

BRB Nos. 04-0289 BLA  
and 04-0289 BLA-A

RUSSELL ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 09/29/2004
	)	
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 Rudolf L. Jansen,  
Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for  
employer.

Barry H. Joyner (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  
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Denying Benefits (2002-BLA-5064) of Administrative Law Judge Rudolf L. Jansen 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 credited claimant with twelve years of coal mine employment, based on a stipulation of the parties. Decision and Order at 4; Hearing Transcript at 25-26. Addressing the merits of entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 9-11. Moreover, the administrative law judge found the evidence insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 11-13. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the x-ray and medical opinion evidence insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). In addition, claimant contends that the administrative law judge erred in failing to find that claimant established a total respiratory disability based on the medical opinion evidence pursuant to Section 718.204(b)(2). In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response to claimant's brief.<sup>1</sup>

In its cross-appeal, employer asserts that the limitations on the development of medical evidence contained at 20 C.F.R. §725.414 are invalid. Employer further asserts, assuming *arguendo* that the regulations at Section 725.414 are valid, that the administrative law judge erred in his application of this regulation.<sup>2</sup> Specifically,

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<sup>1</sup> The parties do not challenge the administrative law judge's decision to credit claimant with twelve years of coal mine employment or his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i), (ii) and (iii). These findings, therefore, are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>2</sup> The administrative law judge reiterated his holding from the formal hearing to exclude from consideration three medical reports and two x-ray interpretations, *see* Employer's Exhibits 7-10, as exceeding the limitations set forth at 20 C.F.R. §725.414(a)(2)(ii) and (3)(ii). Decision and Order at 5; Hearing Transcript at 15-23. Additionally, the administrative law judge limited consideration of Dr. Repsher's November 2, 2002 medical report to his discussion of the pulmonary function study and blood gas study evidence offered by claimant, and excluded the remainder of the medical

employer contends that the administrative law judge erred in excluding the October 17, 2002 medical report of Dr. Broudy, Employer's Exhibit 7, and Dr. Barrett's x-ray interpretation, Director's Exhibit 23. In addition, employer contends that the administrative law judge erred in limiting consideration of Dr. Repsher's medical report. In response, the Director urges the Board to reject employer's assertion that the evidentiary limitations at Section 725.414 are invalid. Director's May 10, 2004 Letter at 1-4. Additionally, the Director asserts that the administrative law judge erred in excluding Dr. Broudy's October 17, 2002 medical report, *id.* at 4-5, but properly excluded the x-ray interpretation by Dr. Barrett and limited consideration of Dr. Repsher's medical report. *Id.* at 5-6.

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 to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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.<sup>3</sup> The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. Decision and Order at 9-11; *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding that a preponderance of the x-ray interpretations by

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report as being outside of the scope of proper rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii). Decision and Order at 5.

<sup>3</sup> 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 2.

the better qualified physicians was negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 6, 9; *see Staton v. Norfolk & Western Ry. 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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). While noting the presence of a positive x-ray interpretation by Dr. Hussain, the administrative law judge, nonetheless, reasonably found that this interpretation was outweighed by the negative interpretations by physicians who are at least B readers.<sup>4</sup> Decision and Order at 9; Director's Exhibits 9, 10, 22; Employer's Exhibits 1, 2. Since the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), we affirm the administrative law judge's weighing of the x-ray evidence as it is supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton*, 65 F.3d 55, 19 BLR 2-271; *Woodward*, 991 F.2d 314, 17 BLR 2-77; *Edmiston*, 14 BLR 1-65. In addition, we reject claimant's general contention that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3. Claimant has not provided any support for this assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal a selective analysis of the x-ray evidence.

Claimant next generally contends that it was error for the administrative law judge to discredit the medical opinions of Drs. Baker and Hussain. Rather, claimant contends that these opinions are sufficiently reasoned to establish entitlement to benefits. Claimant also argues that the administrative law judge erred in finding Dr. Baker's opinion to be equivocal. We disagree.

With regard to Dr. Baker's opinion diagnosing the existence of pneumoconiosis, the administrative law judge found that Dr. Baker initially opined that claimant had a chronic obstructive disease unrelated to his coal mine employment, but later, in the same report, stated that claimant's impairment was due, at least in part, to his coal mine employment.<sup>5</sup> Decision and Order at 10; Director's Exhibit 10. Based on this

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<sup>4</sup> The administrative law judge correctly found the record contains six readings of four chest x-ray films, of which, the only positive interpretation was by Dr. Hussain, who does not possess any special radiological qualifications. Decision and Order at 9; Director's Exhibit 9. The remaining x-ray interpretations were negative for the existence of pneumoconiosis, of which, four were provided by physicians who are either B readers or dually qualified as B readers and Board-certified radiologists. Decision and Order at 9; Director's Exhibits 10, 22; Employer's Exhibits 1, 2.

<sup>5</sup> Dr. Baker stated that claimant may have some degree of airway impairment from his sixteen years of coal dust exposure. Director's Exhibit 10.

inconsistency, the administrative law judge found Dr. Baker's opinion to be equivocal and, thus, assigned it less weight. Decision and Order at 10. The administrative law judge found the remainder of the medical opinions to be well documented and reasoned. Specifically, the administrative law judge found that Dr. Hussain's opinion, which diagnosed the existence of pneumoconiosis, was reasoned and documented and thus, "entitled to full weight." Decision and Order at 10; Director's Exhibit 9. However, the administrative law judge found the opinion of Dr. Hussain was outweighed by the contrary opinions of Drs. Dahhan and Broudy, that claimant was not suffering from pneumoconiosis.<sup>6</sup> The administrative law judge found the opinions of Drs. Dahhan and Broudy were well documented and better reasoned as the physicians better explained their findings that claimant was not suffering from pneumoconiosis. Decision and Order at 10; Director's Exhibit 22; Employer's Exhibit 2. Consequently, the administrative law judge found that "the evidence fails to support a finding of pneumoconiosis" pursuant to Section 718.202(a)(4). *Id.*

Based on a review of the record and the issues raised on appeal, we affirm the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis as supported by substantial evidence. In particular, we affirm the administrative law judge's decision to accord Dr. Baker's opinion less weight as the administrative law judge reasonably exercised his discretion in finding this opinion to be equivocal based on the inconsistency in Dr. Baker's diagnoses. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984).

Moreover, contrary to claimant's general contentions, the administrative law judge did not discredit the medical opinions of Dr. Hussain or Dr. Baker because their reports were based on a positive x-ray. *See Claimant's Brief* at 5. Rather, the administrative law judge found that the opinion of Dr. Hussain, while including a positive x-ray interpretation, was, nonetheless, reasoned and documented. Decision and Order at 10; Director's Exhibit 9. Likewise, the administrative law judge did not discredit the opinion of Dr. Baker because it was based on a positive x-ray reading, but rather, rationally found the medical report entitled to less weight because it was equivocal, *see discussion, supra*. Consequently, claimant's contentions are rejected as they lack merit. Because claimant does not identify any additional error in the administrative law judge's weighing of the medical opinion evidence, we affirm, as unchallenged on appeal, *see Skrack v. Island*

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<sup>6</sup> The administrative law judge found that Drs. Hussain, Dahhan and Broudy are all pulmonary specialists and, thus their opinions were entitled to additional weight. Decision and Order at 10; Director's Exhibits 9, 22; Employer's Exhibit 2.

*Creek Coal Co.*, 6 BLR 1-710 (1983), the administrative law judge's finding that the remaining medical opinions are insufficient to carry claimant's burden of establishing the existence of pneumoconiosis at Section 718.202(a)(4). Decision and Order at 10-11.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. See *Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In this case, claimant is doing no more than requesting that we reweigh the evidence, which we cannot do. *Anderson*, 12 BLR at 1-113. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. See *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.<sup>7</sup> See *Hill*, 123 F.3d 412, 21 BLR 2-192; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. We, therefore, need not address the arguments, regarding Section 725.414, raised in employer's cross-appeal.<sup>8</sup>

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<sup>7</sup> In light of our affirmance of the administrative law judge's finding that the medical evidence of record was insufficient to establish the existence of pneumoconiosis, a necessary element of entitlement, we decline to address claimant's contentions regarding the administrative law judge's weighing of the evidence under 20 C.F.R. §718.204(b)(2)(iv). See *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); see also *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

<sup>8</sup> Employer asserts that because "it is likely that the claimant will request modification, ... [i]t will greatly complicate the modification proceedings if the evidentiary issues in the original claim are left unresolved." Employer's Brief in Support of Cross-Petition for Review at 16. We reject employer's assertion that the Board must address the contentions it has raised on cross-appeal. Because we affirm the administrative law judge's denial of benefits, see discussion, *supra*, it is not necessary to the adjudication of this appeal to address the issues raised by employer in its cross-appeal.

Accordingly, the administrative law judge's Decision and Order - Denying 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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JUDITH S. BOGGS  
Administrative Appeals Judge