BRB No. 99-0285 BLA

GILMER O'DELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Henry L. Solano, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (88-BLA-2939) of Administrative Law Judge Stuart A. Levin awarding 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 fourth time.

Previously, the Board discussed fully this claim's procedural history. *O'Dell v. Sewell Coal Co.*, BRB No. 96-1462 BLA (Jun. 25, 1997)(unpub.). We now focus only on those procedural aspects relevant to the issues raised in this appeal.

In this case arising under 20 C.F.R. Part 727, claimant has established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(2) by qualifying[1] pulmonary function studies, and employer has not established rebuttal thereof by any of the methods set forth at 20 C.F.R. §727.203(b)(1)-(3). The remaining issues are whether claimant has established invocation by chest x-ray evidence pursuant to 20 C.F.R. §727.203(a)(1), thereby precluding rebuttal pursuant to 20 C.F.R. §727.203(b)(4), *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Curry v. Beatrice Pocahontas Coal Co.*, 18 BLR 1-59 (1994)(*en banc*, Brown and McGranery, JJ., concurring and dissenting, separately), *rev'd on other grounds*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), and, if claimant has not established invocation by this method, whether employer has established rebuttal pursuant to 20 C.F.R. §727.203(b)(4).

In a Decision and Order on Remand issued on July 9, 1996, the administrative law judge found that the x-ray evidence established invocation pursuant to Section 727.203(a)(1) and that rebuttal pursuant to Section 727.203(b)(4) was therefore precluded. Accordingly, he awarded benefits. Pursuant to employer's appeal, the Board vacated the administrative law judge's findings pursuant to Sections 727.203(a)(1) and 727.203(b)(4) because the administrative law judge in weighing the evidence appeared to presume that the negative x-ray readings provided on behalf of employer were the product of bias. [1997] *O'Dell*, Slip op. at 4. Additionally, the Board vacated the administrative law judge's exclusion of a negative x-ray rereading submitted by the Director, Office of Workers' Compensation Programs (the Director), because the administrative law judge applied the x-ray rereading prohibition of Section 413(b) of the Act, 30 U.S.C. §923(b), without first determining whether there was other evidence of a significant and measurable pulmonary or respiratory impairment sufficient to trigger the rereading prohibition. *Id*. Consequently, the Board remanded the case for further consideration.

[1] A "qualifying" pulmonary function study yields values which are equal to or less than the values specified in the table at 20 C.F.R. §727.203(a)(2). A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §727.203(a)(2).

On remand, the administrative law judge found that the uniformly qualifying pulmonary function studies already credited as establishing invocation at Section 727.203(a)(2) demonstrated the presence of a significant and measurable respiratory or pulmonary impairment. The administrative law judge therefore found that Section 413(b) of the Act barred the Director's negative rereading of the July 22, 1980 x-ray, an x-ray that was originally read as positive for pneumoconiosis by a Board-certified radiologist.

Pursuant to Section 727.203(a)(1), the administrative law judge found that the weight of the remaining x-ray readings established the existence of pneumoconiosis and therefore established invocation of the interim presumption of total disability due to pneumoconiosis. The administrative law judge reasoned that after considering the quantity and quality of the x-ray readings, a consideration of the distribution of positive and negative readings in terms of the readers' party affiliation added weight to the positive readings. The administrative law judge explained that he did not impute bias to any x-ray reader, but rather, considered that some of employer's radiological experts rendered positive readings, a factor which in his view bolstered the positive readings submitted by claimant's radiological experts. Accordingly, the administrative law judge concluded that, as subsection (a)(1) invocation was established, subsection (b)(4) rebuttal was precluded, and he awarded benefits.

On appeal, employer contends that the administrative law judge improperly excluded the Director's negative rereading of the July 22, 1980 x-ray, and erred in his weighing of the x-ray readings pursuant to Section 727.203(a)(1). Claimant and the Director respond, urging affirmance.

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 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).

Employer first contends that the administrative law judge erred in excluding the Director's negative rereading of the July 22, 1980 x-ray when, employer argues, there is no evidence of a significant and measurable respiratory or pulmonary impairment. Employer's Brief at 12-13. Employer's contention lacks merit.

