BRB No. 99-0140 BLA

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

Appeal of the Decision and Order-Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research & Defense Fund of Kentucky, Inc.), Prestonsburg, Kentucky, for claimant.

Barry H. Joyner (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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (96-BLA-1587) of Administrative Law Judge Daniel J. Roketenetz 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).[1] The administrative law judge

[1]This case, which is before the Board for a third time, has a long procedural history. Claimant initially filed a claim for benefits on March 3, 1978. Director's Exhibit 1. Eventually, benefits were awarded claimant in a Decision and Order issued by Administrative Law Judge James P. Abell. Director's Exhibit 36. Subsequent to an

appeal by the Director, Office of Workers' Compensation Programs (the Director), the Board issued a Decision and Order vacating the award of benefits. *Wellman v. Director, OWCP*, BRB No. 86-992 BLA (Aug. 30, 1989)(unpub.). Specifically, the Board reversed the administrative law judge's finding of eighteen and three-quarter years of coal mine employment and held that claimant established a coal mine employment history of seven and three-quarter years inasmuch as claimant's employment at Norfolk & Western Railway Company did not constitute coal mine employment. *Id.* The Board thus remanded the claim for consideration pursuant to the permanent criteria at 20 C.F.R. Part 410, Subpart D. *Id.* On remand, Administrative Law Judge Bernard J. Gilday found that claimant failed to establish pneumoconiosis at Section 410.414(a) or total respiratory or pulmonary disability at Section 410.414(b), (c). Accordingly, benefits were denied. Director's Exhibit 45. Subsequent to an appeal by claimant, the Board affirmed the denial of benefits. *Wellman v. Director, OWCP*, BRB No. 89-0264 BLA (Feb. 24, 1993)(unpub.). Director's Exhibit 51. Claimant sought modification with the district director who denied the request. Director's Exhibit 64. Subsequently, Administrative Law Judge Gilday issued a Decision and Order Denying Modification and Benefits. Director's Exhibit 71. Claimant again sought modification with the district director, Director's Exhibit 78, a request which was eventually denied. After a hearing was held,

concluded that claimant established a coal mine employment history of seven and three-quarter years. Decision and Order at 4-5. In reaching this determination, the administrative law judge concluded that no mistake had been made in the prior determination that claimant's employment with Norfolk & Western Railway Company (Norfolk & Western) did not constitute covered coal mine employment. Decision and Order at 5. The administrative law judge also concluded that the instant claim constituted a request for modification pursuant to 20 C.F.R. §725.310. Decision and Order at 5-7. Finally, the administrative law judge found that the entirety of evidence of record failed to establish the presence of totally disabling pneumoconiosis arising out of coal mine employment under the permanent criteria at 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied.

Administrative Law Judge Roketenetz, on October 9, 1998, issued the Decision and Order denying benefits from which claimant now appeals.

On appeal, claimant contends that his work with Norfolk & Western constitutes coal mine employment and that, based on the additional eleven years of such employment, review of the instant claim should have been made pursuant to 20 C.F.R. Part 727. Claimant further contends that the initial finding of invocation at Section 727.203(a)(4) should be reinstated and that the evidence submitted since the initial award of benefits again supports a finding of entitlement. Claimant further asserts that the administrative law judge erred in his analysis of the x-ray evidence as the Director, Office of Workers' Compensation Programs (the Director), violated the Section 413(b) prohibition against the re-reading of x-ray films initially read as positive. 30 U.S.C. §923(b). Claimant lastly asserts that he is entitled to benefits pursuant to 20 C.F.R. §410.490 and that the administrative law judge erred in failing to make findings thereunder. The Director has filed a Motion to Remand,[2] in which he asserts that the administrative law judge properly found that claimant established a coal mine employment history of seven and three-quarter years. Nevertheless, the Director concedes that the later negative re-readings of the x-ray dated April 21, 1993, should have been excluded under Section 413(b) and that remand is necessary for a reweighing of the x-ray evidence. The Director further asserts that remand is necessary for the administrative law judge to consider entitlement under Section 410.490.

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 contends that his eleven years of employment with Norfolk & Western constitutes covered coal mine employment under the Act and that accordingly he has met the ten-year threshold requirement for his claim to be considered under Part 727. Claimant contends that while he worked at the transportation yard at Norfolk & Western, that yard was so closely interconnected with the company's mine site as to be considered one situs. Claimant asserts that his employment preparing empty cars for loading was a necessary part of coal preparation and thus covered coal mine employment under the Act. In finding that claimant's employment with Norfolk & Western did not constitute covered coal mine employment under the Act, the administrative law judge found that the site of

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

claimant's work was not related to the production and processing of coal and that therefore claimant failed to satisfy the "situs" requirement. Accordingly, the administrative law judge found that claimant's eleven years of employment with Norfolk & Western did not constitute coal mine employment and he found that claimant established a coal mine employment history of seven and three-quarter years.

We affirm the administrative law judge's determination that claimant established a coal mine employment history of seven and three-quarter years and the determination that claimant's employment with Norfolk & Western did not constitute coal mine employment under the Act. The record demonstrates that claimant was employed at the Norfolk & Western railroad yard between the years of 1951 and 1962, Director's Exhibits 6, 35. During this period, Norfolk & Western operated a coal mine directly across the river in Goody, Kentucky. Coal from this mine was used to fuel Norfolk & Western's locomotives.

In *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 14 BLR 2-139 (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, enunciated a two-prong situs function test indicating that in order to be considered a miner as defined by the Act, an individual must have worked in or around a coal mine and have been employed in the extraction or preparation of coal. While employment as a railroad transportation worker may constitute covered coal mine employment under the Act, *see Norfolk & Western Railway Co. v. Roberson*, 918 F.2d 1144, 14 BLR 2-106 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991); *see also Norfolk & Western Railway Co. v. Shrader*, 5 F.3d 777, 18 BLR 2-35 (4th Cir. 1993), the record here fails to demonstrate that claimant's employment with Norfolk & Western constituted coal mine employment under the Act. In the instant case, claimant apparently worked cleaning and repairing hopper cars. Director's Exhibit 35. Coal was cleaned and crushed across the river from the Norfolk & Western transportation yard and no further preparation was made at the railroad yard. Accordingly, we conclude that claimant's eleven years of employment with Norfolk & Western does not constitute coal mine employment under the Act, *see Krushansky, supra*; *see also Eplion v. Director, OWCP*, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986), and we affirm the administrative law judge's finding that the prior determination that claimant established a coal mine employment history of seven and three-quarter years did not constitute a mistake in a determination of fact.[3]

[3]Inasmuch as the evidence fails to support a finding of at least ten years of coal mine employment, we need not address claimant's assertions regarding Part 727 as they are moot. *See* 20 C.F.R. §727.203(a).

While the administrative law judge properly determined that claimant established a coal mine employment history of less than ten years, a review of the Decision and Order demonstrates that he then incorrectly determined entitlement under the permanent criteria at 20 C.F.R. Part 410, Subpart D, instead of determining whether claimant established entitlement pursuant to 20 C.F.R §410.490, *i.e.* the interim presumption as applied to short-term miners. We thus vacate the administrative law judge's determination at Part 410, Subpart D and remand the claim for further consideration of the interim presumption as applied to short term miners. *See* 20 C.F.R. §410.490.

The Board held in *Phipps v. Director, OWCP*, 17 BLR 1-39 (1992)(*en banc)* (Smith, J., concurring; McGranery, J., concurring and dissenting), that short-term miners, *i.e.*, those with fewer than ten years of coal mine employment who filed their claims on or before March 31, 1980, may establish invocation of the interim presumption of total disability by establishing the existence of pneumoconiosis by x-ray, biopsy or autopsy evidence and by establishing causality, *i.e.*, that their pneumoconiosis arose out of coal mine employment, *see Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988); *Phipps*, *supra*. When this case was previously before the Board, the Board held that claimant was precluded from establishing entitlement under Part 410.490 inasmuch as claimant failed to establish the existence of pneumoconiosis through either x-ray, biopsy or autopsy evidence, and further failed to establish causality. *See Wellman*, 89-0264 BLA, slip op. at 5-6. In his request for modification, claimant has submitted additional x-ray evidence along with medical opinion evidence which, if credited, could support a finding of causality. *See* Director's Exhibits 53 59, 60, 62, 63, 74; Claimant's Exhibits 2, 9. Accordingly, we vacate the administrative law judge's denial of benefits and remand the claim for consideration of entitlement pursuant to the interim presumption as applied to short-term miners. *See Phipps, supra*.

In considering whether claimant established the existence of pneumoconiosis pursuant to the permanent criteria at Part 410, Subpart D, the administrative law judge considered the entirety of x-ray evidence and concluded that such evidence failed to establish the existence of pneumoconiosis. As both claimant and the Director contend, however, the administrative law judge's analysis of the x-ray evidence is flawed and must be vacated. 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 certain x-rays reread except for purposes of determining quality. *Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981). This prohibition is applicable when *each* of the following threshold requirements has been met: 1) the physician who originally read the x-ray is either board certified or board eligible; 2) there is other evidence of a significant and measurable pulmonary or respiratory impairment; 3) the x-ray was

performed in compliance with the requirements of the applicable quality standards and was taken by a radiologist or qualified technologist or technician; and 4) there is no evidence that the claim was fraudulently represented. 20 C.F.R. §§727.206(b)(1); 718.202(a)(1)(I). *Auxier v. Director, OWCP*, 4 BLR 1-717 (1982). Where the record before the administrative law judge does not establish the qualifications of the original x-ray reader, the Section 413(b) prohibition is inapplicable. *Casey v. Director, OWCP*, 7 BLR 1-873 (1985); *see Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985). In the instant case, the record demonstrates that the newly submitted x-ray interpreted as positive by Dr. Fisher, Director's Exhibit 59, a B-reader and board-certified radiologist,[4] was later re-read as negative by physicians procured by the Director*, see* Director's Exhibits 62, 63. As claimant contends, and the Director now concedes, these negative re-readings were obtained in violation of the Section 413(b) prohibition. Accordingly, we hold that, on remand, the administrative law judge must consider only the positive interpretation of the April 21, 1993 x-ray rendered by Dr. Fisher. *See Tobias, supra*.

[4]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). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge