BRB Nos. 00-0972 BLA
and 00-0972 BLA-A

PAUL McKAMEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEY MINING, INCORPORATED/ KLINE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John D. Agee (Cooley, Cooley & Agee), Kingston, Tennessee, for claimant.

Natalie D. Brown and Martin E. Hall (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

Sarah M. Hurley (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: SMITH and DOLDER, Administrative Appeals Judges, and NELSON,

Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals and employer cross-appeals the Decision and Order (99-BLA-0179) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits on a miner's 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).[2] Initially, the administrative law judge

[1]Claimant is Paul McKamey, the miner, who filed his claim for benefits on July 9, 1993. Director's Exhibit 1. This claim was denied on December 1, 1993 by the district director and claimant filed a request for modification on December 20, 1993. Director's Exhibits 14, 15. Claimant's request for modification was denied and claimant requested that his case be forwarded to the Office of Administrative Law Judges (OALJ). Director's Exhibits 27, 30, 31, 47. Administrative Law Judge Robert D. Kaplan remanded this case for reconsideration of the responsible operator issue. Director's Exhibit 55. On remand, the Director named Key Mining, Incorporated as the responsible operator and this case was again referred to the OALJ. Director's Exhibits 108, 109.

[2]The Department of Labor 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

found Key Mining, Incorporated/Kline Coal Company, Incorporated[3] to be the responsible operator in this case. Decision and Order at 10. The administrative law judge credited the miner with thirty years and eight months of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 11. Decision and Order at 4. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Decision and Order at 13, 16, 24-26. Accordingly, benefits were denied.

C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]As noted by the administrative law judge, Key Mining, Incorporated changed its name to Kline Coal Company, Incorporated. Decision and Order at 7 n.14. The administrative law judge referred to employer as Key Mining, Incorporated in his Decision and Order and the Board will do the same in our decision.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Sections 718.202(a)(1) (2000) and 718.202(a)(4) (2000). Claimant's Brief at 3-4. Additionally, claimant contends that he is totally disabled due to pneumoconiosis. Claimant's Brief at 4-5. Employer has filed a combined response brief and cross-appeal. In its response brief, employer urges affirmance the administrative law judge's denial of benefits. In its cross-appeal, employer asserts that if the Board vacates the denial of benefits, then the Board should consider employer's contention that the administrative law judge erred in determining that it was properly designated as the responsible operator in this case. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, asserting that the administrative law judge's responsible operator finding is supported by substantial evidence.[4]

[4]We affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2)-(3) (2000) as they are unchallenged on appeal. *See* 20 C.F.R. §718.202(a)(2)-(3); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *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 Ass'n 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 April 18, 2001, to which both employer and the Director have responded.[5] Claimant has not filed a response.[6] Based on the briefs submitted by the parties, 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. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational,

[5]The Director, Office of Workers' Compensation Programs (the Director), has indicated that it is his position that the instant case would not be affected by application of the regulations which are the subject of litigation. Employer asserts that this case must be stayed if the new regulatory criteria are to be applied. Employer's Brief in Response to the Board's April 18, 2001 Order at 4-9. In particular, employer contends that the revised regulations at Sections 718.104(d), 718.201(a)(2), 718.201(c), and 718.204(a), if applied, could affect the outcome of this claim. *Id.* Contrary to employer's contention, Section 718.104(d), requiring that special consideration be accorded to the opinion of a treating physician, only applies to evidence developed after January 19, 2001 and, therefore, would not affect this claim. Additionally, the changes at Section 718.201(a)(2) and Section 718.201(c) will not affect this claim because the revisions to these regulations merely codify existing case law of the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises. *See Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989). Lastly, because we affirm the administrative law judge's denial of benefits, which is based on a finding that claimant failed to establish the existence of pneumoconiosis, the revisions to Section 718.204(a), which deal with total respiratory disability, do not affect the Board's disposition of this case.

[6]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 April 18, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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).

Pursuant to Section 718.202(a)(1) (2000), claimant fails to state with specificity any error made by the administrative law judge, but merely recites the favorable x-ray evidence contained in the record. Claimant's Brief at 3. Thus, since claimant has failed to provide a basis upon which the Board may review the administrative law judge's weighing of the x-ray evidence, we affirm the administrative law judge's Section 718.202(a)(1) (2000) finding.[7] *See* 20 C.F.R. §718.202(a)(1); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[7]The administrative law judge's Section 718.202(a)(1) (2000) finding, that claimant failed to establish the existence of pneumoconiosis by the x-ray evidence, is supported by substantial evidence. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Pursuant to Section 718.202(a)(4) (2000), Drs. Burrell, Seargeant, and Gaziano found the existence of pneumoconiosis, whereas Drs. Pharaoh, Dahhan, Morgan, Wiot, Fino, and Branscomb did not. In considering the medical opinion evidence,[8] the administrative law judge, noting that Dr. Burrell "does not state the findings or reasons upon which he bases his finding of pneumoconiosis," permissibly "assign[ed] diminished probative value" to Dr. Burrell's opinion because the administrative law judge found it to be neither "well-documented nor reasoned." Decision and Order at 25; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673, 1-675 (1983). Conversely, the administrative law judge found the opinions of Drs. Dahhan and Fino to be the "best documented, reasoned, and probative of all the medical opinions in the record." Decision and Order at 26. In doing so, the administrative law judge noted that both these physicians

