Chapter 11

Living Miners' Claims: Entitlement Under Part 718, Judicial Notice, Stipulations, and the Statute of Limitations at 20 C.F.R. § 725.308

This Chapter is focused on the standards and burdens for establishing entitlement under Part 718 as well as determining whether an original or subsequent miner's claim is time-barred under 20 C.F.R. § 725.308. For principles of weighing medical evidence and assessing conformity with quality standards, *see* Chapter 3. For law addressing the admissibility of evidence under the amended regulations at 20 C.F.R. Parts 718 and 725 (2008), *see* Chapter 4.

I. Applicability of Part 718, generally

Section 718 applies to all claims filed after March 31, 1980. Moreover, because the Part 727 regulations were written as interim regulations, the permanent regulations at Part 718 should apply to a claimant who fails to meet the requirements of entitlement under Part 727. Section 727.203(d) provides that "[w]here eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time." 20 C.F.R. § 727.203(d). The Part 727 regulations became effective in March 1978. Since the permanent Part 718 regulations had not been written as of March 1978, the Part 410 regulations became applicable for claims adjudicated prior to March 31, 1980, where a claimant failed to meet the requirements of entitlement under Part 727.

After the Part 718 regulations were written, if a claimant failed to meet the requirements of entitlement under Part 727, the Part 718 regulations were applicable. However, in *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 B.L.R. 1-627 (1981), the Board held that the language in the regulations making Part 718 applicable "as amended from time to time," violated statutory intent. Therefore, under *Muncy*, the new Part 718 regulations do not apply to any claim filed prior to March 31, 1980 in cases that do not arise in the Third, Sixth, Seventh, Eighth, and Eleventh Circuits.

Five circuit courts of appeals have disagreed with the Board's position regarding the applicability of Part 718. The Third, Sixth, Seventh, Eighth, and Eleventh Circuits hold that the regulations at Part 718, not Part 410, apply to Part C claims filed prior to March 31, 1980, yet **adjudicated after March 31, 1980.** *Terry v. Director, OWCP*, 956 F.2d 251 (11th Cir. 1992); Oliver v. Director, OWCP, 888 F.2d 1239 (8th Cir. 1989); *Knuckles v. Director, OWCP*, 869 F.2d 996 (6th Cir. 1989); *Caprini v. Director, OWCP*, 824 F.2d 283 (3rd Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987). Thus, if a

claimant cannot meet the requirements of entitlement under Part 727 in these circuits, the claim must be considered under Part 718.

II. Judicial notice and stipulations

A. Judicial notice

1. Procedure used

In *Pruitt v. Amax Coal Co.*, 7 B.L.R. 1-544, 1-546 (1984), the Board delineated the procedures for taking "official" notice and stated the following:

> The rules of official notice in administrative proceedings are more relaxed than in common law courts. The mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. (citation omitted). Although the administrative law judge erred in failing to cite the 'B' reader list as the source of his information regarding Dr. Morgan's qualifications, and the parties should have been afforded a full opportunity to dispute his qualifications, *Casias v. Director, OWCP*, 2 B.L.R. 1-259 (1979), the error is harmless because Dr. Morgan's name does, in fact, appear on the 'B' reader list and a contrary finding cannot be made on remand. (citations omitted). Claimant has not shown that he was substantially prejudiced by the administrative law judge's action.

Id.

2. Taking official notice of one expert but not another expert constitutes error

In *Simpson v. Director, OWCP*, 9 B.L.R. 1-99 (1986), the record was silent with regard to the B-reader status of two physicians. The judge erred in taking official notice of the B-reader status of one of the physicians appearing on the B-reader list without taking official notice of the other physician's name appearing on the list. This resulted in the judge improperly according more weight to the x-ray interpretation of one reader based on his "superior" B-reader credentials which, as the Board concluded, was substantially prejudicial to the opposing party.

3. Examples of judicial/official notice

a. Medical opinion; no judicial notice

A medical opinion is not a fact of which judicial notice may be taken. *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994).

b. Unreliability of early Social Security records

In *Calfee v. Director, OWCP*, 8 B.L.R. 1-7, 1-9 (1985), the Board held that it was proper for the administrative law judge to note that early social security records were not wholly reliable in weighing Claimant's testimonial evidence and affidavits against such records.

c. Dictionary of Occupational Titles

An administrative law judge may take judicial notice of the Dictionary of Occupational Titles (DOT) provided s/he "does so in accord with principles concerning the taking of judicial notice." Citing to 29 C.F.R. § 18.45, 20 C.F.R. § 725.464, Fed. R. Evid. 201, and *Echo v. Director, OWCP*, 744 F.2d 327, 6 B.L.R. 2-110 (3rd Cir. 1986), it appears that the Board required that the judge give the parties notice and an opportunity to be heard regarding taking judicial notice of the *Dictionary of Occupational Titles*. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989)

In *Snorton v. Zeigler Coal Co.*, 9 B.L.R. 1-106, 1-108 (1986), the Board held that the judge erred in concluding that the miner engaged in heavy labor based on the job description contained in the *Dictionary of Occupational Titles* because the judge failed to comply with the requirements for taking judicial notice.

d. Directory of Medical Specialists

In *Maddaleni v. The Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990), the Board held that the administrative law judge properly took judicial notice of the qualifications of physicians as stated in the *Directory of Medical Specialists.* The Board noted that "[a]lthough claimant first became aware of the administrative law judge's use of judicial notice upon receipt of the administrative law judge's Decision and Order on Remand, claimant had an opportunity to contest the administrative law judge's finding before the Decision and Order became final by filing a motion for reconsideration with the administrative law judge." The Board noted that Claimant did not argue that the credentials noticed by the judge were inaccurate.

e. Criminal conviction of a physician

In *Boyd v. Clinchfield Coal Co.*, 46 F.3d 1122, 1995 WL 10226 (4th Cir. 1995) (table), the Fourth Circuit held that it was proper for an administrative law judge to take judicial notice of Dr. Vinod Modi's criminal conviction. Moreover, citing to *Adams v. Canada Coal Co.*, Case No. 91-3706 (6th Cir. July 13, 1992)(unpublished) (the judge "was obviously justified" in not crediting the testimony of Dr. Modi because of his conviction), the court upheld the judge's decision to accord no weight to Dr. Modi's medical opinion in light of his conviction for tax evasion. *See also* Chapter 3.

B. Stipulations

1. Binding regardless of underlying evidence

In *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996), the Director stipulated to the existence of coal workers' pneumoconiosis in the living miner's claim. The court held the stipulation was binding even though presence of the disease was not "manifest from the medical records." The court then remanded the case to the administrative law judge for a determination of whether coal workers' pneumoconiosis hastened the miner's death in the survivor's claim.

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004)[1], the administrative law judge erred in finding no pneumoconiosis based on the medical opinion of Dr. Spagnolo, where the parties agreed that the disease was present. Citing to *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002), the Third Circuit agreed that "an ALJ may not credit a medical opinion stating that a claimant did not suffer from pneumoconiosis causing respiratory disability after the ALJ had already accepted the presence of pneumoconiosis unless the ALJ stated `specific and persuasive reasons' why he or she relied upon such an opinion." In this case, the court found that the judge did not offer "specific and persuasive reasons" for crediting Dr. Spagnolo's opinion.

Stipulations of fact are binding when received into evidence. *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994).

A stipulation of fact is binding on the parties and on the trier-of-fact. *Nippes v. Florence Mining Co.*, 12 B.L.R. 1-108 (1985).

[1] While the case was pending on appeal, the court noted that the widow died and the executor of her estate, John Soubik, was substituted as the appellant.

2. Stipulation against *pro se* claimant's interest; not binding

In *Wilson v. Youghiogheny and Ohio Coal Co.*, 8 B.L.R. 1-73 (1985), the Board held that it was proper for the district director to list "total disability" as a contested issue notwithstanding the fact that the *pro se* Claimant stated that he was not totally disabled. In so holding, the Board reasoned that it was proper for the district director to implicitly find that the stipulation was not in Claimant's best interests.

3. Stipulation of pneumoconiosis in miner's claim binding in survivor's claim

In *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996), the Director stipulated to the existence of coal workers' pneumoconiosis in the living miner's claim.[2] The court held that it was error, therefore, for the administrative law judge to find that the record did not support a finding of the disease in the survivor's claim. The court further stated that the stipulation was binding even though presence of the disease was not "manifest from the medical records." The court then remanded the case to the administrative law judge for a determination of whether coal workers' pneumoconiosis hastened the miner's death.

4. Stipulation of pneumoconiosis does not constitute stipulation of impairment

In the survivor's claim of *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622 (4th Cir. 1999), Employer stipulated to the presence of coal workers' pneumoconiosis, but argued that it did not hasten the miner's death. In weighing the autopsy evidence of record, the administrative law judge credited Claimant's physicians' opinions over physicians' opinions offered by Employer who found only a "'mild' or 'minimal" level of simple coal workers' pneumoconiosis. The administrative law judge reviewed the definition of pneumoconiosis as "a chronic dust disease of the lung and its sequelae, *including respiratory and pulmonary impairments*, arising out of coal mine employment . . .." 20 C.F.R. § 718.201 (emphasis added). From this, the administrative law judge concluded that "[b]ecause Clinchfield stipulated that

[2] In *Short v. Arch of West Virginia*, BRB No. 02-0857 BLA (Sept. 16, 2003) (unpub.), the Board held that a stipulation of pneumoconiosis by Employer in the miner's claim should not be accorded collateral estoppel effect in the survivor's claim because the issue was not actually litigated. In so holding, the Board cited to *Otherson v. Department of Justice,* 711 F.2d 267, 274 (D.C. Cir. 1983) wherein the circuit court held that "when a particular fact is established not by judicial resolution but by stipulation of the parties, the fact has not been 'actually litigated' and thus is not a proper candidate for issue preclusion." The Board did not cite to the Fourth Circuit's contrary conclusion in *Richardson.*

Mr. Fuller had pneumoconiosis, . . . it must also have stipulated that his pneumoconiosis was impairing . . .." The court disagreed to state that § 718.201 does not contain a requirement that "coal dust-specific diseases . . . attain the status of an 'impairment' to be classified as 'pneumoconiosis.'" The court further noted that the definition of pneumoconiosis is satisfied "whenever one of these diseases is present in the miner at a detectable level; whether the particular disease exists to such an extent as to be compensable is a separate question." As a result, the case was remanded to the administrative law judge to re-weigh the autopsy evidence to determine whether the disease hastened the miner's death.

5. Legal effect of stipulation of fact decided by trier-of-fact

The Board holds that "[i]t is well-settled that the stipulations of parties with respect to the legal effect of admitted facts are not binding on a court." An administrative law judge "is not bound by any agreement of counsel on a question of law." *Casias v. Director, OWCP*, 6 B.L.R. 1-438, 1-443 n. 7 (1983).

6. Stipulation that claim timely filed, binding on Employer

In *Bethenergy Mines, Inc. v. Cunningham*, Case No. 03-1561 (4th Cir. July 20, 2004) (unpub.), the court held that Employer waived its argument that the miner's claim was barred by the three year statute of limitations because Employer "stipulated at the first hearing before the ALJ that Cunningham's claim was timely."

III. Elements of entitlement under Part 718

A. Prior to application of 20 C.F.R. Part 718 (2008)

The claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's total disability is caused by pneumoconiosis. *Gee v. W.G. Moore and Sons*, 9 B.L.R. 1-4 (1986)(*en banc)*; *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986)(*en banc)*.

B. After application of 20 C.F.R. Part 718 (2008)

The amended regulations, at 20 C.F.R. § 725.202(d)(2) (2008), specifically provide that a miner meets the requirements for entitlement by establishing that s/he: (1) has pneumoconiosis; (2) the pneumoconiosis arose

out of coal mine employment; (3) is totally disabled; and (4) the pneumoconiosis *contributes* to the total disability. 20 C.F.R. § 725.202(d)(2) (2008).

IV. The existence of pneumoconiosis

A. "Pneumoconiosis" defined

1. The regulatory provisions

a. Prior to applicability of 20 C.F.R. Part 718 (2008)

Prior to promulgation of the December 2000 amendments to 20 C.F.R. Part 718, "pneumoconiosis" was defined as follows:

> For the purpose of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment. For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. § 718.201 (2000).

b. After applicability of 20 C.F.R. Part 718 (2008)

The new regulatory provisions at 20 C.F.R. § 718.201 (2008) codify certain case law arising under the pre-amendment definition of "pneumoconiosis" to provide the following:

> (a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical

> community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (3) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (2008). According to 20 C.F.R. § 718.2 (2008), this amended definition applies to all Part 718 claims, regardless of their filing dates. *See National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (upholding validity of the amended regulation).

2. "Clinical" versus "legal" pneumoconiosis, a critical distinction

A pulmonary disease may constitute statutory pneumoconiosis if it is significantly related to or aggravated by dust exposure in coal mine employment. A finding of "clinical" or "medical" pneumoconiosis is typically accomplished via chest x-ray evidence or autopsy/biopsy evidence. Through these forms of evidence, the physician determines the presence or absence of specific nodules, opacities, or lesions attributable to a chronic dust disease of the lungs, *i.e.* pneumoconiosis. 20 C.F.R. § 718.202(a)(1) and (a)(2) (2008).

At this point, the issue of whether the pneumoconiosis was caused by coal dust exposure is not necessarily resolved. By definition, "pneumoconiosis" is a chronic dust disease of the lungs. And, there are a variety of non-compensable causes of "clinical" or "medical" pneumoconiosis, such as asbestos exposure from working as a pipefitter on a barge, or uranium exposure from working in a uranium mine. Sometimes, a miner will have a history of multiple exposures. Thus, where "clinical" pneumoconiosis is diagnosed, the fact-finder must apply the regulatory provisions at 20 C.F.R. § 718.203 (2008), which provide a rebuttable presumption that the diagnosed disease is caused, at least in part, by coal dust exposure for miners with ten or more years of coal mine employment.

On the other hand, the "legal" definition of pneumoconiosis is much broader than the clinical or medical definition and encompasses any respiratory or pulmonary condition caused, in part, by exposure to coal dust. Findings of "legal" pneumoconiosis are most often accomplished through a medical expert's report based on testing, history, symptoms, complaints, and physical observations (whether the physician examined the miner, or offers a consultative report based on a review of the medical data of record).

For example, a physician may conclude that the miner suffers from asthma related to coal dust exposure. Although the physician did not specifically state that the miner suffered from coal workers' pneumoconiosis or black lung disease, the expert relates the respiratory condition to coal dust exposure and, therefore, the opinion is supportive of a finding of "legal" coal workers' pneumoconiosis. The same may be said for a myriad of other respiratory conditions, including chronic obstructive pulmonary disease, emphysema, or chronic bronchitis where a physician relates the condition, at least in part, to coal dust exposure.

The Fourth Circuit has cautioned that a judge "must bear in mind when considering medical evidence that physicians generally use 'pneumoconiosis' as a *medical or clinical* term that comprises merely a small subset of the afflictions compensable under the Act." The fact-finder, however, must review evidence in light of the much broader legal definition. *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995).

As an example, in *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the administrative law judge discredited four out of five physicians who found no pneumoconiosis on grounds that the miner's "impairment was obstructive in nature." The court agreed that the opinions were not probative and noted that the definition of *legal* pneumoconiosis "may consist of an obstructive impairment." After reviewing comments of the physicians who stated, *inter alia*, that pneumoconiosis is associated with restrictive impairments and smoking is associated with obstructive impairments, the court concluded that such comments "supported

the ALJ's findings that the employer's physicians were overwhelmingly focused on clinical rather than legal pneumoconiosis."

See also Dehue v. Director, OWCP, 65 F.3d 1189 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995) ("a medical diagnosis of no pneumoconiosis is not equivalent to a legal finding of no pneumoconiosis"). *See also Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000) (the court emphasized the distinction between legal and medical pneumoconiosis; a miner's exposure to coal mine employment must merely contribute "at least in part" to his pneumoconiosis); *Kline v. Director, OWCP*, 877 F.2d 1175, 1178 (3rd Cir. 1989); *Brown v. Director, OWCP*, 851 F.2d 1569 (11th Cir. 1988), *app. dismissed*, 864 F.2d 120 (11th Cir. 1989); *Phipps v. Director, OWCP*, 16 B.L.R. 1-100 (1992) (recognizing the distinction between legal and clinical pneumoconiosis); *Biggs v. Consolidation Coal Co.*, 8 B.L.R. 1-317, 1-322 (1985).

a. Pneumoconiosis is progressive

In *Consolidation Coal Co. v. Director, OWCP [Kramer],* 305 F.3d 203 (3rd Cir. 2002)[3], Employer challenged that a finding that pneumoconiosis was progressive because the miner's pulmonary function and blood gas studies, up to two and one-half years preceding his death, were within normal limits such that pneumoconiosis could not have hastened the miner's death. Employer noted that the miner was diagnosed with colon cancer, which had metastasized to his liver and lungs and which caused the miner's death.

The court stated that "the tenet that pneumoconiosis is non-progressive is simply inconsistent with the 'assumption of [disease] progressivity that underlies much of the statutory regime.'" Moreover, the court stated that, even assuming that the disease was not progressive, the absence of a "clinically significant" pulmonary impairment two and one-half years prior to the miner's death "certainly does not establish that Kramer had incurred no damage to his lung tissue and no pulmonary burden of any degree whatsoever as a result of his occupational exposure." The court further noted that "nothing in the evidence that Consolidation points to would negate the conclusion that a preexisting pulmonary burden, albeit insufficient standing alone to result in measurable loss of lung function, could nonetheless in combination with a further affront to the pulmonary system through advancing cancer have decreased to some degree the lungs' ability to continue to compensate."

[3] The court noted that the parties stipulated in briefs before the administrative law judge that the miner was last employed in the coal mines in West Virginia, which falls within the jurisdiction of the Fourth Circuit. However, Employer appealed in the Third Circuit based on Claimant's previous coal mine employment in Pennsylvania. The Third Circuit considered the appeal on the merits, but cited to Fourth Circuit, as well as its own, case law.

For additional cases involving "progressivity," *see* Chapter 24. For law pertaining to opinions that are "hostile-to-the-Act," *see* Chapter 3.

b. Latency and development after exposure to coal mine dust ceases

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the court upheld application of the amended definition of "pneumoconiosis," *i.e.* that it is a latent and progressive disease. The court noted that the issue of "[w]hether pneumoconiosis . . . is a disease that can be latent and progressive is a scientific question," but the "Department of Labor's regulation reflects the agency's conclusion on that point" and the agency's regulation is entitled to deference. The court found that the regulation is designed to "prevent operators from claiming that pneumoconiosis is *never* latent and progressive." As a result, the court declined to require that Claimant present medical evidence that the miner's pneumoconiosis was "one of the particular kinds of pneumoconiosis that are likely to manifest latent and progressive forms."

In *Parsons v. Wolf Creek Collieries*, 23 B.L.R. 1-29 (2004) (en banc on recon.), Employer challenged the administrative law judge's determination that pneumoconiosis is latent and progressive in the absence of further coal dust exposure. Employer maintained that "claimant must prove by a preponderance of the evidence that he suffers from one of the rare forms of (pneumoconiosis) that could, and in fact did, progress." The Board disagreed and reasoned as follows:

> [W]hile the amendments to Section 718.201 did not alter claimant's burden of proving that he suffers from pneumoconiosis arising out of coal mine employment by a preponderance of the evidence and without the benefit of any presumption of latency or progressivity, the regulations and the *NMA* decision4 do not require that a miner separately prove he suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that his disease actually progressed. (citations omitted). As we explained in *Workman v. Eastern Assoc. Coal Corp.*, 23 B.L.R. 1-22 (2004) (order on recon.) (en banc), because the potential for progressivity and latency is inherent in every case, a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a

4 *Nat'l. Mining Ass'n. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002).

progressive nature.

The Board further noted that Employer had not produced "the type and quality of medical evidence that would invalidate the regulation at 20 C.F.R. § 718.201 (2001)."

See also Workman v. Eastern Assoc. Coal Corp., 23 B.L.R. 1-22 (2004) (order on recon.) (en banc) (the Board noted that "after full notice-and-comment procedures, the Department of Labor . . . reviewed the medical literature in the rulemaking record, consulted with the National Institute for Occupational Safety and Health . . ., which was created by Congress as a source of expertise in the analysis of occupational disease research and which concurred in the proposed changes, and concluded that the scientific evidence showed that chronic dust diseases of the lung and its sequelae arising out of coal mine employment *may* be latent and progressive, albeit in a minority of cases").

For additional cases involving "latency," *see* Chapter 24. For law pertaining to opinions deemed "hostile-to-the-Act," *see* Chapter 3.

3. "Legal" coal workers' pneumoconiosis

a. Established

If a physician concludes that the miner suffers from chronic obstructive pulmonary disease arising out of coal mine employment, then his/her opinion supports a finding of "legal" coal workers' pneumoconiosis. *See Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996) ("COPD, if it arises out of coal mine employment, clearly is encompassed within the legal definition of pneumoconiosis, even though it is a disease apart from clinical pneumoconiosis"). In addition, the Board has held that an obstructive impairment, without a restrictive component, may be considered legal coal workers' pneumoconiosis if it is attributable to coal dust exposure. *Heavilin v. Consolidation Coal Co.*, 6 B.L.R. 1-1209 (1984).

Similarly, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983).

In *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-139 (1999), the Board held that chronic bronchitis and emphysema fall within the definition of pneumoconiosis if they are related to the claimant's coal mine employment.

b. Not established

On the other hand, even if the physician diagnoses a condition set forth in the definition of pneumoconiosis, but fails to attribute the condition to coal dust exposure, the report does not support a finding of compensable pneumoconiosis. For example, by unpublished decision in *C.E.S. v. Consolidation Coal Co.*, BRB No. 07-0329 BLA (Jan. 31, 2008) (unpub.), the physician diagnosed silico-tuberculosis, but failed to attribute it to coal dust exposure. While the administrative law judge correctly noted that silico-tuberculosis was among the possible forms of legal pneumoconiosis under the regulations, he improperly concluded that the miner established compensable pneumoconiosis. The Board reasoned that the physician must attribute the silico-tuberculosis to coal dust exposure or the administrative law judge will be considered to have "impermissibly shift() the burden of proof in requiring employer to rule out the presence of legal pneumoconiosis."

4. "Clinical" or "medical" pneumoconiosis on autopsy or biopsy under § 718.202(a)(2)

A biopsy or autopsy conducted and reported in compliance with § 718.106 may constitute the basis for a finding of the existence of "clinical" or "medical" pneumoconiosis. 20 C.F.R. § 718.202(a)(2) (2008). Section 718.106 sets forth the quality standards for autopsies and biopsies.

In *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113 (1988), the Board held that the quality standards are not mandatory and failure to comply with the standards goes to the reliability and weight of the evidence. In *Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536 (11th Cir. 1993), the Eleventh Circuit held that a biopsy need only be in "substantial compliance" with the quality standards at § 718.106 to be admissible. Specifically, the court held that a biopsy report diagnosing anthracosis that does not include the surgical report is in "substantial compliance" with the regulations.

See Chapter 3 for further discussion of biopsy and autopsy evidence and quality standards.

a. Pigment with associated fibrosis, required

A pathologist may observe black pigment or anthracotic pigment in the lung tissue on autopsy or biopsy. This pigment is generally the result of coal dust deposits embedded in the miner's lungs. In order for a diagnosis to qualify as "pneumoconiosis," there must be evidence that the lung tissue has reacted to the embedded coal dust deposits. Consequently, black pigment, anthracotic pigment, or the like, standing alone, does not constitute a finding of

pneumoconiosis. The regulations support this and provide, in part, as follows:

> A finding in an autopsy or biopsy of anthracotic pigmentation . . . shall not be sufficient, by itself, to establish the existence of pneumoconiosis.

20 C.F.R. § 718.202(a)(2) (2008).

On the other hand, observations of black pigment *with associated fibrosis* would qualify as a diagnosis of the disease. Similarly, anthracotic pigment with associated fibrosis is the equivalent of anthracosis, which satisfies the definition of pneumoconiosis under § 718.202(a).

In *Hapney v. Peabody Coal Co.*, 22 B.L.R. 1-104 (2001)(en banc), a case arising in the Fourth Circuit, the issue was whether a finding of "anthracosis" on biopsy was sufficient to support a finding of pneumoconiosis under the Act, despite preponderantly negative chest x-ray findings. The Board affirmed the administrative law judge's finding that the biopsy findings of anthracosis were credible and fell within the regulatory definition of pneumoconiosis at 20 C.F.R. § 718.202(a)(2). The Board then adopted the Director's position that the etiology of the miner's lung condition as diagnosed on biopsy "is properly considered, not pursuant to the regulation at 20 C.F.R. § 718.202(a), but pursuant to the regulation at 20 C.F.R. § 718.203. Here, because the miner demonstrated more than ten years of coal mine employment, Employer had the burden of rebutting the presumption that the miner's diagnosed anthracosis did not arise from exposure to coal dust.

See also Dagnan v. Black Diamond Coal Mining Co., 994 F.2d 1536 (11th Cir. 1993) (diagnosis of pulmonary anthracosis is the equivalent of a diagnosis of pneumoconiosis); *Bueno v. Director*, OWCP, 7 B.L.R. 1-337 (1984); *Smith v. Island Creek Coal Co.*, 2 B.L.R. 1-1178 (1980); *Luketich v. Bethlehem Mines Corp.*, 2 B.L.R. 1-393 (1979).

Thus, while the administrative law judge must consider evidence that indicates the presence of anthracotic pigment, *Lykins v. Director, OWCP*, 819 F.2d 146 (6th Cir. 1987), pigment without associated fibrosis is insufficient to satisfy the definition of pneumoconiosis. *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995) (pigmentation described as "yellow-black consistent with coal pigment" was insufficient, standing alone, to support a finding of pneumoconiosis).

b. Anthracosis in lymph nodes must be considered

By unpublished decision in *Taylor v. Director, OWCP*, BRB No. 01-0837 BLA (July 30, 2002) (unpub.), a physician concluded, on autopsy, that no coal

workers' pneumoconiosis was present, but he also stated that there was "minimal anthracosis in the mediastinal lymph nodes." As a result, the Board remanded the case to the judge to determine whether the legal definition of pneumoconiosis at 20 C.F.R. § 718.201 (2008), which includes anthracosis, was satisfied. The Board held that "anthracosis found in lymph nodes may be sufficient to establish the existence of pneumoconiosis."

c. Finding of no pneumoconiosis on biopsy not preclude finding through other means

With regard to biopsy evidence, the regulations provide that negative biopsy evidence does not preclude a finding of pneumoconiosis using other medical data:

> A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis. However, where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis.

20 C.F.R. § 718.106(c) (2008).

5. Use of blood gas and pulmonary function testing

a. Blood gas testing

In *Morgan v. Bethlehem Steel Corp*., 7 B.L.R. 1-226 (1984), the Board held that, while blood gas studies are relevant primarily to the determination of the existence or extent of impairment, such evidence "also may bear upon the existence of pneumoconiosis insofar as test results indicate the absence of any disease process, and by implication, the absence of any disease arising out of coal mine employment."

b. Pulmonary function testing

The Board has held that pulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis. *Burke v. Director, OWCP*, 3 B.L.R. 1-410 (1981). In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the circuit court held that a medical opinion attributing the miner's respiratory impairment to his smoking history on grounds that pulmonary function testing produced a purely obstructive defect was not well-reasoned. The court stated the following:

> Each of the three doctors unfavorable to Cornett reported that his respiratory problems were caused by his smoking habit *only*. If this is so, Cornett's ailments do not qualify as statutory

> pneumoconiosis. *See* 20 C.F.R. § 718.201. But, of the three, only Dr. Fino attempted to explain his rationale for completely excluding Cornett's exposure to coal dust as an aggravating factor. Dr. Fino attributed Cornett's obstructive lung disease solely to cigarette smoking because, in his opinion, the pulmonary function tests were not consisted with 'fibrosis as would be expected in simple coal workers' pneumoconiosis.' What the ALJ did not consider in his opinion is that, although 'fibrosis' is generally associated with 'medical' pneumoconiosis, it is not a required element of the broader concept of 'legal' pneumoconiosis. *Cf. Hobbs*, 45 F.3d at 821. The legal definition does not require 'fibrosis' but instead requires evidence that coal dust exposure aggravated the respiratory condition. *See Southard*, 732 F.2d at 71-72. Unlike Dr. Fino, Drs. Broudy and Dahhan make no attempt to explain on what basis they believe that coal dust exposure did not contribute to Cornett's respiratory problems. By contrast, the opinions of Drs. Vaezy and Baker-which, as noted, were discredited by the ALJ as having an inadequate basis-clearly address the statutory requirements by acknowledging that coal dust, while not conclusively the cause of Cornett's condition, was certainly an aggravating factor, contributing to Cornett's respiratory impairment.

Id.

Likewise, in *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the administrative law judge discredited four out of five physicians rendering opinions in the case because they found no pneumoconiosis stating that the miner's "impairment was obstructive in nature." The court agreed and noted that the definition of *legal* pneumoconiosis "may consist of an obstructive impairment." After reviewing comments of the physicians who stated, *inter alia*, that pneumoconiosis is associated with restrictive impairments and smoking is associated with obstructive impairments, the court concluded that such comments "supported the ALJ's findings that the employer's physicians were overwhelmingly focused on clinical rather than legal pneumoconiosis."

6. Admission against interest

In *Johnson v. Royal Coal Co.*, 22 B.L.R. 1-132 (2002), Claimant served *Requests for Admission* on Employer and Director to which Employer responded and admitted certain matters, but remained silent on other matters, including the existence of pneumoconiosis and disability causation. The Director failed to respond. At the hearing, Employer's counsel withdrew controversion of all issues listed on the CM-1025 except the existence of pneumoconiosis and disability causation. At that time, Claimant's counsel "did not contend that

employer had already admitted the existence of pneumoconiosis and that claimant's total disability is due to pneumoconiosis due to its failure to respond to claimant's request for an admission on these matters." The hearing proceeded on the merits.

