internal medicine or pulmonary medicine. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-22 (1994); Decision and Order at 14; Claimant's Exhibits 2, 14; Employer's Exhibit 6.

In contrast, the administrative law judge permissibly found that the opinions of Drs. Dahhan and Repsher were better reasoned and documented than those of Drs. Baker and Forehand.[8] *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 14; Employer's Exhibits 1, 3, 10, 11. Substantial evidence supports the administrative law judge's permissible credibility determinations. We, therefore, affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

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data base to decide if claimant's coronary conditions affected his respiratory condition. Decision and Order at 14 n. 11; Employer's Exhibit 5 at 8.

[7] Dr. Baker testified by deposition that claimant's heart conditions could affect his respiratory condition, Employer's Exhibit 5 at 8, and that claimant's hypoxemia diagnosed by blood gas study could be affected by heart disease. Employer's Exhibit 5 at 15. Moreover, Dr. Baker testified by deposition that both coal mine employment and smoking probably contributed equally to the destruction of lung tissue and stated that it was hard to say one cause was responsible and one cause was not responsible, when both etiologies could cause claimant's respiratory impairment. Employer's Exhibit 5 at 17.

[8] To the extent claimant argues that the administrative law judge erred in discounting the opinions of Drs. Gabor, Potter, and Sikder, his contention lacks merit. The form reports submitted by these doctors were excluded from the evidentiary record, and claimant does not challenge the exclusion of these reports. Decision and Order at 4. Moreover, although Dr. Sikder's treatment records were admitted into evidence, they do not address the cause of claimant's pulmonary impairment. Claimant's Exhibit 6.

In light of our affirmance of the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. We will now turn to employer's cross-appeal.

Employer argues that the administrative law judge erred in excluding two x-ray readings and a medical report proffered by employer, on the ground that they exceeded the evidentiary limitations of 20 C.F.R. §725.414. Employer contends that because the evidence was relevant, the administrative law judge improperly excluded it, in violation of Section 923(b) of the Act, and in violation of the Administrative Procedure Act (APA). Employer's contention that the evidentiary limitations of 20 C.F.R. §725.414 violate the Act and the APA lacks merit, and is rejected. *See Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 297, 23 BLR 2-430, 2-460 (4th Cir. 2007); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 873-874, 23 BLR 2-124, 2-181 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-58 (2004)(*en banc*).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits 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