In all claims filed before January 1, 1982, Section 413(b) of the Act, 30 U.S.C. §923(b), prohibits the Director from having an x-ray reread, except for purposes of determining quality, when, in part, the physician who originally read the x-ray is a Board-certified radiologist and there is other evidence of a pulmonary or respiratory impairment. 30 U.S.C. §923(b); 20 C.F.R. §727.206(b)(1). The administrative law judge must determine whether such "other evidence" of impairment is credible, and whether it demonstrates a significant and measurable level of pulmonary or respiratory impairment. *Hyle v. Director,*

OWCP, 8 BLR 1-512, 1-514-16 (1986).

Here, the administrative law judge properly found that the uniformly qualifying pulmonary function studies were credible evidence of a significant and measurable pulmonary or respiratory impairment. *See* 20 C.F.R. §727.206(b)(2)(I)("The term 'other evidence' means medical tests such as . . . pulmonary function studies . . . ."); *Hyle, supra*. Employer does not argue that claimant's qualifying pulmonary function studies are unreliable, but instead merely asserts that the Table values set forth at Section 727.203(a)(2) are not based upon valid medical science. Employer additionally argues that the medical opinions of record prove that claimant's respiratory impairment is mild. Employer, however, cites no authority for its apparent proposition that the administrative law judge was required to weigh together all record evidence of impairment to determine whether Section 413(b) applies. *See Hyle*, 8 BLR at 1-517 n.6 (administrative law judge need only determine whether the other evidence is "credible"); *Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 1207, 19 BLR 2-22, 2-29 (7th Cir. 1994)(for "other evidence," claimant need not make the same evidentiary showing necessary to establish total disability or entitlement). Therefore, we reject employer's contention and affirm the administrative law judge's finding that Section 413(b) of the Act barred consideration of the Director's negative rereading of the July 22, 1980 x-ray.

Employer contends further that the administrative law judge erred by weighing Dr. Kress's 1/1 classification of the July 22, 1980 x-ray as positive for pneumoconiosis when, employer asserts, Dr. Kress "refute[d]" his 1/1 classification.[2] Employer's Brief at 14-15. Review of the record indicates that Dr. Kress, a B-reader, completed the ILO x-ray classification form by checking "Yes," there were abnormalities "consistent with pneumoconiosis" on claimant's July 22, 1980 x-ray. Employer's Exhibit 3. Dr. Kress classified these abnormalities as small opacities, shape and size "s/t", located in all six lung zones, at a profusion of "1/1." *Id*. Although the ILO classification form included a space for comments, Dr. Kress included no comments relating to the 1/1 small opacities.

In a separate report in which Dr. Kress reviewed much of the medical evidence of record, he repeated that he "felt that there were some irregular opacities scattered throughout both lungs, categorized as s/t, profusion 1/1," on the July 22, 1980 x-ray. Employer's Exhibit 3 at 2. Later in the same report, however, when discussing another physician's reading of the same x-ray, Dr. Kress stated without explanation that "[n]either of us . . . found evidence of

[2] Because employer raised this issue before the administrative law judge, the Director's argument that employer waived the issue lacks merit. Director's Brief at 13.

coal workers' pneumoconiosis." *Id.*, at 4.

On these facts, we are not persuaded by employer's argument that Dr. Kress's latter comment "refuted" the careful, thorough, 1/1 classification that he described twice. Indeed, at first glance, Dr. Kress's comment simply appears to be a mistake.[3] Even assuming, however, that Dr. Kress meant what he said, he stated that he found no evidence of "coal workers' pneumoconiosis," a term not used in Section 727.203(a)(1) or in the ILO x-ray classification system, which are instead concerned with whether a chest x-ray shows the presence of "pneumoconiosis." 20 C.F.R. §§727.203(a)(1), 410.428(a). Dr. Kress clearly indicated on the ILO classification form--unqualified by any comments--and early in his report that the July 22, 1980 x-ray showed 1/1 opacities consistent with pneumoconiosis. Employer's Exhibit 3. To the extent that employer argues that Dr. Kress's comment was intended to address the source of the diagnosed pneumoconiosis, *see Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*), review of Dr. Kress's report reveals no discussion of any alternative etiology for the 1/1 opacities that he described on the July 22, 1980 x-ray. Therefore, we find no error in the administrative law judge's consideration of Dr. Kress's 1/1 ILO classification as a reading positive for the existence of pneumoconiosis pursuant to Section 727.203(a)(1).

Employer next argues that the administrative law judge's weighing of the x-ray readings did not comply with the Board's remand instructions. Employer's Brief at 7-10. Specifically, employer contends that the administrative law judge assumed that employer's radiological experts were biased.

After reviewing the administrative law judge's Decision and Order on Remand and the x-ray readings of record, we hold that the administrative law judge permissibly weighed the x-ray readings. In his previous decision, the administrative law judge appeared to attach too much significance to the fact that all of the negative readings were procured by employer. Without further explanation by the administrative law judge, it appeared to the Board on appeal that the administrative law judge had improperly assumed that the negative readings were unreliable merely because they were obtained by employer in the course of litigation. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991)(*en banc*).

On remand, however, the administrative law judge carefully explained that he considered the experts' party affiliation in a more limited sense, and only after he considered the quantity and quality of the x-ray evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49,

[3] Dr. Kress did classify a different chest x-ray as "0/1," a classification not considered as positive for pneumoconiosis. Employer's Exhibit 3.

16 BLR 2-61 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Specifically, the administrative law judge rationally considered that three of employer's radiological experts read claimant's x-rays as positive for the existence of pneumoconiosis:

> Contrary to [employer's] assertions . . . I have actually relied upon its experts. The fact that a party's medical expert provides evidence which supports the opponent's case, while not an admission against interest, seems a relevant factor for a trier of fact to consider in assessing the strength of each party's case.

Decision and Order on Remand at 6. In the administrative law judge's view, it was not simply party affiliation that tipped the balance, but rather, "the distribution of positive and negative readings [viewed] in terms of party affiliation," that bolstered claimant's case by adding probative value to the positive x-ray readings. *Id*. Contrary to employer's contention, the administrative law judge did not assume that employer's experts were biased, *see Melnick*, *supra*; rather, he appropriately considered that some of employer's experts demonstrated their honesty and lack of bias by providing x-ray readings that supported claimant's case. *See Adkins*, *supra*. Finding no error in the administrative law judge's consideration of the experts' party affiliation in this context, we reject employer's allegation of error.

Employer contends further that the administrative law judge did not adequately consider the readers' radiological qualifications. Employer's Brief at 11-12. Contrary to employer's contention, however, the administrative law judge considered all fourteen readings of four x-rays in light of the readers' qualifications. Decision and Order on Remand at 2-3, 5-8; *see Adkins*, *supra*. While noting that the nine negative readings outnumbered the five positive readings, the administrative law judge properly declined to defer to the numerical superiority of the negative readings.[4] *See Adkins*, *supra*; *Woodward*, *supra*. Finding the competing experts' radiological qualifications to be comparable, the administrative law judge then permissibly considered whether the party affiliation of the experts who read the x-rays as positive was a factor that supported claimant's case.

Employer insists that certain of its experts' negative readings should have received the greatest weight, in view of those experts' arguably superior credentials. However, it is for

[4] Each of the four x-rays of record received at least one positive reading for the existence of pneumoconiosis by a physician qualified as a B-reader, Board-certified radiologist, or both. Director's Exhibits 11, 20; Claimant's Exhibit 2; Employer's Exhibits 1, 3.

the administrative law judge to assess the relative weight of the x-ray readings, *see Adkins, supra*, and the administrative law judge was not required to defer to the x-ray readers who are professors of radiology. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993)(the administrative law judge may consider a physician's professorship in radiology as a factor relevant to his or her radiological competence.). Because the administrative law judge considered the x-ray readings in light of the readers' qualifications, provided valid reasons for the weight that he accorded to the x-ray evidence, *see Adkins, supra*, and because substantial evidence supports his finding, we affirm the administrative law judge's finding pursuant to Section 727.203(a)(1). Consequently, we also affirm the administrative law judge's attendant finding that rebuttal pursuant to Section 727.203(b)(4) was precluded. *See Mullins, supra*; *Curry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge