BRB Nos. 07-0117 BLA
07-0117 BLA-A

J.L.J.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/28/2007
	)	
FRONTIER-KEMPER CONSTRUCTORS, INCORPORATED	)	
	)	
	)	
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 – Denial of Benefits and Decision and Order – Denial of Reconsideration Request of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

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

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denial of Benefits and the Decision and Order – Denial of Reconsideration Request (2005-BLA-05303) of Administrative Law Judge Richard T. Stansell-Gamm with respect to 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 initially determined that employer was the responsible operator. With respect to the merits of the claim, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and denied benefits accordingly. In compliance with the Chief Administrative Law Judge's order, the administrative law judge identified claimant by his initials on the first page of his Decision and Order. Employer filed a Request for Reconsideration in which it asked the administrative law judge to reissue his Decision and Order with claimant's full name appearing in the case caption, as required under 20 C.F.R. §725.477(b) (2006). The administrative law judge denied employer's request.

On appeal, claimant argues that the administrative law judge erred in redesignating two of the x-ray interpretations submitted by the parties and in considering an x-ray reading that appeared in claimant's treatment records. Claimant also contends that the administrative law judge should have accorded greater weight to the interpretations of the more recent x-rays under 20 C.F.R. §718.202(a)(1). Claimant further maintains that the administrative law judge did not properly weigh the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Employer responds and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and urges the Board to reject claimant's allegations of error regarding the administrative law judge's evidentiary rulings.

In its cross-appeal, employer argues that the administrative law judge erred in determining that it is the responsible operator. Employer also contends that the administrative law judge erred in excluding the hearing testimony of Mr. Brock, an employee who described the conditions that claimant experienced while performing coal mine construction work. Employer further alleges that the administrative law judge's failure to identify claimant by name, rather than initials, constitutes error. Claimant has responded and urges the Board to reject employer's contentions relating to the

[1] Because claimant's most recent coal mine employment occurred in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

responsible operator issue. The Director has also responded and argues that there is no merit in employer's allegations of error.[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 supported by substantial evidence, is rational, and is in accordance with applicable law. 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 in a miner's claim filed after January 1, 1982, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that he was totally disabled due to pneumoconiosis. 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 (1989).

We will first address the issues raised in claimant's appeal of the denial of benefits. Pursuant to Section 718.202(a)(1), the administrative law judge considered nine readings of four x-rays. The administrative law judge rendered the evidentiary rulings concerning this evidence at the hearing and in his Decision and Order – Denial of Benefits. At the start of the hearing, the administrative law judge admitted Dr. Cappiello's negative interpretation of the film dated July 11, 2003, as a treatment record under 20 C.F.R. §725.414(a)(4). Hearing Transcript at 28; Director's Exhibit 13. In his Decision and Order – Denial of Benefits, however, the administrative law judge determined, based upon claimant's subsequent testimony, that this reading was actually procured by claimant in preparation for litigation. Decision and Order – Denial of Benefits at 2. The administrative law judge further determined that if he excluded Dr. Cappiello's reading of the July 11, 2003 film, he would be required to exclude the positive interpretation of this film performed by Dr. Alexander and submitted by claimant under 20 C.F.R. §725.414(a)(2)(ii), as it would no longer constitute rebuttal evidence. *Id.*; Claimant's Exhibit 1. In order to avoid rejecting otherwise admissible evidence, the administrative law judge designated Dr. Alexander's positive reading of the July 2003 film as part of claimant's affirmative case at 20 C.F.R. §725.414(a)(2)(i). He then shifted Dr. Forehand's positive reading of an x-ray obtained on September 25, 2003, in conjunction with the pulmonary evaluation provided by the Department of Labor, to 20 C.F.R. §725.414(a)(3)(iii). Decision and Order – Denial of Benefits at 2-3; Director's

[2] We affirm the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (a)(3), as they are unchallenged on appeal. Decision and Order – Denial of Benefits at 13; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711-12 (1983).

Exhibit 22. The administrative law judge then designated Dr. Cappiello's negative reading of the July 2003 x-ray as employer's rebuttal evidence under 20 C.F.R. §725.414(a)(3)(ii). *Id*.

With respect to the remainder of the x-ray evidence proffered by the parties, the administrative law judge admitted Dr. Antoun's negative reading of a film dated October 17, 2002, as a treatment record under Section 725.414(a)(4). Hearing Transcript at 30; Director's Exhibit 13. The administrative law judge admitted Dr. Alexander's positive interpretation of an x-ray dated September 25, 2003 as claimant's second affirmative case reading at Section 725.414(a)(2)(i). *Id*. at 29-30; Claimant's Exhibit 3. With respect to claimant's rebuttal evidence, the administrative law judge admitted Dr. Alexander's positive reading of the film dated March 25, 2003 pursuant to Section 725.414(a)(2)(ii). The administrative law judge accepted the negative interpretations submitted by Dr. Scott of the film dated September 25, 2003, and by Dr. Castle of the x-ray dated March 23, 2005, as employer's affirmative case evidence at Section 725.414(a)(3)(i). *Id*. at 31, 34; Employer's Exhibits 1, 3, 4. Dr. Wheeler's negative reading of the September 25, 2003 film filled employer's second rebuttal evidence slot under Section 725.414(a)(3)(ii). *Id*.; Director's Exhibit 13.

The administrative law judge then considered each film separately and determined that the x-ray dated October 17, 2002 was negative, based upon Dr. Antoun's "sole, and uncontested interpretation." Decision and Order – Denial of Benefits at 13. The administrative law judge found that the film dated July 11, 2003 was inconclusive for the presence of pneumoconiosis, as one physician qualified as a Board-certified radiologist and B reader interpreted the x-ray as positive, while the other similarly qualified physician read it as negative. *Id*. The administrative law judge concluded that the x-ray obtained on September 25, 2003 was negative, as the two dually qualified physicians' negative readings outweighed the sole positive reading by a dually qualified physician. *Id*. With respect to the film dated March 23, 2005, the administrative law judge determined that it was positive for pneumoconiosis, as the positive reading by the dually qualified physician outweighed the negative reading by the physician qualified as a B reader. *Id*. Upon considering all four x-rays, the administrative law judge found that:

> Over the three year course of the radiographic record in this case, which I find to be sufficiently contemporaneous, one film is inconclusive (July 11, 2003), one chest x-ray is positive for pneumoconiosis (March 23, 2005), and two radiographic studies are negative for pneumoconiosis (October 17, 2002 and September 23, 2003). Consequently the preponderance of the chest x-ray evidence is negative for pneumoconiosis and Mr. J is unable to prove the presence of pneumoconiosis through x-rays under 20 C.F.R. §718.202(a)(1).

Id.

Claimant argues that the Board must vacate the administrative law judge's finding under Section 718.202(a)(1), as the administrative law judge erred in considering Dr. Antoun's negative reading of the October 17, 2002 film, which appeared in a treatment record. Claimant also contends that the administrative law judge exceeded his authority in redesignating the readings of Drs. Cappiello and Alexander. Lastly, claimant maintains that the administrative law judge erred in failing to apply the later evidence rule.

Upon review of the relevant evidence, the Decision and Order – Denial of Benefits, and the arguments raised on appeal, we hold that the administrative law judge's finding, that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), is rational and supported by substantial evidence. With respect to Dr. Antoun's negative reading of the October 17, 2002 film, the administrative law judge's admission and consideration of this film was appropriate. Section 725.414(a)(4) provides that:

> Notwithstanding the limitations in paragraphs (a)(2) and (a)(3) of this section, any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence.

20 C.F.R. §725.414(a)(4). We concur with the Director's position that, contrary to claimant's argument, the plain meaning of the language set forth in Section 725.414(a)(4) is that treatment records are exempt from the evidentiary limitations that appear elsewhere in Section 725.414. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). Section 725.414(a)(4) does not, therefore, prohibit an administrative law judge from including the objective medical data contained in these records in his or her weighing of the evidence relevant to entitlement.

Regarding the readings of the film dated July 11, 2003, error, if any, in the administrative law judge's decision to switch the conflicting interpretations offered by Drs. Cappiello and Alexander from the subsections of Section 725.414 designated by the parties is harmless. As the Director notes, the administrative law judge rationally determined that this film was inconclusive and, thus, did not rely upon it in rendering his ultimate finding, that the preponderance of the x-rays of record was negative for pneumoconiosis. Decision and Order – Denial of Benefits at 13; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant is also incorrect in asserting that the administrative law judge was required to accord greatest weight to the positive readings of the film obtained on March 23, 2005, because it is the most recent x-ray of record. Although the chronology of the evidence can be an important factor to consider when assessing the evidence, particularly when the more recent evidence is consistent with a finding of pneumoconiosis, an administrative law judge is not required to give more weight to the most recent x-ray evidence. *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985). In addition, the administrative law judge rationally determined that "the three year course of the radiographic record in this case" was "sufficiently contemporaneous," thereby rendering the later evidence rule inapplicable. Decision and Order – Denial of Benefits at 13; *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). We affirm, therefore, the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Cardona, Fino, and Castle.[3] Dr. Cardona examined claimant on July 11, 2003 and diagnosed pneumoconiosis based upon an abnormal chest x-ray and claimant's symptoms of severe shortness of breath. Claimant's Exhibit 2. Dr. Forehand, who is Board-certified in pediatrics and allergy and immunology, and is Board-eligible in pediatric pulmonary medicine, examined claimant on September 25, 2003. Dr. Forehand opined that claimant suffers from pneumoconiosis and is totally disabled by a respiratory impairment caused solely by coal dust exposure. Director's Exhibits 10, 14. Dr. Castle, who is Board-certified in internal medicine and pulmonary medicine, examined claimant on March 23, 2005, and reviewed claimant's medical records. Dr. Castle opined that claimant does not have pneumoconiosis or any other dust related occupational disease. Employer's Exhibits 1, 2.

The administrative law judge found that Dr. Cardona's diagnosis of clinical pneumoconiosis was entitled to little weight because the physician relied upon a positive reading of an x-ray, that the administrative law judge determined was inconclusive, and that was contrary to the administrative law judge's finding that the preponderance of the x-ray evidence was negative for pneumoconiosis. Decision and Order – Denial of Benefits at 17. The administrative law judge indicated that Dr. Cardona's attribution of claimant's respiratory impairment to coal dust exposure was inadequately reasoned and

[3] The administrative law judge summarized the opinions of Drs. Robins and Motos, but determined that they were not probative of the issue of the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). Decision and Order – Denial of Benefits at 17. We affirm this finding, as it is not challenged on appeal. *Skrack*, 6 BLR at 1-711-12.

documented, as Dr. Cardona relied solely upon claimant's history of coal mine employment. *Id*. at 18. With respect to Dr. Forehand's opinion, the administrative law judge found that Dr. Forehand's diagnoses of clinical and legal pneumoconiosis were "minimally reasoned since he based his diagnoses on the totality of his pulmonary evaluation." *Id*. The administrative law judge determined that the opinion in which Dr. Castle ruled out the presence of both clinical and legal pneumoconiosis was reasoned and documented. The administrative law judge further indicated that Dr. Castle's findings were entitled to "enhanced probative value" based upon his status as a Board-certified pulmonologist and because he "had the most complete documentary basis upon which to evaluate [claimant's] pulmonary health." *Id*. The administrative law judge concluded, therefore, that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Id*.

Claimant contends that the administrative law judge erred in discrediting Dr. Cardona's diagnosis of legal pneumoconiosis and in determining that Dr. Castle's opinion was adequately reasoned. Claimant also alleges that the administrative law judge's finding that Dr. Forehand's opinion was "minimally reasoned" does not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

We hold that the administrative law judge's finding that the existence of pneumoconiosis was not established under Section 718.202(a)(4) is rational and supported by substantial evidence. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Cardona's diagnosis of legal pneumoconiosis was inadequately explained, as the doctor did not identify any rationale in support of his diagnosis other than claimant's history of coal mine employment. Decision and Order – Denial of Benefits at 17; Claimant's Exhibit 2; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). The administrative law judge also rationally determined that Dr. Castle's opinion, that claimant does not have either clinical or legal pneumoconiosis, was entitled to greater weight than Dr. Forehand's opinion, as Dr. Castle, unlike Dr. Forehand, based his opinion upon a review of claimant's medical records, in addition to the results of his examination of claimant. Decision and Order – Denial of Benefits at 18; Director's Exhibits 10, 14; Employer's Exhibits 1, 2; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Pastva v. The Youhiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985).

Contrary to claimant's contention, Dr. Castle set forth the objective data obtained by Drs. Cardona and Forehand and explained why this data did not support their diagnoses of clinical and/or legal pneumoconiosis. Employer's Exhibit 1 at 6. Dr. Castle also addressed both clinical and legal pneumoconiosis in his opinion, indicating that the

majority of Board-certified radiologists and B readers did not diagnose pneumoconiosis, and that any impairment suffered by claimant was related to obesity and/or back problems. *Id*. at 6-7. In addition, there is no support for claimant's assertion that Dr. Castle's opinion was tainted by his reliance upon an affidavit in which the duration of claimant's exposure to coal dust was estimated to have been thirty-four days. Dr. Castle explicitly cited claimant's statement that he had worked for twenty-three years in the coal mine industry and indicated that claimant "worked in or around the underground mining industry for a sufficient enough time to have developed coal workers' pneumoconiosis if he were a susceptible host." *Id*. Lastly, claimant is incorrect in suggesting that the administrative law judge was required to discredit Dr. Castle's opinion because the doctor did not identify the cause of claimant's asthma, which was only noted by history in the reports of Drs. Castle and Forehand.[4] *See Clark*, 12 BLR at 1-151.

Because we have affirmed the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we must also affirm the denial of benefits under Part 718. *Anderson*, 12 BLR at 1-112.

We will now turn to employer's cross-appeal. Employer asserts that the administrative law judge erred in using claimant's initials, rather than his full name, to identify him on the first page of the Decision and Order – Denial of Benefits. Employer also argues that the administrative law judge erred in excluding Mr. Delone Brock's hearing testimony regarding the extent to which claimant was exposed to dust in his coal mine construction work. Employer further asserts that the administrative law judge erred in finding that employer failed to rebut the presumption, set forth in 20 C.F.R. §725.202(b)(1), that claimant was exposed to coal mine dust during all of the periods of his employment that occurred in or around coal mines.

With respect to employer's argument concerning the administrative law judge's use of initials to identify claimant, the Director has responded and urges that Board to reject employer's allegation of error. The Director notes that 20 C.F.R. §725.477(b), the regulation that employer cites in support of its allegations, has been revised and no longer requires identification of parties by name. The Director also maintains that employer was

[4] Because we have affirmed the administrative law judge's determination that Dr. Castle's opinion was entitled to greater weight than Dr. Forehand's opinion, as Dr. Castle relied upon a more extensive documentary record, we need not address claimant's argument that the administrative law judge erred in finding that Dr. Castle has qualifications superior to those possessed by Dr. Forehand. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983).

not aggrieved by the administrative law judge's action, as claimant was identified by name on a cover sheet attached to the Decision and Order – Denial of Benefits.

When the administrative law judge issued his Decision and Order on August 29, 2006, Section 725.477(b) provided that a "decision and order shall contain…the names of the parties." 20 C.F.R. §725.477(b) (2006). The Department of Labor issued a revised version of Section 725.477(b) on January 30, 2007, in which the latter requirement was stricken. 20 C.F.R. §725.477(b) (2007); 72 Fed. Reg. 4205 (Jan. 30, 2007). As the Director asserts, the administrative law judge's Decision and Order – Denial of Benefits is clearly in compliance with the regulation now in effect. We further hold that the administrative law judge was in substantial compliance with the prior version of Section 725.477(b), as he included a cover sheet on which claimant was identified by name. With respect to the concerns raised by employer regarding impediments to tracking the subsequent history of a claim and performing legal research, they are merely speculative and do not constitute evidence that employer has suffered prejudice in this case. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158 (1985). Thus, the administrative law judge did not commit error in identifying claimant by his initials on the first page of the Decision and Order – Denial of Benefits.

We decline to reach the arguments that employer has raised regarding the administrative law judge's exclusion of Mr. Brock's hearing testimony on employer's status as responsible operator and his determination that employer did not rebut the presumption, set forth in Section 725.202(b)(1), that claimant was regularly exposed to coal mine dust. In light of our affirmance of the denial of benefits on the merits in this case, we need not address the administrative law judge's findings regarding the responsible operator issue. *Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits and Decision and Order – Denial of Reconsideration Request are 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