BRB Nos. 07-0184 BLA
and 07-0184 BLA-A

H.C.L.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/30/2007
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, 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 - Denying Benefits (05-BLA-6136) of Administrative Law Judge Linda S. Chapman on 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 at least twelve years of coal mine employment and

adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's March 15, 2004 application for benefits. Addressing the elements of entitlement, the administrative law judge found that the weight of the medical evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in weighing the x-ray and medical opinion evidence in finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he is not submitting a substantive responsive to this appeal.

Employer, in its cross-appeal, challenges the administrative law judge's application of the evidentiary limitations set forth at 20 C.F.R. §725.414(a), in excluding several x-ray interpretations and the medical report of Dr. Castle. Employer argues that the regulations that impose limitations on the evidence each party is permitted to submit, are arbitrary and capricious, as all relevant evidence should be admissible, citing Section 923(b) of the Act, 30 U.S.C. §923(b), and the holding 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).[1] In the alternative, employer contends that the evidence should have been admitted under the "good cause" exception set forth at 20 C.F.R. §725.456(b)(1). Neither claimant nor the Director has responded to employer's cross-appeal.[2]

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 pursuant to 20

[1] As claimant's coal mine employment occurred in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] As the parties do not challenge the administrative law judge's length of coal mine employment determination, or her finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3), these findings are affirmed. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, we address the procedural issue raised in employer's cross-appeal, that the administrative law judge erred in applying the evidentiary limitations, set forth in Section 725.414, to exclude the x-ray interpretations of Drs. Wiot, Spitz and Meyer, and the medical opinion of Dr. Castle, submitted as Employer's Exhibits 2, 3, and 4. Contrary to employer's contentions, the Fourth Circuit and the Board have held that the regulation at Section 725.414, placing limits on the evidence to be submitted by each party, is valid and does not contravene the Act or controlling precedent. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007); *see Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*).

In addition, we reject employer's contention that this evidence should have been admitted under the good cause exception at Section 725.456(b)(1) because each physician has analyzed the medical evidence and provided his own unique and probative interpretations. Employer's Brief at 2, n.3. The record does not indicate that employer attempted to provide a basis for establishing that "good cause" exists for the admission of this evidence pursuant to Section 725.456(b)(1). During the May 6, 2006 hearing, employer stated that this evidence was only being submitted to preserve the issue for appellate purposes. Hearing Transcript at 12. 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 excessive evidence. *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-145 (2006). Thus, based on the facts of this case, we hold that the administrative law judge correctly applied the evidentiary limitations set forth at Section 725.414, and properly excluded the excessive medical evidence submitted in this case. 20 C.F.R. §725.414; *Dempsey*, 23 BLR at 1-58; *see Brasher*, 23 BLR at 1-145; *Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-74 (2004).

With regard to claimant's challenge to the administrative law judge's findings on the merits of entitlement, claimant contends that the administrative law judge erred in finding that "there are no positive x-ray interpretations in the record." Claimant's Brief at 5. Specifically, claimant contends that because the October 27, 2003 x-ray was read as positive by Dr. Pathak, even though it was reread as negative by Dr. Scatarige, a B reader and Board-certified radiologist, the administrative law judge's finding that there are no positive interpretations is "clearly erroneous." Claimant's Brief at 5.

A review of the record shows that the administrative law judge considered the relevant x-ray evidence of record, including the radiological qualifications of the physicians providing the readings. Decision and Order at 3; Director's Exhibits 14, 15; Claimant's Exhibit 1; Employer's Exhibits 1, 8. In weighing this evidence, the administrative law judge reasonably exercised her discretion in finding that the October 27, 2003 x-ray was negative for the existence of pneumoconiosis, finding that the positive reading by Dr. Pathak, whose radiological qualifications the administrative law judge found were not in the record, was outweighed by the negative interpretation of Dr. Scatarige, a dually-qualified radiologist. Decision and Order at 9-10; *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-68 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985).

