

BRB No. 01-0307 BLA

VERNON AVERY YATES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LITTLE SIX COAL CORPORATION	)	
	)	
Employer-Respondent	)	DATE ISSUED:_____
	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (99-BLA-0022) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits 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,

<sup>1</sup>Claimant is Vernon Avery Yates, the miner, who filed his claim for benefits on August 19, 1991. Director's Exhibit 1. The miner's claim was denied on November 4, 1997 by the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 66. On May 5, 1998, claimant requested modification, the district director denied this request, and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 67, 69, 72.

30 U.S.C. §901 *et seq.* (the Act).<sup>2</sup> Initially, the administrative law judge noted the parties

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<sup>2</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). While claimant and employer submitted supplemental briefs in response to the Board's order, the court's decision renders moot those arguments made by claimant and employer regarding the impact of the challenged regulations.

stipulated that claimant has “at least” forty-four years of coal mine employment and that Little Six Coal Corporation is the responsible operator, Hearing Transcript at 7-8. Decision and Order at 3. The administrative law judge found that claimant established modification pursuant to 20 C.F.R. §725.310 (2000) based on a change in conditions because the new evidence demonstrates that claimant “suffers from a totally disabling pulmonary condition.” Decision and Order at 4-5. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). Decision and Order at 24-27. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) (2000) and Section 718.202(a)(4) (2000). Claimant’s Brief at 2-7. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.<sup>3</sup>

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).

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<sup>3</sup>We affirm the administrative law judge’s findings pursuant to 20 C.F.R. §718.202(a)(2)-(a)(3) (2000) as they are unchallenged on appeal. 20 C.F.R. §718.202(a)(2)-(a)(3); see *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(1) (2000), the administrative law judge considered all the x-ray evidence in the record, noting that the only two positive interpretations were rendered by Dr. Alexander, a B-reader<sup>4</sup> and a Board-certified radiologist, on the films dated August 15, 1997 and August 4, 1998. Decision and Order at 24. The administrative law judge found Dr. Alexander's positive reading on each film to be outweighed by the four negative interpretations of each x-ray, two of which were rendered by Drs. Wheeler and Scott, who are also B-readers and Board-certified radiologists. *Id.* Accordingly, the administrative law judge found the August 15, 1997 and the August 4, 1998 x-rays to be negative for the existence of pneumoconiosis. *Id.* Since all of the readings of the other seventeen x-rays in the record were also negative, the administrative law judge permissibly found that "the preponderance of the chest x-ray interpretations does not support a finding of pneumoconiosis."<sup>5</sup> Decision and Order at 24 (emphasis in original); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Claimant asserts that "employer has not only failed to rebut the x-ray evidence, but has confirmed the diagnosis of cwp (emphysema)" by the x-ray evidence. Claimant's Brief at 3. In claimant's brief, he makes several references to employer's failure to rebut a presumption, but does not specify which presumption employer has failed to rebut. Claimant's Brief at 2-4, 7. Because claimant filed his claim in 1991, *see* n.1, *supra*, he is not entitled to the interim presumption at 20 C.F.R. Part 727. 20 C.F.R. §§718.2, 727.101. Moreover, there are no other presumptions that would assist claimant in establishing the existence of pneumoconiosis available to him in this case. *See* 20 C.F.R. §718.202(a)(3); *see*

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<sup>4</sup>A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

<sup>5</sup>Similarly, the administrative law judge found that the CT scan evidence was negative for the existence of pneumoconiosis. Decision and Order at 24-25. In doing so, the administrative law judge, considering the physicians' qualifications, found that the four negative interpretations outweighed Dr. Alexander's positive interpretation of the July 15, 1997 CT scan. Decision and Order at 25.

*generally Trent, supra*. Additionally, contrary to claimant's assertion, a physician's finding of emphysema on an x-ray, without more elaboration, is not indicative of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See* 20 C.F.R. §§718.102(b) (2000), 718.202(a)(1); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990). Therefore, inasmuch as the administrative law judge properly concluded that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence, we affirm the administrative law judge's finding. *See* 20 C.F.R. §718.202(a)(1); *Ondecko, supra*.

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred in crediting the opinions of Drs. Fino and Castle. Claimant's Brief at 3-7. In his Decision and Order, the administrative law judge thoroughly discussed all of the medical opinions in the record and noted that Drs. Saado and Joshi mention pneumoconiosis in their medical notes on claimant, that Drs. Alderman and Paranthaman diagnosed pneumoconiosis, and that Drs. Fino, Castle, McSherry, and Sargent found that claimant does not suffer from coal workers' pneumoconiosis.<sup>6</sup> Decision and Order at 15-24, 25-27. Regarding the opinion

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<sup>6</sup>The administrative law judge gave "reduced probative value" to the opinions of Drs. Sargent and Paranthaman because these physicians relied on dated medical documentation to support their conclusions. *See 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). The administrative law judge accorded less weight to the opinions of Drs. McSherry and Saado inasmuch as he found that these two physicians did not provide sufficient reasoning for their conclusions. *See Clark, supra; Fields, supra; see also Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Claimant does not specifically challenge the administrative law judge's discrediting of these opinions, and thus we affirm the administrative law judge in this regard. *See Coen v. Director, OWCP*, 7 BLR 1-30

of Dr. Fino, the administrative law judge initially noted that Dr. Fino, who examined claimant twice and conducted two medical evidence reviews, “had an exceptionally well documented basis for his medical conclusion that [claimant] does not have pneumoconiosis.”

Decision and Order at 27. However, the administrative law judge accorded less probative value to Dr. Fino’s opinion because he did not address the presence of pneumoconiosis as defined in the regulations, focusing on whether claimant has clinical pneumoconiosis rather than considering whether coal dust exposure may have caused claimant’s obstructive pulmonary impairment. *Id.* Inasmuch as the administrative law judge did not credit Dr. Fino’s opinion, we render moot claimant’s contentions regarding this physician’s opinion. *See Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984); *see generally Cregar v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

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(1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Considering Dr. Castle's opinion, the administrative law judge found that this physician "provided the most probative, in relative terms, medical opinion in the record" and found that Dr. Castle's opinion is most consistent with the objective medical evidence in the record.<sup>7</sup> Decision and Order at 27. The administrative law judge stated that while Dr. Castle did not actually examine claimant, this physician considered the examination reports as well as claimant's medical history, which, the administrative law judge found, provided Dr. Castle with "a broad documentary basis for his assessment."<sup>8</sup> *Id.* Therefore, the administrative law judge concluded that claimant has not established the existence of pneumoconiosis based on the "well documented and reasoned medical analysis" provided by Dr. Castle.<sup>9</sup> *Id.*; see *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 additionally asserts that the administrative law judge erred in failing to accord greater weight to claimant's treating physicians' opinions. Claimant's Brief at 2, 6. While the administrative law judge considered that Dr. Alderman treated claimant for several years and that Dr. Joshi treated claimant from February 1995 through, at least, June 1998, he chose to accord both these opinions diminished probative value. Decision and Order at 25-

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<sup>7</sup>The administrative law judge additionally stated that Dr. Castle, "in his exhaustive analysis did partly focus on an absence of a restrictive component," but this physician "also acknowledged and considered that pneumoconiosis could also present itself with only an obstructive component." Decision and Order at 27; see *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

<sup>8</sup>Contrary to claimant's assertion, an administrative law judge is not required to give less weight to a reviewing physician's opinion. See *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); see also *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).

<sup>9</sup>We reject claimant's assertion that Dr. Castle was influenced by the fact that his opinion was rendered for employer inasmuch as there is no evidence in the record to support claimant's assertion that this physician was biased against claimant. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); see also *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1993). Additionally, claimant's objection to Dr. Castle's interpretation of claimant's testimony regarding his smoking history is without merit. Claimant's Brief at 5. As a reviewing physician rendering an opinion regarding whether or not claimant has pneumoconiosis, it was reasonable for Dr. Castle to consider the evidence in the record concerning claimant's smoking history and determine that claimant's smoking history was more extensive than what claimant testified to.

26. The administrative law judge found Dr. Alderman's opinion was "not as well documented nor reasoned as the other medical opinions in the record" because this physician did not consider any objective medical evidence later than 1993 and did not explain the impact of claimant's former cigarette use on his pulmonary problems. *Id.* Moreover, the administrative law judge found Dr. Joshi did not explain the bases for his conclusions, therefore, he found this physician's opinion was not well reasoned. Decision and Order at 26. Accordingly, contrary to claimant's contention, the administrative law judge properly did not accord greater weight to the opinions of Drs. Alderman and Joshi solely on the basis of their status as treating physicians, but considered other factors, *i.e.* whether these opinions are documented and reasoned. *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).

Inasmuch as an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met its burden of proof, *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we hold that the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence. *See* 20 C.F.R. §718.202(a)(4); *Ondecko, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Additionally, in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000), the administrative law judge weighed all of the x-ray, CT scan, and medical opinion evidence together and properly concluded that claimant failed to establish the existence of pneumoconiosis. *See* discussion, *supra*. Therefore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a).

Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, *see Trent, supra*; *Perry, supra*, we also affirm his denial of benefits.<sup>10</sup>

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<sup>10</sup>The administrative law judge considered the case law regarding modification and concluded that "the modification process has been expanded so much that an administrative law judge essentially has to reconsider the underlying decision." Decision and Order at 4.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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Therefore, the administrative law judge found that claimant has established a change in conditions pursuant to 20 C.F.R. §725.310(a) (2000). *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). We deem any error the administrative law judge may have made in this regard to be harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as he considered all the evidence to determine whether claimant is entitled to benefits on the merits of his case. *See Jessee, supra; Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge