BRB Nos. 06-0946 BLA
and 06-0946 BLA-A

W.H.G.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
BETTY B COAL COMPANY	)	DATE ISSUED: 09/24/2007
	)	
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.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, 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 (06-BLA-5279) of Administrative Law Judge Linda S. Chapman rendered on a subsequent 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

[1] Claimant's first claim for benefits, filed on March 31, 1973, was finally denied on October 10, 1985, because claimant did not establish the existence of pneumoconiosis

administrative law judge credited claimant with forty-one years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found that the medical evidence developed since the most recent denial of benefits was insufficient to establish the existence of pneumoconiosis, total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.204(b)(2)(i)-(iv), (c). The administrative law judge therefore determined that claimant failed to establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d).[3] *See White v. New White Coal Co.,* 23 BLR 1-1 (2004). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[4] Claimant also argues that the administrative law judge erred in finding that the evidence did not establish total disability or disability causation pursuant to 20 C.F.R. §718.204(b)(2), (c). Employer responds in support of the administrative law judge's

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or total disability. Director's Exhibit 1. His second claim, filed on January 24, 2001, was denied on January 24, 2002, because claimant did not establish the existence of pneumoconiosis or total disability. Director's Exhibit 2. Claimant filed his third claim, the subject of this appeal, on February 10, 2005.

[2] The record indicates that claimant's last coal mine employment occurred in West Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement ... has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995) (applying prior regulations, claimant must establish at least one element of entitlement previously adjudicated against him). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibits 2.

[4] Because claimant does not challenge the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2)-(4), we affirm them. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

denial of benefits. On cross-appeal, employer argues that the limitations on evidence in the amended regulations are arbitrary and capricious and thus that the administrative law judge erred in excluding several x-ray readings under the evidentiary limitations set forth at 20 C.F.R. §725.414(a)(3)(ii). The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 under 20 C.F.R. 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*).

Initially, we will address employer's arguments on cross-appeal that the evidentiary limitations in the amended regulations are arbitrary and capricious. Employer's Brief at 2 n.3. Subsequent to the submission of employer's brief, the United States Court of Appeals for the Fourth Circuit held that the "Evidence Limiting Rules" set forth at 20 C.F.R. Part 725 (the evidentiary limitations provisions of the revised regulations) are a reasonable and valid exercise of the Secretary's authority to regulate evidentiary development in Black Lung Act proceedings, that they are based on a permissible construction of the Act, and they are neither arbitrary, capricious, nor manifestly contrary to the statute. *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007). In light of the court's ruling, we reject employer's contentions on cross-appeal and address claimant's appeal on the merits.

Claimant contends that pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge "mechanically considered only the opinions offered by the dually qualified readers" and disregarded the interpretations by Dr. Rasmussen, a B reader. Claimant's Brief at 3. Claimant suggests that the readings by a physician who is a Board-certified radiologist, as well as a B reader, are not necessarily entitled to greater weight than the readings of a physician who is only a B reader since both physicians have passed the B reader examination and have demonstrated their proficiency at diagnosing

pneumoconiosis by x-ray.[5] *Id*. Claimant's arguments are flawed. Contrary to claimant's contentions, a review of the administrative law judge's decision reveals that in evaluating the x-ray evidence, the administrative law judge did not ignore Dr. Rasmussen's x-ray interpretations. Rather, the administrative law judge considered all eight readings of the three x-rays in conjunction with the radiological qualifications of the x-ray readers. Decision and Order at 4, 9-10. The administrative law judge permissibly deferred to the readings of those physicians who were dually-qualified as Board-certified radiologists and B readers to find that a preponderance of the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004) (*en banc*).

With respect to the x-rays with conflicting readings, the March 8, 2005 x-ray was interpreted by Dr. Rasmussen as positive and by Dr. Wiot, who is dually qualified, as negative.[6] Director's Exhibit 12; Employer's Exhibit 1. The administrative law judge relied on Dr. Wiot's "superior qualifications" to find that the March 8, 2005 x-ray was negative. Decision and Order at 10. The December 12, 2005 x-ray was interpreted as positive by Dr. Rasmussen and Dr. Alexander, who is dually qualified, and negative by Drs. Meyer and Wiot, who are dually qualified. Claimant's Exhibits 1-2; Employer's Exhibits 7-8. The administrative law judge relied on the two negative readings by dually qualified readers, as opposed to only one positive reading by a dually qualified reader, to find that the December 12, 2005 x-ray was "not positive for pneumoconiosis."[7] *Id*. The administrative law judge, however, stated that even if she "were to disregard the respective qualifications of the interpreter, I would find that these interpretations are in equipoise, and thus that this x-ray is not positive for pneumoconiosis." *Id*.

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[5] While proposing that a B reader and a dually qualified physician are equally proficient at interpreting x-rays for the presence of pneumoconiosis, claimant suggests that the administrative law judge should have considered that only Dr. Rasmussen had the benefit of important sources of claimant's historical diagnostic information. Claimant's Brief at 6.

[6] The December 8, 2005 x-ray was interpreted as negative by Dr. Hippensteel, who is a B reader, and Dr. Wiot, who is dually qualified. Decision and Order at 10; Employer's Exhibits 1-2. There were no positive interpretations.

[7] As noted by the administrative law judge, Dr. Rasmussen's interpretation was in narrative form and that the doctor did not complete an ILO form. Decision and Order at 4 n.4. Although employer argues that the administrative law judge should not have considered this interpretation, in light of our determination to affirm his finding at 20 C.F.R. §718.202(a)(1), any error, if any, committed by the administrative law judge in considering this reading is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983).

Thus, the administrative law judge permissibly found that the existence of pneumoconiosis was not established by a preponderance of the newly submitted x-ray evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon.*); Decision and Order at 4, 9-10; Director's Exhibit 12; Claimant's Exhibits 1, 4; Employer's Exhibits 1-2, 4, 7-8. Furthermore, because the administrative law judge performed a qualitative and quantitative analysis of the x-ray evidence, claimant's contention that the administrative law judge relied solely on the readings by dually qualified readers lacks merit. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) as it is supported by substantial evidence. *Id.*

Substantial evidence also supports the administrative law judge's additional finding that all of the evidence relating to the existence of pneumoconiosis, weighed together, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 12; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). This additional finding is therefore affirmed.

Claimant further contends that the administrative law judge erred in discrediting the opinion of Dr. Rasmussen with respect to the issues of disability and disability causation pursuant to 20 C.F.R. §718.204(b)(2), (c). Claimant's Brief at 7. Claimant contends that the administrative law judge's reliance on medical reports that conclude that claimant suffers from congestive heart failure is not supported by the record.[8] We disagree.

In considering the evidence under the heading *Total Disability Due to Pneumoconiosis*, the administrative law judge noted that Dr. Rasmussen's March 8, 2005 post-exercise blood gas study results were qualifying, and absent contrary probative evidence, these results would be sufficient to establish that claimant has a totally disabling respiratory impairment. Decision and Order at 12. However, the administrative law judge found that, based on the contrary probative evidence provided by the opinions of Drs. Castle and Hippensteel, total respiratory or pulmonary disability was not established. *Id.* The administrative law judge credited the opinions of Drs. Castle and Hippensteel, attributing claimant's pulmonary symptoms to his cardiac disease and congestive heart failure, and not to pneumoconiosis or coal dust exposure, because

[8] We affirm the administrative law judge's findings that there is no evidence of cor pulmonale, that the newly submitted pulmonary function study results did not meet the regulatory criteria to establish total disability, *see* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(iii), and that the exercise blood gas study values meet the regulatory criteria demonstrating total disability, *see* 20 C.F.R. §718.204(b)(2)(ii), because they are not challenged on appeal. *Skrack*, 6 BLR at 1-711.

she found they "described how all of the findings - on examination, x-ray, EKG, and arterial blood gas testing - were consistent with [claimant's] cardiac condition, but not with pneumoconiosis or coal dust exposure." *Id*. Consequently, the administrative law judge found that the evidence did not establish that claimant "has a totally disabling respiratory or pulmonary impairment, whether due to pneumoconiosis or otherwise." *Id.*

Claimant's argument that the administrative law judge improperly discredited the opinion of Dr. Rasmussen pursuant to Section 718.204(b)(2)(iv) and (c) is without merit. While discussing whether the evidence established the existence of pneumoconiosis, the administrative law judge determined that one of the reasons she could not credit Dr. Rasmussen's conclusions was because the physician did not explain how his generalized statement about emphysema applies to this case, when there is no diagnosis that claimant suffers from emphysema. Decision and Order at 10-11. Dr. Rasmussen stated:

> There are several causes of [claimant's] totally disabling respiratory insufficiency. These clearly include cigarette smoking and coal mine dust, both of which can cause identical forms of emphysema….
>
> The patient has a long history of cardiac disease and having had a mitral valve repaired. Longstanding severe congestive heart failure can lead to permanent lung damage resulting in fibrosis, but not emphysema. In this case we have no history of longstanding congestive heart failure. He currently has cardiomegaly, but no evidence of congestive heart failure.

Claimant's Exhibit 1. The administrative law judge concluded that "Dr. Rasmussen's statement that [claimant] has no history of longstanding congestive heart failure, or evidence of congestive heart failure, is manifestly incorrect." Decision and Order at 11; *see* Decision and Order at 6. The administrative law judge discounted Dr. Rasmussen's opinion in light of the contrary opinions of Drs. Hippensteel and Castle that she found were supported by the physician's explanations and the evidence of record. Decision and Order at 11.

The administrative law judge's decision to assign less weight to Dr. Rasmussen's opinion because it was "confusing and poorly reasoned," and ignored the contribution of significant coronary disease as a factor in claimant's impairment, was within her discretion as the finder of fact. *Id*. Likewise, the administrative law judge had discretion to accord determinative weight to Drs. Hipppensteel and Castle because she found that their opinions were well-reasoned, consistent with claimant's cardiac history, and were better supported by the objective medical evidence. Decision and Order at 12; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v.*

Karst-Robbins Coal Co., 12 BLR 1-149 (1989) (*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). We therefore affirm the administrative law judge's findings as supported by substantial evidence.

Because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's determination that claimant failed to establish a change in an applicable condition of entitlement under Section 725.309(d). We therefore affirm the denial of benefits. *White*, 23 BLR at 1-3; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

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

SO ORDERED.

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NANCY S. DOLDER
Administrative Appeals Judge

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ROY S. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge