BRB Nos. 04-0672 BLA
and 04-0672 BLA-A

DONALD E. GILBERT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 05/31/2005
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy Myers Cogan Voegelin & Tennant LC), Wheeling, West Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order (03-BLA-5986) of Administrative Law Judge Michael P. Lesniak denying benefits 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 at least thirty years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), he found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[1] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer contends that the administrative law judge abused his discretion by excluding Dr. Altmeyer's deposition testimony from the record. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's cross-appeal, contending that the administrative law judge properly excluded Dr. Altmeyer's deposition testimony.[2]

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).

Initially, we will address employer's assertion, on cross-appeal, that the administrative law judge abused his discretion by excluding Dr. Altmeyer's deposition testimony from the record. In an Order dated January 26, 2004, the administrative law judge granted claimant's request to exclude Dr. Altmeyer's deposition testimony in accordance with the evidentiary limitations set forth at 20 C.F.R. §725.414. In considering whether to admit Dr. Altmeyer's

[1]In view of the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge found that the issues of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §718.203 and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) are moot.

[2]Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

deposition testimony, the administrative law judge specifically stated:

> The medical reports that [e]mployer has submitted as its affirmative evidence in this claim are those of Drs. Rosenberg and Fino. TR 7. Dr. Altmeyer treated the [c]laimant as his pulmonary specialist. TR 6. The regulations allow Dr. Altmeyer's notes from treating [c]laimant to be admitted into evidence. 20 C.F.R. §725.414(a)(4). The regulations also provide for the admission of physicians' depositions into evidence. 20 C.F.R. §725.414(c). However, §725.414(c) allows the depositions of physicians who wrote medical reports in the claim to be admitted into evidence; it makes no provision for the depositions of [c]laimant's treating physician(s). In fact, the Regulations are explicit in limiting the testimony of physicians: §725.414(c) requires a party to show good cause to admit the testimony of any physician beyond the two whose reports are in affirmative evidence; §725.457(2) (sic) requires that any physician testifying about a claimant's medical condition must have prepared a medical report, unless the testimony will be in lieu of a party's written medical report.

Administrative Law Judge's January 26, 2004 Order at 1-2. Further, the administrative law judge stated that employer offered no support for its argument that Dr. Altmeyer's deposition testimony should be admitted into the record because the regulations permit treatment records and allow a preference for the opinions of treating physicians. *Id*. at 2. Lastly, the administrative law judge found that employer did not attempt to make a showing of good cause as to why Dr. Altmeyer's deposition testimony should be admitted into evidence. *Id*.

Section 725.414, in conjunction with Section 725.456(b)(1), sets forth the limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "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). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

At the outset, we reject employer's assertion that Section 725.414 is an invalid regulation. The Board has rejected the argument that Section 725.414 conflicts with Section 923(b) of the Act. 30 U.S.C. §923(b); *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). The Board has also rejected the argument that the evidentiary limitations set forth at Section 725.414 are inconsistent with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Dempsey*, 23 BLR at 1-58.

Employer also asserts that the administrative law judge erred in excluding Dr. Altmeyer's deposition testimony for reasons that claimant did not specifically raise in his motion. Contrary to employer's assertion, claimant is not required to provide reasons for the administrative law judge to exclude medical evidence from the record when that evidence exceeds the evidentiary limitations set forth at 20 C.F.R. §725.414(a). Section 725.456(b)(1) provides that "[m]edical evidence in excess of the limitations contained in §725.414 *shall not* be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1)(emphasis added). Thus, we reject employer's assertion that the administrative law judge erred in excluding Dr. Altmeyer's deposition testimony for reasons that claimant did not specifically raise in his motion.

Employer further asserts that claimant waived his right to object to the admissibility of Dr. Altmeyer's deposition testimony by participating in the deposition. Contrary to employer's assertion, Section 725.456(b)(1) does not include a waiver provision for evidence submitted under Section 725.414. *Smith v. Martin County Coal Corp.*, BRB No. 04-0126 BLA, slip op. at 4 (Oct. 27, 2004)(published). Additionally, claimant's right to cross-examine Dr. Altmeyer as a witness against him would be meaningless if his participation in Dr. Altmeyer's deposition constitutes a waiver to object to its admissibility. *Richardson v. Perales*, 402 U.S. 389 (1971); *Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991). Thus, since the regulations make plain that the evidentiary limitations are mandatory, *see* 20 C.F.R. §§725.414 and 725.456(b)(1), we reject employer's assertion that claimant waived his right to object to the admissibility of Dr. Altmeyer's deposition testimony by participating in the deposition.

Employer additionally asserts that the administrative law judge erred in excluding Dr. Altmeyer's deposition testimony because Dr. Altmeyer's medical treatment record was admitted into the record. Section 725.414(c) provides that a physician who prepared a

medical report admitted into the record may testify with respect to the claim by deposition. Although Dr. Altmeyer's medical treatment records were admitted into the record pursuant to 20 C.F.R §725.414(a)(4),[3] the record does not contain a medical report prepared by Dr. Altmeyer pursuant to 20 C.F.R. §725.414(a)(3)(i). The regulations do not provide that a treating physician who prepared medical treatment records may testify by deposition. Thus, since Dr. Altmeyer did not prepare a medical report that was admitted into the record as one of the medical reports in employer's affirmative case, we reject employer's assertion that the administrative law judge erred in excluding Dr. Altmeyer's deposition testimony because Dr. Altmeyer's medical treatment record was admitted into the record.

In addition, employer asserts that the administrative law judge erred in finding that it did not establish good cause to admit Dr. Altmeyer's deposition testimony into the record. Employer stated that "[t]he very notion of Dr. Altmeyer as treating physician makes his opinion relevant as a matter of law requiring the trier of fact to consider for (sic) enumerated factors. *See* §718.104(d)." Employer's Brief in Support of Cross-Petition for Review at 10. As the Director asserts, while a treating physician's opinion is relevant in a black lung case, an administrative law judge may reasonably find that its relevance alone is not sufficient to establish good cause for its admission into the record. Director's Brief at 5. The administrative law judge, within his discretion as trier-of-fact, must determine whether good cause exists to admit medical evidence that exceeds the evidentiary limitations set forth at 20 C.F.R. §725.456(b). *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Since the administrative law judge reasonably found that employer failed to make a compelling argument for establishing good cause for admitting Dr. Altmeyer's deposition testimony into the record, we affirm the administrative law judge's finding that good cause did not exist to justify the admission of Dr. Altmeyer's deposition testimony into the record.

Next, we address claimant's contentions on the merits of the case. Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record consists of thirty-six interpretations of twenty-three x-rays. Director's Exhibits 19-24, 26; Claimant's Exhibit 1; Employer's Exhibit 6. The administrative law judge properly accorded greater weight to the x-ray readings that were provided by physicians who are dually qualified as B readers and Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Drs. Noble and Wiot are the only physicians of record who are dually qualified as B readers and Board-certified radiologists. Dr. Wiot read the October 14, 1999, March 13,

[3]Section 725.414(a)(4) provides that any record of a miner's hospitalization for respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease may be received into evidence.

2000, September 13, 2000, March 13, 2001, October 29, 2001, and March 6, 2002 x-rays as negative for pneumoconiosis, Director's Exhibit 22; Employer's Exhibit 6, while Dr. Noble read the May 10, 2002 x-ray only as positive for pneumoconiosis, Director's Exhibit 20.

Claimant asserts that the administrative law judge should have accorded dispositive weight to the positive reading of the May 10, 2002 x-ray by Dr. Noble based on application of the "later evidence" rule. In *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, noted that the logic of the "later is better" theory with respect to x-ray evidence only holds where the evidence is consistent with the premise that the miner's condition has worsened.[4] The Fourth Circuit also noted that if the evidence, taken at face value, shows that the miner's condition has improved, the reasoning of the "later is better" theory cannot apply. The Fourth Circuit stated, "[*i*]*t is impossible to reconcile the evidence*." *Adkins*, 958 F.2d at 52, 16 BLR at 2-65 (emphasis in original). Hence, the Fourth Circuit concluded that the reliability of irreconcilable items of evidence must be evaluated without reference to their chronological relationship.

