BRB Nos. 07-0988 BLA
and 07-0988 BLA-A

N.B.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 08/26/2008
ISLAND CREEK 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-Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

N.B., Oakwood, Virginia, *pro se*.[1]

Kathy L. Snyder and Seth P. Hayes (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

[1] Brenda Yates, a lay representative with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Yates is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant appeals, without the assistance of counsel, and employer cross-appeals the Decision and Order-Denial of Benefits (06-BLA-5094) of Administrative Law Judge Richard T. Stansell-Gamm 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). Claimant filed his third and instant claim on February 5, 2004.[2] Initially, the administrative law judge excluded from the record two positive interpretations of chest x-rays dated February 26, 2003 and March 9, 2004, that were submitted by claimant and the Director, Office of Workers' Compensation Programs (the Director). The administrative law judge then credited claimant with at least twenty-three years of coal mine employment, as stipulated.[3] The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) by establishing total disability pursuant to 20 C.F.R. §718.204(b)(2) based on new evidence. Considering the claim on its merits, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's finding on the merits that claimant did not establish the existence of pneumoconiosis, and thus responds in support of the administrative law judge's denial of benefits. However, employer has

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[2] Claimant's first claim, filed on August 10, 1992, was denied on October 27, 1992, because claimant did not establish total disability. Director's Exhibit 1. Claimant's second claim, filed on June 28, 1995, was denied on October 9, 1997, because claimant did not establish total disability. [*N.B.*] *v. Island Creek Coal Co.*, BRB No. 97-0241 BLA (Oct. 9, 1997)(unpub.); Director's Exhibit 1. Claimant requested modification on March 2, 1998. Director's Exhibit 1. Administrative Law Judge Richard A. Morgan denied claimant's modification request on August 3, 1999, because claimant did not establish the existence of pneumoconiosis, total disability, or total disability due to pneumoconiosis. Director's Exhibit 1. Subsequently, the Board affirmed Judge Morgan's denial of benefits on October 31, 2000, affirming the finding that claimant did not establish the existence of pneumoconiosis. [*N.B.*] *v. Island Creek Coal Co.*, BRB No. 99-1194 BLA (Oct. 31, 2000)(unpub.). The United States Court of Appeals for the Fourth Circuit affirmed the Board's decision on May 18, 2001. [*N.B.*] *v. Island Creek Coal Co.*, No. 00-2430 (4th Cir. May 18, 2001).

[3] The record indicates that claimant's coal mine employment was in Virginia. Decision and Order at 10; Director's Exhibit 4. 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*).

also filed a cross-appeal, challenging the administrative law judge's weighing of certain medical opinions concerning the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and his finding that total disability was established pursuant to 20 C.F.R. §§718.204(b)(2) and 725.309(d).[4] Employer states that the Board need not address its cross-appeal if the administrative law judge's denial of benefits is affirmed. The Director declined to file a substantive response brief to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

We first address the administrative law judge's evidentiary rulings that were adverse to claimant in this case. The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). The administrative law judge excluded Dr. Pathak's positive reading of the February 26, 2003 x-ray submitted by claimant. The administrative law judge committed no abuse of discretion in excluding Dr. Pathak's reading. The applicable regulation entitled claimant to submit "no more than two chest X-ray interpretations" in support of his affirmative case. 20 C.F.R. §725.414(a)(2)(i). The administrative law judge accurately determined that claimant had already designated interpretations of the January 16, 2006 x-ray by Drs. Ahmed and Alexander as his two affirmative case x-ray interpretations. Further, the administrative law judge rationally found that Dr. Pathak's reading was not a treatment record that would be admissible pursuant to 20 C.F.R. §725.414(a)(4), because Dr. Pathak indicated that claimant had been referred to him by Stone Mountain Health Services, the same entity that represented claimant in his black lung claim at the hearing. *See* 20 C.F.R. §725.414(a)(2), (a)(4); Decision and Order at 3; Administrative Law Judge's Exhibit 2 at 2; Proposed Director's Exhibit 11.

[4] Specifically, employer challenges the administrative law judge's discounting of the opinions of Drs. Fino and Spagnolo pursuant to 20 C.F.R. §718.202(a)(4), and argues that the administrative law judge erred in finding that the blood gas studies established total disability without considering the contrary probative evidence of record pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d). Employer does not challenge the administrative law judge's rulings excluding excess evidence that was submitted by employer.

The administrative law judge also excluded the positive x-ray interpretation of the March 9, 2004 x-ray by Dr. Forehand, that was submitted by the Director as part of the initial complete pulmonary evaluation provided to claimant by the Department of Labor. The administrative law judge committed no abuse of discretion in excluding this reading. As the administrative law judge found, the Department later substituted Dr. Rasmussen's report as the complete pulmonary evaluation of record, and claimant had not designated Dr. Forehand's reading as part of his affirmative x-ray evidence. *See* 20 C.F.R. §725.414(a)(2), (a)(3); Decision and Order at 3-5; Administrative Law Judge's Exhibits 2 at 2, 3 at 2; Proposed Director's Exhibit 14; Proposed Claimant's Exhibit 3. Detecting no abuse of discretion, we affirm the administrative law judge's evidentiary rulings excluding these two x-ray readings. *See Clark*, 12 BLR at 1-153.

We next address the administrative law judge's consideration of the merits of entitlement. 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 one of these elements precludes 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).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered multiple readings of twenty-five x-rays taken between 1974 and 2006, and considered the readers' radiological qualifications. Of the twenty-five x-rays, the administrative law judge noted that four x-rays received only positive readings, nine received only negative readings, and another five received readings that were inconclusive for the presence or absence of pneumoconiosis. Substantial evidence supports these findings.

Turning to the seven x-rays that the administrative law judge found to have received conflicting readings, the administrative law judge noted accurately that Dr. Fritz, a Board-certified radiologist, read the August 31, 1992 x-ray as positive for pneumoconiosis, but that Dr. Sargent, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Based on Dr. Sargent's "superior credentials," the administrative law judge permissibly found the August 31, 1992 x-ray to be negative for pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 14; Director's Exhibit 1.

Similarly, the administrative law judge properly found that the negative readings of the September 1, 1994 x-ray by two Board-certified radiologists and B-readers (Drs. Spitz and Wiot) and two B readers (Drs. Castle and Fino), outweighed the "inconclusive" finding of interstitial fibrosis reported by Dr. Patel, whose radiological qualifications are

not of record.[5] *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 14; Director's Exhibit 1. Additionally, the administrative law judge correctly noted that Dr. Francke, a Board-certified radiologist and B reader, and Dr. Forehand, a B reader, both interpreted the September 12, 1995 x-ray as positive for pneumoconiosis, and that Drs. Spitz, Wheeler, and Wiot, all of whom are Board-certified radiologists and B readers, interpreted the same x-ray as negative for pneumoconiosis. Based on the preponderance of the readings by the "better qualified radiologists," the administrative law judge reasonably found the September 12, 1995 x-ray to be negative for pneumoconiosis. *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 14; Director's Exhibit 1.

Next, the administrative law judge reasonably found that the October 10, 1997 x-ray was positive for pneumoconiosis, since Dr. Alexander, a Board-certified radiologist and B reader, read the x-ray as positive for pneumoconiosis and his "dual qualifications" were superior to those of the B readers, Drs. Castle and Hippensteel, who had read the x-ray as negative for pneumoconiosis.[6] *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 14; Director's Exhibit 1. Further, the administrative law judge properly found that the August 17, 1998 x-ray was negative for pneumoconiosis, based on the consensus of the qualified physicians, Drs. Castle, Hippensteel, Scott, Wheeler, and Wiot, over the lone positive reading by Dr. Westerfield, whose radiological credentials are not of record. *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 14; Director's Exhibit 1.

Finally, the administrative law judge permissibly found that the last two x-rays, dated January 11, 2005 and January 16, 2006, were inconclusive for the existence of pneumoconiosis because equally qualified physicians "reached contrary, and off-setting, interpretations." *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; *Chaffin*, 22 BLR at 1-300; Decision and Order at 14; Director's Exhibits 16, 20; Claimant's

[5] The administrative law judge provided no explanation for apparently considering Dr. Patel's finding of "interstitial fibrosis" to be a positive reading for the existence of pneumoconiosis, but any error was harmless in view of the administrative law judge's finding that the qualified readings of this x-ray were negative for pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[6] The record reflects that the administrative law judge did not consider Dr. Wiot's opinion that the October 10, 1997 x-ray was unreadable. Director's Exhibit 1. We conclude that any error by the administrative law judge was harmless, in view of his finding that the weight of the overall x-ray evidence did not establish the existence of pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

Exhibits 1, 2; Employer's Exhibits 5, 8. Substantial evidence supports this finding. As the administrative law judge found, Drs. Patel and Wheeler, both of whom are Board-certified radiologists and B readers, read the January 11, 2005 x-ray as positive and negative, respectively, and on the January 16, 2006 x-ray, four Board-certified radiologists and B readers, Drs. Ahmed, Alexander, Scott, and Scatarige, rendered evenly split, positive and negative readings.

Based on the foregoing analysis of each individual x-ray, the administrative law judge determined that overall, five x-rays were positive for pneumoconiosis, thirteen were negative, and seven were inconclusive. He therefore found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1). It is therefore affirmed.

The administrative law judge properly found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), as there is no biopsy evidence or evidence of complicated pneumoconiosis, in this living miner's claim filed after January 1, 1982. *See* 20 C.F.R. §718.202(a)(2), (3); Decision and Order at 10.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions and treatment records of fifteen different physicians.[7] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[8] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the medical opinion evidence established the existence of clinical pneumoconiosis, the administrative law judge permissibly discounted the opinions of Drs. Briggs, Forehand, Modi, Rasmussen, and Vishakantiaiah, because their opinions that claimant has clinical pneumoconiosis based on positive x-rays conflicted with the weight of the x-ray evidence, which did not establish the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000); Director's Exhibits 1, 19; Claimant's Exhibits 3, 4; March 18, 1999 Hearing Transcript at 68. Further, the administrative law judge acted within his discretion in discounting Dr. Smiddy's and Dr. Jackson's treatment notes diagnosing clinical coal workers' pneumoconiosis, because neither physician identified any specific medical evidence to support this diagnosis.

[7] We will focus on the administrative law judge's analysis of only those physicians' reports and records that were supportive of claimant's case.

[8] "Legal pneumoconiosis" includes any chronic disease or impairment of the lung and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Fuller v. Gibraltar Coal Corp., 6 BLR 1-1291, 1-1294 (1984); Director's Exhibit 1. Substantial evidence supports the foregoing findings.

In considering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge properly found that Dr. Caday did not diagnose legal pneumoconiosis in a May 1987 hospitalization report, because he did not relate claimant's hypoxemia to his coal mine employment. 20 C.F.R. §718.201(a)(2); Decision and Order at 27; Director's Exhibit 1. Additionally, the administrative law judge permissibly discounted the opinions of Drs. Briggs, Modi, Piriz, Rasmussen, and Vishakantiaiah because they failed to adequately explain their opinions that claimant has legal pneumoconiosis. *See Clark*, 12 BLR at 1-155; Decision and Order at 28-29; Director's Exhibits 16, 19; Claimant's Exhibits 4, 7, 8. Upon review, we conclude that substantial evidence supports these findings.

Having discounted every other opinion of record regarding the existence of legal pneumoconiosis, the administrative law judge was left with those of Drs. Forehand and Hippensteel, which the administrative law judge found to be well-reasoned and documented.[9] Dr. Forehand, who is Board-certified in Allergy and Immunology, opined that claimant has a blood gas transfer impairment that is related to his coal mine dust exposure. Claimant's Exhibit 3. Dr. Hippensteel, who is Board-certified in Internal Medicine and Pulmonary Disease, opined that claimant has no respiratory or pulmonary impairment related to coal mine dust exposure, but does have an impairment that is due to cardiac dysfunction. Employer's Exhibit 4 at 20-25. The administrative law judge acted within his discretion in finding that these two opposing opinions as to whether claimant's breathing problems are related to his coal mine dust exposure were, at best, in equipoise, and that therefore, claimant did not meet his burden of proof. *See Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12. The administrative law judge alternatively found, within his discretion, that "[t]o the extent the balance is tipped in favor of either opinion," Dr. Hippensteel's certification in Pulmonary Disease "adds to the ultimate probative weight of his assessment that [claimant's] breathing difficulties are due to his heart condition and not his exposure to coal mine dust." Decision and Order at 30-31; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998). Substantial

[9] In considering the opinions of Drs. Forehand and Hippensteel, the administrative law judge acted within his discretion to find that neither physician's review of an inadmissible x-ray undercut the probative value of the physician's report, because each physician had also reviewed similar, admissible x-rays that supported his opinion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-09 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2006)(*en banc*).

evidence supports the administrative law judge's credibility determinations. Therefore, we affirm the administrative law judge's finding that claimant did not establish the existence of clinical or legal pneumoconiosis by a preponderance of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4).

Substantial evidence supports the administrative law judge's additional finding that the chest x-ray and medical opinion evidence considered together did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Compton*, 211 F.3d at 211, 22 BLR at 2-174. It is therefore affirmed.

Because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. Consequently, we need not address the arguments raised in employer's cross-appeal.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge