BRB Nos. 04-0557 BLA
and 04-0557 BLA-A

DAVID G. HERRON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 03/16/2005
	)	
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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 – Denying Benefits (2003-BLA-5914) of Administrative Law Judge Mollie W. Neal on 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). The administrative law judge found fourteen years of qualifying coal mine employment pursuant to the parties' stipulation and, after considering all of the evidence of record, found that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204. Decision and Order at 4-13. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and further erred in not finding total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). On cross-appeal, employer contends that, although the administrative law judge's denial of benefits was proper, the administrative law judge erred in applying 20 C.F.R. §725.414 to limit its submission of evidence. Employer argues that the evidentiary limitations are in violation of the Act and asserts that, pursuant to 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), all relevant evidence must be considered by the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, responds, and urges that the Board reject employer's assertions on cross-appeal and hold that Section 725.414 is consistent with the Act.[1]

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 be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[1] The administrative law judge's length of coal mine employment determination, and his finding that the evidence of record could not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[2] Claimant's assertion that the administrative law judge erred in failing to find the existence of pneumoconiosis established lacks merit. The administrative law judge considered the entirety of the x-ray evidence of record and rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). He permissibly found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) because the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 14, 15, 18, 19; Employer's Exhibits 1,3; Decision and Order at 5; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). We therefore reject claimant's argument and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant further contends that the administrative law judge erred in not finding the existence of pneumoconiosis established based upon the medical opinions of Drs. Baker and Simpao. Claimant's Brief at 4-5. We disagree. In determining whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed all of the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions were supported by their underlying documentation and were adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR at 1-108; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-155; *Kuchwara*, 7 BLR at 1-170; Decision and Order at 7-11. The administrative law judge acted within his discretion, as fact-finder, in concluding that Dr. Baker's opinion was insufficient to support a finding of pneumoconiosis because the physician's diagnosis of pneumoconiosis was based only upon claimant's coal mine employment history, and upon Dr. Baker's positive x-ray reading, which was re-read as negative by Dr. Wiot, a B-reader and board-certified radiologist.[3] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569,

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[3] 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

22 BLR 2-107 (6th Cir. 2000); *Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); Decision and Order at 10; Director's Exhibit 15; Employer's Exhibit 3. Further, the administrative law judge found that, while Dr. Baker was claimant's treating physician, the physician's opinion was not entitled to controlling weight pursuant to 20 C.F.R. §718.104(d)[4] as Dr. Baker had only treated claimant "for a year or so" and did not provide treatment records or testimony regarding the nature and extent of his treatment of claimant. Decision and Order at 10. Therefore, the administrative law judge rationally concluded that Dr. Baker's opinion was not entitled to dispositive weight based on his status as claimant's treating physician. 20 C.F.R. §718.104(d); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-624 (6th Cir. 2003); *Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495. The administrative law judge further acted within his discretion in according less weight to the opinion of Dr. Simpao because, while he found the opinion to be well-reasoned and documented, the credibility of the opinion was "diminished" in part due to Dr. Simpao's reliance on a positive x-ray reading later re-read as negative, and because the physician was not as well-qualified as those physicians rendering contrary opinions. Decision and Order at 9, 10; *see Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Tedesco*, 18 BLR 1-103; *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).

Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Dahhan and Jarboe that claimant does not have pneumoconiosis because

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established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, 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). The record establishes only B-reader credentials for Dr. Baker. Director's Exhibit 15.

[4] Section 718.104(d) provides that a treating physician's opinion may be accorded superior weight based upon:

a) the nature of the physician/claimant relationship
b) the duration of that relationship
c) the frequency of the physician's treatment
d) the extent of the treatment

The regulation also requires the administrative law judge to consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

he found that the physicians offered well-reasoned and documented opinions that were supported by the objective medical evidence of record, and the physicians' superior qualifications. *See Williams*, 338 F.3d 501, 22 BLR 2-623; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR at 1-108; *Trumbo*, 17 BLR at 1-89; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel*, 8 BLR 1-139 (1985); Decision and Order at 10; Director's Exhibit 178; Employer's Exhibits 1, 4, 5. We therefore affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement is precluded and we need not address the administrative law judge's additional findings pursuant to 20 C.F.R. §718.204. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Likewise, because we affirm the administrative law judge's denial of benefits, we need not reach employer's arguments on cross-appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984). We note that the Board has previously rejected arguments raised by employer in its cross-appeal with respect to the validity of Section 725.414. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004).

Accordingly, the administrative law judge's Decision and Order – Denial of 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