BRB No. 00-0876 BLA

ERSEL BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUCHANNON FUEL 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 Rejecting Employer's Exhibits 2-10 and Reopening Record, the Decision and Order on Reconsideration Affirming Prior Holdings, Rejecting Claimant's Exhibit 3, and Striking Dr. Wheeler's X-ray Rereading, and the Decision and Order on Remand - Awarding Benefits of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Rejecting Employer's Exhibits 2-10 and Reopening Record, the Decision and Order on Reconsideration Affirming Prior Holdings, Rejecting Claimant's Exhibit 3, and Striking Dr. Wheeler's X-ray Rereading, and the Decision and Order on Remand - Awarding Benefits (80-BLA-2023) of Administrative Law Judge Lawrence P. Donnelly (the administrative law judge) in 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).[1] This case is before the Board for the third time. In the original Decision and Order, Administrative Law Judge Lawrence E. Gray found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (a)(3) and (a)(4). Judge Gray also found the evidence insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, Judge Gray ordered benefits to commence as of November 1, 1977. In response to employer's appeal, the Board reversed Judge Gray's finding at 20 C.F.R. §727.203(a)(4), and remanded the case for further consideration of the evidence at 20 C.F.R. §§727.203(a)(1), (a)(3), (a)(4) and 727.203(b)(2), (b)(4). The Board also vacated Judge Gray's onset date of total disability determination and remanded the case for further consideration of the evidence thereunder. *Blankenship v. Buchannon Fuel Co.*, BRB No. 81-1162 BLA (Dec. 31, 1984)(unpub.).

On the first remand, Judge Gray found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) and (a)(3). Judge Gray also found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) and (b)(4). Accordingly, Judge Gray again ordered benefits to commence as of November 1, 1977. In disposing of employer's second appeal, the Board affirmed Judge Gray's finding at 20 C.F.R. §727.203(a)(3). However, the Board vacated Judge Gray's finding at 20 C.F.R. §727.203(a)(1), and remanded the case for further consideration of the evidence. In addition, although the Board affirmed Judge Gray's finding at 20 C.F.R. §727.203(b)(2), the Board remanded the case for further consideration of the evidence at 20 C.F.R. §727.203(b)(3) and (b)(4). Lastly, the Board affirmed Judge Gray's onset date of

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

disability determination. *Blankenship v. Buchannon Fuel Co.*, BRB No. 85-2198 BLA (May 24, 1988)(unpub.).

On the second remand, Judge Gray found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). Judge Gray also found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Judge Gray noted that invocation of the interim presumption at subsection (a)(1) precluded rebuttal of the interim presumption at subsection (b)(4). Accordingly, Judge Gray again awarded benefits. Based on employer's third appeal, the Board affirmed Judge Gray's finding at 20 C.F.R. §727.203(a)(1) and noted that rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) was precluded. Additionally, the Board affirmed Judge Gray's finding at 20 C.F.R. §727.203(b)(3). *Blankenship v. Buchannon Fuel Co.*, BRB No. 88-2931 BLA (Dec. 29, 1992)(unpub.). However, in response to employer's request for reconsideration,[2] the Board vacated both its previous holding at 20 C.F.R. §727.203(a)(1) and Judge Gray's previous finding at 20 C.F.R. §727.203(a)(1), and remanded the case to Judge Gray to weigh all of the x-ray evidence and explain his findings in compliance with the Administrative Procedure Act (APA), 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). In addition, in view of its holding at 20 C.F.R. §727.203(a)(1), the Board vacated both its previous holding at 20 C.F.R. §727.203(b)(4) and Judge Gray's previous finding at 20 C.F.R. §727.203(b)(4), and remanded the case for further consideration of the evidence thereunder. The Board also vacated Judge Gray's findings at 20 C.F.R. §727.203(b)(2) and (b)(3) in light of the new legal standards adopted by the United States Court of Appeals for the Fourth Circuit in *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987), and *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), and remanded the case to Judge Gray to make new findings after he reopened the record for the submission of new evidence. *Blankenship v. Buchannon Fuel Co.*, BRB No. 88-2931 BLA (July 17, 1996)(unpub. Decision and Order on Reconsideration).

[2]Employer filed a request for reconsideration on March 19, 1993, which the Board denied. *Blankenship v. Buchannon Fuel Co.*, BRB No. 88-2931 BLA (Order)(Apr. 8, 1993)(unpub.). However, in response to employer's subsequent request for reconsideration and briefing order, the Board stated, "[i]nasmuch as employer did not expeditiously receive a copy of the Board's Decision and Order, we grant employer's motion for a briefing order and allow employer thirty (30) days from the date of issuance of this Order in which to file a brief in support of his Motion for Reconsideration." *Blankenship v. Buchannon Fuel Co.*, BRB No. 88-2931 BLA, slip op. at 2 (Order)(July 23, 1993)(unpub.). The Board also stated, "we vacate our April 8, 1993 Order denying employer's Motion for Reconsideration, as it was rendered without allowing employer the opportunity to file a supporting brief." *Id*. Hence, the Board granted employer's request for reconsideration and remanded the case for further proceedings. *Id*.

On the most recent remand, the case was transferred to the administrative law judge, who issued a decision dated July 19, 1999, limiting the reopening of the record to medical reports of physicians who discuss the evidence which was already in the record, and rejecting Employer's Exhibits 2-10 because they were based on a new physical examination and newly submitted studies. The administrative law judge granted employer thirty days to submit any medical opinions rendered in compliance with findings in his decision and granted claimant thirty days thereafter to respond with any rebuttal evidence.

Following employer's request for reconsideration of the July 19, 1999 decision, the administrative law judge issued a decision dated February 11, 2000, finding the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). The administrative law judge also noted that the Board had previously affirmed Judge Gray's prior finding that the evidence was sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(3). However, the administrative law judge granted employer thirty days to submit medical opinion evidence in compliance with this decision and his 1999 decision. The administrative law judge also granted claimant thirty days thereafter to respond with rebuttal evidence. The administrative law judge stated that "[s]hould no further evidence be submitted, an order will be entered granting benefits to the [c]laimant, as it is the [e]mployer's burden to rebut the invocation of the interim presumption and the Board has affirmed the finding that the evidence in the record does not do so." [February 11, 2000] Decision and Order at 3. In a subsequent Decision and Order on Remand dated April 28, 2000, the administrative law judge awarded benefits based on his prior findings since there was no further medical evidence for consideration. Accordingly, the administrative law judge ordered benefits to commence as of November 1, 1977.

On appeal, employer contends that it should be dismissed as the responsible operator and liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund) since the administrative law judge's delay in processing the case violated its right to due process. Employer also contends that the administrative law judge violated its right to due process in refusing to reopen the record on remand for the submission of evidence based on a new physical examination and objective studies. Lastly, employer challenges the administrative law judge's finding that the evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) and (a)(3). Claimant responds, urging affirmance of the administrative law judge's award of benefits. In a brief in reply to claimant's response brief, employer reiterated its prior contentions. The Director, Office of Workers' Compensation Programs (the Director), contends that liability for this claim correctly rests with employer and there is no legitimate basis for transferring liability to the Trust Fund.[3]

[3]Employer filed a brief in reply to the response brief of the Director, Office of

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which employer and the Director have responded. In a brief dated April 2, 2001, employer indicated that the revisions to the regulations would not affect the outcome of the case.[4] In a brief dated March 29, 2001, the

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Workers' Compensation Programs (the Director), asserting that the Director recognized that the delay in processing the case, which was caused by the administrative law judge's intransigence, resulted in a manifest injustice. In a subsequent reply brief, the Director asserts that employer mischaracterized his response.

[4]Employer noted that it contests the retroactive application of the revised regulations to pending claims. Employer also stated that if the Board believes that the administrative law judge's award of benefits should be affirmed based on the new regulations, the case must be stayed for the duration of the briefing, hearing and decision schedule set by the United States District Court for the District of Columbia in the preliminary injunction. Further, employer stated that if the challenged regulations are upheld following litigation, the Board may not

Director indicated that it is his position that the instant case would not be affected by application of the revised regulations. The Director, therefore, indicated that the Board could decide the instant case. Claimant has not filed a brief in response to the Board's order.[5] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 address employer's contention that it should be dismissed as the responsible operator and liability for the payment of benefits should be transferred to the Trust Fund since it was denied its right to due process. Citing *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), and *Lane Hollow Coal Co. v. Director, OWCP, [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), employer specifically asserts that the delays in the processing of the case caused by the administrative law judge's intransigence violated its right to due process. The United States Court of Appeals for the Fourth Circuit in *Borda* and *Lockhart* allowed for a transfer of liability to the Trust Fund because the Department of Labor's failure to timely notify the appropriate employer of its potential liability denied it an opportunity to mount a meaningful defense, and the United States Court of Appeals for the Sixth Circuit in *Holdman* allowed for a transfer of liability to the Trust Fund because of the Department of Labor's inexcusable delay in processing the claim. However, the facts in the instant case are distinguishable from the facts in *Holdman*,

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adjudicate this appeal in any event since remand would be required for the administrative law judge to afford the parties an opportunity to respond to the changes in the law with new proof and for further fact-finding under the revised regulations.

[5]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

Borda and *Lockhart*. Here, employer was involved from the beginning and has vigorously litigated the case. Employer was notified of the miner's claim, the hearing and the decisions issued by Judge Gray, the administrative law judge and the Board. Moreover, the continued litigation of this claim is a direct result of employer's appeals of the decisions of Judge Gray and the administrative law judge, and not a result of the Department of Labor's delay in processing the claim. Thus, inasmuch as the facts of the present case, unlike those in *Holdman*, *Borda*, and *Lockhart*, do not provide persuasive support for employer's assertion that its right to due process was violated, we reject employer's contention that it should be dismissed as the responsible operator and that liability for the payment of benefits should be transferred to the Trust Fund.

Next, we address employer's contention that the administrative law judge violated its right to due process in refusing to reopen the record on remand for the submission evidence based on a new physical examination and objective studies. In its Decision and Order on Reconsideration, the Board stated, "[a]lthough our prior holdings regarding subsections (b)(2) and (b)(3) were correct, they must be vacated, in order for the administrative law judge on remand to make new findings after reopening the record for the submission of new evidence." *Blankenship v. Buchannon Fuel Co.*, BRB No. 88-2931 BLA, slip op. at 7 (July 17, 1996)(unpub. Decision and Order on Reconsideration). The Board also stated that "[o]n remand, the administrative law judge must address rebuttal pursuant to subsections (b)(2) and (b)(3), considering all of the evidence of record, including any newly developed evidence." *Id*. In a subsequent Decision and Order, the administrative law judge determined that "[s]ince exhibits EX 2 through 10 do not concern themselves with simply a review of the previously submitted evidence, but include newly obtained studies and a physical examination, they are herein rejected." [July 19, 1999] Decision and Order at 5. The administrative law judge stated, "I find that the [e]mployer is not entitled to a *carte blanche* reopening of the record." *Id*. To the contrary, the administrative law judge stated that "the reopening on remand must be limited to the physicians discussing the evidence which was already in the record, without further questioning the validity of the studies."[6] *Id*. Therefore, the administrative law judge granted employer thirty days to submit medical evidence in compliance with his decision.[7]

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[6]The administrative law judge stated that "[t]he change in case law affecting the instant claim had nothing to do with quality standards of x-rays, pulmonary function studies, and arterial blood gas tests." [July 19, 1999] Decision and Order at 5. The administrative law judge also stated that "[i]t had nothing to do with which values were qualifying under the [r]egulations." *Id*. Rather, the administrative law judge stated that "[t]he change in law had simply to do with how a physician considers the objective evidence before him and words his opinion." *Id*.

[7]In a subsequent Decision and Order on Reconsideration, the administrative law judge

granted employer another thirty days to submit medical evidence in compliance with his July 19, 1999 Decision and Order. [February 11, 2000] Decision and Order at 3.

Relevant case law supports the proposition that due process and fundamental fairness mandate a reopening of the record where a significant alteration in the type of evidence necessary to meet a party's burden of proof results from an altered legal standard. *See Peabody Coal Co. v. Ferguson,* 140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998); *Peabody Coal Co. v. White*, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998); *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *see also Bethenergy Mines, Inc. v. Director, OWCP* [*Vrobel*], 39 F.3d 458, 19 BLR 2-95 (3d Cir. 1994); *Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989); *cf. Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999).[8] However, the administrative law judge has discretion in determining the admissibility of evidence submitted when the record is reopened on remand. *See generally Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). Thus, inasmuch as the administrative law judge acted within his discretion in opening the record for the limited development of relevant evidence in response to the new legal standards adopted by the Fourth Circuit in *Sykes* and *Massey*, we reject employer's contention that the administrative law judge violated its right to due process in refusing to reopen the record on remand for the submission of evidence based on a new physical examination and objective studies. *See generally Underwood, supra*; *Onderko, supra*. Moreover, inasmuch as there is no evidence of record to support employer's assertion of intransigence by the administrative law judge, we reject employer's assertion that the case should be transferred to another administrative law judge. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). Employer's contention is based on the premise that the administrative law judge erred in weighing the conflicting x-ray evidence. Specifically, employer asserts that the administrative law judge erred in excluding Dr. Wheeler's negative x-ray reading pursuant to

[8]In *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999), the Board rejected employer's assertion that the administrative law judge's refusal to reopen the record in order to permit it to supplement the record in light of *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), constituted an abuse of discretion inasmuch as *Swarrow* imposes an increased burden on claimant, not employer, to prove a material change in conditions. Although the law changed with regard to 20 C.F.R. §725.309, the Board held that the change in the law did not increase employer's evidentiary burden or alter the type of evidence relevant to 20 C.F.R. §725.309. Hence, the Board concluded that due process and fundamental fairness did not mandate a reopening of the record.

Section 413(b) of the Act, 30 U.S.C. §923(b), since there is no evidence that the Director obtained this rereading. The record contains five interpretations of four x-rays. Dr. Sutherland read the August 29, 1977 x-ray as positive for pneumoconiosis, Director's Exhibit 30, and Dr. Evans read the October 31, 1979 x-ray as negative for pneumoconiosis, Director's Exhibit 44. Whereas Dr. Eryilmaz read the January 18, 1979 x-ray as positive for pneumoconiosis, Director's Exhibit 33, Dr. Wheeler reread this x-ray as negative, Director's Exhibit 28. Dr. Eryilmaz interpreted an x-ray dated February 2, 1978, finding that claimant's heart and mediastinum were normal, that claimant's broncho-vascular markings were somewhat increased in both lungs due to bronchitis, and that claimant did not have pneumonia. Director's Exhibit 31.

In considering the conflicting x-ray evidence, the administrative law judge stated that "Dr. Wheeler's rereading is rejected [pursuant to Section 413(b)], and the prior findings under [20 C.F.R. §§727.203(a)(1) and 727.203(b)(4)] are not disturbed." [February 11, 2000] D&O on Reconsideration at 2. The administrative law judge further stated, "for the benefit of the parties, I have weighed the admitted x-ray readings along with Dr. Wheeler's rereading."[9] *Id*. The administrative law judge permissibly discredited Dr. Eryilmaz's reading of the February 2, 1978 x-ray because "there is no indication that [Dr. Eryilmaz] read it for the presence or absence of pneumoconiosis, or that the x-ray was of sufficient quality for such a reading." *Id*.; *see Sacolick v. Ruston Mining Co.*, 6 BLR 1-930 (1984). Thus, based on the four remaining x-ray interpretations of Drs. Eryilmaz, Evans, Sutherland and Wheeler, the administrative law judge stated, "I find no basis for giving one x-ray greater weight than another." *Id*. The administrative law judge therefore concluded that "at least, then, these readings [i.e., the two positive readings of Drs. Eryilmaz and Sutherland and the two negative readings of Drs. Evans and Wheeler] are in equipoise as to the presence of pneumoconiosis." *Id*. However, the administrative law judge stated, "considering that Dr. Sutherland is the [c]laimant's treating physician and he found pneumoconiosis present, and his finding is supported by the positive reading of a [B]oard-certified radiologist, I find that the x-ray evidence establishes the presence of pneumoconiosis." *Id*.

[9]The administrative law judge observed that "[a]ll of the x-rays were taken over a twenty-six month period, and the [c]laimant ceased his coal mine employment in November 1977." [February 11, 2000] Decision and Order on Reconsideration at 3.

Citing *Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991), in its Decision and Order on Reconsideration in employer's prior appeal, the Board held that "Section 413(b) does not prohibit the administrative law judge from considering Dr. Wheeler's re-reading of the film originally interpreted by Dr. Eryilmaz, inasmuch as employer, a private coal mine operator, is defending this claim." *Blankenship v. Buchannon Fuel Co.*, BRB No. 88-2931 BLA, slip op. at 5 (July 17, 1996)(unpub.). The Board therefore vacated Judge Gray's finding that the evidence was sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), and remanded the case for further consideration of all of the x-ray evidence in compliance with the APA. However, on remand the administrative law judge stated, "as the Director pointed out in his April 19, 1999 letter brief, Dr. Wheeler's rereading is still not admissible if it was obtained at the request of the Director." [February 11, 2000] Decision and Order on Reconsideration at 2. After further reflection upon the holding by the Fourth Circuit in *Gray*,[10] we hold that although the Section 413(b) prohibition does not apply to x-ray rereadings originally obtained by employers or by claimants, *see Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985), an employer may not submit a rereading of an x-ray obtained by the Director in violation of Section 413(b) of the Act, 30 U.S.C. §923(b); *see Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981). Nothing

[10]In *Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991), the court noted that "[the original] X-ray was reread as 'completely negative' for pneumoconiosis by four doctors retained by Riverton." *Gray*, 943 F.2d at 515, 15 BLR at 2-216. Citing *Tobias*, the court stated that "[the Board] has consistently held that §923(b) requires the 'Secretary' to accept a positive X-ray reading in specified circumstances and thereby prohibits the Secretary from considering government-obtained rereadings, but that private employers are not precluded from obtaining and offering rereadings." *Gray*, 943 F.2d at 516, 15 BLR at 2-218. Hence, the court held that 30 U.S.C. §923(b) did not preclude the mine operator from offering its own conflicting interpretations of x-rays for consideration by the administrative law judge. *Gray*, 943 F.2d at 520, 15 BLR at 2-223. Here, employer did not offer its own x-ray rereading.

prevented employer from obtaining its own rereading. It should not now be heard to complain when it is prohibited from relying upon the Director's rereading obtained in contravention of the statute.

In the instant case, the administrative law judge determined that "[a] review of the x-ray reading indicates that [the rereading] was obtained at the request of the Director." [February 11, 2000] Decision and Order on Reconsideration at 2. The administrative law judge observed that "[t]he form used states that '[t]he Department of Labor will only pay for films of acceptable quality (+and+)'" *Id.* The administrative law judge additionally observed that "Dr. Wheeler gave his Department of Labor Medical Provider Number." *Id.* Thus, contrary to employer's assertion, the administrative law judge rationally found that the Director, and not employer, obtained Dr. Wheeler's negative x-ray rereading.

Employer further asserts that the administrative law judge erred in applying the Section 413(b) prohibition to exclude Dr. Wheeler's negative x-ray rereading since the qualifications of Dr. Eryilmaz are not in the record. In a 1988 Decision and Order on Remand, Judge Gray stated, "[a]s noted in my August 14, 1985 Decision and Order on Remand, a check of standard reference works (including the Dictionary of Medical Specialists published by Marquis Who's Who) disclosed that both Dr. Eryilmaz and Dr. Wheeler are Board-certified radiologists." [August 3, 1988] Decision and Order on Remand at 1-2. Judge Gray further stated, "[h]aving taken official notice of Dr. Eryilmaz's status as a Board-certified radiologist, I must as a matter of law, iterate my finding that, under Section 413(b) of the Act, Dr. Wheeler's rereading may be considered only for his appraisal of the quality of the original film."[11] *Id.* at 2.

In a subsequent Decision and Order on Reconsideration, the administrative law judge indicated that he took judicial notice of Dr. Eryilmaz's qualifications as a Board-certified radiologist. The administrative law judge observed that "[e]mployer has an argument that since Dr. Eryilmaz's qualifications are in the record only through judicial notice, and since case law provides that if the record does not establish the qualifications of the physician who first interprets the x-ray, the rule does not apply and the Director may reread the x-ray." [February 11, 2000] Decision and Order on Reconsideration at 2. The administrative law judge also observed that "[Dr. Sutherland's] finding is supported by the positive reading of a [B]oard-certified radiologist." *Id.* at 3. Dr. Eryilmaz is the only other physician of record who interpreted an x-ray as positive for pneumoconiosis. Employer does not challenge the accuracy and reliability of the source relied upon by the administrative law judge in taking judicial notice that Dr. Eryilmaz is a Board-certified radiologist. Rather, employer

[11]The administrative law judge stated, "[f]or the record, Dr. Wheeler found the film to be of acceptable quality." [August 3, 1988] Decision and Order on Remand at 2.

challenges the administrative law judge's application of the Section 413(b) prohibition since Dr. Eryilmaz's qualifications are not actually in the record. Inasmuch as the administrative law judge properly took judicial notice that Dr. Eryilmaz is a Board-certified radiologist,[12] *see generally Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990), we reject employer's assertion that the administrative law judge erred in excluding Dr. Wheeler's negative x-ray rereading pursuant to Section 413(b). *See* 30 U.S.C. §923(b); *Gray, supra*; *Tobias, supra*. Furthermore, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to

[12]Employer asserts that the administrative law judge erred in failing to take judicial notice that Dr. Wheeler is a Board-certified radiologist in addition to being a B-reader since the administrative law judge took judicial notice that Dr. Eryilmaz is a Board-certified radiologist. Inasmuch as we affirm the administrative law judge's exclusion of Dr. Wheeler's rereading pursuant to Section 413(b), we hold that any error by the administrative law judge in failing to take judicial notice of Dr. Wheeler's qualifications is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1).[13]

[13]After finding that the four remaining x-ray interpretations of Drs. Evans, Eryilmaz, Sutherland and Wheeler were in equipoise, the administrative law judge additionally stated, "considering that Dr. Sutherland is the [c]laimant's treating physician and he found pneumoconiosis present, and his finding is supported by the positive reading of a [B]oard-certified radiologist, I find that the x-ray evidence establishes the presence of pneumoconiosis." *Id*. Although this is not a valid basis for according greater weight to Dr. Sutherland's x-ray reading than to the contrary x-ray readings of record, *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991), we hold that the administrative law judge's error in this regard is harmless in view of our holding that the administrative law judge properly excluded Dr. Wheeler's rereading pursuant to Section 413(b), *see Larioni, supra*. As previously noted, the administrative law judge found the relevant x-ray evidence to be in equipoise with Dr. Wheeler's negative rereading included in the record, not with it excluded from the record. Furthermore, while the administrative law judge properly took judicial notice that Dr. Eryilmaz is a Board-certified radiologist, the credentials of Dr. Evans are not in the record. Moreover, employer does not contend that Dr. Evans is better qualified than Dr. Eryilmaz.

Inasmuch as we affirm the administrative law judge's finding that the evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1),[14] we hold that rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) is precluded. Furthermore, inasmuch as the record does not contain any new evidence in response to the new legal standards adopted by the Fourth Circuit in *Sykes* and *Massey*, we hold as a matter of law that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) and (b)(3).[15]

Accordingly, the administrative law judge's Decision and Order Rejecting Employer's Exhibits 2-10 and Reopening Record, Decision and Order on Reconsideration Affirming Prior Holdings, Rejecting Claimant's Exhibit 3, and Striking Dr. Wheeler's X-ray Rereading, and Decision and Order on Remand - Awarding Benefits are affirmed.

SO ORDERED.

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[14]Inasmuch as we affirm the administrative law judge's finding at 20 C.F.R. §727.203(a)(1), we decline to address employer's contention with regard to 20 C.F.R. §727.203(a)(3).

[15]The Board previously affirmed Judge Gray's finding that the evidence was insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) and (b)(3). *Blankenship v. Buchannon Fuel Co.*, BRB No. 88-2931 BLA (Dec. 29, 1992)(unpub.).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's award of benefits. In its Decision and Order on Reconsideration in employer's prior appeal, the Board noted that, in *Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991), "[the United States Court of Appeals for the Fourth Circuit] discussed the legislative intent of Section 413(b), which limits its application, and stated that Section 413(b) is an attempt to 'restrict governmental attempts to frustrate the payment of claims and not to preclude evidence that may be offered by private parties in opposing claims.'" *Blankenship v. Buchannon Fuel Co.*, BRB No. 88-2931 BLA, slip op. at 5 (July 17, 1996)(unpub. Decision and Order on Reconsideration). The Board held that Section 413(b) does not prohibit the administrative law judge from considering Dr. Wheeler's rereading of the x-ray originally read by Dr. Eryilmaz because employer, a private mine operator, is defending this claim. The Board therefore instructed the administrative law judge to consider Dr. Wheeler's negative x-ray rereading in his consideration of the conflicting x-ray evidence. Despite the Board's specific instructions, the administrative law judge, on remand, excluded Dr. Wheeler's negative x-ray rereading pursuant to Section 413(b) because he found that it was obtained by the Director. Contrary to the administrative law judge's analysis of the x-ray evidence with respect to Section 413(b), the important issue is not whether the x-ray rereading was obtained by the Director. Rather, the critical issue is whether the Director, and not a private operator, is using such a rereading to avoid liability. *See Gray, supra*. Thus, I would hold that the administrative law judge erred in failing to

follow the Board's remand order that Section 413(b) does not prohibit the administrative law judge from considering Dr. Wheeler's negative x-ray rereading.

I would also hold that the administrative law judge erred in his analysis of all of the conflicting x-ray evidence of record, including Dr. Wheeler's negative x-ray rereading. In addition to finding the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) with Dr. Wheeler's negative x-ray rereading excluded from the record, the administrative law judge also found the evidence sufficient to establish invocation of the interim presumption thereunder with Dr. Wheeler's negative x-ray rereading included in the record. The administrative law judge considered the five x-ray interpretations of Drs. Evans, Eryilmaz, Sutherland and Wheeler. After discrediting Dr. Eryilmaz's interpretation of an x-ray dated February 2, 1978, the administrative law judge found the four remaining x-ray interpretations of Drs. Evans, Eryilmaz, Sutherland and Wheeler to be in equipoise. Nevertheless, the administrative law judge erroneously accorded greater weight to Dr. Sutherland's positive x-ray interpretation than to the contrary x-ray interpretations of record because "Dr. Sutherland is the [c]laimant's treating physician and he found pneumoconiosis present, and his finding is supported by the positive reading of a [B]oard-certified radiologist." [February 11, 2000] Decision and Order on Reconsideration at 3; *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). Not unmindful of the length of time this case has been in the system, I do not believe that the administrative law judge's finding at 20 C.F.R. §727.203(a)(1) is affirmable. Therefore, I would vacate the administrative law judge's finding at 20 C.F.R. §727.203(a)(1) and remand the case for further consideration of all of the relevant x-ray evidence of record. Further, I would instruct the administrative law judge to consider whether he should take judicial notice of the qualifications of any of the other physicians of record who provided x-ray interpretations, since he took judicial notice that Dr. Eryilmaz is a Board-certified radiologist. *See Simpson v. Director, OWCP*, 9 BLR 1-99 (1986).

Further, I would hold that the administrative law judge erred in excluding the new evidence submitted on remand with regard to rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) and (b)(3). The Board instructed the administrative law judge to reopen the record on remand for the submission of new evidence in light of the new legal standards adopted by the Fourth Circuit in *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987), and *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). The Board did not limit the type of evidence which the parties could submit on remand to discussions by physicians based upon evidence previously in the record. To the contrary, the Board stated, "preclusion of the opportunity to develop new evidence could result in injustice to employer." *Blankenship v. Buchannon Fuel Co.*, BRB No. 88-2931 BLA, slip op. at 7 (July 17, 1996)(unpub. Decision and Order on Reconsideration). Nonetheless, the administrative law judge, on remand, precluded employer from submitting medical opinions based on a new physical examination and objective studies. Inasmuch as

employer submitted new evidence in response to the new legal standards adopted by the Fourth Circuit in *Sykes* and *Massey*, due process and fundamental fairness mandate that employer's new evidence be admitted into the record on remand. *See Peabody Coal Co. v. Ferguson,* 140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998); *Peabody Coal Co. v. White*, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998); *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *see also Bethenergy Mines, Inc. v. Director, OWCP* [*Vrobel*], 39 F.3d 458, 19 BLR 2-95 (3d Cir. 1994); *Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989). Therefore, I would remand the case to the administrative law judge to reopen the record on remand for the submission of all new evidence that is relevant to the new legal standards adopted by the Fourth Circuit in *Sykes* and *Massey*.

NANCY S. DOLDER
Administrative Appeals Judge