In the instant case, the positive reading of the May 10, 2002 x-ray by Dr. Noble is consistent with the premise that claimant's condition has worsened. Thus, *Adkins* would not prohibit the administrative law judge from applying the "later evidence" rule based on the logic of the theory. Nonetheless, while an administrative law judge may accord greater weight to the most recent evidence, *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983), he is not required to do so, *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983). The May 10, 2002 x-ray was taken only two months after the March 6, 2002 x-ray, an x-ray Dr. Wiot interpreted as negative for pneumoconiosis. Thus, we reject claimant's assertion that the administrative law judge should have accorded dispositive weight to the positive reading of the May 10, 2002 x-ray based on application of the "later evidence" rule. The administrative law judge acted within his discretion in crediting the six negative readings by dually qualified readers over the single positive reading by a similarly qualified radiologist. *Adkins*, 958 F.2d at 52, 16 BLR at 2-66.

Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at

[4]The United States Court of Appeals for the Fourth Circuit stated, "[i]n a nutshell, the [later is better] theory is: (1) pneumoconiosis is a progressive disease; (2) therefore, claimants cannot get better; (3) therefore, a later test or exam is a more reliable indicator of the miner's condition than an earlier one." *Adkins v. Director, OWCP*, 958 F.2d 49, 51, 16 BLR 2-61, 2-65 (4th Cir. 1992).

20 C.F.R. §718.202(a)(1).[5]

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R §718.202(a)(4). The record, as properly found by the administrative law judge, consists of Dr. Altmeyer's medical treatment records, and the reports of Drs. Fino, Lenkey, Ranavaya, Rosenberg, and Saludes. Specifically, the administrative law judge admitted into the record Dr. Altmeyer's medical treatment records pursuant to 20 C.F.R. §725.414(a)(4), as well as the reports of Drs. Ranavaya and Saludes in claimant's affirmative case pursuant to 20 C.F.R. §725.414(a)(2)(i), the reports and depositions of Drs. Fino and Rosenberg in employer's affirmative case pursuant to 20 C.F.R. §725.414(a)(3)(i) and (c), and Dr. Lenkey's pulmonary evaluation pursuant to 20 C.F.R. §725.406.[6] Dr. Altmeyer diagnosed asbestosis. Director's Exhibit 24. Drs. Lenkey, Ranavaya, and Saludes opined that claimant suffers from pneumoconiosis,[7] while Drs. Fino and Rosenberg opined that claimant does not suffer from the disease.[8] Specifically, Dr. Lenkey diagnosed coal workers' pneumoconiosis related to coal dust exposure. Director's Exhibit 14. Similarly, Dr. Ranavaya opined that "[claimant] has Coal Workers' Pneumoconiosis most likely due to his occupational exposure to dust in the coal mining industry and that he has moderately severe disabling pulmonary insufficiency as described which primarily arose from his coal mining dust exposure." Director's Exhibit

[5]Section 725.456(b)(1) specifically states that medical evidence submitted in excess of the Section 725.414 limitations shall not be admitted into the hearing record in the absence of good cause. *See* 20 C.F.R. §725.456(b)(1). In this case, the administrative law judge admitted thirty-six x-ray interpretations into the record without rendering a finding of good cause. Nonetheless, we hold that the administrative law judge's error in admitting x-ray interpretations in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414 is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), since the record contains only one positive x-ray reading by a dually qualified B reader and Board-certified radiologist, that of Dr. Noble. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

[6]Section 725.406 provides that "[t]he results of the complete pulmonary evaluation shall not be counted as evidence submitted by the miner under §725.414." 20 C.F.R. §725.406.

[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), is sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

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

28. Dr. Saludes, in a hospital report, opined that "[claimant] does have evidence of black lung disease in the range of 10-20%." Claimant's Exhibit 1. Dr. Saludes further opined that "[c]laimant] also has evidence of asbestos related lung disease with pleural thickening." *Id*.

In contrast, Dr. Fino opined that claimant does not suffer from "clinical" or "legal" pneumoconiosis. Director's Exhibit 23. Further, Dr. Rosenberg opined that claimant does not suffer from coal workers' pneumoconiosis. Employer's Exhibit 2. Dr. Rosenberg also opined that "[claimant] has some form of interstitial lung disease of a linear character, such as asbestosis or idiopathic pulmonary fibrosis." *Id*. Dr. Rosenberg additionally opined that "[t]his type of condition does not represent CWP, and has not been caused or hastened by the past inhalation of coal mine dust." *Id*.

In concluding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge found that Dr. Saludes' opinion is outweighed by the opinions of Drs. Altmeyer, Fino, Lenkey, Ranavaya, and Rosenberg, based on the superior qualifications of these latter doctors. The administrative law judge, however, then discredited Dr. Lenkey's opinion because it is based, in part, on a positive x-ray reading that is outweighed by the negative x-ray readings provided by a dually qualified physician and because of its equivocal nature regarding the cause of claimant's pulmonary impairment. Further, the administrative law judge ultimately discredited Dr. Ranavaya's opinion because he found it equivocal and not reasoned.

Claimant asserts that the administrative law judge erred in discrediting Dr. Saludes' opinion. Although the administrative law judge subsequently discredited the opinions of Drs. Lenkey and Ranavaya for reasons other than their credentials, he made a threshold determination that Drs. Altmeyer, Fino, Lenkey, Ranavaya, and Rosenberg were highly qualified to render an opinion in this case. Specifically, the administrative law judge properly accorded greater weight to the opinions of Drs. Altmeyer, Fino, Lenkey, Ranavaya, and Rosenberg than to Dr. Saludes' opinion based on their superior qualifications. *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge stated:

> I first note that Drs. Lenkey, Ranavaya, Altmeyer, Fino and Rosenberg are highly qualified physicians who have excellent credentials. Drs. Lenkey, Altmeyer, Fino, and Rosenberg are Board-Certified in Internal Medicine and Pulmonary Disease. Dr. Ranavaya is Board-Certified in Occupational Diseases. Accordingly, I find Drs. Lenkey, Ranavaya, Altmeyer, Fino, and Rosenberg to be highly qualified to render an opinion in this matter. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). Conversely, the qualifications of Dr. Saludes are not part of the record. Therefore, in weighing the opinion of Dr.

> Saludes with the highly qualified opinions of the other consultants to this matter, I accord the opinion of Dr. Saludes less weight.

Decision and Order at 15. Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Saludes' opinion.

Claimant also asserts that the administrative law judge erred in discrediting Dr. Lenkey's opinion. Contrary to claimant's assertion, the administrative law judge properly discredited Dr. Lenkey's diagnosis of coal workers' pneumoconiosis because it is based, in part, on a positive x-ray interpretation, a reading that the administrative law judge found inconsistent with the preponderance of the x-ray evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Lenkey's opinion.[9]

Claimant additionally asserts that the administrative law judge erred in discrediting Dr. Ranavaya's opinion. Contrary to claimant's assertion, the administrative law judge properly discredited Dr. Ranavaya's opinion because, while Dr. Ranavaya stated that he based his opinion that claimant suffered from coal workers' pneumoconiosis on a positive x-ray reading, he did not identify the x-ray upon which he relied. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge stated that "[i]n his report, Dr. Ranavaya noted [c]laimant 'reportedly' had radiographic evidence of pneumoconiosis and that therefore it was medically reasonable to conclude [c]laimant had CWP due to occupational exposure to coal mine dust." Decision and Order at 16. However, the administrative law judge determined that "[i]t is not clear to which radiographic evidence

[9]Claimant raises several other assertions of error by the administrative law judge in discrediting Dr. Lenkey's opinion. Claimant asserts that the administrative law judge erred in discrediting Dr. Lenkey's opinion because it is equivocal. Claimant also asserts that the administrative law judge erred in discrediting Dr. Lenkey's opinion because it is based, in part, on claimant's coal dust exposure history. Further, claimant asserts that the administrative law judge erred in failing to consider all of the factors that Dr. Lenkey relied on in reaching his opinion. In addition, claimant asserts that the administrative law judge erred in failing to consider that Dr. Lenkey is Board-certified in sleep medicine. Since the administrative law judge provided an alternate basis for discrediting Dr. Lenkey's opinion, *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), namely, he properly discredited Dr. Lenkey's diagnosis of coal workers' pneumoconiosis because it is based, in part, on a positive x-ray interpretation that is inconsistent with the preponderance of the x-ray evidence, *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), we decline to address claimant's other assertions with regard to Dr. Lenkey's opinion.

Dr. Ranavaya was referring in his report." *Id*. Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Ranavaya's opinion.[10]

Claimant further asserts that the administrative law judge erred in relying on Dr. Rosenberg's opinion. Specifically, claimant argues that Dr. Rosenberg made statements in his deposition with respect to the certainty of his diagnoses of idiopathic pulmonary fibrosis and asbestosis that are inconsistent with the statements he made in a prior report. In a report dated September 16, 2003, Dr. Rosenberg opined:

> When all the above information is looked at in total, the information supports [claimant] as having an interstitial form of lung disease. However, it does not represent coal workers' pneumoconiosis (CWP). The linear pattern and lower lung field distribution is that of idiopathic pulmonary fibrosis or even asbestosis (something which he has been labeled as having).

Employer's Exhibit 2.

In a subsequent deposition dated November 17, 2003, Dr. Rosenberg opined that claimant does not suffer from pneumoconiosis. Employer's Exhibit 5 (Dr. Rosenberg's Deposition at 14). However, Dr. Rosenberg stated, "[t]he situation is the linear changes that he has, if he does have a condition such as asbestosis or idiopathic pulmonary fibrosis, this is clearly – that is not caused, hastened or exacerbated by coal dust exposure." *Id*. (Dr. Rosenberg's Deposition at 15). Dr. Rosenberg also stated, "[s]o I'm not convinced a hundred percent that that is definitely asbestosis or idiopathic pulmonary fibrosis." *Id*. (Dr. Rosenberg's Deposition at 17). Nonetheless, Dr. Rosenberg did not change his opinion that claimant does not suffer from pneumoconiosis.

[10]The administrative law judge also discredited Dr. Ranavaya's opinion that claimant suffers from pneumoconiosis at 20 C.F.R. §718.202(a)(4) because it is equivocal. Contrary to the administrative law judge's finding, it is Dr. Ranavaya's opinion that claimant's pneumoconiosis is due to coal dust exposure that is equivocal, not Dr. Ranavaya's diagnosis of pneumoconiosis. In his report, Dr. Ranavaya opined that "[claimant] has Coal Workers' Pneumoconiosis most likely due to his occupational exposure to dust in the coal mine industry." Director's Exhibit 28. Nonetheless, we hold that the administrative law judge's error in discrediting Dr. Ranavaya's opinion at 20 C.F.R. §718.202(a)(4) because it is equivocal is harmless, *Larioni v. Director, OWCO*, 6 BLR 1-1276 (1984), because the administrative law judge properly discredited Dr. Ranavaya's opinion because he did not identify the x-ray upon which he relied, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In considering the differences in Dr. Rosenberg's report and deposition with regard to his opinion about idiopathic pulmonary fibrosis and asbestosis, the administrative law judge stated:

> He opined in his report that [c]laimant did not have pneumoconiosis but did have idiopathic pulmonary fibrosis (IPF) or asbestosis. However, prior to his deposition, Dr. Rosenberg was given additional medical evidence to review, including the medical reports of Drs. Fino, Ranavaya and Lenkey, as well as the pulmonary function study from 5-10-02. He also reviewed x-ray films from 1999 through 2002 and was not convinced that the changes seen were due to IPF or asbestosis. Based on his review of the additional information, Dr. Rosenberg reasonably concluded [c]laimant's major problem was massive obesity, hypoventilation, ventilation profusion, and mismatched obesity. Therefore, although Dr. Rosenberg's testimony was somewhat inconsistent with his initial report, the discrepancy in his opinion was explained at the deposition and was based on new information he obtained prior to the deposition. Therefore, overall, I find that the opinion of Dr. Rosenberg is well-reasoned and consistent with the objective diagnostic testing of record.

Decision and Order at 17. The administrative law judge also noted that "Dr. Rosenberg concluded that [c]laimant's obesity hyperventilation syndrome could explain his entire respiratory status." *Id*. at 9. Thus, since the administrative law judge recognized that Dr. Rosenberg changed his opinion with respect to the certainty of his diagnoses of idiopathic pulmonary fibrosis and asbestosis after reviewing additional evidence, we reject claimant's assertion that the administrative law judge erred in relying on Dr. Rosenberg's opinion.[11] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In addition, claimant asserts that the administrative law judge erred in relying on Dr. Fino's opinion that claimant does not suffer from pneumoconiosis because Dr. Fino's opinion is internally inconsistent. Specifically, claimant argues that although Dr. Fino stated that claimant's shortness of breath does not interfere with his usual daily activities, Dr. Fino also stated that claimant is limited in what he can do because of his breathing. Claimant's Brief at 24. In addressing claimant's symptoms, Dr. Fino noted that claimant's breathing problem is characterized by shortness of breath and does not interfere with his usual daily activities. Director's Exhibit 23. Dr. Fino also noted that claimant is limited in what he can

[11]We decline to consider claimant's assertion on appeal that Dr. Rosenberg's opinion is hostile to the Act because claimant did not raise this assertion at the trial level before the administrative law judge. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Lyon v. Pittsburg & Midway Coal Co.*, 7 BLR 1-199 (1984).

do because of his breathing. *Id*. Nonetheless, in addressing the issue of the existence of pneumoconiosis, Dr. Fino opined that claimant does not suffer from clinical or legal pneumoconiosis. Since the issue of the existence of pneumoconiosis is the relevant issue in this case, we reject claimant's assertion that the administrative law judge erred in relying on Dr. Fino's opinion that claimant does not suffer from pneumoconiosis as the administrative law judge was not compelled to reject Dr. Fino's pneumoconiosis finding for the reason identified by claimant.[12]

Claimant also asserts that the administrative law judge erred in finding that Dr. Altmeyer's diagnosis of asbestosis does not fall within the definition of pneumoconiosis. Claimant's Brief at 26. The pertinent regulation provides that " '[l]egal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R §718.201(a)(2). In considering Dr. Altmeyer's treatment records, the administrative law judge stated that "[t]here is no evidence in Dr. Altmeyer's notes that [c]laimant's asbestosis arose out of his coal mine employment." Decision and Order at 16. In treatment records dated October 14, 1999, November 1, 1999, September 13, 2000 and March 11, 2002, Dr. Altmeyer opined that claimant suffers from asbestosis. Director's Exhibit 24. However, Dr. Altmeyer did not opine that this condition is related to coal dust exposure. *See* 20 C.F.R. §718.201(a)(2). Thus, we reject claimant's assertion that the administrative law judge erred in finding that Dr. Altmeyer's diagnosis of asbestosis does not fall within the definition of pneumoconiosis.

Finally, claimant asserts that the administrative law judge erred in failing to consider his lay testimony, along with Dr. Altmeyer's opinion. Claimant's Brief at 27-29. Contrary to claimant's assertion, lay testimony of exposure to asbestosis cannot supplement Dr. Altmeyer's opinion. The applicable regulation provides that "[a] determination of the existence of pneumoconiosis shall not be made solely on the basis of a living miner's statements or testimony." 20 C.F.R. §718.202(c). Accordingly, "at least a quantum of medical evidence" must corroborate the lay testimony in a living miner's case. *Madden v. Gopher Mining Co*., 21 BLR 1-122, 1-125 (1999). In view of our affirmance of the administrative law judge's finding that the medical evidence in this living miner's case does not establish the existence of pneumoconiosis, the testimony provided by claimant could not serve as the basis for a determination of the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(c). Thus, we reject claimant's assertion that the administrative law judge erred by

[12]We also decline to address claimant's assertion on appeal that Dr. Fino's opinion is hostile to the Act because claimant did not raise this assertion at the trial level before the administrative law judge. *Perry*, 9 BLR at 1-3; *Lyon*, 7 BLR at 1-201. In addition, we reject claimant's assertion that Dr. Fino is biased against him because there is no evidence in the record to support this assertion. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

not considering and weighing the lay testimony of claimant, along with Dr. Altmeyer's opinion. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

JUDITH S. BOGGS
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). While the claimant and the employer may each submit no more than two chest X-ray interpretations in support of their affirmative cases, *see* 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii), each party may submit no more than one physician's interpretation of each chest X-ray in rebuttal of the case presented by the opposing party, *see* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Section 725.456(b)(1) provides that "[m]edical evidence in excess of the limitations contained in §725.414 *shall not* be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1)(emphasis added). In the instant case, the administrative law judge admitted thirty-six x-ray

interpretations into the record. The administrative law judge did not discuss whether good cause existed for admitting x-ray interpretations in excess of the evidentiary limitations. Since the regulations make plain that the evidentiary limitations are mandatory, *see* 20 C.F.R. §§725.414 and 725.456(b)(1), I would vacate the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and remand the case to the administrative law judge to admit the x-ray evidence in accordance with the evidentiary limitations set forth at 20 C.F.R. §725.414.

BETTY JEAN HALL
Administrative Appeals Judge