Based on both the quality and the quantity of the other x-ray evidence, the administrative law judge found that this evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). This finding is not challenged by claimant. Consequently, based on her weighing of the October 27, 2003 x-ray, as well as the x-ray evidence as a whole, any error in the administrative law judge's statement that "there are no positive x-ray interpretations in the record" is harmless, because the administrative law judge properly weighed the x-ray evidence of record and provided a clear discussion of her findings. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We, therefore, affirm her weighing of the x-ray evidence as it is supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *accord Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence failed to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, claimant contends that Dr. Rasmussen, who diagnosed the existence of legal pneumoconiosis, provided a well-reasoned and cogent medical opinion, as the physician stated that claimant's pulmonary impairment was due to a combination of coal dust exposure and smoking. Claimants' Brief at 5. In addition, claimant contends that, contrary to the administrative law judge's characterization of his opinion, Dr. Rasmussen addressed claimant's cardiac problems in his opinion. Claimant's Brief at 6. With regard to the contrary opinions, claimant also contends that Drs. Crisalli and Zaldivar failed to acknowledge that claimant's significant coal dust exposure might have contributed to his pulmonary impairment. Claimant's Brief at 5-6. We disagree.

Pursuant to Section 718.202(a)(4), the administrative law judge found that the weight of the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 12. The administrative law judge set forth the opinions of Drs. Rasmussen and Bird, which are supportive of a finding that claimant suffers from legal pneumoconiosis, and the contrary

opinions of Drs. Crisalli and Zaldivar, that claimant's pulmonary problems are not the result of coal dust exposure or his coal mine employment. Decision and Order at 4-8; Director's Exhibits 14, 15; Claimant's Exhibit 2; Employer's Exhibits 1, 6, 7. The administrative law judge found the opinion of Dr. Bird, claimant's treating physician, entitled to little weight because the physician's opinion is conclusory, as Dr. Bird did not include any explanation for his findings and did not include any objective documentation to support his opinion. Decision and Order at 10. With regard to Dr. Rasmussen's opinion, that claimant suffers from pneumoconiosis, the administrative law judge acknowledged that Dr. Rasmussen diagnosed a disabling lung condition based on the results of the exercise blood gas study, but further determined that Dr. Rasmussen failed to adequately discuss whether, or to what extent, claimant's significant heart condition may have played a role in producing the results seen in the blood gas study. Decision and Order at 10-11. However, the administrative law judge found the opinions of Drs. Crisalli and Zaldivar, that claimant does not suffer from pneumoconiosis, well-reasoned and supported by their underlying documentation, and that they discussed in detail the results of claimant's physical examination and how his symptoms and test results are related to claimant's significant heart disease, and not pneumoconiosis or coal dust exposure. Decision and Order at 10-12. Consequently, the administrative law judge found, relying on the opinions of Drs. Crisalli and Zaldivar, that claimant has not established that he has pneumoconiosis by a preponderance of the medical opinion evidence.

Contrary to claimant's contentions, the administrative law judge permissibly found the opinions of Drs. Crisalli and Zaldivar, stating that claimant does not have legal pneumoconiosis, to be well documented and reasoned and supported by the objective evidence of record. Decision and Order at 10, 12; Director's Exhibit 15; Employer's Exhibits 1, 6, 7; *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, 21 BLR 2-269 (4th Cir. 1997). Specifically, the administrative law judge found that these physicians discussed, in detail, the results of their examinations and why claimant's symptoms and the results of the objective testing supported their determination that claimant's pulmonary problems were due to his significant heart disease, and not pneumoconiosis or coal dust exposure. Decision and Order at 10-12; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269.

In addition, the administrative law judge reasonably exercised her discretion in finding that Dr. Rasmussen's opinion was entitled to less weight because the physician did not adequately explain his conclusions that claimant's pulmonary condition was entirely due to coal dust exposure and cigarette smoking, and that the claimant's cardiac condition was not a causative factor, in light of the objective evidence of record. Decision and Order at 10-12; Director's Exhibit 14; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190

(1989). Moreover, the administrative law judge is empowered to weigh the evidence and to draw her own conclusions, and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113. The administrative law judge considered all aspects of the medical opinion evidence and has provided credible reasons in support of her analysis of the weight and credibility of the evidence and claimant's contentions are tantamount to a request to reweigh the evidence. We, therefore, affirm the administrative law judge's findings regarding the existence of pneumoconiosis at Section 718.202(a), as they are supported by substantive evidence in the record and are in compliance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

In light of our affirmance of the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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