BRB Nos. 04-0616 BLA
and 04-0616 BLA-A

JERRY W. NAPIER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
KANAWHA RIVER MINING COMPANY	)	DATE ISSUED: 06/21/2005
	)	
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 Mollie W. Neal, 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.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; 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 (03-BLA-5318) of

Administrative Law Judge Mollie W. Neal 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 a cross-appeal. The administrative law judge initially credited claimant with twenty-five 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) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred by admitting x-ray evidence submitted by employer in excess of the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(3)(i). With respect to the merits, 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) and (a)(4) and total respiratory disability under Section 718.204(b)(2)(iv). Employer responds to claimant's appeal, urging affirmance of the denial of benefits. Employer has also filed a cross-appeal arguing that, while the ultimate decision denying benefits in this case is rational and supported by substantial evidence, the portion of the administrative law judge's decision limiting employer's exhibits should be overruled because the newly promulgated regulations that impose limitations on the evidence each party is permitted to submit are invalid.[2] Specifically, employer argues that these evidentiary limitations violate Section 413(b) of the Act, 30 U.S.C. §923(b), Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), and the holding articulated by 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). The Director, Office of Workers' Compensation Programs (the Director), has filed a response letter, limited to the allegations of error with respect to the evidentiary limitations regulation,

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[1] Claimant, Jerry W. Napier, filed his first application for benefits on March 22, 2000. Director's Exhibit 1. However, on March 12, 2001, claimant filed a Motion to Voluntarily Withdraw Claim, and consequently, the district director issued an order withdrawing the claim on March 20, 2001. Director's Exhibit 1. Subsequently, claimant filed another application for benefits on May 15, 2001. Director's Exhibit 2.

[2] During the formal hearing, the administrative law judge asked employer's counsel whether she had any additional documents to be received into the evidence of record. Employer's counsel responded that, although she had five additional exhibits to be marked for identification as Employer's Exhibits 1 through 5, she admitted that Employer's Exhibits 4 and 5 exceeded the medical evidence limitations and requested that these exhibits "be marked for appeal purposes." Hearing Transcript at 9-10.

contending that both claimant's and employer's arguments are unmeritorious. The Director contends that claimant's argument lacks merit because the administrative law judge's admission of employer's x-ray readings is in accordance with the limitations imposed by Section 725.414(a)(3)(i), (ii), and that employer's argument lacks merit because, in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*), the Board rejected Sewell Coal Company's arguments, which are identical to those raised by employer in the instant case, that Section 725.414 is invalid because it conflicts with Section 413(b) of the Act, Section 7(c) of the APA, and the decision in *Underwood*.[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 argues that in rendering her finding that claimant was not totally disabled pursuant to Section 718.204(b)(2)(iv), the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine work as a heavy equipment operator in conjunction with the medical opinion of Dr. Hussain, who diagnosed a moderate pulmonary impairment. Claimant further asserts that the administrative law judge erred by failing to consider his disability, age, limited education, and work experience, factors that would preclude him from obtaining gainful employment outside of the coal mine industry, when the administrative law judge determined that claimant was not totally disabled.

In her summary of the medical opinion evidence, the administrative law judge correctly found that, while Dr. Hussain opined that claimant suffered from a moderate pulmonary impairment, Dr. Hussain opined further that claimant retained the physiological capacity to continue his previous coal mine employment or comparable work. Decision and Order at 7; Director's Exhibit 8. After reviewing the medical opinion of Dr. Hussain, in addition to the opinions of Drs. Castle, Dahhan, and Baker, all of whom similarly opined that, from a respiratory standpoint, claimant retains the physiological capacity to perform his previous coal mine work or a job of comparable physical demand, the administrative law

[3] 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) and 718.204(b)(2)(i)-(iii) 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 3, 5, 9-10.

judge, within a proper exercise of her discretion, found that the record did not contain evidence sufficient to demonstrate that claimant was totally disabled by a respiratory or pulmonary impairment. *See Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); Decision and Order at 10. Contrary to claimant's assertion therefore, consideration of the exertional requirements of his usual coal mine work and other factors affecting his ability to obtain gainful employment was "unnecessary" because the administrative law judge properly found that no physician of record concluded that claimant was suffering from a totally disabling respiratory or pulmonary impairment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); Decision and Order at 10. Accordingly, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004).

In addition, the administrative law judge properly found that the four pulmonary function studies of record were non-qualifying, the four arterial blood gas studies of record were non-qualifying, that there was no evidence of cor pulmonale with right-sided congestive heart failure, and that the medical opinions of Drs. Hussain, Baker, Dahhan, and Castle concluded that claimant retained the physiological capacity to continue his previous coal mine employment and was not totally disabled due to a respiratory or pulmonary impairment. Decision and Order at 10. Accordingly, after weighing all the evidence relevant to Section 718.204(b)(2)(i)-(iv), the administrative law judge rationally found that the evidence of record failed to affirmatively establish total respiratory disability. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Because claimant has not otherwise challenged the administrative law judge's credibility determinations, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to Section 718.204(b)(2). *See Fields*, 10 BLR at 1-19; *Gee*, 9 BLR at 1-4.

Consequently, because the administrative law judge's determination that claimant failed to affirmatively establish total respiratory disability at Section 718.204(b), a requisite element of entitlement under Part 718, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's determination that claimant's entitlement to benefits is precluded. *See Fields*, 10 BLR at 1-19; *Shedlock*, 9 BLR at 1-236.[4]

[4] Our affirmance of the administrative law judge's determination that claimant failed to establish total respiratory disability at Section 718.204(b) precludes the need to address the parties' arguments with respect to the administrative law judge's exclusion of the x-ray

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

evidence under Section 725.414(a)(3)(i), (ii), or her findings concerning the existence of pneumoconiosis under Section 718.202(a). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Similarly, our affirmance of the administrative law judge's denial of benefits in this case obviates the necessity to address the merits of employer's cross-appeal.