[8]The administrative law judge found the opinions of Drs. Wiot, Branscomb, and Morgan to have diminished probative value. Decision and Order at 25. The administrative law judge properly accorded less weight to Dr. Wiot's opinion at Section 718.202(a)(4) (2000) because he found it to be based solely on an x-ray report. *Id*; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, BLR (6th Cir. 2000); *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Additionally, the administrative law judge rationally, *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), accorded less weight to the opinions of Drs. Morgan and Branscomb because he found that these physicians focused their analysis on medical pneumoconiosis when the legal definition of pneumoconiosis is broader than the medical definition, Director's Exhibit 94; Employer's Exhibit 4 at 54, 59. Decision and Order at 25; *see Cornett, supra*.

"considered the entire medical record and provided integrated and comprehensive explanations for their conclusions that the objective medical evidence in this case did not support a finding of pneumoconiosis" and "thoroughly explain[ed] why coal dust does not contribute to [claimant's] respiratory obstruction." *Id.* The administrative law judge added that, unlike any other physician who evaluated this case, Dr. Dahhan based his conclusions on his own examination of claimant and his review of claimant's entire medical record. *Id.*

Regarding claimant's treating physician, Dr. Seargeant, the administrative law judge acknowledged his status as treating physician but declined to accord "greater probative value" to his opinion for three reasons. Decision and Order at 26. First, the administrative law judge stated that Dr. Seargeant's reports were made available to the other medical experts who considered this case. *Id.* Second, the administrative law judge found that Dr. Seargeant's opinion was not as well documented as the opinions of Drs. Dahhan and Fino.[9] *Id.* Third, the administrative law judge noted that Dr. Seargeant is not as well qualified as Drs. Dahhan and Fino, who are both Board-certified in internal medicine and pulmonary disease, Employer's Exhibit 2.[10] *Id.*

Claimant asserts that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Seargeant based on his status as the miner's treating physician. Claimant's Brief at 4. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held in *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995), that under certain circumstances an administrative law judge is not required to give greater weight to the opinion of a treating physician. *See Griffith, supra*; *see generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In this case, the administrative law judge reasonably found the opinions of Drs. Dahhan and Fino to be entitled to more weight because he found their opinions to be better documented than Dr. Seargeant's opinion and because he found Drs. Dahhan and Fino to be better qualified than Dr. Seargeant. Decision and Order at 26; *see Griffith, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields, supra; Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, contrary to claimant's contention, the administrative law judge did not err in according less weight to the opinion of Dr. Seargeant.

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[9]Similarly, the administrative law judge permissibly found the opinions of Drs. Pharaoh and Gaziano to be less probative because these physicians did not review claimant's entire medical record as did Drs. Dahhan and Fino. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

[10]The record does not reflect that Dr. Seargeant is Board-certified in internal medicine and pulmonary disease. Claimant's Exhibit 1 at 4-6, 11-12.

See Griffith, supra.

Inasmuch as an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met its burden of proof, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's Section 718.202(a)(4) (2000) finding. *See* 20 C.F.R. §718.202(a)(4).

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718,[11] *see Trent v. Director, OWCP*, 11

[11]The administrative law judge considered the case law regarding modification and concluded that its effect "is to turn a request for modification into a request for reconsideration." Decision and Order at 12. Therefore, the administrative law judge did not make a threshold determination as to whether claimant has established a change in conditions or a mistake in fact pursuant to 20 C.F.R. §725.310(a) (2000). *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). We deem any error the administrative law judge may have made in this regard to be harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as he considered all the evidence to determine whether claimant is entitled to benefits on the merits of his case. *See Worrell, supra*; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Additionally, at the hearing, there was some question by the parties as to whether the district director properly treated claimant's request

BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), and, therefore, need not address employer's arguments, regarding the responsible operator issue, raised in its cross-appeal.

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for reconsideration of the district director's denial as a request for modification. 1999 Hearing Transcript at 7-9.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge