BRB Nos. 05-0879 BLA
and 05-0879 BLA-A

DAVID L. BROWN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	
	)	DATE ISSUED: 06/27/2006
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 -- Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

David L. Brown, Camden on Gauley, West Virginia, *pro se*.

Christopher H. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order -- Denying Benefits (04-BLA-5928) of Administrative Law Judge Gerald M. Tierney 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 in the instant case. The administrative law judge initially credited claimant with thirteen years of qualifying coal mine employment. The administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's Decision and Order denying benefits. Employer responds to claimant's *pro se* appeal, urging affirmance of the administrative law judge's 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 pursuant to 20 C.F.R. §725.414 should be overruled because the newly promulgated regulations that impose limitations on the evidence each party is permitted to submit are arbitrary and capricious. In addition, employer argues that the administrative law judge erred in failing to admit Employer's Exhibit 5 into the record under the "good cause" exception to the evidentiary limitations set forth in 20 C.F.R. §725.456(b)(1). While the Director, Office of Workers' Compensation Programs (the Director), did not respond to claimant's *pro se* appeal, he has filed a response letter limited to employer's cross-appeal concerning the evidentiary limitations regulation and contends that employer's arguments lack merit because the prevailing case law has established that the Section 725.414 evidentiary limitations are a valid exercise of the Secretary of Labor's rulemaking authority and because employer failed to demonstrate "good cause" sufficient to provide a reasonable basis for the administrative law judge to admit employer's x-ray interpretations contained in Employer's Exhibit 5.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and

[1] Claimant filed his application for benefits on August 2, 2001. Director's Exhibit 2.

[2] We affirm the administrative law judge's determination regarding length of coal mine employment, which is not adverse to claimant, because this determination is 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.

conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

After consideration of the Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error, and we therefore affirm it. Relevant to Section 718.202(a)(1), the administrative law judge correctly found that all four interpretations of the two x-ray films of record were negative for the existence of pneumoconiosis. Decision and Order at 3; Director's Exhibits 13; Employer's Exhibits 1, 2.[3] The administrative law judge's determination that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis because all of the interpretations contained in the record were negative for the existence of pneumoconiosis was rational and supported by substantial evidence. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Langerud v. Director, OWCP*, 9 BLR 1-101, 1-103 (1986); Decision and Order at 3. We, therefore, affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Likewise, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(3). A review of the record reveals that there is no biopsy evidence, hence, claimant cannot establish the existence of pneumoconiosis under Section 718.202(a)(2). Similarly, a review of the record reveals that none of the presumptions referred to in Section 718.202(a)(3) is applicable to the case at bar inasmuch as the record is devoid of evidence establishing that claimant has complicated pneumoconiosis, *see* 20 C.F.R. §718.304, the instant claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305, and this is a living miner's claim, *see* 20 C.F.R. §718.306. Consequently, the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(2) and (a)(3). 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304 - 718.306. While the administrative law judge did not specifically discuss the aforementioned subsections in his analysis, he correctly found that the only applicable methods by which claimant could establish the existence of pneumoconiosis were by the x-ray evidence under Section 718.202(a)(1) or the medical opinion evidence under Section 718.202(a)(4) based on the evidence contained in the record. Decision and Order

[3] The administrative law judge correctly indicated that Dr. Navani, who is a Board-certified radiologist and B-reader, read the November 28, 2001 film for quality only and rated this film as a "3." Decision and Order at 3; Director's Exhibit 14.

at 3, 6. Consequently, we affirm the administrative law judge's finding as it is rational and supported by the evidence of record.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), a review of the record reveals that there are four physicians' opinions of record. The West Virginia Occupational Pneumoconiosis Board diagnosed claimant with coal workers' pneumoconiosis resulting in a twenty-five percent pulmonary functional impairment. Director's Exhibit 7. In a report dated November 28, 2001, Dr. Rasmussen diagnosed chronic obstructive pulmonary disease due to coal mine dust exposure and cigarette smoking causing a moderate loss of lung function. Director's Exhibit 10. After conducting a pulmonary evaluation of claimant on December 29, 2003, Dr. Zaldivar found evidence of a pulmonary impairment caused entirely by asthma and opined that claimant does not have coal workers' pneumoconiosis or any dust related disease of the lungs. Employer's Exhibit 1. After conducting a review of the medical records, Dr. Castle opined that claimant does not suffer from coal workers' pneumoconiosis and is "probably totally disabled as a result of bronchial asthma and asthmatic bronchitis." Employer's Exhibit 4. Drs. Castle and Zaldivar similarly reiterated these same conclusions during their depositions that were both held on December 21, 2004. Employer's Exhibits 6, 7 respectively.

The administrative law judge permissibly found the opinion of Dr. Rasmussen, whose medical qualifications are not contained in the record, entitled to little weight because Dr. Rasmussen concluded that coal mine dust exposure was a contributing factor to claimant's impaired lung function but failed to provide any rationale or explanation for his opinion. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 9. The administrative law judge further properly found that the opinion of Dr. Zaldivar, that claimant did not have pneumoconiosis, was more persuasive and, therefore, entitled to determinative weight because Dr. Zalidvar, who is Board-certified in internal medicine with a subspecialty in pulmonary diseases, not only provided more extensive pulmonary testing including lung volume and diffusing capacity testing, but also reviewed and considered additional medical records and objective tests, including the report of Dr. Rasmussen. *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, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984). Consequently, the administrative law judge rationally determined that Dr. Zaldivar's opinion was more reliable as it was based on a more complete picture of the miner's health. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); *Spradlin v. Island Creek Coal Co.*,6 BLR 1-716, 1-719 (1984); Decision and Order at 6; Employer's Exhibit 1. Similarly, the administrative law judge properly found that while Dr. Castle, who is Board-certified in internal

medicine with a subspecialty in pulmonary diseases, did not perform a physical examination of claimant, Dr. Castle rendered a well reasoned opinion because he conducted a full review of the medical evidence of record, including the reports of both Drs. Rasmussen and Zaldivar, before rendering his opinion and adequately set forth the reasons for his conclusion that claimant did not suffer from coal workers' pneumoconiosis. This was rational. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *King*, 8 BLR at 1-262; *Lucostic*, 8 BLR at 1-46; *Carpeta*, 7 BLR at 1-147 n.2; Decision and Order at 6. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm his crediting of the opinions of Drs. Zaldivar and Castle over the contrary opinion of Dr. Rasmussen pursuant to Section 718.202(a)(4) and, accordingly, affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). We, likewise, affirm the administrative law judge's determination that because claimant failed to affirmatively establish the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4), claimant failed to satisfy his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 6.

We will now address the arguments employer has raised it its cross-appeal. Employer asserts that the administrative law judge erred in applying the evidentiary limitations set forth in Section 725.414 to exclude the reports contained in Employer's Exhibit 5[4] from the record and in failing to admit these reports under the "good cause" exception pursuant to Section 725.456(b)(1). Employer argues that the amended regulations mandating limits on the evidence that parties may file are arbitrary, capricious, and violative of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), and of the holding in *Underwood*, 105 F.3d at 946, 21 BLR at 2-23, which both require that all relevant evidence be considered. We disagree. The Board has held that the provision set forth in Section 725.414 is valid and, in this case, employer has advanced no compelling argument in support of altering the Board's holding on this issue. *See Ward v. Consolidation Coal Co.*, BLR , BRB No. 05-0595 BLA (Mar. 28, 2006) (published); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*). Similarly, we also reject that portion of employer's argument that Employer's Exhibit 5 should have been admitted under the "good cause" exception pursuant to Section 725.456(b)(1) inasmuch as employer fails to state with specificity why the administrative

[4] Employer's Exhibit 5 consists of four x-ray interpretations rendered by Drs. Spitz and Meyer, radiologists who each interpreted the November 28, 2001 chest x-ray film and the December 15, 2003 chest x-ray film. Employer's Exhibit 5.

law judge's conclusion is contrary to law and has not otherwise raised any specific legal or factual challenge to the administrative law judge's determination that employer failed to demonstrate good cause. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); Decision and Order at 2; Employer's Consolidated Petition for Review and Supporting Brief on Cross-Appeal at 7. Hence, we affirm the administrative law judge's determination to exclude Employer's Exhibit 5 because he rationally found that it was in excess of the evidentiary limitations set forth in Section 725.414(a)(3).

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to affirmatively establish the existence of pneumoconiosis pursuant to Section 718.202(a), as this finding is rational, contains no reversible error, and is supported by substantial evidence. Inasmuch as claimant has failed to satisfy his burden to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that entitlement to benefits is precluded. *See* 20 C.F.R. §718.202(a); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the Decision and Order -- Denying Benefits of the administrative law judge 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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JUDITH S. BOGGS
Administrative Appeals Judge