BRB Nos. 97-1447 BLA
and 97-1447 BLA-A
Case No. 93-BLA-1042

WALTER R. BAILEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER on
Party-in-Interest	)	RECONSIDERATION *EN BANC*

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilberston (Kilcullen, Wilson & Kilcullen, Chartered), Washington, D.C., for employer.

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

HALL, Chief Administrative Appeals Judge:

Employer has filed a timely Motion for Reconsideration and Suggestion for Reconsideration *En Banc,* requesting the Board to reconsider its Decision and Order of May 28, 1998, in the above-captioned case which arises under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended 30 U.S.C. §901 *et seq.* (the Act). By Decision and Order dated October 27, 1995, the Board affirmed Administrative Law Judge Lawrence E. Gray's award of benefits under 20 C.F.R. Part 718, but vacated his determination regarding the onset of total disability, and remanded the case for further consideration of the evidence under 20 C.F.R.

§725.503(b). *Bailey v. U.S. Steel Mining Co.*, BRB No. 95-1270 BLA (Oct. 27, 1995)(unpub.). Employer filed a motion for reconsideration, and the Board granted the motion but denied the relief requested.

On remand, the case was reassigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge), who concluded that claimant was entitled to benefits as of April 1, 1992. Claimant appealed and employer cross-appealed from the administrative law judge's July 2, 1997 Decision and Order. The Board vacated the administrative law judge's onset finding pursuant to Section 725.503(b), and remanded the case for further consideration of the relevant evidence of record in determining the date from which claimant is entitled to benefits. The Board also acknowledged employer's arguments on cross-appeal regarding claimant's entitlement to benefits under 20 C.F.R. Part 718, but declined to revisit the issue, holding that employer's arguments were previously raised and rejected by the Board. *See Bailey v. U.S. Steel Mining Co.,* BRB No. 95-1270 BLA (Aug. 30, 1996)(Decision and Order on Reconsideration)(unpub.); *Bailey v. U.S. Steel Minin*g Co.*,* BRB No. 95-1270 BLA (Oct. 27, 1995)(unpub.); *Bailey v. U.S. Steel Mining Co.*, BRB Nos. 97-1447 BLA and 97-1447 BLA-A (May 28, 1998)(unpub.). Additionally, the Board noted employer's concession that it appealed "in order to preserve the entitlement issues for further appeal to the United States Court of Appeals for the Fourth Circuit." Employer's September 4, 1997 Brief at 8; *Bailey*, BRB Nos. 97-1447 BLA and 97-1447 BLA-A at 2 n. 3.

In its Motion for Reconsideration, employer argues that the Board erred in not addressing the entitlement issues previously raised by employer under 20 C.F.R. §§718.202(a)(1) and 718.204(b). Employer further urges the Board to remand this case to the administrative law judge to apply *Sterling Smokeless Coal Co. v. Akers,* 131 F.3d 438, 21 BLR 2-269 (4th Cir.1997), and *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir.1998). In this regard, employer argues that "these cases clearly establish that the [Fourth Circuit] will not affirm the underlying award of benefits in this case." Employer's Motion at 2. Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded to employer's Motion for Reconsideration.

Employer contends that the Board failed to address its arguments that Judge Gray committed three errors in weighing the x-ray evidence at Section 718.202(a)(1): by applying the "true doubt rule," by applying a "headcount" approach, and by erroneously applying the "later evidence rule." Employer argues that any one of these errors on Judge Gray's part requires that the Board vacate his finding of the existence of pneumoconiosis at Section 718.202(a)(1).

In its Decision and Order dated October 27, 1995, and in its Decision and

Order on Reconsideration dated August 30, 1996, the Board addressed employer's arguments regarding Judge Gray's application of the true doubt rule and his reliance on the numerical preponderance of positive readings rendered by highly-qualified physicians on certain x-rays. *Bailey,* BRB No. 95-1270 BLA, slip op. at 3-4, (Oct. 27, 1995)(unpub.); *rec'd,* BRB No. 95-1270 BLA, slip op. at 2 (Decision and Order on Reconsideration)(Aug. 30, 1996). The Board did not, however, address employer's argument that Judge Gray failed to adequately explain his treatment of the interpretations of the most recent x-ray dated January 23, 1993. We hold that Judge Gray erred in applying the "later evidence rule." Referring to the first x-ray of record taken on October 22, 1970, and interpreted as negative for pneumoconiosis by Dr. Morgan, Judge Gray, citing *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), gave no credit to Dr. Morgan's interpretation because of its age,[1] and because the physician's qualifications were not part of the record. March 9, 1994 Decision and Order Awarding Benefits at 4; Director's Exhibit 38. Judge Gray also found that:

> When looking at the x-ray evidence as a whole, four out of the remaining seven x-rays were interpreted as positive for pneumoconiosis. I find that the later evidence rule applies in this situation; these readings are more probative of the Claimant's worsening condition.

March 9, 1994 Decision and Order Awarding Benefits at 4. Judge Gray was referring to the x-rays taken on January 23, 1980, December 19, 1986, October 15, 1987 and June 11, 1991. Decision and Order Awarding Benefits at 4, 5; Director's Exhibits 15, 30, 63-65; Employer's Exhibits 4, 7. However, referring to the most recent x-ray taken on January 23, 1993,[2] Judge Gray summarily stated, "Following

[1]Judge Gray noted that this x-ray was taken ten years prior to the next most recent x-ray of record. March 9, 1994 Decision and Order Awarding Benefits at 4.

[2]The most recent x-ray taken on January 28, 1993, submitted with claimant's petition for modification, was uniformly read as negative for the existence of pneumoconiosis by four B readers, two of whom are also Board-certified radiologists. Employer's Exhibits 1, 3, 4, 10.

Adkins, I give not [sic] weight to these readings." Judge Gray did not explain why the four negative readings by qualified physicians, four B readers, two of whom are also Board-certified radiologists, carry no weight. March 9, 1994 Decision and Order Awarding Benefits at 5.

In this case, as in *Adkins*, the application of the "later evidence rule" is inappropriate because all the interpretations of the most recent x-rays are negative and the second most recent x-ray taken on June 11, 1991 had conflicting interpretations.[3] *See Adkins, supra*; Director's Exhibits 63-65; Employer's Exhibits 1, 3, 4, 7, 10. Without an adequate analysis by the administrative law judge, the interpretations of the 1991 and 1993 x-rays, the only newly submitted x-ray evidence, taken at face value,[4] tend to support Judge Bober's prior denial, in which he found the evidence insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §725.310; *see Adkins, supra, Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kova*c *v. BCNR Mining Corp.*, 16 BLR 1-71 (1992); Director's Exhibit 60.

[3]In 1992, claimant filed a petition for modification of a Decision and Order issued by Administrative Law Judge Marvin Bober, in which Judge Bober denied benefits based on his finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Director's Exhibits 60, 61. In addition to the most recent x-ray taken on January 23, 1993, and uniformly interpreted as negative, sixteen interpretations of the x-ray taken on June 11, 1991 were submitted along with this petition for modification. Eleven B readers, nine of whom are also Board-certified radiologists, read the x-ray as positive for the existence of pneumoconiosis, Director's Exhibits 63, 65, while five B readers, four of whom are also Board-certified radiologists, read the x-ray as negative, Director's Exhibits 63, 64; Employer's Exhibits 4, 7.

[4]In *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992)*,* the United States Court of Appeals for the Fourth Circuit, in pertinent part, held that:

> if the evidence, taken at face value, shows that the miner has improved...*[i]t is impossible to reconcile the evidence*. Either the earlier or the later result *must* be wrong, and it is just as likely that the later evidence is faulty as the earlier. The reliability of irreconcilable items of evidence must therefore be evaluated without reference to their chronological relationship.

Id. at 52, 16 BLR at 2-65.

Therefore, we vacate Judge Gray's finding that the preponderance of the evidence established the existence of pneumoconiosis under Section 718.202(a)(1), and his finding that the prior denial was based on a mistake in a determination of fact at Section 725.310. We thereby also vacate Judge Gray's finding that the February 13, 1988 x-ray is positive for pneumoconiosis based on his application of the now invalid true doubt rule.[5] *See Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 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); Director's Exhibits 32, 45; Employer's Exhibit 11.[6]

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[5]There are five interpretations of the x-ray taken on February 13, 1988 :

1.	DX-4	0/0	SABA	B, BC
2.	DX-45	0/0	SCOTT	B, BC
3.	DX-32	1/1	CAPPIELLO	B, BC
4.	DX-45	0/0	WHEELER	B, BC
5.	EX-11	0/0	FINO	B

Judge Gray, based on his application of the true doubt rule, erred in finding the x-ray to be positive for the existence of pneumoconiosis and in not considering Dr. Fino's interpretation.

[6]Of the thirty-six x-ray interpretations of record, the interpretations by Drs. Modi and Fino were not considered by Judge Gray. Director's Exhibits 15, 16, 28, 30, 32, 36, 38, 45, 63-65; Employer's Exhibits 1, 4, 7, 11. Dr. Modi's qualifications were revoked in 1989. Director's Exhibit 58.

In light of the aforementioned, we remand this case for the administrative law judge to reconsider the newly submitted x-ray evidence, along with the previously submitted x-ray evidence, to determine whether claimant established a change in conditions. *See Nataloni, supra*; *Kova*c, *supra*. Additionally, the administrative law judge must reconsider whether there was a mistake in a determination of fact in the prior denial. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In assessing the reliability of irreconcilable items of the x-ray evidence, the administrative law judge must analyze the evidence without reference to its chronological relationship. *See Adkins, supra; Akers, supra.*[7] Further, the administrative law judge must consider the radiological qualifications of the physicians, see *Adkins, supra*, analyze all the relevant evidence, and sufficiently explain his rationale, see *Akers*, *supra*, *Hicks, supra.*[8]

Under Section 718.204(b), employer reiterates its arguments on appeal that Judge Gray failed to adequately explain why he found that claimant established causation, failed to address the causative effects of claimant's cigarette smoking, and erred in crediting the opinions of Drs. Rasmussen and Buddington over the contrary opinions of Drs. Fino and Hippensteel. Judge Gray accorded little weight to the opinions of Drs. Fino and Hippensteel, that claimant's respiratory impairment was due to cigarette smoking, because they determined that claimant does not have pneumoconiosis and because they did not address adequately the majority of the

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[7]In *Sterling Smokeless Coal Co. v. Akers,* 131 F.3d 438, 21 BLR 2-269 (4th Cir.1997), the United States Court of Appeals for the Fourth Circuit, in pertinent part, citing *Adkins*, held that an administrative law judge may not ignore the relative qualifications of competing physicians in conducting his review, restating that:

> [r]esolving the conflict [between the opinions of the two sets of physicians] requires counting heads (i.e., any two opinions are better than one) or looking to qualifications. The first course is as hollow as "later is better"; the second is prescribed by the regulations.

Id. at 440, 21 BLR at 2-274.

[8]In *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir.1998), the United States Court of Appeals for the Fourth Circuit remanded the case for further consideration because the administrative law judge, as in this case, failed to analyze all the relevant evidence, and failed to adequately explain his reasons for crediting certain evidence and discrediting other evidence. *Id.* at 528, 21 BLR at 2-326.

positive x-ray evidence that demonstrated the existence of pneumoconiosis. March 9, 1994 Decision and Order Awarding Benefits at 8. Because Judge Gray relied on his evaluation of the x-ray evidence in finding total disability due to pneumoconiosis at Section 718.204(b), *id*., his finding on disability causation cannot stand and we vacate this finding. Further, because Drs. Fino and Hippensteel acknowledged claimant's disabling respiratory impairment, but nevertheless both concluded that it was caused by claimant's thirty years of smoking, their opinions directly rebut the miner's evidence that pneumoconiosis contributed to his disability. *See Hicks, supra; Dehue Coal Co. v. Ballard,* 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). If, on remand, the administrative law judge finds that claimant has established the existence of pneumoconiosis, he must then reweigh the evidence regarding disability causation under Section 718.204(b) and make findings consistent with controlling circuit court case law.

Accordingly, employer's motion for reconsideration is granted *en banc,* and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

Employer's argument that the administrative law judge erred in holding that claimant had established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) reflects a significant distortion of the record by selective quotation and omission. I respectfully dissent from the majority's decision to remand this case yet again. I would affirm the award of benefits.

The administrative law judge considered the eight x-rays of record and their varying interpretations. The x-rays were taken in 1970, 1980, 1986, 1987 (2 x-rays), 1988, 1991, and 1993. Because the 1970 x-ray was ten years older than the next most recent and it was read only once, as negative, by a doctor whose credentials were not in the record, the administrative law judge excluded it from consideration. The administrative law judge then considered each x-ray separately, discussing both the number of readings from each side as well as the credentials of the readers. He then determined whether each x-ray should be credited as positive or negative . He found five x-rays were positive: 1980, 1986, October 1987, 1988 and 1991; and he found two were negative: June 1987 and 1993. He weighed the x-rays together and because there were five positive x-rays as opposed to two negative x-rays, he held that claimant had established the existence of pneumoconiosis by a preponderance of the evidence. March 9, 1994 Decision and Order-Awarding Benefits at 5.

Employer contends that the administrative law judge erred in his consideration of the 1993, 1991 and 1988 x-rays. With respect to the 1993 x-ray, employer argues that the administrative law judge erroneously refused to credit the four readings of this x-ray, all by B readers who found the x-ray negative. To support this contention, employer relies upon the following statement in the Decision and Order:

> Finally, the x-ray dated January 23, 1993 was interpreted as negative for pneumoconiosis by four physicians who are all either board certified in radiology or B-readers. Following *Adkins* [*v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992)], I give not weight to these readings.

March 9, 1994 Decision and Order-Awarding Benefits at 5.

Of course employer overlooks the statement immediately following the quotation:

> In summary, I find that five of the x-rays are positive for the existence of pneumoconiosis and only two of the probative x-rays are negative for pneumoconiosis. The claimant has established the presence of pneumoconiosis by a preponderance of the evidence in accordance with 20 C.F.R. §718.202(a)(1).

Id.

Since the 1993 x-ray was one of the two x-rays the administrative law judge found negative, it is clear that he did credit the readings of this x-ray and that he gave the 1993 x-ray weight equal to the others. Thus, it is obvious that employer's argument that the administrative law judge refused to credit the 1993 x-ray readings is entirely specious. Moreover, it is also obvious that the sentence upon which employer relies contains an error since "I give not weight" is not conventional English. When read in the context of the entire Decision and Order "following *Adkins,* I give not weight to these [negative] readings", it is clear that the administrative law judge made at the very least an error omitting a word like "more" or "greater" between "not" and "weight." *Adkins* teaches that it is irrational to give *greater* weight to the more recent x-ray when that would indicate that claimant's condition has improved. Hence, the administrative law judge obeyed the teaching of *Adkins* when he refused to give *greater* weight to the negative, 1993 x-ray because of its recency: He gave equal weight to all the probative x-rays. Thus, employer's argument that the administrative law judge erroneously applied the later evidence rule by refusing to weigh the most recent x-ray is entirely false.

Employer's argument concerning the administrative law judge's consideration of the 1991 x-ray is similarly devoid of merit. Employer asserts that the administrative law judge's determination that this x-ray should be considered positive is erroneous because it was based solely on numerical superiority (Brief for Employer at 21). The administrative law judge stated:

> The x-ray dated June 11, 1991 was overwhelmingly interpreted as positive for pneumoconiosis. Ten physicians who are either board certified radiologists and/or B readers interpreted the x-ray as positive for pneumoconiosis. Four physicians who are either board

> certified in radiology and/or B readers interpreted the x-ray as negative for pneumoconiosis. I find this x-ray is probative evidence of the existence of pneumoconiosis.

March 9, 1994 Decision and Order-Awarding Benefits at 5. The emptiness of employer's argument is demonstrated by the fact that employer is unable to offer any analysis of this evidence which would support a finding that the 1991 x-ray was negative.[9] The administrative law judge correctly stated that this x-ray "was overwhelmingly interpreted as positive for pneumoconiosis."

As for the administrative law judge's consideration of the evidence relating to the 1988 x-ray, employer points out that the administrative law judge erred by relying upon the "true doubt" rule to find that the 1988 x-ray was positive. In our Decision and Order issued on October 27, 1995, the Board acknowledged this error but held it harmless since the administrative law judge had found that claimant had established the existence of pneumoconiosis at Section 718.202(a)(1) by a preponderance of the evidence (five positive x-rays as opposed to two negative x-rays); therefore, a finding that the 1988 x-ray was negative would not affect the ultimate determination (four positive x-rays versus three negative x-rays.). Our holding is now the law of the case and employer has offered no reason to depart from it. *See Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990).

Because I would affirm the administrative law judge's determination that claimant has established the existence of pneumoconiosis by a preponderance of the evidence, I would also affirm his finding that the previous administrative law judge made a mistake in fact in failing to find the existence of pneumoconiosis. Accordingly, I would affirm the administrative law judge's determination to grant modification. *See O'Keeffe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254 (1971).

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[9]Although employer contends that the administrative law judge failed to consider two negative readings of the 1991 x-ray, he offers no support for this assertion, nor is any readily apparent since neither the administrative law judge nor employer identified the doctors who provided negative readings of the 1991 x-ray. (Brief for Employer at 20).

Finally, employer repeats the argument made previously on appeal, that the administrative law judge erred in finding that claimant had established causation pursuant to Section 718.204(b). The Board rejected employer's allegations of error with respect to this finding in its Decision and Order issued on October 27, 1995 and in its Decision and Order on Reconsideration issued on August 30, 1996. Since employer has offered no reason for the Board to depart from application of the doctrine of the law of the case, I would summarily reject employer's argument. *See Brinkley, supra.*

Accordingly, I would grant employer's motion for reconsideration *en banc,* but deny the relief requested.

REGINA C. McGRANERY
Administrative Appeals Judge