

PART IV

ADMINISTRATIVE PROCESSING OF CLAIMS, POWERS AND DUTIES OF THE ADMINISTRATIVE LAW JUDGE

D. EVALUATION AND WEIGHING OF EVIDENCE

6. X-RAYS, READERS, QUALITY STANDARDS

b. Section 413(b)

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).

"Board certified" means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. "Board eligible" means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology. 20 C.F.R. §§727.206(b)(2)(iii) and (iv); 718.202(a)(1)(ii)(C), (D); **Roberts v. Bethlehem Mines Corp.**, 8 BLR 1-211 (1985).

The party seeking to rely on an x-ray interpretation bears the burden of establishing the qualifications of the reader. **Rankin v. Keystone Coal Mining Co.**, 8 BLR 1-54 (1985). 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. **Vance v. Eastern Associated Coal Corp.**, 8 BLR 1-68 (1985); **Casey v. Director, OWCP**, 7 BLR 1-873 (1985). 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); however, an employer may not submit a rereading of an x-ray obtained by the Director performed in violation of Section 413(b). **Tobias, supra**.

To meet the "other evidence" requirement of Section 413(b), the Board has held

that such evidence must establish a "significant and measurable" level of pulmonary or respiratory impairment. **Bobbit v. Director, OWCP**, 8 BLR 1-381 (1985); **Auxier v. Director, OWCP**, 4 BLR 1-717 (1982). Whether or not a medical opinion of minimal disability establishes a significant and measurable pulmonary impairment sufficient to trigger the Section 413(b) rereading prohibition is a factual finding to be made by the administrative law judge. **Bobbit, supra**.

In order to meet the "other evidence" requirement, such evidence must be admitted prior to the close of the record. There is no requirement that the "other evidence" be present at the time the x-ray in question was reread or at the time the x-ray rereading is admitted into evidence. **Hensley v. Grays Knob Coal Co.**, 10 BLR 1-88 (1987); **Hyle v. Director, OWCP**, 8 BLR 1-512 (1986).

The Section 413(b) prohibition applies to all x-ray rereadings regardless of when the rereadings were performed, *i.e.*, before or after the date of the Reform Act (March 1, 1978), as long as the applicable requirements are met. **Bueno, supra**; **Free, supra**; **Auxier, supra**. Because the Section 413(b) prohibition is mandatory, it may be raised for the first time on appeal and the Board will raise it *sua sponte*. **Pulliam, supra**; **Martin v. Director, OWCP**, 7 BLR 1-72 (1984).

CASE LISTINGS

[Section 413(b) rereading prohibition applies if physician who *interpreted* x-ray was either board certified or board eligible and individual who takes x-rays be radiologist or qualified technician; to meet "other evidence of a respiratory or pulmonary impairment" requirement, evidence need only establish significant and measurable level of respiratory or pulmonary impairment] **Auxier v. Director, OWCP**, 4 BLR 1-717 (1982).

[adjudicator must determine whether any rereadings should be excluded as violative of Section 413(b) in considering x-ray evidence for purpose of Section 727.203(b)(4) rebuttal] **Krulcik v. Consolidation Coal Co.**, 5 BLR 1-533, 1-538 (1982).

[neither Director nor employer may rely on x-ray rereadings performed for Director in violation of Section 413(b)] **Boyd v. Freeman United Coal Mining Co.**, 6 BLR 1-159 (1983).

[employer may reread its own x-rays; not bound by positive readings performed at its request] **Horn v. Jewell Ridge Coal Corp.**, 6 BLR 1-933 (1984); **Meadows v. Westmoreland Coal Co.**, 6 BLR 1-773 (1984).

[doctor who examines x-ray for purpose of monitoring claimant's cancer, not for determining existence of pneumoconiosis, is not primary reader for purposes of Section

413(b)] **Sacolick v. Rushton Mining Co.**, 6 BLR 1-930 (1984).

