BRB Nos. 05-0655 BLA
and 05-0655 BLA-A

HOWARD LITTON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MARTIN COUNTY COAL CORPORATION	)	DATE ISSUED: 03/28/2006
	)	
and	)	
	)	
AT MASSEY	)	
	)	
Employer/Carrier-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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Howard Litton, Stambaugh, Kentucky, *pro se*.

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

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; 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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals and employer cross-appeals the Decision and Order Denying Benefits (03-BLA-6232) of Administrative Law Judge Alice M. Craft 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). At the hearing in this case, the administrative law judge excluded several exhibits submitted by employer as exceeding the evidentiary limitations of 20 C.F.R. §725.414, without a showing of good cause by employer for exceeding those limits. Hearing Transcript at 8-9. In a Decision and Order Denying Benefits issued on April 21, 2005, the administrative law judge excluded an additional x-ray reading submitted by employer as exceeding the evidentiary limitations. Considering the merits of entitlement, the administrative law judge credited claimant with nineteen years of coal mine employment,[1] as stipulated by the parties, and found that the medical evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), but failed to establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the denial of benefits. Employer also cross-appeals, contending that the administrative law judge erred in her application of 20 C.F.R. §725.414 to exclude evidence submitted by employer. Employer further asserts that the administrative law judge erred in her analysis of the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in claimant's appeal, but responds to employer's cross-appeal, urging affirmance of the administrative law judge's evidentiary rulings and disagreeing in part with employer's arguments pursuant to 20 C.F.R. §718.202(a)(1).

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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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 the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer asserts that the administrative law judge erred in applying the evidentiary limitations set forth at 20 C.F.R. §725.414 to limit the admission of employer's evidence because Section 725.414 violates Section 923(b) of the Act, Section 556(d) of the Administrative Procedure Act, and the decision of 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). Employer's Brief at 25. The Board has rejected these arguments and held that Section 725.414 is a valid regulation. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-58-59 (2004)(*en banc*). To these arguments, employer adds the contention that Section 725.414 conflicts with the holding of the United States Supreme Court in *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Employer's Brief at 25. Employer's reliance on *Mullins* is misplaced. In *Mullins*, the Court held that in a Part 727 claim, Section 923(b) of the Act is satisfied so long as all relevant evidence is considered at some point, either at the invocation stage or rebuttal stage of the claim. *Mullins*, 484 U.S. at 149-50, 11 BLR at 2-8-9. The Court did not address the Department of Labor's authority to impose limitations on the admission of evidence in black lung claims. We therefore reject employer's argument that the administrative law judge could not apply the evidentiary limits of Section 725.414.

Employer also contends that the administrative law judge erred in excluding from the record, at the time of the decision, Director's Exhibit 20 consisting of Dr. Wiot's May 27, 2002 interpretation of a February 12, 2002 x-ray. Employer specifically contends that because claimant did not object to the admission of any of the Director's exhibits at the hearing, the administrative law judge erred in excluding Dr. Wiot's reading. We disagree.

In her decision, the administrative law judge found that a post-hearing review of the evidence revealed that employer had submitted Dr. Wiot's interpretation of the February 12, 2002 x-ray to the district director. Director's Exhibit 20; Decision and Order at 2. The administrative law judge further found that although this x-ray interpretation had not been designated by counsel as part of employer's evidence, and exceeded the limitations set forth at 20 C.F.R. §725.414(a)(3), claimant had not objected

to its admission. Decision and Order at 2. Contrary to employer's argument, the administrative law judge properly concluded, pursuant to *Smith v. Martin County Coal Corp.*, 23 BLR 1-71, 1-74 (2004), that as the regulations do not provide for parties to waive the regulatory limitations on medical evidence submitted in fulfillment of Section 725.414, Dr. Wiot's interpretation of the February 12, 2002 x-ray should be excluded from the record in the absence of a showing of good cause. Decision and Order at 2.

Employer additionally contends that the administrative law judge erred in failing to find good cause existed for admission into the record of Dr. Wiot's interpretation of the February 12, 2002 x-ray, contained in Director's Exhibit 20, and the excess x-ray interpretations contained in Employer's Exhibit 7. Employer's Brief at 27-28. We disagree.

The administrative law judge did not abuse her discretion in determining that employer did not establish good cause under Section 725.456(b)(1) for the submission of the medical evidence proffered by employer in excess of the imitations. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*). At the hearing, the administrative law judge offered employer's counsel the opportunity to present an argument for the admission of employer's excess evidence. Hearing Transcript at 8-9. Employer's counsel declined, responding that he wished only to preserve his objection for appeal. Hearing Transcript at 9.

On appeal, employer asserts that because the additional x-ray interpretations are relevant, the administrative law judge erred in failing to find good cause for their admission into the record. Employer's Brief at 27-28. It was employer's burden to demonstrate good cause. *See* 20 C.F.R. §725.456(b)(1); 65 Fed. Reg. 79920, 80000 (Dec. 20, 2000) (stating that a party must "convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence"). On the facts and arguments presented, we detect no abuse of discretion in the administrative law judge's determination that employer did not demonstrate good cause for exceeding the limits of Section 725.414. *Clark*, 12 BLR at 1-153. The administrative law judge offered employer the opportunity to make a good cause argument, and employer declined. Thus, the administrative law judge acted reasonably in excluding employer's excess evidence. In addition, employer's arguments on appeal are without merit, as the mere assertion that evidence is relevant is insufficient to establish good cause. *Cf. Conn v. White Deer Coal Co.*, 6 BLR 1-979, 1-981-82 (1984)(holding that a mere assertion that evidence is relevant does not establish good cause for a party's failure to timely submit the evidence under the former Section 725.456(b)(2)(2000)).

Turning to the merits of entitlement, after consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we affirm the administrative law judge's denial of benefits based on claimant's failure to establish

total pulmonary or respiratory disability at 20 C.F.R. §718.204(b). Considering the pulmonary function and blood gas study evidence of record, the administrative law judge properly found that as all of the pulmonary function and blood gas studies are non-qualifying,[2] claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). *See Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp*., 16 BLR 1-11, 1-13-14 (1991); Director's Exhibits 13, 17, 33; Employer's Exhibit 1; Decision and Order at 13, 14. In addition, we affirm as supported by substantial evidence the administrative law judge's finding that the record contains no medical evidence that shows that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 13. Finally, as the administrative law judge properly found that Drs. Ranavaya, Jarboe, Baker and Rosenberg agreed that claimant retains the respiratory capacity to perform his usual coal mine work, and as there are no contrary medical opinions of record, we affirm the administrative law judge's finding that claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Because the administrative law judge's determinations are supported by substantial evidence in the record, we affirm the administrative law judge's finding that the evidence failed to establish total disability at 20 C.F.R. §718.204(b), and, consequently, affirm the denial of benefits. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

Because we affirm herein the administrative law judge's denial of benefits based on the insufficiency of the record evidence to establish total disability at 20 C.F.R. §718.204(b), we need not address employer's challenge to the administrative law judge's findings in determining that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202. A finding of entitlement to benefits is precluded in this case.

[2] A "qualifying" pulmonary function or blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge