BRB No. 05-0200 BLA

DENNIE FLEMING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRANHAM & BAKER COAL COMPANY	)	
	)	DATE ISSUED: 10/31/2005
Employer-Respondent	)	
	)	
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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Erik A. Schramm (Hanlon, Duff, Estadt & McCormick Co., LPA), St. Clairsville, Ohio, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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[1] appeals the Decision and Order - Denying Benefits (03-BLA-5543) of Administrative Law Judge Stuart A. Levin in a miner's 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). The administrative law judge credited claimant with thirty-one years of coal mine employment. Decision and Order at 2. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 10-11. However, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 4-10. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence to find that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total respiratory disability due to pneumoconiosis pursuant to Section 718.204(c). Claimant's Brief at 4-11. Claimant further asserts that the administrative law judge should have remanded this case to the district director because Dr. Wicker's opinion is insufficient to satisfy the obligation of the Director, Office of Workers' Compensation Programs (the Director), to provide claimant with a complete and credible pulmonary evaluation as required by the Act. *Id.* at 4. Lastly, claimant asserts that the administrative law judge erred in allowing employer to submit the reports of Drs. Broudy and Dahhan because these physicians, in rendering their opinions, relied on x-ray evidence that is inadmissible pursuant to 20 C.F.R. §725.414. *Id.* at 4-5, 7. Employer has filed a response brief, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a limited response to this appeal.[2] The Director argues that Dr. Wicker's report fulfills his obligation to provide claimant with a complete and credible pulmonary evaluation because this report is credible and addresses all the elements of entitlement. Director's Brief at 3-4.

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[1]Claimant is Dennie Fleming, the miner, who filed his claim for benefits on February 12, 2001. Director's Exhibit 2.

[2]We affirm the administrative law judge's finding of thirty-one years of coal mine employment and his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3) because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

To establish entitlement to benefits under Part 718 in a living miner's claim, a 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); *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*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Dr. Alam, claimant's treating physician, and Drs. Baker, Wicker, Broudy and Dahhan. Decision and Order at 9-10. Dr. Alam diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to coal dust exposure. Director's Exhibit 15; Claimant's Exhibits 1, 3 at 12, 14. Dr. Baker opined that claimant "has a chronic dust disease of the lung." Claimant's Exhibit 2. Drs. Wicker, Broudy, and Dahhan did not find the existence of pneumoconiosis or a chronic dust disease related to coal mine employment. Director's Exhibit 8; Employer's Exhibits 1, 2.

Claimant asserts that the administrative law judge erred in weighing the medical opinion evidence regarding the existence of pneumoconiosis. In considering the medical opinion evidence, the administrative law judge found that Drs. Broudy and Dahhan based their finding that claimant does not suffer from pneumoconiosis on the negative x-ray evidence, the clinical findings on physical examination, and the objective test results, including pulmonary function and blood gas studies. Decision and Order at 9. The administrative law judge further found that the findings of Drs. Broudy and Dahhan are "well supported by Dr. Wicker's conclusions on examination as well." *Id.* In contrast, the administrative law judge found that Dr. Baker's finding that claimant suffers from pneumoconiosis is "mainly based on the treating physician's findings without discussing any laboratory test results or findings on examination which support his conclusion."[3] *Id.* at 9.

[3]In his report, Dr. Baker stated that "it is my opinion that the miner has a chronic dust disease of the lung based on Dr. Alam's treating notes." Claimant's Exhibit 2. Dr. Baker further stated that he "would agree with Dr. Alam's opinion since he is the treating physician and has spent more time with [claimant] in treating his condition." *Id.*

In considering Dr. Alam's report, the administrative law judge noted that this physician relied "on his examination findings, Claimant's work history and the results of the cardiopulmonary test." *Id.* The administrative law judge found Dr. Alam's reliance on the cardiopulmonary test to be "less credible" because that test measures pulmonary capacity, but does not indicate the etiology of any disability. *Id.* Moreover, the administrative law judge stated that "Dr. Alam's deposition testimony demonstrated the tenuous basis for his diagnosis of pneumoconiosis." *Id.* As the administrative law judge noted, Dr. Alam's testimony undermines the bases for this physician's diagnosis of pneumoconiosis. First, Dr. Alam testified that he had not conducted the cardiopulmonary test prior to his initial diagnosis of pneumoconiosis. Claimant's Exhibit 3 at 56. Second, Dr. Alam testified that the number one criterion he used to diagnose pneumoconiosis was claimant's long exposure to coal dust, but Dr. Alam admitted that although he knew that claimant had a thirty year length of coal mine employment, he did not know claimant's job duties or the extent of his dust exposure, *i.e.*, whether claimant worked underground, above ground, or in an office. *Id.* at 56-59. Further, Dr. Alam agreed, at his deposition, that he initially diagnosed pneumoconiosis based on his physical examination of claimant and claimant's statement that he had worked for over thirty years in coal mine employment, without any objective testing. *Id.* at 61-62. The administrative law judge also noted that Dr. Alam did not address the questions raised by Dr. Dahhan about Dr. Alam's treatment of claimant with bronchodilators which is inconsistent for coal workers' pneumoconiosis.[4] Decision and Order at 9. Accordingly, the administrative law judge found that "the reports of Dr. Broudy, Dr. Wicker, and Dr. Dahhan are better supported than the conclusions set forth in the reports of Dr. Alam and Dr. Baker." *Id.*

Because Dr. Alam is claimant's treating physician,[5] the administrative law judge considered this physician's report pursuant to 20 C.F.R. §718.104(d). *Id.* at 10. However, the administrative law judge found that he could not give controlling weight to Dr. Alam's opinion in light of its reasoning and documentation and the other relevant evidence in the record. *Id.* Specifically, the administrative law judge determined that

[4]Dr. Dahhan opined that claimant "persistently demonstrates significant response to bronchodilator therapy on his pulmonary function testing, indicating that his airway obstruction is variably reversible, a finding that is inconsistent with the permanent adverse [e]ffects of coal dust on the respiratory system." Employer's Exhibit 2. Dr. Dahhan noted that Dr. Alam, claimant's treating physician, has been prescribing multiple bronchodilators, which indicates that Dr. Alam believes that claimant's condition is responsive to such measures. *Id.*

[5]Dr. Alam testified that he first saw claimant in January of 2000 and that he sees claimant every three to four months. Claimant's Exhibit 3 at 6, 9.

"Dr. Alam's reports did not include the thorough discussion of the medical evidence included in the reports of Drs. Broudy and Dahhan." *Id.* The administrative law judge stated that Dr. Alam's "deposition testimony illustrated the flaws in his reasoning and lack of support for his diagnosis of pneumoconiosis by any medical tests, other than the results of the cardiopulmonary exercise test which is limited in the diagnosis of pneumoconiosis as noted above." *Id.* Furthermore, the administrative law judge stated that Dr. Alam's January 8, 2004 letter, which is subsequent to his deposition, "includes mainly general comments on exposure without identifying specific findings on pulmonary testing which supports [sic] his conclusion that coal dust is responsible for at least part of Claimant's pulmonary changes."[6] *Id.* Accordingly, the administrative law judge found that Dr. Alam's report is not well-supported or well-reasoned and is outweighed by the reports of Drs. Dahhan, Broudy, and Wicker. *Id.*

Claimant asserts that the administrative law judge erred in failing to find the opinions of Drs. Alam and Baker sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), adding that the regulations allow for deference to be given to a miner's treating physician. Contrary to claimant's contention, an administrative law judge may not automatically accord greater weight to the medical opinion of a treating physician. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)(there is no rule requiring deference to treating physicians' opinions in black lung claims). Rather, an administrative law judge must properly examine all of the physicians' opinions on their merits and make a reasoned judgment about their credibility, with proper deference given to the treating physicians' opinions only when warranted. *See* 20 C.F.R. §718.104(d). The administrative law judge, in the instant case, performed such an inquiry in determining the weight to be accorded to the opinion of claimant's treating physician, Dr. Alam. Moreover, contrary to claimant's contention, the administrative law judge, within his discretion as trier-of-fact, found that the opinions of Drs. Broudy, Dahhan, and Wicker are entitled to greater weight because he found these physicians' opinions to be better reasoned and documented than the opinions of Drs. Alam and Baker. *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Claimant further contends that the administrative law judge erred in his consideration of Dr. Wicker's report. First, claimant asserts that the administrative law

[6]As the administrative law judge noted, although Dr. Alam refers to an x-ray read as positive for the existence of pneumoconiosis in his January 8, 2004 letter, this x-ray report is not in the record. Decision and Order at 9.

judge erred in crediting the opinion of Dr. Wicker, who is not a pulmonary specialist, over the opinions of Drs. Alam and Baker, who are both Board-certified in internal medicine and pulmonary disease. Claimant's assertion is without merit. In considering the physicians' qualifications, the administrative law judge stated:

> The record indicates Dr. Alam, Dr. Broudy, Dr. Dahhan and Dr. Baker are all pulmonary specialists, thus, the qualifications of the physicians does [sic] not provide any basis for crediting the report of one physician over the other one. I find, however, that the conclusions set forth in the reports of Dr. Broudy, Dr. Wicker, and Dr. Dahhan are better supported than the conclusions set forth in the reports of Dr. Alam and Dr. Baker.

Decision and Order at 9.[7] Thus, in crediting the opinions of Drs. Broudy, Dahhan, and Wicker over the opinions of Drs. Alam and Baker, the administrative law judge did not rely on the formers' superior qualifications. Rather, the administrative law judge credited the opinions of Drs. Broudy, Dahhan, and Wicker because he found them to be better reasoned and documented than the opinions of Drs. Alam and Baker. *See Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985)(an administrative law judge **may** give greater weight to the reports of physicians with demonstrated greater expertise).

Second, claimant contends that Dr. Wicker's pulmonary evaluation, provided by the Director, is incomplete and unreasoned because it does not meet the quality standards of 20 C.F.R. §718.104 and does not address all the elements of entitlement. Therefore, claimant asserts that Dr. Wicker's opinion is insufficient to fulfill the Director's obligation to provide him with a complete and credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.

Claimant contends that Dr. Wicker's report does not meet the quality standards of Section 718.104 because it does not include "[a]ll manifestations of chronic respiratory disease," as required by Section 718.104(a)(2). Claimant supports his assertion by stating that it was inconsistent for Dr. Wicker not to have listed any respiratory disease in his

[7]The record reveals that Dr. Dahhan is Board-certified in internal medicine and pulmonary disease. Employer's Exhibit 2. Dr. Broudy is a B reader and is Board-certified in internal medicine and pulmonary disease. Employer's Exhibit 1. The qualifications of Dr. Wicker are not in the record. Drs. Alam and Baker are both Board-certified in internal medicine and pulmonary disease. Claimant's Exhibits 2, 3 at 4.

report and to also have found that claimant has a disabling respiratory condition due to cigarette smoking. Claimant questions Dr. Wicker's ability to "conclude that claimant's disabling respiratory condition was due to cigarette smoking if, in deed [sic], there was no chronic respiratory disease." Claimant's Brief at 4. In making his assertion, claimant misstates the contents of Dr. Wicker's report. In fact, Dr. Wicker did not state that claimant has no chronic respiratory disease. Rather, Dr. Wicker found "no evidence of pneumoconiosis." Director's Exhibit 8. Therefore, it was not inconsistent for Dr. Wicker to have found that there is no evidence of pneumoconiosis and to have found that claimant's respiratory capacity is inadequate to perform coal mine employment because of his cigarette abuse. *Id.* Moreover, contrary to claimant's contention, Dr. Wicker's failure to list a chronic respiratory disease due to smoking, even though he found total disability due to smoking, does not render his report incomplete at 20 C.F.R. §725.456(e) because such a diagnosis would not have assisted claimant in establishing one of the conditions of entitlement.

Additionally, claimant asserts that Dr. Wicker did not address all the elements of entitlement in his report. Specifically, claimant asserts that Dr. Wicker did not address the etiology of claimant's cardiopulmonary diagnosis because, in reference to the question regarding the relationship between the disease diagnosed and coal mine employment, Dr. Wicker noted, "not applicable." However, Dr. Wicker wrote "not applicable" when asked about the relationship between the disease and coal mine employment, because he did not diagnose pneumoconiosis. *Id.* Furthermore, Dr. Wicker addressed Section 718.204(b) and (c) by diagnosing a totally disabling respiratory impairment and by finding that the impairment is related to cigarette smoking. Contrary to claimant's assertion, Dr. Wicker did address all the elements of entitlement and, therefore, the administrative law judge did not err in not remanding this case for the Director to perform another pulmonary evaluation. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

With regard to Drs. Broudy and Dahhan, claimant asserts that the administrative law judge erred in considering these physicians' opinions because their opinions contain x-ray interpretations which exceed the limitations for the submission of x-ray evidence outlined in Section 725.414(a)(3)(i). At the hearing, claimant objected to employer's submission of the reports of Drs. Broudy and Dahhan, Employer's Exhibits 1 and 2, because these reports contain interpretations of x-rays contained in claimant's treatment records, which he alleged exceed the limitations for the submission of x-ray evidence outlined in Section 725.414(a)(3)(i).[8] Hearing Transcript at 19-20. The administrative

[8]Drs. Broudy and Dahhan interpreted five x-rays, dated February 17, 1998, March 30, 1999, February 20, 2000, August 4, 2000, and August 8, 2000, in excess of the limit

law judge overruled claimant's objection to the admission of Employer's Exhibits 1 and 2. *Id.* at 23. The administrative law judge stated that the evidentiary limitations of Section 725.414 do not apply to evidence submitted at Section 725.414(a)(4)(allowing for the submission of a miner's hospitalization or treatment records, notwithstanding the limitations of Section 725.414(a)(2)(i) and (a)(3)(i)). *Id.* at 22-23. Therefore, the administrative law judge reasoned, if evidence is allowed to be submitted under Section 725.414(a)(4) without being subject to the regulatory limit, then the opposing party should be allowed to rebut or address this evidence without being subject to the regulatory limit. *Id.* at 23.

In his Decision and Order, the administrative law judge did not consider, at 20 C.F.R. §718.202(a)(1), the narrative x-ray interpretations contained in Dr. Alam's treatment records because they did not conform to the quality standards set forth at 20 C.F.R. §§718.102(b), 718.202(a)(1). Decision and Order at 4. Accordingly, the administrative law judge found that "[s]ince the original readings of these x-ray films are not included in the record and since those readings exceed the number allowed by the regulatory provisions, I find no basis for including these opinions [the interpretations by Drs. Broudy and Dahhan of the x-rays contained in Dr. Alam's treatment records] in the record. *See* 725.414(a)(3)(i)." *Id.* Because the administrative law judge previously admitted the reports of Drs. Broudy and Dahhan over claimant's objection at the hearing, the administrative law judge did not further discuss the propriety of his consideration and crediting of these physicians' reports pursuant to Section 718.202(a)(4) in his Decision and Order. *See* Decision and Order at 9-10.

The Director agrees with claimant's position that employer was not permitted to rebut evidence contained in treatment records submitted by claimant. Director's Brief at 4 n.3. However, because the administrative law judge did not consider the treatment x-ray rereadings, submitted by employer, at Section 718.202(a)(1), the Director concludes that no error was committed. *Id.* The Director further takes the position that there was no error in the administrative law judge's failure to exclude the reports of Drs. Broudy and Dahhan at Section 718.202(a)(4) merely because these physicians relied, in part, on inadmissible negative x-ray rereadings. *Id.* The Director argues that Section 725.414(a)(3)(i) does not require that a medical report that contains inadmissible evidence also be deemed inadmissible, but "simply insures that parties cannot exceed the

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of two readings allowed by 20 C.F.R. §725.414(a)(3)(i). Employer's Exhibits 1, 2. Drs. Broudy and Dahhan found no evidence of coal workers' pneumoconiosis on these x-ray films. *Id.*

limitations by submitting excess test results as part of a doctor's report."[9] *Id.* Rather, the Director contends, in appropriate circumstances, an administrative law judge may admit a report containing inadmissible evidence, but determine whether the physician's consideration of the inadmissible evidence affects the weight to be given to that report. *Id.* Although the administrative law judge did not perform such an analysis in this case, the Director asserts that there has been "no prejudice to claimant" because the *admissible* x-rays are uniformly negative. *Id.* Therefore, the Director reasons that the opinions of Drs. Broudy and Dahhan would not have changed had they considered only the admissible x-ray readings in their reports.

We find persuasive the Director's position that the administrative law judge's consideration of the opinions of Drs. Broudy and Dahhan has not resulted in any prejudice to claimant. As the Director states, because the admissible x-rays contained in the record are uniformly negative, it is doubtful that Drs. Broudy[10] and Dahhan would have changed their opinions regarding the existence of pneumoconiosis had they considered only the admissible x-ray readings in their reports. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Based on the foregoing, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Because we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a requisite element of entitlement under Part 718, we also affirm the administrative law judge's denial of benefits.[11] *Id.*

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[9]The regulation at Section 725.414(a)(3)(i) states that "[a]ny chest X-ray interpretations. . .that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section."

[10]Claimant additionally asserts that the administrative law judge erred in considering Dr. Broudy's August 26, 2003 report because some of the conclusions contained in his report are hostile to the Act. We hold that claimant waived his right to raise this argument on appeal because he did not raise it before the administrative law judge. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-3 (1986)(*en banc*); *Kurcaba v. Consolidation Coal Co*, 9 BLR 1-73, 1-75 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984).

[11]Because we affirm the administrative law judge's denial of benefits based on his determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), it is unnecessary for us to address claimant's assertions regarding the

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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JUDITH S. BOGGS
Administrative Appeals Judge

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cause of claimant's total respiratory disability pursuant to Section 718.204(c). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry*, 9 BLR at 1-2.