BRB Nos. 05-1011 BLA
and 05-1011 BLA-A

TOMMY R. DAVIS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 06/23/2006
RIVER BASIN COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Tommy R. Davis, Caryville, Tennessee, *pro se*.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (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, appearing without the assistance of counsel, appeals and employer cross-appeals, the Decision and Order (03-BLA-5459) of Administrative Law Judge Alice M. Craft 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).[1] The administrative law judge credited claimant with twenty-six years of coal mine employment and found that employer is the proper responsible operator. Decision and Order at 4-8; Hearing Transcript at 5-6. After determining that the instant claim was a subsequent claim, the administrative law judge found that a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 was established, as the newly submitted evidence was sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b).[2] Decision and Order at 2-3, 8, 25-26; Director's Exhibit 1. Considering the record evidence *de novo*, the administrative law judge concluded that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 20-26. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the denial of benefits as supported by substantial evidence, and cross-appeals, asserting that the administrative law judge erred in excluding certain evidence pursuant to 20 C.F.R. §725.414. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in claimant's appeal but asserting that the

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant filed his initial claim for benefits on July 23, 1999, which was finally denied by the Department of Labor on September 3, 1999 as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the instant claim on August 6, 2001. Director's Exhibit 3. The district director awarded benefits on November 14, 2002. Director's Exhibit 29. Employer subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 31.

administrative law judge properly excluded the evidence at issue in employer's cross-appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After review of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[4] Considering all the evidence of record, the administrative law judge acted within her discretion, as fact-finder, in concluding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement. *See White v. New White Coal Co.*, 23 BLR 1-1 (2004); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge reviewed the x-ray interpretations of record and determined whether each individual x-ray was positive or negative based upon the qualifications of the physicians interpreting the film. Decision and Order at 22-25; Director's Exhibits 1, 14-18; Claimant's Exhibits 2, 6;

[3] The administrative law judge's responsible operator and length of coal mine employment determinations as well as her findings pursuant to 20 C.F.R. §§718.204(b) and 725.309 are not adverse to claimant and are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 4, 7, 8.

Employer's Exhibits 2, 4, 5. The administrative law judge acted within her discretion as fact-finder in subsequently determining that the x-ray evidence of record, as a whole, was insufficient to establish the existence of pneumoconiosis, as the preponderance of readings by physicians who are both B readers and Board-certified radiologists was negative. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. 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).

The administrative law judge also correctly found that the claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3), as the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306 are not applicable to this claim.[5] *See* 20 C.F.R. §§718.202(a)(2)-(3); Decision and Order at 21.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order at 23-25. The administrative law judge permissibly concluded that the opinions of Drs. Seargeant and Smiddy were insufficient to meet claimant's burden of proof. The administrative law judge determined correctly that Dr. Seargeant, the only physician to examine claimant in the original claim, opined that claimant did not suffer from any coal dust induced lung disease. Decision and Order at 25; Director's Exhibit 1. The administrative rationally found that Dr. Smiddy's opinion was entitled to little weight, as Dr. Smiddy did not identify the rationale underlying his diagnosis of coal workers' pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Trumbo*, 17 BLR 1-85; Decision and Order at 25; Claimant's Exhibit 3.

The administrative law judge also considered the reports in which Dr. Baker and Kellie Brooks, a nurse-practitioner, opined that the miner suffered from chronic obstructive pulmonary disease due to his exposure to coal mine dust, which could satisfy the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). Director's Exhibits 14, 17; Claimant's Exhibits 1, 5; Employer's Exhibit 7. The administrative law

[5] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 3. Lastly, this claim is not a survivor's claim or filed prior to June 30, 1982; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

judge, in a proper exercise of her discretion as fact-finder, rationally determined that the diagnoses by Dr. Baker and Nurse Brooks were unreliable and thus insufficient to establish the existence of pneumoconiosis because Dr. Baker and Nurse Brooks did not provide any explanation or identify the basis for their conclusions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 24; Director's Exhibits 14, 17; Claimant's Exhibit 5; Employer's Exhibit 7.

Moreover, in finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge permissibly accorded greatest weight to the opinions of Drs. Dahhan and Hudson, who stated that the miner did not have pneumoconiosis or any condition caused by the inhalation of coal dust, as these physicians offered well documented and reasoned opinions which are supported by the treatment evidence of record. *See Trumbo*, 17 BLR 1-85; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 24; Director's Exhibit 16; Employer's Exhibits 3, 8, 9. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Consequently, we affirm the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as they are supported by substantial evidence and in accordance with law.[6] Because we have affirmed the administrative law judge's determination that claimant has not proven that he has pneumoconiosis, an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

We will now address employer's cross-appeal. Employer asserts that the administrative law judge erred in applying the evidentiary limitations to exclude Dr. Spitz's interpretation of an x-ray and the evidence appearing in Employer's Exhibits 10-12.[7] Employer maintains that 20 C.F.R. §725.414 violates 30 U.S.C. §923(b), 5 U.S.C. §556(d) of the Administrative Procedure Act, and is contrary to the decisions of the United States Supreme Court in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*,

[6] The administrative law judge properly noted that as claimant failed to establish the existence of pneumoconiosis, claimant could not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); Decision and Order at 26.

[7] This evidence included Dr. Ghio's medical report and deposition and x-ray readings performed by Drs. Spitz and Wiot.

484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988) and 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). We disagree. The Board has held that 20 C.F.R. §725.414 is a valid regulation 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 (2004)(*en banc*).

Employer further asserts that because the evidence which it sought to admit is relevant to the merits of entitlement, good cause has been established for its submission pursuant to 20 C.F.R. §§725.414(d) and 725.456(b)(3). The administrative law judge indicated in her Decision and Order that employer did not establish good cause for admission of the evidence which exceeded the limitations set forth in 20 C.F.R. §725.414(a)(3). Decision and Order at 2; *see* Hearing Transcript at 10-12. We affirm the administrative law judge's determination, as a mere assertion of relevancy is insufficient to support a finding of good cause. *Dempsey*, 23 BLR at 1-62.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge