

BRB No. 90-1377 BLA

RUBY HYLE)
(Widow of CLELL HYLES))
)
Claimant-Petitioner)

v.

) DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent) DECISION and ORDER

Appeal of the Revised Decision and Order of Virgil M. McElroy, Administrative Law Judge, United States Department of Labor.

James M. Garrett, Unionville, Missouri, for claimant.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand (81-BLA-8900) of Administrative Law Judge Virgil M. McElroy 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 the third time. The miner filed claims for benefits on August 2, 1972 and January 19, 1978. The miner died on September 20, 1979 and claimant filed a claim on September 27, 1979. In his first Decision and Order, the administrative law judge found that claimant established at least eighteen years of coal mine employment and properly considered both the miner's and the survivor's claims pursuant to 20 C.F.R. Part 727. The administrative law judge then found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. On appeal, the Board vacated the administrative law judge's Decision and Order awarding benefits and remanded the case for the administrative law judge to reconsider all of the x-ray evidence

pursuant to 20 C.F.R. §727.203(a)(1). See *Hyle v. Director, OWCP*, 8 BLR 1-512 (1986). On remand, the administrative law judge again found that invocation was established pursuant to 20 C.F.R. §727.203(a)(1) and that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were again awarded. On appeal, the Board vacated the administrative law judge's Decision and Order on Remand awarding

benefits and remanded the case to the administrative law judge for a proper weighing of all of the x-ray evidence and for the administrative law judge to clarify his findings regarding the qualifications of the physicians and the supporting evidence of record pertaining thereto. See *Hyle v. Director, OWCP*, BRB No. 86-3260 BLA (Aug. 31, 1989)(unpub.). On remand, the administrative law judge reweighed the x-ray evidence and found that claimant failed to establish invocation pursuant to 20 C.F.R. §727.203(a)(1). The administrative law judge also noted that his findings that invocation was not established pursuant to 20 C.F.R. §727.203(a)(2)-(4) were not disturbed on appeal. The administrative law judge then held that invocation pursuant to 20 C.F.R. §410.490 is precluded as well. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge's finding pursuant to 20 C.F.R. §727.203(a)(1) is not supported by substantial evidence. Specifically, claimant contends that the administrative law judge erred in failing to consider the reports of Drs. Gutensohn and Judd pursuant to 20 C.F.R. §727.206 and in failing to invoke the rereading prohibition of Section 413(b) of the Act, 30 U.S.C. §923(b), to exclude the rereading performed by Dr. Sargent. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Regarding the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1), the x-ray evidence of record consists of five interpretations of three x-rays. Of these five interpretations, only one was positive for the existence of pneumoconiosis. See Director's Exhibits 28, 29, 34. The positive interpretation was performed by Dr. Willman, a Board Certified Radiologist. See Director's Exhibit 29. Two of the negative readings were performed by Drs. Sargent and Spitz, both Board Certified Radiologists and B-Readers. See Director's Exhibits 28, 34. The remaining two negative interpretations were by Drs. Williams and Murphy, both Board Certified Radiologists. See Director's Exhibit 34. The administrative law judge properly considered the readers' qualifications and permissibly found that the four negative readings by highly qualified physicians outweigh the sole positive reading of record. See Decision and Order at 2; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Also, the Board previously considered claimant's arguments concerning the Section 413(b) rereading prohibition and its implementing regulation at 20 C.F.R. §727.206(b) and affirmed the administrative law judge's rejection of the opinions of Drs. Gutensohn and Judd. See *Hyle*, 8 BLR 1-512

(1986); *see also Brinkely v. Peabody Coal Co.*, 14 BLR 1-147 (1990). As a result, the administrative law judge's finding that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) is affirmed.¹

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

¹The administrative law judge's findings that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2)-(4) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).