[a finding that x-rays insufficient to invoke does not violate Section 413(b), which prohibits denial of claim based solely on negative x-rays, but negative x-rays may be used to determine whether claimant has met burden of proving existence of disease] **Smith v. Eastern Associated Coal Corp.**, 6 BLR 1-1130 (1984).

[Section 413(b) does not apply to positive rereadings of negative x-rays; moreover, this prohibition not directed against claimant] **Paladino v. Silverbrook Anthracite Co.**, 6 BLR 1-1296 (1984).

[where record establishes that first rereader is board-certified radiologist, his interpretation sufficient to trigger rereading prohibition, notwithstanding absence in record of initial reader's qualifications] **Martin v. Director, OWCP**, 7 BLR 1-72 (1984).

[lay testimony cannot establish respiratory impairment where miner deceased to preclude rereading where record contains contrary medical evidence] **Clayton v. Pyro Mining Co.**, 7 BLR 1-551 (1984).

[medical opinion diagnosing severe chronic obstructive pulmonary disease with emphysema and simple pneumoconiosis, stating pulmonary disease disabling, may constitute evidence of "significant and measurable" level of pulmonary or respiratory impairment] **Coburn v. Director, OWCP**, 7 BLR 1-632 (1985).

[Section 413(b) prohibition applies to rereadings obtained by SSA as well as those obtained by Director] **Coburn v. Director, OWCP**, 7 BLR 1-632 (1985).

[Director may use x-ray readings originally obtained by employer even though forbidden to have obtained such readings] **Brown v. Director, OWCP**, 7 BLR 1-730 (1985); **Stanley v. Director, OWCP**, 7 BLR 1-386 (1984).

[Sixth Circuit found provision of Section 413(b), as amended in 1977, which prohibits rereading of certain x-rays, does not apply to cases initially adjudicated prior to effective date of amendment because provisions of amendment are not applied retroactively] **Couch v. Secretary of Health and Human Services**, 774 F.2d 163, 8 BLR 2-57 (6th Cir. 1985).

[where record does not establish original reader's qualifications, Director's rereading permissible under Section 413(b)] **Vance v. Eastern Associated Coal Corp.**, 8 BLR 1-68 (1985); **Sakach v. Director, OWCP**, 8 BLR 1-237 (1985).

DIGESTS

The Board remanded for the administrative law judge to make specific findings concerning the application of Section 413(b) where the evidence was conflicting in regard to whether there was a "significant and measurable" level of respiratory impairment which would trigger the rereading prohibition. **Herald v. Director, OWCP**, 8 BLR 1-499 (1986).

The Board held that in order to trigger the Section 413(b) rereading prohibition, the other evidence of a respiratory or pulmonary impairment must be present at the time the entitlement issues are being adjudicated but need not be in existence when the rereading is sought. The "other evidence" does not trigger the rereading prohibition unless it is credited by the administrative law judge. The Board overruled **Boyd v. Freeman United Coal Mining Co.**, 6 BLR 1-159 (1983), to the extent that it held that the mere presence of medical evidence of a respiratory disorder triggers the prohibition. **Hyle v. Director, OWCP**, 8 BLR 1-512 (1986).

The Sixth Circuit held that the director did not violate 30 U.S.C. §923(b) by having a positive x-ray re-read as negative because the positive x-ray was not read by either a board certified or board eligible radiologist. **Back v. Director, OWCP**, 796 F.2d 169, 9 BLR 2-93 (6th Cir. 1986).

The Board, following its decision in **Martin v. Director, OWCP**, 7 BLR 1-72 (1984), held that the positive reading of the first reader of record, who meets the board certified or board eligible requirement of Section 413(b), triggers the rereading prohibition. **McMath v. Director, OWCP**, 12 BLR 1-6 (1988).

Any error by the administrative law judge in admitting exhibit in violation of the Section 413(b) re-reading prohibition is harmless as the weight of the x-ray evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). **Johnson v. Jeddo-Highland Coal Co.**, 12 BLR 1-53 (1988).

6/95