BRB Nos. 05-0748 BLA
and 05-0748 BLA-A

DAVID L. HAIRE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 06/22/2006
	)	
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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (04-BLA-5542) of Administrative Law Judge Robert L. Hillyard denying benefits in a subsequent 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).[1] The administrative

[1]Claimant filed his first claim on July 12, 1993. Director's Exhibit 1. This claim was denied by the Department of Labor on December 16, 1993 on the grounds that the

law judge credited claimant with twenty-nine and one-half years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.203. Further, although he found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), the administrative law judge found the newly submitted evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge concluded that the newly submitted evidence is insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant also challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer challenges the administrative law judge's exclusion of Employer's Exhibits 8 through 12 from the record on the basis that the evidentiary limitations set forth in 20 C.F.R. §725.414 are invalid. Alternatively, employer contends that the administrative law judge erred in excluding Employer's Exhibits 8 through 12 from the record, arguing that "good cause" existed for their admission. The Director, Office of Workers' Compensation Programs, responds by letter brief, urging the Board to reject employer's contentions that the evidentiary limitations set forth in Section 725.414 are invalid, and that "good cause" existed for the admission of Employer's Exhibits 8 through 12.[2]

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evidence did not show that claimant had pneumoconiosis, that the disease was caused at least in part by coal mine work, and that claimant was totally disabled by the disease. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on January 10, 2002. Director's Exhibit 3.

[2]Since the administrative law judge's length of coal mine employment finding and his findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2)-(4) and 718.203, and sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address employer's contention, on cross-appeal, that the administrative law judge erred in excluding Employer's Exhibits 8 through 12 from the record on the basis that the evidentiary limitations set forth in 20 C.F.R. §725.414 are invalid. The administrative law judge admitted Employer's Exhibits 1 through 7 into the record. *Id*. at 8. However, the administrative law judge excluded Employer's Exhibits 8 through 12 from the record on the ground that they exceeded the evidence allowed by the evidentiary limitations set forth in Section 725.414.[3] *Id*.

At the outset, we reject employer's assertion that Section 725.414 is invalid. The Board has rejected the argument that Section 725.414 conflicts with Section 923(b) of the Act. 30 U.S.C. §923(b); *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). The Board has also rejected the argument that the evidentiary limitations set forth at Section 725.414 are inconsistent with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A),

[3]Section 725.414, in conjunction with Section 725.456(b)(1), sets forth the limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Dempsey*, 23 BLR at 1-58.

We also reject employer's alternative contention that the administrative law judge erred in excluding Employer's Exhibits 8 through 12 from the record on the basis that "good cause" existed for their admission into evidence. The comments to the regulations provide that:

> A showing of "good cause" is necessary only in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony.

65 Fed. Reg. 80000 (Dec. 20, 2000). Thus, if employer wanted to submit evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, it was required to make a showing of "good cause" for its submission. In the instant case, employer did not attempt, during the hearing, to make a showing that there was good cause for the admission of Employer's Exhibits 8 through 12 into the record. Rather, after indicating its understanding that Employer's Exhibits 8 through 12 would exceed the evidentiary limitations under the amended regulations, employer merely requested the administrative law judge to admit these exhibits into the record for appeal purposes only. Hearing Transcript at 7. Consequently, we hold that employer waived its right to assert that the administrative law judge erred in failing to consider whether good cause was established for admitting Employer's Exhibits 8 through 12 into the record. *Brasher v. Pleasant View Mining Co.*, BLR , BRB No. 05-0570 BLA (Apr. 27, 2006).

Next, we turn our attention to claimant's contentions of error. Claimant initially contends that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record consists of four interpretations of three x-rays dated March 23, 2002, November 11, 2003, and February 4, 2003. Dr. Repsher read the November 11, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 2. Similarly, Dr. Jarboe read the February 4, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Both Dr. Repsher and Dr. Jarboe are B readers. Dr. Wiot read the March 23, 2002 x-ray as negative for pneumoconiosis, Employer's Exhibit 3, while Dr. Baker read this x-ray as positive for pneumoconiosis,[4] Director's Exhibit 11. Although Dr. Baker is a B reader, Dr. Wiot is dually qualified as a B reader and Board-certified radiologist.[5]

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[4]Dr. Sargent, a dually qualified B reader and Board-certified radiologist, read the March 23, 2002 x-ray for quality only. Director's Exhibit 11.

[5]The administrative law judge stated that "Dr. Baker…lists no radiographic

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the difference in the qualifications of the readers. *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In this case, the administrative law judge properly accorded greater weight to the x-ray reading by a physician who is dually qualified as a B reader and Board-certified radiologist. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge specifically stated, "I give greater weight to the dually certified reading of Dr. Wiot and find that the March 23, 2002[] x-ray evidence is negative for pneumoconiosis." Decision and Order at 10-11. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87.

Claimant next contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Baker, Jarboe, and Repsher. In a March 23, 2002 report, Dr. Baker diagnosed coal workers' pneumoconiosis related to coal dust exposure, and chronic obstructive pulmonary disease, moderate hypoxemia and chronic bronchitis related to coal dust exposure and cigarette smoking. Director's Exhibit 11. Further, Dr. Baker opined that claimant has a moderate respiratory impairment and noted "fully" in the section of the report regarding the extent that the diagnosed conditions contributed to claimant's impairment. *Id*. In addition, in an attached form, Dr. Baker indicated that coal dust exposure and cigarette smoking contributed to claimant's moderate respiratory impairment. *Id*. Dr. Baker also checked a box marked "No" to indicate that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id*.

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credentials." Decision and Order at 10. However, Dr. Baker's March 23, 2002 letter indicates that Dr. Baker is a B reader. Director's Exhibit 11. Nonetheless, because the administrative law judge properly accorded greater weight to Dr. Wiot's negative reading of the March 23, 2002 x-ray than to Dr. Baker's positive reading of this x-ray, on the basis that Dr. Wiot is dually qualified as a B reader and a Board-certified radiologist, *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985), we hold that the administrative law judge's error in failing to consider Dr. Baker's credentials is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In contrast, in a February 10, 2003 report, Dr. Jarboe opined that claimant's disabling respiratory impairment had not been caused by, or substantially contributed to by, the inhalation of coal dust or the presence of coal workers' pneumoconiosis. Employer's Exhibit 1. Rather, Dr. Jarboe opined that claimant's disabling respiratory impairment was caused by cigarette smoking and a tendency toward bronchial asthma. *Id*. During a January 20, 2005 deposition, Dr. Jarboe opined that coal dust exposure has not caused or aggravated claimant's respiratory impairment. Employer's Exhibit 6. Similarly, in a December 1, 2003 report, Dr. Repsher opined that claimant does not have coal workers' pneumoconiosis or any other pulmonary or respiratory disease or condition caused by, or aggravated by, coal dust exposure. Employer's Exhibit 2. Further, during a March 13, 2004 deposition, Dr. Repsher opined that "[claimant] does not have any individually discernible impairment or disease." Employer's Exhibit 5.

The administrative law judge found that the opinions of Drs. Jarboe and Repsher, that pneumoconiosis did not contribute to claimant's impairment, outweighed Dr. Baker's contrary opinion. Thus, the administrative law judge found that the newly submitted medical opinion evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c). Decision and Order at 16-18.

Claimant asserts that "[t]he ALJ's weighing of the respective medical opinions appears to have been superficial." Claimant's Brief at 4. Contrary to claimant's assertion, the administrative law judge properly accorded greater weight to the disability causation opinions of Drs. Jarboe and Repsher than to the contrary disability causation opinion of Dr. Baker, on the basis that they are better reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In considering Dr. Jarboe's opinion, the administrative law judge stated:

> [Dr. Jarboe] opined that the [m]iner's respiratory disability was due to continuing cigarette smoking, obesity, and asthma and not by coal dust inhalation. He further explained that the [m]iner's significantly reduced diffusion capacity, as measured in the pulmonary function test, indicated a smoking etiology. The [m]iner's diffusion capacity was only 52% of normal. He explained that coal dust inhalation rarely causes a drop in diffusion capacity.

Decision and Order at 16. The administrative law judge further stated that "[w]hile Dr. Repsher did not make a disability finding, he did opine in his analysis that any impairment suffered by the [m]iner was explained by heart disease, mild obesity, and smoking, possibly with an asthmatic component, and due, in part, to mild obesity." *Id*. at 18.

With regard to Dr. Baker's opinion, the administrative law judge noted that Dr. Baker listed smoking as a contributing cause of claimant's chronic obstructive pulmonary disease, hypoxemia, and bronchitis. *Id*. at 16. The administrative law judge also found, however, that "[Dr. Baker] fail[ed] to incorporate the [m]iner's 34 pack year, ongoing smoking history into his impairment causation analysis." *Id*. The administrative law judge further stated that "[Dr. Baker] fail[ed] to discuss other possible causes of the [m]iner's impairment including asthma, heart disease, and obesity as noted by the other physicians." *Id*. Thus, in view of the foregoing, we reject claimant's assertion that the administrative law judge's weighing of the medical opinions was superficial.[6] *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. We also reject claimant's assertion that Dr. Jarboe is biased against him because there is no evidence in the record to support this assertion. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). Therefore, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

Furthermore, because claimant raises no other contentions of error, we affirm the administrative law judge's denial of benefits.

[6]The administrative law judge also accorded greater weight to Dr. Jarboe's opinion than to Dr. Baker's contrary opinion on the basis of Dr. Jarboe's superior qualifications. Decision and Order at 17. The administrative law judge noted that Dr. Jarboe is a Board-certified internist and pulmonologist. *Id*. at 16; Employer's Exhibit 1. The administrative law judge also stated that "Dr. Baker…lists no pulmonary credentials." Decision and Order at 16. We note, however, that Dr. Baker's March 23, 2002 letter indicates that Dr. Baker is Board-certified in internal medicine and pulmonary diseases. Director's Exhibit 11. Nonetheless, because the administrative law judge provided a valid alternate basis for finding that Dr. Jarboe's opinion outweighed Dr. Baker's contrary opinion, *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), namely, that Dr. Jarboe's opinion is better reasoned than Dr. Baker's opinion, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), we hold that the administrative law judge's error in failing to consider Dr. Baker's qualifications is harmless, *Larioni*, 6 BLR at 1-1278.

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