

PART IV

ADMINISTRATIVE PROCESSING OF CLAIMS, POWERS AND DUTIES OF THE ADMINISTRATIVE LAW JUDGE

D. EVALUATION AND WEIGHING OF EVIDENCE

3. SPECIFIC EVIDENTIARY PRINCIPLES

b. Later Evidence

Pneumoconiosis is generally considered to be a progressive and irreversible disease. The adjudication officer, in weighing the medical evidence of record, may, therefore, give more weight to the most recent evidence especially when a significant amount of time separates the newer from the older evidence. See, e.g., *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Accordingly, for example, it is reasonable to place greater weight on more recent x-ray evidence. See, e.g., *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983).

Whether to rely upon the most recent evidence is a matter for the discretion of the administrative law judge, see *Pate, supra*, as s/he is not *required* to give more weight to the most recent evidence. See, e.g., *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983).

The Board has stressed that the practice of crediting the later evidence should not be followed mechanically. *Keen, supra*. An administrative law judge may reasonably find that a relatively short space of time between x-rays or blood gas studies, for example, does not warrant favoring the later evidence. While the Board has held the administrative law judge need not credit a later x-ray over one taken less than five and one-half months previously, *Stanley v. Director, OWCP*, 7 BLR 1-386 (1984), it has also held that it is error not to discuss a five year span between an early negative x-ray and a later positive x-ray. *Edwards v. Director, OWCP*, 6 BLR 1-265 (1983). Likewise, while chronology of the evidence is a relevant factor, an administrative law judge need not always consider specifically the chronological order of evidence, particularly where close in time. *Drenning v. Delta Mining Co.*, 6 BLR 1-60 (1983).

CASE LISTINGS

[later evidence rule does not require adjudicator to credit positive x-ray over negative one taken two months earlier] **Martin v. Director, OWCP**, 6 BLR 1-535 (1983).

[assignment of greater weight to more recent evidence within discretion of fact-finder especially where, as here, three years separated early negative x-ray and later positive one] **Pate v. Alabama By-Products Corp.**, 6 BLR 1-636 (1983).

[adjudicator properly credited earlier qualifying blood gas study under subsection (b)(2) where he discussed and weighed all blood gas studies, emphasized generally low values in all and also discussed claimant's testimony and medical reports] **Webb v. Armco Steel Corp.**, 6 BLR 1-1120 (1984).

[adjudicator not always required to specifically discuss chronology of medical reports] **Laird v. Alabama By-Products Corp.**, 6 BLR 1-1146 (1984).

[report rationally given less weight where several years earlier than other reports] **Cosalter v. Mathies Coal Co.**, 6 BLR 1-1182 (1984).

[later evidence principle not applicable to x-ray rereading dates but date on which x-ray taken] **Wheatley v. Peabody Coal Co.**, 6 BLR 1-1214 (1984).

[reasonable inference that x-ray evidence of pneumoconiosis should have appeared well before date of claimant's last and only positive film read in 1981 where last dust exposure was in 1940] **Sabett v. Director, OWCP**, 7 BLR 1-299 (1984)(Ramsey, C.J., dissenting).

[no requirement to credit later blood gas study simply because it is most recent evidence by six months] **Conley v. Roberts and Shaefer Co.**, 7 BLR 1-309 (1984).

[later blood gas studies properly credited as more probative of miner's present condition than earlier studies] **Sexton v. Southern Ohio Coal Co.**, 7 BLR 1-411 (1984).

[adjudicator's crediting of April 1979 negative x-ray over September 1981 positive x-ray affirmed, noting reasonable explanation and that later evidence principle not to be applied mechanically] **Burns v. Director, OWCP**, 7 BLR 1-597 (1984).

[adjudicator not required to give more weight to most recent x-ray evidence even when it is positive] **McMath v. Director, OWCP**, 12 BLR 1-6 (1988); **York v. Jewell Ridge Coal Corp.**, 7 BLR 1-766 (1985).

[medical report that contained most recent physical examination properly accorded greater weight] **Gillespie v. Badger Coal Co.**, 7 BLR 1-839 (1985).

[relevant consideration in weighing evidence is recency of report] **Wetzel v. Director, OWCP**, 8 BLR 1-139 (1985).

DIGESTS

The Sixth Circuit approved the practice of finding later x-rays more persuasive than earlier ones, as subsequent x-rays should show more, not less, evidence of pneumoconiosis, a progressive disease. **Orange v. Island Creek Coal Co.**, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986).

The administrative law judge's irrational and inconsistent application of the "latest evidence" rule required remand. Although the administrative law judge credited a more recent medical opinion and x-ray evidence on the basis that pneumoconiosis is a progressive disease and therefore the most recent evidence should generally be assigned more weight, he did not credit the latest blood gas study, stating that the latest evidence rule should not be applied mechanically. **Shedlock v. Bethlehem Mines Corp.**, 9 BLR 1-195 (1986).

Under the facts of this case involving a request for modification, the Board held that the administrative law judge's weighing of the medical opinion evidence was fully consistent with the amended regulations and **Nat'l Mining Ass'n v. U.S. Dep't of Labor**, 292 F.3d 849 (D.C. Cir. 2002). The administrative law judge engaged in a proper evidentiary analysis: after finding that the earlier evidence did not establish the existence of pneumoconiosis, he reasonably focused primarily on the more recent evidence in determining whether claimant established a change in his condition, and permissibly relied on the later positive evidence, which he found was better reasoned than the contrary evidence, to find the existence of pneumoconiosis established. **Workman v. Eastern Associated Coal Corp.**, BRB No. 02-0727 BLA, BLR (Aug. 19, 2004) (Motion for Recon.)(*en banc*).

The Board held that where the administrative law judge engages in a proper evidentiary analysis, he may, in his discretion, rely on the more recent medical evidence. Under the facts of this case involving a duplicate claim, however, the invalid reasons which the administrative law judge provided for his credibility determinations may have tainted his overall weighing of the evidence, thus necessitating a remand. **Parsons v. Wolf Creek Collieries**, BRB No. 02-0188 BLA, BLR (Sep. 30, 2004)(Motion for Recon.)(*en banc*)(McGranery, J., concurring and dissenting).

12/04