BRB Nos. 97-1398 BLA
and 97-1398 BLA-A

EVERETT C. CLOVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
FMC CORPORATION	)	
	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy, Myers, Cogan, Voegelin & Tennant, L.C.), Wheeling, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-0361) of Administrative Law Judge Daniel L. Leland 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). The administrative law judge credited claimant with eleven years of coal mine employment but found that the medical

evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge improperly denied claimant's motion to compel answers to interrogatories. Claimant further asserts that the administrative law judge committed several errors in weighing the medical evidence pursuant to Section 718.202(a)(1), (2), and (4). Employer responds, urging affirmance, and argues on cross-appeal that the administrative law judge's length of coal mine employment finding is inadequately explained, and that the administrative law judge erred in his weighing of one of the medical opinions. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant contends that the administrative law judge improperly declined to compel answers to certain interrogatories. Claimant's Brief at 26-27. On October 9, 1996, claimant's counsel filed a set of interrogatories in which he requested employer to disclose its total attorney's fees and costs and, for each testifying medical expert, to state both the "number of claimants examined by this physician in Federal Black Lung Claims in each year for the last ten years," and the "number of claimants that each doctor concluded was totally disabled due to coal workers' pneumoconiosis in each year for the last ten years." Claimant's First Set of

[1] We affirm as unchallenged on appeal the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Interrogatories and Requests for Production of Documents, Oct. 9, 1996, at 2. Employer declined to answer on the grounds that its attorney's fees and costs were not discoverable, and that compliance with the second request would be unduly burdensome unless claimant paid a reasonable fee "for time spent in responding to the discovery request by the expert physicians or their office personnel." FMC Corporation's Response, Nov. 12, 1996, at 2. Claimant took no further action on these interrogatories until the hearing, when he moved to compel answers. Hearing Transcript at 49. The administrative law judge denied the motion because he found that employer's attorney's fees and costs were irrelevant to the merits of this case, and because he determined that the record already contained testimony from one of employer's physicians regarding the total approximate number of miners he had diagnosed totally disabled due to pneumoconiosis. Hearing Transcript at 50-52.

Claimant first asserts that the administrative law judge erred by finding the amount of employer's attorney fees and costs to be irrelevant to the merits of entitlement. Claimant's Brief at 28. We review discovery rulings for abuse of discretion. *See Cline v. Westmoreland Coal Co*., 21 BLR 1-69, 1-77 (1997); *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990). At the hearing, the administrative law judge asked claimant's counsel to explain the relevance of employer's attorney fees and costs. Counsel responded that he believed that this information would "put [employer's] evidence into some kind of context," by indicating "how much effort went into" producing it. Hearing Transcript at 52. In light of the rather non-specific nature of counsel's stated reason for requesting this information, we do not believe that the administrative law judge abused his discretion in determining that the requested information was not relevant to the merits of entitlement. *See Cline, supra*; *Martiniano, supra*. Claimant further argues that, because employer submitted no specific evidence of burdensomeness, the administrative law judge erred by declining to compel an answer to claimant's second interrogatory. Claimant's Brief at 27. At the hearing, employer's counsel explained to the administrative law judge that claimant's request was "unanswerable without doing an extensive file review by each physician." Hearing Transcript at 50. In response to further questioning by the administrative law judge, claimant's counsel stated that he had questioned Dr. Fino at his deposition regarding the approximate number of claimants that he diagnosed totally disabled due to pneumoconiosis. Hearing Transcript at 49, 51; Employer's Exhibit at 11 at 36. Based on these responses, and based upon his own familiarity with the physicians used by employer, the administrative law judge ruled that "without burdening the record as to exactly what their findings have been in the past, I can take notice of the fact of their findings in previous cases. . . ." Hearing Transcript at 51. In light of employer's objection, and in light of the fact that the record already contained some evidence of the variety sought by claimant, we cannot say that the administrative law

judge abused his discretion in declining to order answers to claimant's second interrogatory. *See Cline, supra*; *Martiniano, supra*. Therefore, we reject these contentions.

Pursuant to Section 718.202(a)(1), the administrative law judge considered all sixty-four readings of the twenty-eight x-rays of record. There were thirty-six negative readings, six positive readings,[2] and twenty-two readings that were not ILO-classified for the presence or absence of pneumoconiosis. Of the negative readings, thirty-two were by B-readers and four were by physicians who are both Board-certified radiologists and B-readers. Of the positive readings, three were by B-readers, two were by physicians who are both Board-certified radiologists and B-readers, and one was by a physician whose radiological credentials are not in the record. The administrative law judge weighed the x-ray readings in light of the readers' credentials and permissibly concluded that "[t]he preponderance of the x-rays at each level of reader qualification [is] negative for the existence of pneumoconiosis." Decision and Order at 11; *see Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We reject claimant's contention that the administrative law judge ignored a positive x-ray reading because, as the administrative law judge noted, the x-ray reading to which claimant refers was not ILO-classified. Decision and Order at 3; Director's Exhibit 25; *see* 20 C.F.R. §718.102(b). Claimant also argues that the administrative law judge was bound to discredit Dr. Renn's 0/0 readings at Section 718.202(a)(1) because the administrative law judge when weighing the medical opinions pursuant to Section 718.202(a)(4) labeled as hostile Dr. Renn's testimony that he believes that simple pneumoconiosis will not develop or progress once dust exposure ceases. Claimant's Brief at 3; Decision and Order at 13; Employer's Exhibit 9 at 8. This contention lacks merit. Even assuming *arguendo*, that Dr. Renn's belief is contrary to the Act, claimant has failed to explain how that belief biased Dr. Renn's x-ray readings. *See Adams v. Peabody Coal Co*., 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987)(issue is whether physician's predisposed belief forms the primary basis for his conclusion); *Stephens v. Bethlehem Mines Corp*., 8 BLR 1-350, 1-352 (1985). In addition, claimant asserts that the administrative law judge should have rejected Dr. Fino's x-ray readings because Dr. Fino testified that irregular opacities in the lower lung zones are inconsistent with pneumoconiosis. Claimant's Brief at 6. Review of the record indicates that Dr. Fino testified that all of the films that he read were 0/0 and did not merit an ILO profusion rating. Employer's Exhibit 11 at 10. Dr. Fino's comments regarding opacity size and location were directed at

[2] In stating that there were seven positive x-ray readings, the administrative law judge mistook as a separate reading a duplicate of Dr. Valiveti's July 2, 1996 reading of the June 13, 1996 x-ray. Decision and Order at 5; Claimant's Exhibits 2, 3.

the x-ray readings by other physicians who noted irregular opacities in the lower lung zones. Employer's Exhibit 3. The administrative law judge did not rely on Dr. Fino's comments in weighing any of the x-ray readings. Decision and Order at 10-11. Therefore, we reject claimant's contentions and we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2), the record contained a pathology report concerning a lung tissue biopsy. The pathologist diagnosed a "pattern consistent with interstitial fibrosis," but did not link the fibrosis to coal dust exposure. Employer's Exhibit 8. Dr. Naeye, who is Board-certified in anatomical and clinical pathology, reviewed the lung tissue slides and the pathology report and concluded that the small amount of tissue provided showed no features suggestive of coal workers' pneumoconiosis. Employer's Exhibit 5. Since there was no biopsy diagnosis of pneumoconiosis, *see* 20 C.F.R. §718.201, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2), and thus, we need not address claimant's challenges to the credibility of Dr. Naeye's opinion. Claimant's Brief at 25-26. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(2).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the conflicting medical reports and accorded determinative weight to the opinions of Drs. Fino and Naeye that pneumoconiosis was absent based on their documented qualifications[3] and the administrative law judge's conclusion that their reports were well reasoned and documented. Decision and Order at 7-9; 12-13; *see 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); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*). Claimant contends that the administrative law judge erred in weighing the medical opinions based on qualifications because Dr. Rasmussen is also a qualified physician. Claimant's Brief at 25-26. However, as the administrative law judge noted, Dr. Rasmussen's credentials are not in the record. Decision and Order at 13; *see Rankin v. Keystone Coal Mining Corp*., 8 BLR 1-54, 1-56 (1985)(each party bears the burden of establishing its experts' qualifications). Therefore, we reject claimant's contention.

Claimant next asserts that the administrative law judge failed to accord proper weight to the opinion of claimant's treating physician. Claimant's Brief at 24-25. Contrary to claimant's contention, the administrative law judge considered Dr. Schroering's treating status, but permissibly discounted as equivocal his opinion

[3] The record indicates that Dr. Fino is Board-certified in internal medicine and pulmonary diseases, and is a B-reader. Employer's Exhibit 11 at 4.

attributing claimant's fibrosis to aspiration or "possibly" to "industrial exposure." Decision and Order at 9, 12; Director's Exhibit 10; *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992). Therefore, we reject claimant's argument.

Claimant next asserts that the administrative law judge should have discredited Dr. Fino's opinion because Dr. Fino did not apply the legal definition of pneumoconiosis and holds beliefs that are contrary to the Act. Claimant's Brief at 13-19. Contrary to claimant's first contention, Dr. Fino's written report states that claimant has no coal workers' pneumoconiosis or any other "occupationally acquired pulmonary condition." Employer's Exhibit 3; *see* 20 C.F.R. §718.201. Further, Dr. Fino testified that he applied the medical definition of pneumoconiosis plus any airway impairments related to coal dust exposure. Employer's Exhibit 11 at 25. Contrary to claimant's second contention, Dr. Fino simply did not base his opinion on premises contrary to the Act.[4] Therefore, we reject these contentions.

Finally, claimant contends that the administrative law judge erred by discounting Dr. Ranavaya's diagnosis of pneumoconiosis based on his reliance on an invalid pulmonary function study. Claimant's Brief at 19-20. Dr. Ranavaya based his diagnosis in part on his conclusion that claimant's July 12, 1996 pulmonary function study revealed a severe obstructive and restrictive defect. Claimant's Exhibit 4. After reviewing the tracings, Drs. Renn and Fino declared this pulmonary function study technically invalid. Employer's Exhibits 10, 11 at 21. The administrative law judge found that this factor, along with the absence of Dr. Ranavaya's qualifications, undermined Dr. Ranavaya's diagnosis. Decision and Order at 12-13. Claimant argues that an administrative law judge may not credit the invalidation report of a non-examining physician. Claimant's Brief at 20. This contention lacks merit. Pulmonary function study tracings are required for the purpose of permitting independent verification of the test results. *Zeigler Coal Co. v. Sieberg*, 839 F.2d 1280, 1283, 11 BLR 2-80, 2-84 (7th Cir. 1988). Claimant further contends that Dr. Renn's pulmonary function study invalidation report lacked probative value because the administrative law judge found Dr. Renn's belief about the nature of simple pneumoconiosis to be hostile to the Act. Claimant's Brief at 19-20. We reject this contention for the same reasons that we stated above.[5] *See*

[4] Dr. Fino testified that he believes that simple pneumoconiosis can be disabling, that pneumoconiosis can cause obstructive impairments, and that he would diagnose pneumoconiosis even absent a positive chest x-ray. Employer's Exhibit 11 at 27, 30, 31.

[5] We emphasize that we do not decide whether Dr. Renn's belief that simple pneumoconiosis does not progress absent further coal dust exposure is hostile to

Adams, supra; *Stephens, supra*. Therefore, we reject claimant's contentions and we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). In light of our disposition of this case, employer's cross-appeal is moot.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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the Act. *See Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 842-43, 21 BLR 2-92, 2-99-100 (7th Cir. 1997).