BRB No. 98-0844 BLA

EDWARD W. MURPHY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTUCKY CARBON COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Edward W. Murphy, Delbarton, West Virginia, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson, and Kilcullen, Chartered), Washington, D.C.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand - Denying Benefits (88-BLA-2704) of Administrative Law Judge Clement J. Kichuk 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.[1] In the initial Decision and Order

[1] Claimant is Edward W. Murphy, who filed his application for benefits on February 25, 1975. Director's Exhibit 1.

dated September 27, 1989, Administrative Law Judge Bernard J. Gilday, Jr. credited claimant with eleven and three-quarter years of qualifying coal mine employment and, adjudicating this claim pursuant to 20 C.F.R. Part 727, determined that claimant failed to establish invocation of the interim presumption of total disability pursuant to 20 C.F.R. §727.203(a)(1)-(4), and pursuant to 20 C.F.R. Part 718, determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Claimant timely appealed, and the Board affirmed as unchallenged Administrative Law Judge Gilday's findings under 20 C.F.R. §§727.203(a)(2)-(4) and 718.202(a)(2)-(4), but vacated his determinations at 20 C.F.R. §§727.203(a)(1) and 718.202(a)(1) because he failed to provide an adequate explanation for these determinations. Therefore, the Board remanded the case to the administrative law judge for reconsideration of the x-ray evidence. *Murphy v. Kentucky Carbon Coal Corp.*, BRB No. 89-3473 BLA (Jun. 29, 1992)(unpub.). In addition, the Board noted to the administrative law judge that, on remand, he should consider whether any of the x-ray evidence must be excluded in light of the limitations pronounced in Section 413(b) of the Act, 30 U.S.C. §923(b), which restricts the admission of x-ray rereadings obtained by the Director, Office of Workers' Compensation Programs (the Director).

On remand, Administrative Law Judge Gilday initially found that none of the x-ray evidence was subject to the provisions found in 30 U.S.C. §923(b) of the Act, and that, the x-ray evidence was insufficient to demonstrate either invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) or the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). Accordingly, benefits were denied. Claimant appealed and the Board held that the administrative law judge erred in finding that none of the x-ray evidence must be excluded pursuant to 30 U.S.C. §923(b) because the Director had submitted rereadings of x-ray films. The Board vacated the administrative law judge's findings pursuant to Sections 727.203(a)(1) and 718.202(a)(1) inasmuch as the administrative law judge's determinations contravened the holding in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993),[2] and accordingly, remanded the case. *Murphy v. Kentucky*

[2] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held, "Administrative factfinders simply cannot consider the quantity of evidence alone, without reference to a difference in the qualifications of the readers or without an examination of the party affiliation of the experts. In other words, consideration of merely quantitative differences, without an attendant qualitative evaluation of the x-rays and their readers, is legal error." *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *see Staton v. Norfolk & Western Ry. Co.*,
65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995).

Carbon Coal Corp., BRB No. 93-0919 BLA (Jun. 28, 1994)(unpub.). Subsequently, employer filed a Motion for Reconsideration, which the Board denied. *Murphy v. Kentucky Carbon Coal Corp.*, BRB No. 93-0919 BLA (Jul. 22, 1997)(unpub.).

Inasmuch as Administrative Law Judge Gilday was unavailable, Administrative Law Judge Clement J. Kichuk (administrative law judge) was assigned the case on remand. After reviewing all of the x-ray evidence of record, the administrative law judge excluded the readings of Dr. Poulos of the x-ray films dated June 23, 1980 and October 10, 1980 inasmuch as these readings are prohibited by 30 U.S.C. §923(b). Next, the administrative law judge found that the x-ray evidence failed to establish either invocation of the interim presumption pursuant to Section 727.203(a)(1) or the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the denial. The Director, as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 727.203(a)(1), a review of the x-ray evidence reveals that there are twenty x-ray films with seventy-four interpretations, of which forty readings are negative, thirty interpretations are positive, and four films are unreadable. Director's Exhibits 18-23, 30, 31, 37, 39; Claimant's Exhibits 1-7, Employer's Exhibits 1-3, 6, 7, 9, 11-13, 14. Dr. Branscomb, a B-reader and Board-certified internist, reviewed the medical evidence in a report dated June 13, 1989, and, with respect to the x-ray evidence, opined that there is a "heavy preponderance" of readings indicating the absence of pneumoconiosis because "two [physicians] identified pneumoconiosis in the upper end of the chest, three found pneumoconiosis in the lower end, and the remainder either did not specify or

described the changes in all six lung zones." Employer's Exhibit 10.

In determining that the x-ray evidence of record is insufficient to invoke the presumption of total disability due to pneumoconiosis pursuant to Section 727.203(a)(1), we affirm the administrative law judge's determination that claimant failed to satisfy his burden of establishing the existence of pneumoconiosis by a preponderance of the x-ray evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986); [1998] Decision and Order on Remand at 8-9. In analyzing the voluminous x-ray evidence of record, the administrative law judge examined the x-ray films taken during the period before and after 1974, when claimant ceased working coal mine employment, and properly noted that there were no positive readings of the earliest x-ray films of record taken in 1971, 1972, and 1974. *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)("early negative x-ray readings are not inconsistent with significantly later positive readings... This proposition is not applicable where the factual pattern is reversed."); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); [1988] Decision and Order on Remand at 7; Director's Exhibits 30, 39. Next, the administrative law judge reviewed the readings of films taken subsequent to 1974, and permissibly rejected the interpretations rendered by Dr. Wright because he is a Board-certified anesthesiologist and discredited the readings of Drs. Varney and Clarke because they are A-readers inasmuch as these physicians lack superior radiological expertise. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); [1988] Decision and Order on Remand at 7. Subsequently, the administrative law judge rationally concluded that the remainder of the x-ray readings that were rendered by Board-certified radiologists who are also B-readers consisted of "multiple negative readings," and accordingly found that the probative value of the negative readings outweighed that of the positive interpretations. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); Decision and Order at 8. Finally, the administrative law judge properly found the opinion of Dr. Branscomb, that the preponderance of the x-ray evidence is negative for the presence of pneumoconiosis, entitled to probative weight because he rendered a well reasoned and fully documented opinion that is consistent with all of the probative medical evidence in the record in this case. *See Mullins*, *supra*; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); [1998] Decision and Order on Remand at 9. Inasmuch as the administrative law judge permissibly found that the preponderance of the credible x-ray evidence is

negative for the existence of pneumoconiosis, and is therefore, entitled to greater weight, we affirm his Section 727.203(a)(1) determination as rational and supported by substantial evidence. *See Allen v. Union Carbide Corp.*, 8 BLR 1-393, 1-395 (1985).

We similarly affirm the administrative law judge's determination pursuant to Section 718.202(a)(1) inasmuch as the administrative law judge, within a proper exercise of discretion, accorded probative weight to the negative interpretations in finding that the preponderance of the x-ray evidence failed to establish the existence of pneumoconiosis. Under this subsection, the administrative law judge, within a proper exercise of discretion, permissibly found that the "consensus" of the negative interpretations by dually-qualified radiologists more persuasive than the positive interpretations by equally-qualified radiologists, and hence, claimant failed to satisfy his burden of establishing the existence of pneumoconiosis under subsection (a)(1). *See Ondecko*, *supra*; *Allen*, *supra*; [1988] Decision and Order on Remand at 10. Inasmuch as the administrative law judge's Section 718.202(a)(1) finding is rational, supported by substantial evidence, and within his discretion as the trier-of-fact, we affirm this determination.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge