[BLR cite: *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993)]
BRB No. 91-2075 BLA

MICHAEL WORHACH)
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Claimant-Petitioner)
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v.)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Lynne G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

Rodger Pitcairn (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (86-BLA-2001) of Administrative Law Judge Edward J. Murty, Jr. 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). This case is before the Board for a second time. In the initial Decision and Order, the administrative law judge noted that the instant claim was a duplicate claim and found that claimant established "perhaps four years" of coal mine employment, Decision and Order at 1. The administrative law judge further found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(4). Decision and Order at 3-4. Accordingly, benefits were denied.

In response to an appeal by claimant, the Board vacated the administrative law judge's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(1). *Worhach v. Director, OWCP*, BRB No. 86-2622 BLA slip op. at 2 (June 29, 1990) (unpub.). The Board instructed the administrative law judge to "discuss and weigh the various conflicting x-ray evidence and provide sufficient rationale which explains the relationship between his findings and conclusions." *Worhach*, slip op. at 2. The Board also instructed the administrative law judge to explain how Dr. Greene's credentials were superior to those of the other B-readers and board-certified readers. *Worhach*, slip op. at 3. The Board further vacated the administrative law judge's findings pursuant to Section 718.202(a)(4) and instructed the administrative law judge to discuss and weigh all relevant medical evidence thereunder. The Board noted that the administrative law judge erred in rejecting Dr. Kraynak's opinion because it was based on a positive x-ray. *Worhach*, slip op. at 2-3. Finally, the Board affirmed the administrative law judge's allowance of the submission of post-hearing evidence. *Worhach*, slip op. at 3.[1]

On remand, the administrative law judge found that the x-ray readings failed to establish the existence of pneumoconiosis and again gave greatest weight to the negative reading of Dr. Greene, Decision and Order on Remand at pp.1-2 (unpaginated). The administrative law judge further found that the medical opinion evidence also failed to establish the existence of pneumoconiosis, and rejected the medical opinions of Dr. Kraynak and Dr. Kruk. Decision and Order on Remand at p.2 (unpaginated). Accordingly, benefits were again denied.

[1]The Board also held that the evidence submitted subsequent to the denial of the original claim met the standard for a material change pursuant to the holding in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 , 1-176 (1988). Accordingly, the Board held that a material change in conditions was established and there was no need to remand the claim for consideration of the issue. *Worhach*, slip op. at 2, n.1.

Claimant, on appeal, contends that the administrative law judge erred in failing to find that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(1) and (a)(4). Claimant requests that the case be remanded to a different administrative law judge contending that his "due process rights would be greatly impaired by remanding [the case] again to this same administrative law judge." Claimant's Brief at 10. The Director, Office of Workers' Compensation Programs, (the Director) files, in the form of a letter, a brief[2] requesting the Board to vacate the administrative law judge's findings that pneumoconiosis was not established at Section 718.202(a)(1) and (a)(4) and to remand for reconsideration thereunder.[3]

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).

Claimant and the Director both contend, initially, that the administrative law judge failed to follow the remand directions of the Board pursuant to Section 718.202(a)(1) in finding that the existence of pneumoconiosis was not established by x-ray evidence.[4] Claimant and the Director both further contend that the administrative law judge again improperly gave greatest weight to the negative x-ray readings of Dr. Greene and the Director asserts that the administrative law judge mechanically relied on the numerical superiority of the readings to find that

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[2]We accept this letter as the Director's response brief and herein decide the claim on its merits.

[3]Inasmuch as the administrative law judge's length of coal mine employment finding has never been challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Claimant also asserts, generally, that "concerning the issue of the presence of pneumoconiosis as per radiological evidence, recent x-ray evidence **must** [emphasis added] be given more weight over that of older evidence." Claimant's Brief at p.5 (unpaginated). We reject this contention inasmuch as the administrative law judge is under no duty to give greater weight to the most recent evidence. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *see generally Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

pneumoconiosis was not established. Decision and Order at 4. A review of the x-ray evidence indicates that there are ten readings of five x-rays. *See* Director's Exhibits 20-24, 34; Claimant's Exhibits 1, 6, 7. Of these ten readings, six were negative for the existence of pneumoconiosis, Director's Exhibits 20-24, 34, and four were positive, Claimant's Exhibits 1, 6, 7. In finding that the x-ray evidence failed to establish the existence of pneumoconiosis, the administrative law judge concluded that "[a]lthough the number of B readings tilts toward claimant, the numerical superiority is negative both in number of interpreters and in number of interpretations." Decision and Order on Remand at 2. The administrative law judge also noted that:

> "I regard Dr. Reginald Greene [who made the negative readings at Director's Exhibits 20 and 34] as the best qualified of all of the physicians who have interpreted these films. He has demonstrated his expertise and has earned the respect of his peers as a teacher of radiologists and Professor of Radiology at Harvard University, one of the premier colleges of medicine in the nation."

Decision and Order on Remand at 2. As the Director notes, the Board, in *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991), held that a prestigious teaching position is not relevant to radiological qualifications and thus not relevant to the weighing of the evidence pursuant to Section 718.202(a)(1). We hold, however, that *Melnick* is inapposite to the instant case inasmuch as *Melnick* does not address a case, such as the case at bar, where the doctor is teaching **radiology**. After the administrative law judge considers the B-reader[5] and board-certified reader status of Dr. Greene and the other readers of record, under the regulatory directive at Section 718.202(a)(1) and *Melnick*, he is not barred from considering further factors relevant to the level of radiological competence, such as a professorship in the field of radiology, in evaluating the relative weight of the x-ray readings. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1989)(*en banc*); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); *Burns v. Director, OWCP*, 7 BLR 1-597, 1-599 (1984). Further, an administrative law

[5]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 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).

judge may give greater weight to negative x-ray readings based on their numerical superiority, *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1985). Inasmuch as the administrative law judge has provided valid reasons for giving greater weight to the negative x-ray readings, *see generally Oggero v. Director, OWCP*, 7 BLR 1-860 (1985), the numerical superiority of such readings and the qualifications of the physicians, bases which the administrative law judge did not specifically provide in his initial Decision and Order, *see* Decision and Order at 3, we hold that the administrative law judge substantially complied with the Board's remand order with regard to Section 718.202(a)(1) and affirm the administrative law judge's finding that the existence of pneumoconiosis has not been established pursuant to Section 718.202(a)(1).

Claimant also contends that the administrative law judge did not apply the true doubt rule.[6] The United States Court of Appeals for the Third Circuit, in whose jurisdiction this claim arises, recently held in *Greenwich Collieries v. Director, OWCP* [*Ondecko*], F.2d , Nos. 92-3270, 90-281, 1993 U.S. App. LEXIS 5595 (3d Cir. March 23, 1993), that reliance on the true doubt rule is improper because the rule contravenes the United States Supreme Court's holding in *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). Accordingly, we reject

[6]"True doubt" is said to exist if equally probative, but contradictory medical evidence is presented in the record, and selection of one set of facts would resolve the case against the claimant but the selection of the contrary set of facts would resolve the case for the claimant. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984).

claimant's contention in this regard.[7]

[7]We further note that, in any event, the true doubt rule has never been held to be applicable when, as in the instant case, no finding has been made that the conflicting x-ray and medical opinion evidence is equally probative. *See Hansen v. Director, OWCP*, 984 F.2d 364 (10th Cir. 1993); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984); *Conley v. Roberts & Schaefer Co.* 7 BLR 1-309 (1984).

Claimant and the Director further contend that the administrative law judge again erred in his consideration of the evidence pursuant to Section 718.202(a)(4), and in his finding that the medical opinion evidence did not establish the existence of pneumoconiosis. In the Board's initial Decision and Order, the administrative law judge was instructed to reconsider the medical opinion Dr. Kraynak, who opined that claimant suffered from pneumoconiosis which was causally related to coal dust exposure, Claimant's Exhibits 3, 9, as the administrative law judge improperly discredited the opinion because it was based on a negative x-ray. *Worhach*, slip op. at 3-4; *see Taylor v. Director, OWCP*, 9 BLR 1-22, 1-24 (1986). The Board further instructed the administrative law judge to consider the medical opinion of Dr. Kruk, who opined that claimant suffered from coal workers' pneumoconiosis, Claimant's Exhibit 8. *Worhach*, slip op. at 4. In his deposition, Dr. Kraynak testified that he had been treating claimant since 1986, Claimant's Exhibit 9 at 11, asserted that his diagnosis was not based solely on x-ray evidence, and specifically discredited the effects of claimant's twenty-year smoking history, *id*. at 25, 31, 33. On remand, the administrative law judge concluded that Dr. Kraynak's "diagnosis was not based on objective medical evidence as required by §718.202(a)(4)....It was no more than his weighing of the x-ray evidence." Decision and Order on Remand at 2. With regard to Dr. Kruk,[8] the administrative law judge concluded that the physician "found that pulmonary function tests and the x-ray reports are consistent with pneumoconiosis. He does not explain how or why the pulmonary function tests persuade him that this chronic smoker suffers from pneumoconiosis....Obviously it is merely the restatement of a positive reading." Decision and Order on Remand at 2. While the an administrative law judge may not discredit a medical opinion merely because it relies, in part, on a positive x-ray reading, *Taylor*, *supra*, the administrative law judge here, in a proper exercise of his discretion, discredited the medical opinions of Drs. Kraynak and Kruk because he found them to be unsupported by their underlying documentation. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Further, a medical opinion which is merely a restatement of an x-ray opinion may not establish the existence of pneumoconiosis, under Section 718.202(a)(4), *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989), and a medical opinion that purports to be based on clinical findings beyond an x-ray reading may be found to be based solely on the x-ray reading; *see Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Weaver v. Reliable Coal Corp.*, 7 BLR 1-486 (1984). Further still, in referring to the opinions of Drs. Kraynak and Kruk,

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[8]We note that the administrative law judge refers to neither Dr. Kraynak, nor Dr. Kruk, by name. *See* Decision and Order on Remand at 2; *but see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983).

the administrative law judge found that "[b]oth of these opinions exaggerate [claimant's] mining history." Decision and Order at 2. An administrative law judge may discredit a medical opinion based on an inaccurate length of coal mine employment,[9] *see Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). Inasmuch as the administrative law judge has provided several valid reasons for discrediting the medical opinions of Drs. Kraynak and Kruk, we hold that the administrative law judge sufficiently complied with the Board's remand order with regard to Section 718.202(a)(4) and affirm the administrative law judge's finding that the existence

[9]Dr. Kraynak and Dr. Kruk both stated that claimant had a history of eight years of coal mine employment, *see* Claimant's Exhibits 3, 5, while the administrative law judge credited claimant with four years of coal mine employment. *See* Decision and Order on Remand at 1.

of pneumoconiosis was not established at Section 718.202(a)(4).[10] We therefore affirm the administrative law judge's finding that claimant failed to establish pneumoconiosis under Section 718.202, a necessary element of entitlement, *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[10]In view of our disposition of the instant case, we need not address claimant's due process argument concerning the issue of remand to the administrative law judge as it is moot. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984).