For the first time in its closing brief, Claimant argued that, pursuant to 29 C.F.R. § 18.20, Employer admitted the existence of pneumoconiosis as well as the etiology of Claimant's disability in failing to respond to requests for admissions on these issues. The Board upheld the administrative law judge's denial of benefits and concluded that the "statement of issues (on the CM-1025) prepared by the district director is of critical importance, as the regulations contemplate that this document will provide the road map for the hearing." The Board further stated the following:

> The alleged admissions that claimant points to under 29 C.F.R. § 18.20 are in conflict with the issues listed on the Form CM-1025 pursuant to the black lung regulations, yet claimant does not explain his apparent assumption that the black lung procedures are trumped by 29 C.F.R. § 18.20 because of employer's technical error in drafting its response to the request for admissions.

Citing to 20 C.F.R. § 725.455(a), the Board noted that the judge was not bound by technical or formal rules of procedure except as provided by the Administrative Procedure Act and 20 C.F.R. Part 725. Moreover, Claimant did not appear to rely on Employer's alleged admissions in preparing for trial. The Board concluded that the provisions at 29 C.F.R. § 18.20 were "inapplicable in the procedural context of this case because the black lung regulations are 'controlling.'" The Board further noted that, even if 29 C.F.R. § 18.20 was applicable, Claimant waived his right to rely on Employer's alleged admissions because he failed to raise this issue at the hearing.

With regard to the effect of stipulations and uncontested issues in subsequent claims under 20 C.F.R. § 725.309, *see Chapter 24*.

B. Regulatory methods of establishing pneumoconiosis

The existence of pneumoconiosis may be established through the following four methods: (1) chest x-rays demonstrating Category 1 opacities or greater; (2) autopsy or biopsy; (3) the presumptions contained at §§ 718.304, 718.305, or 718.306; or (4) a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a) (2000) and (2008).

1. The "Tobias rule" and re-reading chest x-rays

Section 413(b) of the Act prohibits the Director from rereading certain positive x-rays in claims filed before January 1, 1982. 30 U.S.C. § 923(b), implemented at 20 C.F.R. § 718.202(a)(1)(i). In *Tobias v. Republic Steel Corp.*, 2 B.L.R. 1-1277 (1981), the Board set forth the threshold requirements of Section 413(b) of the Act, which are as follows: (1) there is other evidence of a pulmonary or respiratory impairment; (2) the x-ray was taken by a radiologist or qualified technician and it is of a quality sufficient to demonstrate the presence of pneumoconiosis; (3) the physician who first interpreted the x-ray is a board-certified radiologist; and (4) no evidence exists that the claim has been fraudulently represented. *Id*. at 1-1279. If these requirements are satisfied, then the Director must accept the initial interpretation of the x-ray and cannot have the x-ray reread. *Id*.

Under the "Tobias rule," the administrative law judge must exclude re-readings submitted by the Director from consideration. Section 413(b) also applies to positive x-rays obtained by the Social Security Administration. *Coburn v. Director, OWCP*, 7 B.L.R. 1-632 (1985). *See also Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994) (the rereading prohibition was applicable to evidence submitted by the claimant on modification).

a. No other evidence of impairment at time of hearing needed

There is no requirement that the other evidence of a pulmonary or respiratory impairment be in existence at the time the Director seeks to reread the x-ray. Other evidence need only be in existence at the time of the hearing. *Hyle v. Director, OWCP*, 8 B.L.R. 1-512 (1986). For a discussion of evidence that constitutes sufficient "other evidence" to establish a pulmonary or respiratory impairment, *see Coburn v. Director, OWCP*, 7 B.L.R. 1-632 (1985), and *Bobbitt v. Director, OWCP*, 8 B.L.R. 1-380 (1985).

b. No prohibition on re-reading study interpreted as negative

Section 413(b) does not prohibit the re-reading of x-rays originally read as negative. *Rankin v. Keystone Coal Mining Corp.*, 8 B.L.R. 1-54 (1985). Section 413(b) also does not prohibit the Director from having the x-ray reread to determine the quality of the x-ray, *i.e.*, whether it is unreadable for pneumoconiosis.

c. Initial interpretation must be made by board-certified radiologist

The physician who first interprets the x-ray must be a board-certified radiologist. 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 have the x-ray study reread. *Vance v. Eastern Associated Coal Corp.*, 8 B.L.R. 1-68 (1985); *Pulliam v. Drummond Coal Co.*, 7 B.L.R. 1-846 (1985).

d. The "Tobias" rule does not apply to employer

Section 413(b) does not prohibit an employer from rereading positive x-rays. *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984). However, in *Tobias*, the Board held that if Section 413(b) prohibits the Director from admitting an x-ray rereading, the employer cannot introduce the same x-ray rereading. *Tobias*, 2 B.L.R. at 1-1286.

e. The "Tobias" rule does not apply to claims filed after January 1, 1982

The Section 413(b) prohibition was eliminated by the 1981 Amendments to the Act. Consequently, *the prohibition does not apply to claims filed after January 1, 1982*. 20 C.F.R. § 718.202(a)(1)(i).

2. Weighing evidence together versus weighing evidence separately

a. Benefits Review Board

Over the years, the Board has held that pneumoconiosis may be established by operation of presumption, or by a preponderance of the evidence at any one of the individual subsections at § 718.202(a)(1), (a)(2), or (a)(4). For example, in *Jones v. Badger Coal Co.*, 21 B.L.R. 1-103 (1998) (*en banc*), the Board held that it was proper for the administrative law judge to separately evaluate the x-ray evidence at § 718.202(a)(1) and find no evidence of pneumoconiosis, but find that the medical opinion evidence at § 718.202(a)(4) did support a finding of the disease. Employer had argued that, under § 718.202(a), "all relevant evidence must be weighed together to determine whether claimant suffers from the disease," and it cited to the Third Circuit's holding in this regard in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3rd Cir. 1997). The Board countered to note that *Jones* did not arise within the Third Circuit such that the *Williams* decision was not controlling. Moreover, it stated that the circuit court failed to distinguish between clinical and legal pneumoconiosis. In this vein, the Board reasoned that legal pneumoconiosis

"is a broader category which is not dependent upon a determination of clinical pneumoconiosis, and the absence of clinical pneumoconiosis does not necessarily influence a physician's diagnosis of legal pneumoconiosis."[5]

Again, in *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002)(en banc), a case arising in the Sixth Circuit, the Board declined to apply the Fourth Circuit's holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), which required that a determination of the presence of pneumoconiosis be based on weighing all types of evidence under 20 C.F.R. § 718.202 together. Rather, the Board noted that "the Sixth Circuit has often approved the independent application of the subsections at Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis."

b. Third Circuit

In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3rd Cir. 1997), the Third Circuit stated the following with regard to establishing pneumoconiosis pursuant to the methods set forth at § 718.202(a):

> We agree with the Director that 'although section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease.' (citations omitted).
>
> It is significant that the language of the regulation does not list the methods in the disjunctive. The word 'or' does not appear between the paragraphs enumerating the four approved means of determining the presence of pneumoconiosis. It follows that the Board erred when it found the presence of pneumoconiosis based on the x-ray evidence alone without evaluating the other relevant evidence.

In its brief before the Third Circuit, the Director argued the following:

> The Act requires that 'all relevant evidence' must be considered in determining the validity of claims. (citations omitted). Thus, if a record contains both x-ray interpretations and biopsy reports

[5] The Board has also held that all evidence relevant to the existence of pneumoconiosis must be considered and weighed. In *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986), the Board upheld a finding that the claimant had not established the existence of pneumoconiosis even where the x-ray evidence of record was positive. The Board concluded that the "administrative law judge's assignment of less weight to the record's positive x-rays was rational and based on substantial evidence," where "the weight of other medical evidence indicat[ed] that claimant's impairment was due to interstitial fibrosis of unknown etiology." *Id*. at 1-68.

> relevant to the question, the Act prohibits the conclusion that the miner did or did not have pneumoconiosis based on the x-ray evidence alone. The biopsy evidence must also be weighed. Further extending this analysis, if the x-ray and biopsy evidence proves negative for 'clinical' pneumoconiosis, the Act requires that the record must then be evaluated for the adequacy of the physicians' opinions that the miner suffered from the broader category of 'legal' pneumoconiosis; that is, 'pneumoconiosis' as defined by the Act and section 718.201.
>
> Our construction of section 718.202(a) to include consideration of all the relevant evidence also advances the intent of Congress to compensate victims of disabling pneumoconiosis caused by coal dust exposure.

Id.

c. Fourth Circuit

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the administrative law judge concluded that the miner did not establish pneumoconiosis through chest x-ray evidence under § 718.202(a)(1), but he did find pneumoconiosis established via medical opinion evidence at § 718.202(a)(4). The Fourth Circuit vacated this finding of pneumoconiosis and held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from the disease. The circuit court cited to the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24-25 (3rd Cir. 1997) that requires the same analysis and the Fourth Circuit reasoned as follows:

> [W]eighing all of the relevant evidence together makes common sense. Otherwise, the existence of pneumoconiosis could be found even though the evidence as a whole clearly weighed against such a finding. For example, suppose x-ray evidence indicated that the miner had pneumoconiosis, but autopsy evidence established that the miner did not have any sort of lung disease caused by coal dust exposure. In such a situation, if each type of evidence were evaluated only within a particular subsection of §718.202(a) to which it related, the x-ray evidence could support an award for benefits in spite of the fact that more probative evidence established that benefits were not due. *See Griffith v. Director, OWCP*, 49 F.3d 184, 187 (6th Cir. 1995) (noting that autopsy evidence is generally accorded greater weight than x-ray evidence).

The Director took the position that x-ray evidence should not be weighed with medical opinion evidence as these two types of evidence measure different types of pneumoconiosis, *i.e.* clinical versus legal pneumoconiosis. The court agreed that there are two types of pneumoconiosis and stated that "[m]edical pneumoconiosis is a particular disease of the lung generally characterized by certain opacities appearing on the chest x-ray." The court further noted that legal pneumoconiosis encompasses a broader category of coal dust induced respiratory diseases and concluded the following:

> In that sense, the Director's point is well-taken: Evidence that does not establish medical pneumoconiosis, *e.g.*, an x-ray read as negative for coal workers' pneumoconiosis, should not necessarily be treated as evidence weighing against a finding of legal pneumoconiosis.

However, the circuit court rejected the Director's position and held that it was not a reasonable interpretation of either the Act or the regulations:

> [A]lthough we recognize that there is a meaningful distinction between evidence of medical pneumoconiosis and evidence of legal pneumoconiosis, it cannot be said that evidence showing that a miner does not have medical pneumoconiosis is irrelevant to the question of whether the miner has established pneumoconiosis for purposes of a black lung claim. Further, nothing in the text of the regulation supports his position.

See also Consolidation Coal Co. v. Director, OWCP [Held], 314 F.3d 184 (4th Cir. 2002).

d. Eleventh Circuit

In *U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977 (11th Cir. 2004), the court cited, with approval, to the Fourth Circuit's decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), which requires that all evidence under 20 C.F.R. § 718.202(a) be weighed together (such as x-ray interpretations, autopsy or biopsy evidence, and medical opinions) to determine whether pneumoconiosis is present. The Eleventh Circuit noted that, although *Compton* was not binding authority, "even if it were", Employer's challenge to the judge's award of benefits "would still fail" because the judge did weigh the x-ray and medical opinion evidence together prior to finding pneumoconiosis present.

C. Presumption at 20 C.F.R. § 718.304 (2008), complicated pneumoconiosis

The regulations at 20 C.F.R. § 718.202(a)(3) (2008) provide that "[i]f the presumptions described in §§ 718.304, 718.305 or 718.306 are applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis." 20 C.F.R. § 718.202(a)(3) (2008). Under 20 C.F.R. § 718.304 (2008), there is an irrebuttable presumption that a miner is totally disabled or died due to pneumoconiosis, if the miner suffers/suffered from complicated pneumoconiosis. Complicated pneumoconiosis is established by x-rays classified as Category A, B, or C, or by an autopsy or biopsy, which yields evidence of massive lesions in the lung or nodules in the lung that would equate to a greater than one centimeter opacity on x-ray.

A determination of whether the miner has complicated pneumoconiosis is a finding of fact, and the administrative law judge must consider and weigh all relevant evidence. *Melnick v. Consolidation Coal Co.,* 16 B.L.R. 1-31 (1991); *Maypray v. Island Creek Coal Co.*, 7 B.L.R. 1-683 (1985).

Finally, if the fact-finder concludes that complicated pneumoconiosis is present through the chest x-ray, autopsy, and/or biopsy evidence, then s/he must determine whether the pneumoconiosis is due to coal dust exposure at 20 C.F.R. § 718.203 (2008). *See* the discussion regarding the etiology of pneumoconiosis, *infra*, in this Chapter.

1. Chest x-ray evidence

a. Use of the ILO form, must find A, B, or C opacity

If the ILO form is used, a physician must specifically conclude that the chest x-ray study demonstrates a size A, B, or C opacity in order to support a finding of complicated pneumoconiosis. If the physician merely comments that s/he observes a greater than one centimeter mass on the x-ray, the comment, standing alone, does not support a finding of complicated pneumoconiosis.

For example, by unpublished decision in *McCoy v. Holly Beth Coal Co.*, BRB No. 05-0818 BLA (May 25, 2006) (unpub.), the Board held that the physician must check a box indicating the presence of an A, B, or C opacity in order for a diagnosis of complicated pneumoconiosis to be made via chest x-ray. Thus, where certain physicians did not check a box indicating the presence of an A, B, or C opacity, but commented that there was a "1.5 centimeter mass," "scattered masses as large as two centimeters," or a "1.5 centimeter nodule," the Board concluded that their comments did not constitute findings of complicated pneumoconiosis under the regulations.

Similarly, in *H.M. v. Clinchfield Coal Co.*, BRB No. 07-0288 BLA (Dec. 31, 2007) (unpub.), the Board held that complicated pneumoconiosis is demonstrated on chest x-ray if a physician specifically determines that the mass is Category A, B, or C. Notably, this finding "is not determined solely by the dimensions of the irregularity." The Board reasoned that, "under the regulations, an x-ray interpretation on an ILO form, which notes a mass that is larger than one centimeter in the 'Comments' section, but which does not diagnose pneumoconiosis with a size A, B, or C, is not sufficient to assist claimant in establishing complicated pneumoconiosis pursuant to Section 718.304."

b. Cause of the opacities

If the fact-finder determines that a size A, B, or C opacity is present, then it must be determined whether the opacity is related to coal dust exposure. For a discussion of the impact of 20 C.F.R. § 718.203 on this analysis, see the proper subsection of this Chapter.

Claimant's burden

In *Looney v. Shady Lane Coal Corp.*, BRB No. 06-0508 BLA (Feb. 28, 2007)(unpub.), a case arising in the Fourth Circuit, the Board held that the following:

> In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis, including evidence of simple pneumoconiosis and of no pneumoconiosis.

Moreover, the Board held that "the relevant question," in weighing physicians' opinions regarding the existence of complicated pneumoconiosis:

> . . . is not whether (the physicians) definitively found the changes in claimant's lungs to be due to other diseases, but whether these physicians definitively excluded complicated pneumoconiosis as a diagnosis. (citation omitted).

Slip op. at 10. *See also Lester v. Director, OWCP,* 993 F.2d 1143 (4th Cir. 1993) (Claimant bears the burden of establishing that the large opacities are caused by dust exposure in coal mine employment rather than the employer being required to prove that the opacities are due to a specific non-coal dust related source).

Opacity "consistent with" other process, held probative

In *Deel v. Buchanan Production Co.*, BRB No. 06-0188 BLA (Nov. 30, 2006) (unpub.), the Board held that, where a radiologist concludes that abnormalities on a chest x-ray are consistent with tuberculosis or other diseases, the administrative law judge may not discredit the opinion solely on the basis that there is no other medical data of record demonstrating that the miner suffered from tuberculosis. In this vein, the Board concluded that "[t]he fact that the record does not reveal that claimant suffered from tuberculosis does not undermine the interpretations of those physicians who found that claimant's x-rays revealed abnormalities consistent with that disease." Slip op. at 8, n. 6.

Equivocal opinion on cause of opacity, not probative

By unpublished decision in *Yogi Mining Co. v. Director, OWCP [Fife]*, Case No. 04-2140 (4th Cir. Dec. 7, 2005), the court held that it was proper for the Administrative Law Judge to accord less weight to equivocal or speculative opinions regarding the etiology of opacities measuring greater than one centimeter on a chest x-ray. In so holding, the court stated the following:

> The ALJ . . . explained that he was according less weight to Drs. Scott and Wheeler because their opinions were equivocal on the abnormalities shown on Fife's X-rays, in that they could only opine that such spots were 'compatible with' or 'probably' tuberculosis. (citation omitted). Moreover, Scott and Wheeler both acknowledged that Fife's X-rays could indicate pneumoconiosis. (citation omitted). As the ALJ explained, 'not only were the physicians unable to offer a clear explanation for the abnormalities revealed on Fife's chest x-rays, Drs. Wheeler and Scott also were 'unable to unequivocally conclude that Mr. Fife does not suffer from pneumoconiosis.' (citation omitted). Although Scott and Wheeler were both dually qualified (B/BCR), the ALJ considered their opinions to be inconclusive, and he chose to rely instead on the unequivocal diagnoses of complicated pneumoconiosis by two other experts: Dr. Alexander, who was also dually qualified (B/BCR), and Dr. Forehand, a B reader. (citation omitted).

The court noted that one of the miner's treating physicians reported that the miner's test for tuberculosis produced negative results. In this vein, the court concluded that the administrative law judge properly accorded "little evidentiary weight" to the CT-scan interpretations of Drs. Scott and Wheeler "because both had interpreted the scans as showing evidence of tuberculosis, while Fife had, in fact, tested negative for the disease." Moreover, in a footnote, the court noted that "[a] diagnosis of tuberculosis does not necessarily exclude the possibility that a miner also suffers from

pneumoconiosis."

In *Cooper v. Westmoreland Coal Co.,* BRB No. 04-0589 BLA (Mar. 28, 2005) (unpub.), the administrative law judge properly acted within his discretion in finding that "Dr. Wheeler's and Dr. Gaziano's equivocal identification of TB as the disease process that accounts for the markings that other physicians have identified as complicated pneumoconiosis diminishes their credibility." Citing to *Lester v. Director, OWCP,* 993 F.2d 1143 (4th Cir. 1993), the Board stated that Claimant "bears the burden of establishing that the large opacities are caused by dust exposure in coal mine employment rather than the employer being required to prove that the opacities are due to a specific non-coal dust related source." However, the Board concluded that, under *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000), "in order to resolve conflicting x-ray interpretations regarding the presence of complicated pneumoconiosis, the administrative law judge must assess the probative value of the x-ray readings in their entirety, rather than accepting them at face value." In this vein, the Board agreed with the administrative law judge that equivocal statements regarding etiology was not sufficient to outweigh the opinion of other physicians who concluded that the large opacity was coal dust related.

2. Autopsy or biopsy evidence

a. Equivalency determination

The Board and some circuit courts have held that an equivalency determination is necessary to assess whether lesions found in the lung on autopsy or biopsy would correspond to opacities that are greater than one centimeter when viewed on an x-ray. Some physicians maintain that a chest x-ray will record only the central part of the actual lesion and, therefore, a lesion must be larger than one centimeter on autopsy to constitute a greater than one centimeter opacity on a chest x-ray. Other physicians argue that technological advances have resulted in increased accuracy on chest x-rays such that a one centimeter lesion on autopsy would be equal to a greater-than-one-centimeter opacity on chest x-ray. This disparity must be resolved on a case-by-case basis using medical experts.

b. Benefits Review Board, equivalency required

In *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 B.L.R. 1-1264 (1984), the Board concluded that the evidence did not support a finding of complicated pneumoconiosis, even though a doctor indicated that "the lung parenchyma also has underspread black modules which vary up to 0.9 to 1.2 centimeters." Similarly, the evidentiary basis was found lacking in *Smith v. Island Creek Coal Co.*, 7 B.L.R. 1-734 (1985), where the doctor who performed the autopsy

indicated that the lungs revealed two nodular areas measuring 1.2 to 1.3 centimeters, but no attempt was made to equate the lesions found on autopsy with the size of x-ray opacities required by § 718.304(a). *See also Reilly v. Director, OWCP*, 7 B.L.R. 1-139 (1984).

On the other hand, in *Braenovich v. Cannelton Industries, Inc.*, 22 B.L.R. 1-236 (2003), the Board upheld the judge's "equivalency determination" that a 1.5 centimeter lesion on autopsy would constitute a 1.0 centimeter or greater opacity on a chest x-ray, thus establishing the presence of complicated pneumoconiosis under 20 C.F.R. § 718.304. In support of the judge's finding, the Director argued that the autopsy prosector and a reviewing pathologist found a lesion larger than one centimeter in the miner's lungs. The Director stated that, although another reviewing pathologist, Dr. Naeye, found a 0.9 centimeter lesion on the slides, this would not "disprove the existence of a nodule larger than one centimeter in the miner's lungs." The Director noted that one of Employer's experts, Dr. Kleinerman, "acknowledged that a tissue sample shrinks by about 10 - 15% when prepared for a slide . . .." *See also Hawker v. Zeigler Coal Co.*, 22 B.L.R. 1-168 (2000).

c. Third Circuit, equivalency required

In *Clites v. Jones & Loughlin Steel Corp.*, 663 F.2d 14 (3rd Cir. 1981), a physician testified that nodules found on autopsy, if viewed radiographically, would amount to opacities over one centimeter. Thus, the court upheld the administrative law judge's finding of the existence of complicated pneumoconiosis.

d. Fourth Circuit, equivalency required

In *Perry v. Mynu Coals Inc.*, 469 F.3d 360 (4th Cir. 2006), *reh'g. denied* (4th Cir. Feb. 16, 2007), the Board upheld the administrative law judge's finding that the miner did not suffer from complicated pneumoconiosis based on autopsy evidence of record. However, the Fourth Circuit concluded that the denial should be vacated and it remanded the case "to the Board which will see to the entry of an appropriate order awarding benefits."

In sum, the administrative law judge rejected a finding of complicated pneumoconiosis on three grounds: (1) the prosector's statements with regard to what size the four and six centimeter nodules would be on x-ray were "equivocal"; (2) the prosector was unfamiliar with the miner's smoking history; and (3) the prosector failed to identify pneumoconiosis as a cause of death. The prosector testified that, although he "was not a hundred percent sure," he thought that the four and six centimeter lesions would appear greater than one centimeter on an x-ray and that they were related to coal dust exposure and

cancer. The court held this was sufficient to invoke the irrebuttable presumption at § 718.304 of the regulations and that the bases for the administrative law judge's rejection of the prosector's opinion were erroneous.

In *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000), the circuit court affirmed the administrative law judge's finding that the x-ray and autopsy evidence of record supported invocation of the presumption at 20 C.F.R. § 718.304 (complicated pneumoconiosis). The court held that there was no evidence to demonstrate that the 1.7 centimeter nodules on the autopsy would not equate to the 1.0 centimeter opacity on a chest x-ray. Some additional holdings in *Scarbro* are as follows:

- normal pulmonary function study values at the end of the miner's coal mine employment does not preclude a finding of complicated pneumoconiosis at the time of his death;

- the most objective measure of the presence of complicated pneumoconiosis is by chest x-ray and x-ray evidence of complicated pneumoconiosis "can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader";

- it is error to accord greater weight to the opinion of the prosector solely because s/he conducted the autopsy and observed the miner's entire respiratory system (*see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186 (4th Cir. 2000));

- The fact that a physician states that the 1.7 centimeter nodules observed on the autopsy slides did not constitute complicated pneumoconiosis in the medical sense is insufficient to exclude presence of the disease in the legal sense; the physician failed to state whether the lesions met the statutory definition of the disease, not merely the pathological or medical definition; and

- the administrative law judge properly found that the prosector's report supported a finding of massive lesions in the lungs based on a dictionary definition of "massive" as meaning "extensive or severe.

In *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999), a case involving the issue of complicated pneumoconiosis, the court stated that a diagnosis of "massive lesions" on autopsy or biopsy is the same as requiring a finding of A, B, or C opacities on chest x-ray. In this vein, the court found that a physician's finding of "massive fibrosis" on biopsy, which included a lesion or nodule measuring 1.3 centimeters in diameter, was insufficient to determine whether Claimant suffered from complicated pneumoconiosis. Rather, it concluded the following:

> To determine whether Blankenship's condition meets the statutory criteria, we must remand this case to the Board for remand to the ALJ to find whether the 1.3-centimeter lesion would, if x-rayed prior to removal of that portion of Blankenship's lung, have showed as a one-centimeter opacity.
>
> It may be necessary for an ALJ to make a separate equivalency determination each time a miner presents evidence of massive lesions diagnosed by biopsy. On the other hand, it may be possible for the Department of Labor to engage in a single fact-finding exercise to determine how large a lesion must be in order to appear on an x-ray as a greater-than-one-centimeter opacity and thereafter to promulgate a rule imposing this finding on all future cases. Either way, however, an equivalency determination must be made.

The court noted that, in some cases, the Board and medical community have determined that the lesion found on biopsy or autopsy must measure at least two centimeters in diameter in order to support a finding of complicated pneumoconiosis because nodules are larger on autopsy or biopsy than they appear on a chest x-ray. The court declined to follow this bright-line rule, however, and reasoned that "[t]he statute does not mandate the use of the medical definition of complicated pneumoconiosis."

See also Gollie v. Elkay Mining Co., 22 B.L.R. 1-306 (2003), *aff'd.*, Case No. 03-2131 (4th Cir. Apr. 8, 2004) (unpub.), *cert. denied*, 125 S. Ct. 344 (2004) (a physician's opinion that a 12 mm nodule viewed on a lobectomy and 2 cm lesions on autopsy slides "would look like complicated pneumoconiosis on x-ray" fell short of the required equivalency finding).

e. Sixth Circuit, equivalency required

In *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999), the court held that a miner who died of a self-inflicted gunshot wound may nevertheless be awarded black lung benefits if it is determined that he suffered from

complicated pneumoconiosis and, therefore, invoked the irrebuttable presumption of total disability and death due to the disease. The court then reviewed the record to determine whether it supported a finding of complicated pneumoconiosis. It noted that a diagnosis of the disease may be made based upon chest x-ray evidence revealing opacities greater than one centimeter in diameter, or autopsy or biopsy evidence that demonstrates "massive lesions." The court then determined that x-ray evidence of opacities measuring at least one centimeter does not, alone, trigger the irrebuttable presumption where conflicting autopsy evidence exists. Moreover, the "one-centimeter standard applicable to x-rays simply does not apply to autopsy evidence." The court stated that x-rays are the "least accurate method" of diagnosing complicated pneumoconiosis such that "all relevant evidence" must be weighed prior to invocation of the presumption. In this vein, the court concluded that the autopsy evidence did not support a finding of complicated pneumoconiosis as Dr. Kleinerman testified "that the lesions on the lung-tissue slides would not appear as opacities of greater than one centimeter on an x-ray" and the nodules observed in the miner's lung on autopsy did not constitute "massive lesions" as required by the regulation.

f. Eleventh Circuit, equivalency not required

In *The Pittsburgh & Midway Coal Mining Co. v. Director, OWCP*, 508 F.3d 975 (11th Cir. 2007), the court affirmed an administrative law judges' award of benefits to the survivor of a miner pursuant to the irrebuttable presumption at 20 C.F.R. § 718.304. The prosector identified massive lesions and "[m]ultiple scattered fibroanthracotic nodules measuring up to 1.2 cm" and stated that the "microscopic features are consistent with a complicated pneumoconiosis, as defined by the Black Lung Program Guidelines . . .." The prosector then testified that "pathologists are best able to make a diagnosis of complicated pneumoconiosis when they perform both a gross and microscopic examination because 'the things you see grossly are not . . . necessarily in toto represented on the slides . . .." Employer submitted a contrary report wherein a reviewing pathologist concluded that the largest nodule he could find on the autopsy slides measured 0.9 centimeters, which did not qualify for a diagnosis of complicated pneumoconiosis.

On appeal, Employer argued that, because the miner died due to congestive heart failure, the provisions at § 718.205(c)(4) (that a survivor is not entitled to benefits where the principal cause of death is unrelated to pneumoconiosis) mandated denial of the survivor's claim. The court disagreed and held that the provisions at § 718.304 are mandatory and provide that there "*shall* be an *irrebuttable* presumption" of the cause of death where it is established that the miner suffered from complicated pneumoconiosis.

Turning to the medical evidence, the court noted that Claimant did not

produce chest x-ray evidence sufficient to invoke the irrebuttable presumption at § 718.304. With regard to the autopsy evidence, one of Employer's experts maintained that "'massive lesions' refers to lesions the size of a chicken egg or one-third of one lung, significantly larger than the 1.2 centimeter lesion found by" the prosector. The Director disagreed and stated that the "chicken-egg standard has no medical basis, and that '[t]he term massive lesions is merely one of several ways of describing the condition known as complicated pneumoconiosis.'"

The court noted that neither the Act nor the implementing regulations define the term "massive lesions." Upon review of legislative intent, case law, and regulatory history, the court concluded that the Director's position was correct. In sum, the court stated:

> We are satisfied that the term 'massive lesions' means lesions revealed on autopsy or biopsy that support a diagnosis of complicated pneumoconiosis. Because 'massive lesions' is simply shorthand for complicated pneumoconiosis, we agree with the BRB's conclusion that a physician need not employ the magic words 'massive lesions' in order to satisfy the requirements found in § 718.304(b). It is sufficient if the claimant can establish by a preponderance of the evidence that the miner's autopsy or biopsy results are consistent with a diagnosis of complicated pneumoconiosis under accepted medical standards. (citations omitted).

Here, the court concluded that the prosector's identification of multiple nodules, including a nodule measuring 1.2 centimeters, was sufficient to support a finding of complicated pneumoconiosis. In this vein, the court declined to follow *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 242 (4th Cir. 1999) wherein the Fourth Circuit required a claimant to demonstrate that the lesion on autopsy would show as an opacity greater than one centimeter in diameter on x-ray. The Eleventh Circuit held that the regulations do not require such an "equivalency determination." In a footnote, the court further stated that, "because [the prosector] found at least one lesion as large as 1.2 centimeters in diameter, . . . we are satisfied that 1.2 centimeters is sufficiently greater than 1 centimeter to qualify as 'massive'" in support of a finding of complicated pneumoconiosis.

3. Medical opinion evidence

In *S.P.W. v. Peabody Coal Co.*, BRB No. 07-0278 BLA (Dec. 27, 2007)(unpub.), the Board held that the irrebuttable presumption at 20 C.F.R. § 718.304 cannot be invoked under subsection (c) using medical opinions that are based solely on chest x-ray interpretations. Specifically, the Board noted that § 718.304(c) permits invocation of the presumption "*by means other*

than" interpretations of chest x-rays at § 718.304(a) of the regulations. Therefore, while medical opinions may be considered under § 718.304(c) to invoke the irrebuttable presumption, such opinions cannot be based solely on x-ray interpretations.

4. "Other evidence" under § 718.107, consideration of

Consideration of "other evidence," such as digital x-rays and CT-scans, is permitted in determining whether complicated pneumoconiosis exists. This evidence is properly weighed under 20 C.F.R. § 718.304(c) (2008).

By unpublished decision in *Mullins v. Plowboy Coal Co.*, BRB No. 06-0900 BLA (Aug. 30, 2007)(unpub.), the Board held that CT-scan evidence is weighed under § 718.304(c) and the administrative law judge "must determine whether the CT scan evidence under Section 718.304(c) tends to independently establish both a chronic dust disease of the lung, and an opacity or mass that would appear as greater than one centimeter if seen on x-ray, which would satisfy the regulatory definition of complicated pneumoconiosis." The Board affirmed the administrative law judge's decision to weigh medical opinion evidence addressing the existence of complicated pneumoconiosis under § 718.304(c). Finally, the Board instructed that once the administrative law judge weighs evidence separately under subsections (a), (b), and (c) of § 718.304, then s/he must "weigh the entirety of the evidence . . . together before determining whether claimant has complicated pneumoconiosis and before finding that claimant is entitled to invocation of the irrebuttable presumption."

By unpublished decision in *C.E.S. v. Consolidation Coal Co.*, BRB No. 07-0329 BLA (Jan. 31, 2008) (unpub.), arising in the Fourth Circuit, the Board remanded the claim for reconsideration of evidence pertaining to the existence of complicated pneumoconiosis. Specifically, the administrative law judge accorded greater weight to a positive x-ray interpretation of complicated pneumoconiosis by Dr. Patel on grounds that it was supported by Dr. Groten's CT-scan interpretation. The Board noted:

> . . . the administrative law judge engaged in circular reasoning by crediting Dr. Groten's CT scan interpretations, despite Dr. Groten's failure to set forth either an equivalency analysis or the dimensions of any large opacities observed . . ..

Slip op. at 4.

By unpublished decision in *Keene v. G&A Coal Co.*, BRB No. 96-1689 BLA-A (Sept. 27, 1996) (unpub.), the Board affirmed a finding of complicated pneumoconiosis under 20 C.F.R. § 718.304. It held that the judge properly found that a chest x-ray, in conjunction with CT-scan findings, was sufficient to

find complicated pneumoconiosis. The judge specifically noted that physicians reviewing a CT-scan "confirm(ed) the presence of a large irregular density or mass greater than one centimeter in diameter." The Board further held that a finding of complicated pneumoconiosis need not be accompanied by findings of Category 2 or Category 3 simple pneumoconiosis, contrary to Employer's argument. The Board also found that the judge properly concluded that "Dr. Wheeler's opinion, that claimant's large opacity is compatible with tuberculosis, (did) not negate its compatibility with complicated pneumoconiosis."

D. Fifteen-year presumption at 20 C.F.R. § 718.305 (2008)

Under 20 C.F.R. § 718.305 (2000) and (2008), if a miner was employed for fifteen years or more in one or more underground coal mines, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis. 20 C.F.R. § 718.305(a) (2000) and (2008). A spouse's affidavit or testimony may not be used by itself to establish the applicability of the presumption. 20 C.F.R. § 718.305(a) (2000) and (2008). The presumption may be rebutted by establishing that the miner does not have pneumoconiosis or that his or her respiratory or pulmonary impairment did not arise out of coal mine employment. The presumption can never be rebutted, however, on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of *unknown* origin. 20 C.F.R. § 718.305(d) (2000) and (2008).

In *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995), the court reiterated that, under § 718.305, "[o]n claims filed before January 1, 1982, where a miner has fifteen years of employment and a totally disabling respiratory impairment, it is presumed that pneumoconiosis is a contributing cause of his impairment."

1. Applicability

This presumption is not applicable to any claim filed on or after January 1, 1982. 20 C.F.R. § 718.305(e) (2000) and (2008).

2. Miner must have 15 years of underground coal mine employment or similar

In *Blakley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995), the Seventh Circuit held that, under § 725.305(a), the claimant must demonstrate that "he worked for fifteen years in an underground mine or in a surface mine with dust conditions substantially similar to those found in underground mines." In this vein, the court further held that the claimant "'bears the burden of establishing comparability' but 'must only establish that he was exposed to sufficient coal

dust in his surface mine employment.'" The court stated that it will generally defer to the expertise of the judge in determining the similarity of surface and underground mine conditions.

In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court held that the judge properly invoked the 15-year presumption at 30 U.S.C. § 921(c)(4) having found that the miner's work at the surface of the mine was under "conditions substantially similar to those in an underground coal mine." The judge found "similarity" based on the miner's unrefuted testimony about his employment conditions. The miner worked as an electrician in the mines during some of his coal mine employment, but most of his work "occurred when he worked inside the offices and shops that were built above ground on the coal company's property." The court found that the miner described, in detail, the dusty conditions in his work areas, and it noted the following:

> Summers intermittently labored underground or in buildings located atop subterranean coal mines, performing tasks inexorably intertwined with coal production. Therefore, he is a miner, according to the regulations, and we will not require him to prove similarity in a different manner merely because he did not wield a pickaxe and a shovel while he worked.

Id.

3. Rebuttal of the presumption

Once invoked, the presumption at 20 C.F.R. § 725.305(a) (2000) and (2008) may be rebutted if the employer demonstrates, by a preponderance of the evidence that (1) the miner does not, or did not, have pneumoconiosis, or (2) the respiratory or pulmonary impairment did not arise out of coal mine employment. Citing to *Shelton v. Director, OWCP*, 899 F.2d 690 (7th Cir. 1990), the court stated that, with regard to the second avenue of rebuttal, if the employer establishes that the miner would have been disabled notwithstanding his exposure to coal dust, then his disability did not arise out of coal mine employment. Moreover, although the experts in *Blakley* did not conclusively "rule out" coal workers' pneumoconiosis as a possible factor in the claimant's condition, rebuttal of the presumption was nevertheless accomplished by Employer since the record evidenced that the miner would have been disabled notwithstanding any complications arising from his exposure to coal mine dust.

In *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995), the court held that rebuttal was not established where the autopsy report and related opinions "do not identify the origin of (the miner's) diseases" in light of the broad legal definition of pneumoconiosis.

E. Presumption at 20 C.F.R. § 718.306 (2008), survivors' claims

Under 20 C.F.R. § 718.306 (2000) and (2008), death due to pneumoconiosis or total disability at the time of death will be presumed in certain cases. This presumption is applicable to a claim for survivor's benefits and is discussed in Chapter 16.

F. Reasoned medical opinions

Besides chest x-rays, autopsy/biopsy evidence, and certain presumptions, a determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. § 718.202(a)(4) (2000) and (2008) (simple pneumoconiosis); 20 C.F.R. § 718.304(c) (2000) and (2008) (complicated pneumoconiosis). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 C.F.R. § 718.202(a)(4) (2008).

The Board has emphasized that, under § 718.202(a)(4), "the administrative law judge must consider and weigh all relevant medical evidence to ascertain whether or not claimant has established the presence of pneumoconiosis by a preponderance of the evidence . . .." *Perry v. Director, OWCP*, 9 B.L.R. 1-1, 1-2 (1986). Where the medical opinions are in conflict, the administrative law judge must discuss the conflicting evidence and provide a rationale for choosing one physician's opinion over another. *McGinnis v. Freeman United Coal Mining Co.*, 10 B.L.R. 1-4 (1987).

Notably, the Board has held that a party is not required to establish a "cohesive theory" with regard to whether the miner suffers from coal workers' pneumoconiosis. In *Bentley v. Kentucky Elkhorn Coal, Inc.*, BRB No. 00-0140 BLA (Apr. 6, 2001) (unpub.), the judge noted that Employer's three physicians "disagreed as to the possible contribution of factors such as cigarette smoking, a predisposition to asthma, and hereditary factors, as well as the extent to which the symptoms were related to emphysema, asthma, bronchitis, or asthmatic bronchitis." The judge found that "'it would be absurd to suggest that the credibility of the three physicians retained by the [e]mployer is not undermined at all by the fact that they disagree with each other on the material issues.'" The Board disagreed to state that a finding regarding whether a physician's opinion is well-reasoned and well-documented "requires

analysis of the document within its four corners." As a result, the Board remanded the case for further analysis of the evidence.

V. Etiology of the pneumoconiosis

Once a judge finds that the miner suffers (or suffered) from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a) (2000) and (2008).

A. Applicability

1. Applies to "clinical" pneumoconiosis

In *Andersen v. Director, OWCP*, 455 F.3d 1102 (10th Cir. 2006), the court held that the ten year rebuttable presumption at 20 C.F.R. § 718.203 applies only to determine whether the miner's *clinical* pneumoconiosis is coal dust related.

In *Hapney v. Peabody Coal Co.*, 22 B.L.R. 1-104 (2001)(en banc), a case arising in the Fourth Circuit, the issue was whether a finding of "anthracosis" on biopsy was sufficient to support a finding of pneumoconiosis under the Act, despite preponderantly negative chest x-ray findings. The Board affirmed the administrative law judge's finding that the biopsy findings of anthracosis were credible and fell within the regulatory definition of pneumoconiosis at 20 C.F.R. §§ 718.201(a)(1) and 718.202(a)(2). The Board then adopted the Director's position that the etiology of the miner's lung condition as diagnosed on biopsy "is properly considered, not pursuant to the regulation at 20 C.F.R. § 718.202(a), but pursuant to the regulation at 20 C.F.R. § 718.203." Here, because the miner demonstrated more than ten years of coal mine employment, Employer had the burden of rebutting the presumption that the miner's diagnosed anthracosis did not arise from exposure to coal dust.

2. Applies to complicated pneumoconiosis

In *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007), in assessing whether a miner suffers from complicated coal workers' pneumoconiosis, the court held that the fact-finder has a two step process: (1) whether there are radiographic or other findings consistent with complicated pneumoconiosis under the provisions at 20 C.F.R. § 718.304(a)-(c); and, if so (2) whether the pneumoconiosis arose at least in part out of coal mine employment at 20 C.F.R. § 718.203(a). The court emphasized that the causation element is not "subsumed" in a finding that the miner suffers from complicated pneumoconiosis. Rather, a miner with ten years or more of coal mine employment is entitled to a rebuttable presumption that his complicated pneumoconiosis arose out of coal dust exposure, whereas a miner with fewer than ten years of employment must present medical evidence to establish

causation. *See also W.L.C. v. Westmoreland Coal Co.*, BRB No. 06-0927 BLA (June 26, 2007) (unpub.).

3. Inapplicable to finding of "legal" pneumoconiosis

In *Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-246, 1-259 n. 18 (2006), the Board cited to *Andersen v. Director, OWCP*, 455 F.3d 1102 (10th Cir. 2006) and *Henley v. Cowan & Co.*, 21 B.L.R. 1-147, 1-151 (1999) and agreed with the Director's position that, if an administrative law judge finds the existence of legal pneumoconiosis, then s/he need not separately determine the etiology of the disease at § 718.203 because the findings at § 718.202(a)(4) will necessarily subsume that inquiry.

B. Ten years or more coal mine employment

If a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b) (2008).

C. Fewer than ten years of coal mine employment

1. Claimant's burden

If a miner suffers from pneumoconiosis and was employed fewer than ten years in the Nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c). *See also Stark v. Director, OWCP*, 9 B.L.R. 1-36 (1986); *Hucker v. Consolidation Coal Co.*, 9 B.L.R. 1-137 (1986).

2. Case law

a. Benefits Review Board

The burden of proof is met under § 718.203(c) when "competent evidence establish[es] that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment." *Shoup v. Director, OWCP*, 11 B.L.R. 1-110, 1-112 (1987).

b. Third Circuit

In *Wisniewski v. Director, OWCP*, 929 F.2d 952 (3rd Cir. 1991), the court held that an inference that the miner's pneumoconiosis was caused by coal dust exposure may be raised "if the record [affirmatively] indicates [that there was] no other potential dust exposure."

c. Sixth and Seventh Circuits

The Sixth and Eleventh Circuits apply a more relaxed standard to state that the miner need only establish that his pneumoconiosis arose "in part" from his coal mine employment. *See Stomps v. Director, OWCP*, 816 F.2d 1533, 10 B.L.R. 2-107 (11th Cir. 1987); *Southard v. Director, OWCP*, 732 F.2d 66, 6 B.L.R. 2-26 (6th Cir. 1984).

3. Medical evidence required

The record must contain *medical* evidence establishing the relationship between pneumoconiosis and coal mine employment. The Board has held that "the administrative law judge could not reasonably infer a relationship based merely upon claimant's employment history." *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986). In another case the Board concluded that "the Judge's sole reliance on lay testimony to find § 718.203(c) satisfied . . . is erroneous." *Tucker v. Director, OWCP*, 10 B.L.R. 1-35, 1-39 (1987).

4. Inaccurate employment history, opinion less probative

Medical opinions, which are predicated on an erroneous coal mine employment history, may be given little weight with regard to etiology of the miner's disease. In *Barnes v. Director, OWCP*, 19 B.L.R. 1-71 (1995)(en banc on reconsideration), the Board reiterated that a judge may accord an opinion less weight based upon a discrepancy in the administrative law judge's finding of coal mine employment and that relied upon by the physician. In so holding, the Board stated that "the administrative law judge should . . . consider whether the record contains any documentary or testimonial evidence to suggest that any causal factors other than coal dust exposure as a cause of claimant's pneumoconiosis." The same would hold true for opinions based on an inaccurate smoking history.

For a further discussion of case law pertaining to incorrect smoking or employment histories, *see* Chapter 3.

VI. Establishing total disability

A. Prior to applicability of 20 C.F.R. Part 718 (2008)

A miner shall be considered totally disabled if s/he has complicated pneumoconiosis (§ 718.304 - irrebuttable presumption), or if pneumoconiosis prevents him or her from doing his usual coal mine employment or comparable and gainful employment (§ 718.204(b) - rebuttable presumption). For a discussion of the factors to consider in determining whether a miner is able to perform "comparable and gainful employment," *see* Chapter 10.

Subsection 718.204(c) provides that, *in the absence of contrary probative evidence*, evidence which meets the quality standards of the subsection shall establish a miner's total disability. The administrative law judge cannot merely weigh like/kind evidence. Specifically, it is error to look at all the pulmonary function studies and conclude that the miner is totally disabled, or to look at all the blood gas studies to conclude that the miner is totally disabled. The administrative law judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If so, the administrative law judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Troup v. Reading Anthracite Coal Co.*, 22 B.L.R. 1-11 (1999) (en banc); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986).

B. After applicability of 20 C.F.R. Part 718 (2008)

Under the new regulations, the definitions of total disability and disability causation have been modified. For this reason, the D.C. Circuit Court, in *National Mining Ass'n. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), held that the amendments at § 718.204 are valid, but amended provisions addressing disability causation cannot be applied to claims filed on or before January 19, 2001. The court reasoned that these amended provisions codify the Fourth Circuit's holding in *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994) over the contrary holding of the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994) such that the regulation would be impermissibly retroactive. Section 718.204 provides, in relevant part, the following:

> (a) General. Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who where totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

20 C.F.R. § 718.204(a) (2008).

In its comments to this regulatory amendment, the Department rejected

the concept of compensation based upon a "whole person disability" and stated the following:

> [O]nly respiratory and pulmonary impairments are relevant in determining whether the miner is totally disabled for purposes of the Black Lung Benefits Act, and identifying the causes of that disability.
>
> . . .
>
> The Department has consistently taken the position that proof of a totally disabling respiratory or pulmonary impairment is an essential element of a miner's claim for black lung benefits. (citations omitted). Adoption of a 'whole person' definition of total disability would greatly expand the black lung benefits program and transform it into a general disability program for coal miners.

65 Fed. Reg. 79,947 (Dec. 20, 2000). The Department specifically noted that the amended regulatory provisions constituted a departure from the Seventh Circuit's holding in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), wherein the court held that Claimant's entitlement to benefits was precluded because he suffered from a disabling stroke, which was unrelated to coal mine employment and which occurred before there was evidence of disability due to pneumoconiosis in the record.

C. Methods of demonstrating total disability

Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a) (2000) and (2008). The regulations at § 718.204(b) provide the following five methods to establish total disability: (1) pulmonary function (ventilatory) studies; (2) blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinions; and (5) lay testimony. 20 C.F.R. § 718.204(b) (2000) and (2008). However, it is noted that in a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish total disability." 20 C.F.R. § 718.204(d) (2000) and (2008); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). For the use of lay testimony in a survivor's claim, see *Chapter 17*.

It is noteworthy that the Board and some circuit courts have emphasized that pulmonary function and blood gas testing measure different types of impairment. In *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993), the court noted that the Board has held that the results of blood gas and pulmonary function testing "may consistently have no correlation since coal workers' pneumoconiosis may manifest itself in different types of pulmonary impairment.'" The court cited to *Gurule v. Director, OWCP*, 2 B.L.R. 1-772, 1-777 (1979), *aff'd.*, 653 F.2d 1368 (10th Cir. 1981). *See also*

Sheranko v. Jones and Laughlin Steel Corp., 6 B.L.R. 1-797, 1-798 (1984) (blood gas studies and ventilatory studies measure different types of impairment).

For a discussion of weighing blood gas studies, ventilatory studies, and medical opinions, *see* Chapter 3.

1. Pulmonary function (ventilatory) studies

The quality standards for pulmonary function studies are found at 20 C.F.R. § 718.103 (2000) and (2008). The standards require that the studies be accompanied by three tracings of each test performed, FEV_1, FVC, and MVV. The standards also require that a statement signed by the physician or technician indicate the following: (1) date and time of test; (2) name, claim number, age, height, and weight of the claimant; (3) name of the technician; (4) signature of the physician supervising the test; (5) the claimant's ability to understand the instructions, ability to follow directions, and degree of cooperation in performing the tests; (6) paper speed; (7) name of the instrument used; (8) whether a bronchodilator was used; and (9) that the test is in compliance with the quality standards. 20 C.F.R. § 718.103(b) (2000) and (2008).

The quality standards under the amended regulations at 20 C.F.R. § 718.103(b) (2008) also require the submission of a flow-volume loop. Tests conducted after January 19, 2001 are required to meet this additional quality standard. 20 C.F.R. § 718.101(b) (2008).

2. Blood gas studies

The quality standards for blood gas studies are found at 20 C.F.R. § 718.105 (2000) and (2008). The standards require that no blood gas study shall be performed if medically contraindicated. 20 C.F.R. § 718.105(a) (2000) and (2008). A blood gas study shall initially be administered at rest and in a sitting position. If the results of the blood gas test at rest do not satisfy the requirements of Appendix C, an exercise blood gas test shall be offered unless medically contraindicated. 20 C.F.R. § 718.105(b) (2000) and (2008). The report of the blood gas study shall specify: (1) date and time of test; (2) altitude and barometric pressure; (3) name and claim number of the claimant; (4) name and signature of the physician; (6) recorded values for PCO_2, PO_2, and pH collected at rest and if performed, during exercise; (7) duration and type of exercise; (8) pulse rate; (9) time between drawing of sample and analysis of sample; and (10) whether the equipment was calibrated before and after each test. 20 C.F.R. § 718.105(c) (2000) and (2008).

3. Cor pulmonale with right-sided congestive heart failure

As the pulmonary disease progresses and results in greater pulmonary functional derangement, it produces dysfunction of the pulmonary blood vessels. As the resistance to blood flow in the pulmonary vessels rises, there is an elevation in the pressure in the pulmonary artery and severe stress is placed on the right ventricle of the heart, which eventually fails. Heart disease that is secondary to chronic lung disease is known as *cor pulmonale* and this form of failure of the circulation is known as congestive heart failure. A miner's total disability may be established where the miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. § 718.204(c)(3) (2000) and § 718.204(b)(2)(iii) (2008).

4. Reasoned medical opinions

Where total disability cannot be established by pulmonary function studies, blood gas studies, or by evidence of *cor pulmonale* with right-sided congestive heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual or comparable coal mine employment. 20 C.F.R. § 718.204(b)(2) (2000); 20 C.F.R. § 718.204(b)(1)(ii) (2008). Under this section, "all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element." *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201, 1-204 (1986).

a. Burden of proof

In assessing total disability, the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000) (a finding of total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations); *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). *See also Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(en banc on recon.).

Once it is demonstrated that the miner is unable to perform his or her

usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to 20 C.F.R. § 718.204(b)(2) (2000) or 20 C.F.R. § 718.204(b)(1)(ii) (2008). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

b. Physician's knowledge of duties important

In *Killman v. Director, OWCP*, 415 F.3d 716 (7th Cir. 2005), the court remanded the claim for further consideration of whether the miner demonstrated "total disability" through the medical opinions at 20 C.F.R. § 718.204(b)(2)(iv). In this vein, the court stressed the importance of determining whether the physicians had an accurate assessment of the duties of the miner's last coal mining job. Upon review of their reports, the court noted that "[t]he physicians who concluded that Killman was not disabled either misstated Killman's tasks or did not discuss them at all." Some of these physicians reviewed the reports of Dr. Cohen, who concluded that the miner was disabled, but the court was not convinced that the other physicians clearly understood the miner's job duties:

> [E]ven if the other doctors had made it clear that they had reviewed all of Dr. Cohen's reports, we still have no way of knowing whether they understood the underlying factual background. Logically, it is likely that the doctors paid more attention to Dr. Cohen's medical opinion than to his account of the details of Killman's work history.

Because the court could not discern the basis of the administrative law judge's weighing of the evidence, it concluded that the judge's decision was not supported by substantial evidence and remanded the claim for further consideration.

In *Brigance v. Peabody Coal Co.*, 23 B.LR. 1-170 (2006) (en banc), the Board upheld the administrative law judge's finding that the miner established a totally disabling respiratory impairment based on the medical opinion evidence, despite the fact that the ventilatory and blood gas testing was in equipoise. In this regard, the Board noted that the physicians who opined that the miner was totally disabled "had knowledge of claimant's usual coal mine employment." The Board did not state what other factors the physicians considered in finding the miner totally disabled.

c. Non-respiratory, non-pulmonary impairments irrelevant

In *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994), the Fourth Circuit concluded that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." Rather, the miner must demonstrate that he "has a totally disabling respiratory and pulmonary condition . . . and show that his pneumoconiosis is a contributing cause to this total disability."

Similarly, the Board has held that non-respiratory and non-pulmonary impairments are irrelevant to establishing total disability under § 718.204(c). *Beatty v. Danri Corp.*, 16 B.L.R. 1-11 (1991), *aff'd.* 49 F.3d 993 (3rd Cir. 1995).[6]

The amended regulations at 20 C.F.R. § 718.204(a) (2008) codified the Fourth Circuit's position and provide that non-respiratory and non-pulmonary impairments, which cause an independent disability unrelated to the miner's pulmonary or respiratory condition, "shall not be considered in determining whether the miner is totally disabled due to pneumoconiosis." As previously noted in this *Chapter*, the D.C. Circuit Court in *National Mining Ass'n. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) held that the amended regulations relating to etiology of the miner's total disability apply to claims filed after January 19, 2001.

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the court upheld the validity of the amended regulations at 20 C.F.R. § 718.204(a) (2001). The court further clarified that its holding in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), wherein it concluded that a miner suffering from a pre-existing non-respiratory impairment was not entitled to black lung benefits, applied only to claims adjudicated under 20 C.F.R. Part 727, and not to claims adjudicated under 20 C.F.R. Part 718.

5. Lay testimony

In a living miner's claim, lay testimony cannot support the finding of a totally disabling respiratory impairment in the absence of corroborating medical evidence. For example, in *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-

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[6] It is noted that, in *Carson v. Westmoreland Coal Co.*, 20 B.L.R. 1-64 (1996), *mod'g. on recon.*, 19 B.L.R. 1-16 (1994), the Board concluded that the following holding was an error and struck the language from its prior decision:

> The disabling loss of lung function due to extrinsic factors, *e.g.*, loss of muscle function due to stroke, does not constitute respiratory or pulmonary disability pursuant to 20 C.F.R. § 718.204(c).

122 (1999), the administrative law judge properly found no "material change in conditions" in a miner's claim filed after 1982 under 20 C.F.R. § 725.309 (2000). In so holding, the Board rejected Claimant's argument that the administrative law judge's failure to consider and weigh Claimant's testimony regarding the miner's extreme difficulty in "'performing even the simplest of tasks'" was error. Rather, the Board held that "lay testimony offered by claimant at the hearing . . . is generally insufficient to establish total disability unless it is corroborated by at least a quantum of medical evidence."

Moreover, in *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court held that "[w]hile relevant to the issue of whether there is a totally disabling respiratory impairment, a miner's own statements about his history of coal mine employment or symptoms of pneumoconiosis are not conclusive in resolving conflicting medical opinion evidence." The court then stated that "the length of a miner's coal mine employment does not compel the conclusion that the miner's disability was solely respiratory" and the "mere presence of pneumoconiosis (by x-ray) is not synonymous with a totally disabling respiratory condition."

In a case involving a deceased miner in which a claim was filed prior to January 1, 1982, and where there is no medical or other relevant evidence, affidavits from persons knowledgeable of the miner's physical condition shall be sufficient to establish total disability. 20 C.F.R. §718.204(c)(5) (2000); 20 C.F.R. § 718.204(d)(1) (2008); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). The medical or other relevant evidence refers to evidence "relevant to the existence of, or disability due to, a respiratory or pulmonary impairment." *Gessner v. Director, OWCP*, 11 B.L.R. 1-1, 1-3 (1987). The use of lay testimony alone is available only on claims filed prior to January 1, 1982, and only in the case of a deceased miner. In the case of a living miner's claim, a finding of total disability shall not be made solely on the miner's statements or testimony. 20 C.F.R. § 718.204(d)(2) (2000).

For further discussion of the use of lay testimony in survivors' claims, *see* Chapter 16. *See also* 20 C.F.R. § 718.204(d)(5) (2008).

VII. Etiology of total disability

Unless one of the presumptions at 20 C.F.R. §§ 718.304, 718.305, or 718.306 (2000) and (2008) is applicable, the miner must establish that his or her total disability is due, at least in part, to pneumoconiosis. The Board has held that "[i]t is [the] claimant's burden pursuant to § 718.204 to establish total disability due to pneumoconiosis . . . by a preponderance of the evidence." *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986)(en banc).

A. "Contributing cause" standard

1. Prior to applicability of 20 C.F.R. Part 718 (2008)

The following list of cases set forth variations of the "contributing cause" standard delineated by the Board and circuit courts:

a. Benefits Review Board

The Board requires that pneumoconiosis be a "contributing cause" to the miner's disability. *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990) (*en banc*), *overruling Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988). It is noteworthy that, in *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 BLA (June 19, 1997)(en banc)(unpublished), the Board stated the following:

> Contrary to employer's argument, the issues of total disability and causation are independent; therefore, the administrative law judge was not required to reject Dr. Baker's August 23, 1991 opinion on causation simply because the doctor did not consider claimant's respiratory impairment at that time to be totally disabling.

Id.

b. Third Circuit

The Third Circuit requires that pneumoconiosis be a "substantial contributor" to the miner's total disability. *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734 (3rd Cir. 1989).

c. Fourth Circuit

Pneumoconiosis must be a "contributing cause" to the miner's disability. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). In *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994), the Fourth Circuit concluded that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." Rather, the miner must demonstrate that he has a totally disabling respiratory or pulmonary condition . . . and show that his pneumoconiosis is a contributing cause to this total disability." *See also Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998); *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002) (the judge erroneously accorded greater weight to the opinions of Drs. Castle and Dahhan, who found that the miner's disability was not caused by coal workers' pneumoconiosis, because the physicians concluded that the miner did not suffer from the disease contrary to the judge's findings).

d. Sixth Circuit

The Sixth Circuit requires that total disability be "due at least in part" to pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1989); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 566 (6th Cir. 1989); *Roberts v. Benefits Review Board*, 822 F.2d 636, 639 (6th Cir. 1987). However, in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997), the Sixth Circuit held that, although pneumoconiosis need only be a "contributing cause" to the miner's total disability, a claimant must demonstrate that the disease was more than a *de minimus* or "infinitesimal" factor in the miner's total disability.

In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir. 2003), the court set forth the standard for establishing that a miner's total disability is due to pneumoconiosis and stated the following:

> The claimant bears the burden of proving total disability due to pneumoconiosis and . . . this causal link must be more then *de minimus*. (citation omitted). To satisfy the 'due to' requirement of the BLBA and its implementing regulations, a claimant must demonstrate by a preponderance of the evidence that pneumoconiosis is 'more than merely a speculative cause of his disability,' but instead 'is a contributing cause of some discernible consequence to his totally disabling respiratory impairment.' (citation omitted). To the extent that the claimant relies on a physician's opinion to make this showing, such statements cannot be vague or conclusory, but instead must reflect reasoned medical judgment. (citation omitted).

Id.

e. Seventh Circuit

Pneumoconiosis must be a "*simple* contributing cause" of the miner's total disability (pneumoconiosis must be a necessary, but need not be a sufficient, cause of miner's total disability). *Hawkins v. Director, OWCP*, 907 F.2d 697, 707 (7th Cir. 1990); *Shelton v. Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990).

f. Tenth Circuit

The Tenth Circuit requires that the pneumoconiosis be "at least *a contributing cause*." *Mangus v. Director, OWCP*, 882 F.2d 1527, 1531 (10th Cir. 1989) (emphasis added). By unpublished decision in *Pittsburgh & Midway Coal Mining Co. v. Sanchez*, 2001 WL 997947, Case No. 00-9538 (10th Cir. Aug. 31, 2001), the court declined to apply the causation standard set forth in the

amended regulations at 20 C.F.R. § 718.204(c)(1) (2008) and stated, in a footnote, that "[a]s petitioners concede, . . . we apply the *Mangus* causation standard that was in effect when Sanchez filed for benefits in 1988."[7]

g. Eleventh Circuit

The Eleventh Circuit requires that pneumoconiosis be a "substantial contributor" to the miner's total disability. *Lollar v. Alabama By-Products, Corp.*, 893 F.2d 1258, 1265 (11th Cir. 1990).

In *U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977 (11th Cir. 2004), the court reiterated that pneumoconiosis must be a "substantially contributing cause" to the miner's total disability. The court also cited, with approval, the disability causation standard set forth in the amended regulatory provisions at 20 C.F.R. § 718.204(c)(1) (2008).

2. After applicability of 20 C.F.R. Part 718 (2008)

a. The regulation

The amended regulations at 20 C.F.R. § 718.204(c) (2008) contain a standard for determining whether total disability is caused by the miner's pneumoconiosis and provides the following:

> (c)(1) Total disability due to pneumoconiosis defined. A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in Sec. 718.201, is a *substantially contributing cause* of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a 'substantially contributing cause' of the miner's disability if it: (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.
>
> (2) Except as provided in Sec. 718.305 and paragraph (b)(2)(iii) of this section, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iv) and (d) of this section shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis. Except as provided in paragraph (d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and

[7] *Mangus v. Director, OWCP*, 882 F.2d 1527, 1531-32 (10th Cir. 1989).

reasoned medical report.

20 C.F.R. § 718.204(c) (2008) (emphasis added).

In its comments, the Department noted that addition of the word "material" or "materially" to the foregoing provisions reflects the view that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause to that disability." 65 Fed. Reg. 79,946 (Dec. 20, 2000).

b. Pre-existing, non-coal-dust-related disability does not preclude entitlement

In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the Sixth Circuit interpreted the "materially worsens" standard at 20 C.F.R. § 718.204(c) (2008). Under the facts of the case, Employer argued that the miner's chronic obstructive pulmonary disease "was primarily, if not entirely, a consequence of the estimated quarter-of-a-million cigarettes he had smoked." Said differently, Employer maintained that "there is no substantial evidence that Kirk's total disability, which was not caused by pneumoconiosis in 1988, had suddenly become caused by this disease in 1992." The court found that, under the amended regulatory provisions, the mere fact that Claimant's non-coal dust related respiratory disease would have left him totally disabled even without exposure to coal dust, this would not preclude entitlement to benefits. The court held that Claimant "may nonetheless possess a compensable injury if his pneumoconiosis 'materially worsens' this condition."

c. Apportionment of multiple causes not required

In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004), (unpub.), the court disagreed with Employer's argument that there was insufficient evidence to conclude that the miner's respiratory disability was due to pneumoconiosis because the physicians "could not apportion the relative effects of tobacco use and coal mine dust exposure . . .." Citing to *Cornett v. Benham Coal, Inc.,* 227 F.3d 569, 576 (6th Cir. 2000) with approval, the court held that physicians are not required to precisely determine the percentages of contribution to total disability; rather, "[t]he ALJ needs only to be persuaded, on the basis of all available evidence, that pneumoconiosis is a contributing cause of the miner's disability."

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the judge properly found that a physician's opinion that coal workers' pneumoconiosis constituted one of two causes of Claimant's totally

disabling respiratory impairment satisfied the causation standard at 20 C.F.R. § 718.204(c)(1). Citing to *Gross v. Dominion Coal Corp.*, 23 B.L.R. 1-8, 1-17 to 1-19 (2004), the Board noted that a medical opinion that pneumoconiosis "was one of two causes" of the miner's total disability met the "substantially contributing cause" standard.

In *Consolidation Coal Co. v. Director, OWCP [Williams]*, 453 F.3d 609 (4th Cir. 2006), *cert. denied* (Mar. 19, 2007), the court held that the administrative law judge properly credited a physician's opinion that the miner's airflow obstruction was caused by cigarette smoking as well as coal dust exposure. Employer argued that the opinion was flawed because the physician did not "apportion [Claimant's] lung impairment between cigarette smoke and coal mine dust exposure . . .." The court disagreed and held that physicians need not make "such particularized findings."

In *Crockett Collieries, Inc. v. Director, OWCP [Barrett]*, 478 F.3d 350 (6th Cir. 2007) (J. Rogers, concurring), the administrative law judge's award of black lung benefits was affirmed. In the case, both Drs. Baker and Dahhan concluded that the miner suffered from a respiratory impairment. They disagreed, however, on whether the impairment "could all be due to cigarette smoking or could be due to a combination of cigarette smoking and coal dust exposure." Dr. Baker concluded that coal dust exposure "probably contributes to some extent in an undefinable portion" to the miner's pulmonary impairment. After invoking the rebuttable presumption that the miner's legal pneumoconiosis arose out of coal dust exposure at 20 C.F.R. § 718.203(b), the court held that Dr. Baker's opinion was sufficient to support a finding that the miner suffered from the disease and was not too equivocal. The court further noted:

> In rejecting Dr. Dahhan's opinion, the ALJ found that Dahhan had not adequately explained why Barrett's responsiveness to treatment with bronchodilators necessarily eliminated a finding of legal pneumoconiosis, and had not adequately explained 'why he believes that coal dust exposure did not exacerbate (the miner's) allegedly smoking-related impairments.'

The court agreed with the judge's analysis and affirmed the award of benefits.

B. Blood gas and ventilatory studies not determinative

With respect to the use of blood gas studies and pulmonary function (ventilatory) studies, "the Board consistently has held that pulmonary function studies and blood gas studies are not diagnostic of the etiology of the respiratory impairment, but are diagnostic only of the severity of the impairment." *Tucker v. Director, OWCP*, 10 B.L.R. 1-35, 1-41 (1987). As a

result, the Board concluded that "a claimant who establishes the existence of total disability pursuant to subsections (c)(1) or (c)(2) of 20 C.F.R. § 718.204 (2000) and 20 C.F.R. § 718.204(b)(2) (2008) with pulmonary function studies or blood gas studies . . ., has not also established that the total disability is due to pneumoconiosis." *Id*. at 1-41 and 1-42. The claimant must also establish, by a preponderance of the evidence, that the impairment evidenced by pulmonary function studies and blood gas studies was caused by pneumoconiosis.

C. Weighing medical opinion evidence

In reviewing the medical opinion evidence regarding etiology, opinions wherein the physicians did not diagnose the miner as suffering from pneumoconiosis may be accorded little probative value. The fact-finder must determine, however, whether the opinion merely finds no medical (clinical) pneumoconiosis, or whether it finds no legal pneumoconiosis as well. Said differently, if an administrative law judge concludes that the miner suffers from coal workers' pneumoconiosis, the opinion of a physician who concludes that the miner does not suffer from medical (clinical) pneumoconiosis may nevertheless be considered in determining the etiology of the miner's impairment. This is because that physician has not necessarily concluded that the miner does not have legal pneumoconiosis.

For example, in *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995), the court held that, where the administrative law judge determines that a miner suffers from pneumoconiosis or is totally disabled or both, then a medical opinion wherein the miner is determined not to suffer from pneumoconiosis or is not totally disabled "can carry little weight" in assessing the etiology of the miner's total disability "unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon her disagreement with the ALJ's finding as to either or both of the predicates (pneumoconiosis and total disability) in the causal chain." Moreover, in *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995), the court held that the administrative law judge's finding that the miner's total disability was not due to pneumoconiosis was supported by substantial evidence as "[t]he medical opinions upon which he relied most strongly were not tainted by underlying conclusions of no pneumoconiosis pursuant to the broad legal definition contained in 20 C.F.R. § 718.201."

For additional law on this issue, *see* Chapter 3.

VIII. Applicability of Parts 410 and 727 and § 410.490

As Part 718 contains the permanent black lung regulations for the Department of Labor, a case which is properly adjudicated and denied under

Part 718 need not be considered under any other regulatory scheme.

IX. Applicability of 20 C.F.R. § 718.308, statute of limitations for filing a miner's claim

A. The statute and regulation

The Act, at 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 (2000) and (2008) are more liberal to the claimant and read, in part, as follows:

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.
>
> . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

The Department subsequently promulgated 20 C.F.R. § 725.308 (2008), which reads in part as follows:

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, ...
>
> . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. § 725.308 (2008).[8]

B. Waiver or tolling of the statute, "extraordinary circumstances" required

It is presumed that a claim is timely filed unless the party opposing entitlement demonstrates it is untimely and there are no "extraordinary circumstances" under which the limitation period should be tolled. *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 B.L.R. 1-95 (1994).

1. Waiver of challenge to timeliness

a. Withdrawal of contest at hearing

In *Chaffin v. Peter Cave Coal Co.*, 22 B.L.R. 1-294 (2003), Employer argued that the miner's duplicate claim was untimely under 20 C.F.R. § 725.308 because it was not filed within three years of a physician's opinion diagnosing the miner with totally disabling pneumoconiosis. The Board held, however, that Employer waived this argument because it withdrew its contest of the issue at the hearing before the administrative law judge (and after the Sixth Circuit issued *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001)). On the merits of the multiple claim, the Board held that the judge did not determine whether "the newly submitted evidence differed qualitatively from the previously submitted evidence" as required by *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) since the case arose in that circuit. As a result, the case was remanded to the judge for further consideration. *See also Cabral v. Eastern Assoc. Coal Corp.*, 18 B.L.R. 1-25 (1993) (the opposing party waived reliance on the affirmative defense of timeliness where it raised the issue before the district director, but withdrew it before the administrative law judge).

b. Stipulation of timeliness at hearing

In *Bethenergy Mines, Inc. v. Cunningham*, Case No. 03-1561 (4th Cir. July 20, 2004) (unpub.), the court held that Employer waived its argument that the miner's claim was barred by the three year statute of limitations because Employer "stipulated at the first hearing before the ALJ that Cunningham's claim was timely."

[8] Notably, subparagraph (b) relates to election of review of Part B claims under Part C.

2. "Tolling" of statute, considerations for

In *Sewell Coal Co. v. Director, OWCP [Dempsey]*, 523 F.3d 257 (4th Cir. 2008), the court held that the statute of limitations at 20 C.F.R. § 725.308 applied to subsequent claims filed under 20 C.F.R. § 725.309. However, in footnote 2 of the opinion, the court stated that the fact-finder would need to determine whether the subsequent claim was "timely filed under the statute of limitations, including whether or not the statute of limitations has been tolled. *See S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947)."

In *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 B.L.R. 1-95 (1994), the Board held that it was error for the administrative law judge to dismiss a claim as untimely without a *de novo* hearing. The Board concluded that the miner lacked knowledge of a physician's findings of total disability due to pneumoconiosis and noted that the physician's report of record did not state that the miner was totally disabled due to the disease; rather, the report was addressed to the miner's attorney and stated that the miner suffered from Category 2 pneumoconiosis. There was no evidence of record to demonstrate that the miner physically received the report, or a copy of the physician's subsequent deposition.

C. Applicability to initial claim

1. Generally

The Board and circuit courts have applied the statute of limitations to originially filed miners' claims.

2. Applicable to second claim where first claim denied as untimely

In *Stolitza v. Barnes and Tucker Co.*, 23 B.L.R. 1-93 (2005) a judge's decision awarding benefits was vacated because the claim was barred based on *res judicata*. The Board reasoned that the district director had denied the miner's prior claim on grounds that it was untimely under 20 C.F.R. § 725.308, *i.e.*, the record contained a medical opinion of total disability due to pneumoconiosis that pre-dated the filing of the prior claim by more than three years. Importantly, the district director's denial became final since the miner did not appeal the decision. From this, the Board concluded that a subsequent claim filed by the miner was barred based on *res judicata* and reasoned as follows:

> The administrative law judge . . . erroneously considered the issue (at hearing) to be the propriety of the district director's 1992 denial of the prior claim as untimely filed under 20 C.F.R. §

> 725.308, where that denial is final and not subject to challenge. The pertinent issue is, rather: What effect does the district director's final denial of the prior claim have on the instant subsequent claim? We agree with the employer's argument that the district director's final denial of the prior claim based on its untimeliness is *res judicata* and its effect is to bar the filing of the instant subsequent claim. (citations omitted).

Slip op. at 4.

In a footnote, the Board concluded that its holdings in *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990) and *Faulk v. Peabody Coal Co.*, 14 B.L.R. 1-18 (1990) that the three-year statute of limitation period does not apply to subsequent claims were distinguishable from the present case: *to wit,* in *Andryka* and *Faulk* the initial claims were timely filed whereas, in *Stolitza*, the initial claim was untimely.

D. Applicablity to subsequent claim under 20 C.F.R. § 725.309

1. Held applicable

Fourth Circuit

In *Sewell Coal Co. v. Director, OWCP [Dempsey]*, 523 F.3d 257 (4th Cir. 2008), the court held that the statute of limitations at 20 C.F.R. § 725.308 applies to subsequent claims filed under 20 C.F.R. § 725.309.

In *Kessler v. Island Creek Coal Co.,*23 B.L.R. 1-__ (Mar. 28, 2007), a case arising in the Fourth Circuit, the administrative law judge dismissed the miner's claim as untimely under 20 C.F.R. § 725.308, which provides a rebuttable presumption that a claim is filed within three years of a medical determination of total disability due to pneumoconiosis. Specifically, the judge cited to the miner's hearing testimony, wherein the miner stated that a physician advised that he was totally disabled due to pneumoconiosis in 1988, more than three years before he filed his 2003 claim for federal black lung benefits. The judge further found that the miner received "written notice" in 1994 that he prevailed on a state workers' compensation claim for black lung and "the documentation indicates that [c]laimant received a medical determination of total disability due to pneumoconiosis." Considering the state workers' compensation award in conjunction with the miner's testimony, the judge concluded that the miner's "understanding was that he was totally disabled due to pneumoconiosis" in 1994, more than three years prior to the filing of his federal claim for black lung benefits.

Citing to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), the Board disagreed that the presumption at 20 C.F.R. § 725.308 had been successfully rebutted. First, the Board noted that, "under the language set forth in *Kirk*, a claimant's mere statement that he was told by a physician that he was totally disabled by black lung is insufficient to trigger the running of the statute of limitations."9 Thus, the Board held, in this case, that "claimant's sole statement, as to what he believed a doctor told him in 1988, may be insufficient to trigger the running of the statute, unless the administrative law judge also finds that claimant received a 'reasoned' diagnosis of total disability due to pneumoconiosis."

Second, the Board noted that a disability award under a state workers' compensation program "does not *per se* establish that claimant is totally disabled due to pneumoconiosis for purposes of the (Black Lung Benefits) Act." Rather, the Board concluded the following:

> An award by a state workers' compensation board may be supportive of a finding of total disability, if the administrative law judge determines that the degree of impairment determined by the board prevents a miner from performing the requirements of his usual coal mine work in accordance with the regulatory criteria. (citations omitted). Moreover, in assessing the weight to accord the findings of the state board, the administrative law judge should consider how that agency reached its finding of disability. (citations omitted). In this case, because the December 20, 1994 report fails to explain either the medical or legal criteria relied upon by the (West Virginia Occupational Pneumoconiosis) Board in reaching its determination of respiratory disability, the administrative law judge must assess the probative value of the report in light of the employer's burden of proof at Section 725.308.

The Board noted that x-ray and ventilatory testing was referenced in the state workers' compensation award, but the results of the tests were not disclosed. In sum, the judge's dismissal of the claim was vacated and the case was remanded for further consideration regarding whether the presumption at § 725.308 had been successfully rebutted.

Premature medical opinion. In *Consolidation Coal Co. v. Director, OWCP [Williams]*, 453 F.3d 609 (4th Cir. 2006), *cert. denied* (Mar. 19, 2007), the court held that a miner's subsequent claim was not barred by the three year

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9 Interestingly, the Board cited to the Fourth Circuit's holding in *Island Creek Coal Co. v. Henline*, 456 F.3d 421 (4th Cir. 2007), wherein the court held that the presumption at § 725.308 may be rebutted by a miner's testimony. As a result, the court found that § 725.308 does not contain the written notice requirement adopted by the Board in *Adkins v. Donaldson Mine Co.*, 19 B.L.R. 1-36 (1993).

statute of limitations at 20 C.F.R. § 725.308 based on a medical opinion finding total disability due to pneumoconiosis submitted in conjunction with his prior denied claim. Citing to *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996), the court reiterated that "the legal conclusion attendant with a prior denial—*i.e.,* that the miner was not eligible for benefits at the time of that decision—must be accepted as correct . . .." As a result, a physician's diagnosis of total disability due to pneumoconiosis in the first claim must be treated "as a misdiagnosis in light of the denial of [the] first claim" and the court held that it "must similarly conclude that the (mis)diagnosis had no effect on the statute of limitations for his second claim."

The court noted that pneumoconiosis is latent and progressive and, consequently, it concludes that "nothing bars or should bar claimants from filing claims *seriatim* . . .." The court stressed that, under § 725.309, "only new evidence *following* the denial of the previous claim, rather than evidence predating the denial, can sustain a subsequent claim." The court noted:

> In light of the standard articulated in *Lisa Lee Mines*, we note that Dr. Lebovitz's diagnosis, which related solely to Williams' condition in 1995, could not have sustained a subsequent claim that his condition had materially worsened since the initial denial of benefits in 1996. It would be illogical and inequitable to hold that a diagnosis that could not sustain a subsequent claim could nevertheless trigger the statute of limitations for such a claim.

Id.

Sixth Circuit

In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the Sixth Circuit held that, under proper circumstances, the three year statute of limitations for filing a black lung claim at 20 C.F.R. § 725.308(c) would apply to the filing of a subsequent claim under 20 C.F.R. § 725.309. Under the facts before it, the court determined that the miner had not received a reasoned medical opinion finding him totally disabled due to pneumoconiosis, which would have commenced the running of the limitation period. The court stated the following:

> The three-year limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of a miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or

> acquire such support. Medically supported claims, even if ultimately deemed 'premature' because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period.[10] Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

(italics in original).

By unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 2002 WL 31205502 (6th Cir. Oct. 2, 2002)(unpub.)[11], the Sixth Circuit held that a subsequent claim filed by a miner under 20 C.F.R. § 725.309 is not barred by the three-year statute of limitations at § 725.308(a) because denial of the miner's first claim on grounds that he did not suffer from pneumoconiosis "necessarily renders any prior medical opinion to the contrary invalid . . .." The court reaffirmed its holding in *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), that the three year statute of limitations does apply to subsequent claims. However, the *Kirk* court also stated that prior medical opinions in the miner's favor, which were "premature" because the weight of the evidence did not support entitlement in an earlier claim, were "effective to begin the statutory period." The *Dukes* court concluded that this was dicta and held otherwise. Specifically, the Dukes court adopted the Tenth Circuit's holding in *Wyoming Fuel Co. v. Director, OWCP [Bandolino]*, 90 F.3d 1502, 1507 (10th Cir. 1996) and concluded the following:

> We agree with the reasoning of the Tenth Circuit and likewise expressly hold that a mis-diagnosis does not equate to a 'medical determination' under the statute. That is, if a miner's claim is

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[10] The court referenced a footnote at this juncture which reads as follows:

> This distinction deters finding 'compliant physicians' willing to give the miner an overly-favorable diagnosis that cannot be supported by the weight of the medical evidence. A miner who develops total disability due to pneumoconiosis three years after such a premature determination will find that the 'friendly doctor' has done him no favor. Indeed, the chief danger with this rule, even given the constraint of communication to the miner, could be that '[u]nscrupulous employers could conveniently avoid all liability' by purposely making premature determinations. (Gov't. Br. at 37 n. 12). We have no occasion in this case to address the risk-benefit ratio of such an illegal tactic (or the Director's extraordinary cynicism regarding America's coal industry).

[11] On October 21, 2002, the Director filed a *Motion for Publication of Unpublished Opinion* with the Sixth Circuit and requested that the court's decision in *Dukes* be published. The court declined to publish the opinion.

> ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes. If he later contracts the disease, he is able to obtain a medical opinion to that effect, which then re-triggers the statute of limitations. In other words, this statute of repose does not commence until a proper medical determination.

Slip op. at 5.

In *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002)(en banc), a case arising in the Sixth Circuit, the Board remanded the case for a determination of whether the statute of limitations applied to the miner's subsequent claim which was filed under 20 C.F.R. § 725.309. Citing to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), which was issued after the judge issued his decision and order, Employer argued that the miner's claim was time-barred pursuant to 20 C.F.R. § 725.308 because it was not filed within three years of the date that Dr. Kabani's medical determination of total disability due to pneumoconiosis was communicated to the miner.

The Board initially noted that there is a presumption that every claim for benefits is timely filed, but Employer has the opportunity to rebut that presumption. It held that the judge must determine: (1) whether Dr. Kabani's opinion meets the requirements of 20 C.F.R. § 725.308(a); and (2) whether a medical opinion with meets the requirements of § 725.308, but like Dr. Kabani's opinion is rejected as unpersuasive in a prior claim proceeding, would prevent the statute of limitations from running. The Board concluded that, if the judge determines that the subsequent claim is untimely filed, then "he must give claimant the opportunity to prove that extraordinary circumstances exist that may preclude the dismissal of the claim. 20 C.F.R. § 725.308(c)." The Board issued a related decision in *Abshire v. D&L Coal Co.*, 21 B.L.R. 1-202 (2002)(en banc), a case also arising in the Sixth Circuit.

Premature medical opinion. In *O.R.H. v. Blue Star Coal Corp.*, BRB No. 07-0124 BLA (Oct. 30, 2007) (unpub.), a case arising in the Sixth Circuit, the Board affirmed the administrative law judge's determination that the miner's claim was timely filed under 20 C.F.R. § 725.308. Employer argued that three physicians' opinions in the record pre-dated filing of the miner's claim by more than three years such that the claim was time-barred. The administrative law judge disagreed and the Board affirmed his holdings.

Initially, the miner testified that Dr. Modi told him that he was totally disabled. The administrative law judge determined, however, that the physician did not indicate whether the total disability was respiratory or pulmonary in nature such that the medical opinion was insufficient to trigger

the statute of limitations. Notably, Dr. Modi diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and back pain. He concluded that the miner was totally disabled and advised against further exposure to coal dust, but he did not specify the nature of the disability.

The second physician, Dr. Sutherland, wrote two letters to Claimant's counsel wherein he diagnosed the miner as totally disabled due to pneumoconiosis. The Board affirmed the administrative law judge's conclusion that Dr. Sutherland's opinion was not sufficiently reasoned to trigger the statute of limitations. Citing to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), the Board held that, in defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the court in *Kirk* specifically stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." The Board noted that "the Sixth Circuit has categorically emphasized that it is for the administrative law judge as a fact-finder to 'decide whether a physician's report is sufficiently reasoned, because such a determination is essentially a credibility matter.'" Of note, the third physician, Dr. Robinette, diagnosed coal workers' pneumoconiosis and concluded that the miner suffered from a "significant respiratory impairment." The Board held that this opinion was also insufficiently reasoned to trigger the limitations period.

Moreover, the Board affirmed the administrative law judge's determination that the limitations period was not triggered because the record did not establish that the opinions of Drs. Forehand, Sutherland, or Robinette were *communicated to the miner*. Employer argued that the statute contains no such requirement. The Board nonetheless affirmed the judge's holding and stated:

> Contrary to employer's assertion, the administrative law judge did not err by refusing to impute knowledge of the contents of the medical reports of Drs. Sutherland, Forehand, and Robinette to claimant simply because the reports were made a part of the record in his prior claim or were sent to his attorney. The Board has held that a medical report must be provided directly to claimant to commence the Act's limitation period, *Daughtery* [*v. Johns Creek Elkhorn Coal Corp.*, 18 B.L.R. 1-95, 1-99 (1993)], and, therefore, information possessed by claimant's attorney does not constitute communication to claimant.

Slip op. at 6.

By published decision in a case arising in the Sixth Circuit, *Sturgill v. Bell County Coal Corp.*, 23 B.L.R. 1-159 (2006) (en banc) (J. McGranery, dissenting), the Board held that the district director's preliminary finding of eligibility in conjunction with the miner's 1981 claim did not trigger the three

year statute of limitations at § 725.308 to bar the miner's 2001 subsequent claim. Notably, the miner continued working in "comparable and gainful employment" after the 1981 award such that he was ultimately found not entitled to benefits under the Act.

Claimant and the Director maintained that a district director's finding of entitlement did not constitute a medical determination of total disability due to pneumoconiosis as contemplated by § 725.308 of the regulations. On the other hand, Employer maintained that the district director's finding of entitlement in the first claim implicitly meant that the medical elements of entitlement were satisfied. Further, Employer argued that there were medical opinions in the record, pre-dating the miner's 2001 claim by more than three years, which contained findings of total disability due to pneumoconiosis.

The Board agreed with the Claimant's and Director's position and concluded that, under § 725.308, Claimant is entitled to a rebuttable presumption that his or her claim is timely filed and, under *Tennessee Consol. Coal Co. v. Kirk,* 264 F.3d 602 (6th Cir. 2001), it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the claimant]" more than three years prior to the filing of a claim. The Board specifically emphasized that *Kirk* requires a "trigger of the reasoned opinion of a medical professional" to commence the limitations period.

Importantly, the Board noted that the medical opinion underlying the district director's 1981 award of benefits did not, on its face, support a finding of total disability due to pneumoconiosis. However, because Claimant was entitled to certain presumptions under 20 C.F.R. Part 727 at the time of filing the 1981 claim, the medical opinion constituted a sufficient basis upon which to award benefits.

In another case arising in the Sixth Circuit, *Brigance v. Peabody Coal Co.*, 23 B.LR. 1-170 (2006) (en banc), the Board upheld the Administrative Law Judge's finding that a miner's testimony, that two physicians advised him that he was totally disabled due to black lung disease, was insufficient to trigger the three year statute of limitations for filing his claim under *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). In particular, the *Kirk* court held that the statute relies on the "trigger of the reasoned opinion of a medical professional." From this, the Board reasoned that the physicians' opinions referred to by the miner during his testimony were not in the record and the miner's testimony, standing alone, did not meet the *Kirk* standard for triggering the statute of limitation period.

Inadvisability of return to coal work not sufficient. In *Fields v. Shamrock Coal Co.*, BRB Nos. 05-0603 BLA and 05-0603 BLA-A (Feb. 22, 2006) (unpub.), a case arising within the Sixth Circuit, the administrative law judge properly

concluded that a 1993 medical opinion from Dr. Baker was insufficient to trigger the three year statute of limitations period for filing claims at 20 C.F.R. § 725.308 using the standard set forth in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). In particular, Dr. Baker diagnosed the presence of coal workers' pneumoconiosis and concluded that the miner "should have no further exposure to coal dust" and that he would "have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to these conditions." The Board stated that, "[b]ecause a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment . . . Dr. Baker's opinion . . . is insufficient to support a finding of total disability." As a result, the opinion did not satisfy the requirements at § 725.308 for triggering the statute of limitations period.

"Unreasoned" medical opinion. In *Morgan v. Shamrock Coal Co.*, BRB Nos. 05-0278 BLA and 05-0278 BLA-A (Oct. 24, 2005) (unpub.), the Board vacated application of the three year statute of limitations at 20 C.F.R. § 725.308 to Dr. Clark's medical determination of total disability due to pneumoconiosis underlying the miner's first claim in accordance with *Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). The Director maintained before the Board that Dr. Clark's medical determination was insufficient to trigger the limitations period because it was "unreasoned." The Board held that "[s]uch a factual finding . . . is up to the administrative law judge based on his review of the prior (administrative law judge's) decision . . . and the medical evidence of record."

In *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-___, BRB Nos. 07-0649 BLA and 07-0649 BLA-A (Apr. 30, 2008), Employer challenged whether the miner's 2003 subsequent claim was timely filed under 20 C.F.R. § 725.308 and *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). The Board noted that, under *Kirk*, the limitations period is triggered by "the reasoned opinion of a medical professional." The Board then upheld the administrative law judge's finding that Dr. Baker's 1994 opinion was "unreasoned" due to inconsistent disability findings and Dr. Baker's failure to explain the basis for his opinion. As a result, the opinion was insufficiently reasoned to trigger running of the limitations period such that the miner's claim was timely filed.

<u>*Seventh Circuit*</u>

Failure to attribute condition to coal dust exposure, insufficient. In *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992 (7th Cir. 2005), the circuit court rejected Employer's argument that the miner's claim was time-barred under 20 C.F.R. § 725.308 where physicians in the earlier claim diagnosed emphysema and chronic obstructive pulmonary disease, but they failed to attribute the respiratory ailments to coal dust exposure. The

court noted that, in the miner's subsequent claim, a physician concluded that the miner's totally disabling respiratory ailment was coal dust related and this opinion was communicated to the miner. As a result, the court determined that the requirements of § 725.308 were met and the statute of limitations commenced to run with the newly generated physician's report.

Tenth Circuit

In *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996), Employer argued that a qualifying blood gas study performed in conjunction with the miner's first claim, along with a diagnosis of chronic bronchitis by a physician at the time, constituted a "medical determination of total disability due to pneumoconiosis," which triggered commencement of the three year statute of limitations. The Director, OWCP argued that "requiring claimants to file duplicate claims within three years of the triggering medical opinion would defeat most miners' ability to bring duplicate claims because it may take more than three years from the issuance of a medical opinion before an ALJ and appellate panels decide the original claim." *Id.* at 1507. The court agreed with the Director that the miner's multiple claim did not violate the three year statute of limitations, but it decided the matter using different reasoning and stated:

> When a doctor determines that a miner is totally disabled due to pneumoconiosis, the miner must bring a claim within three years of when he becomes aware or should have become aware of the determination. However, a final finding by the Office of Workers' Compensation Program adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations.
>
> . . .
>
> Instead, Section 309 suggests that a claimant should not be barred from bringing a duplicate claim when his or her first claim was premature because the claimant's conditions had not yet progressed to the point where the claimant met the Act's definition of total disability due to pneumoconiosis.

The circuit court concluded that, because the district director found that the miner did not have pneumoconiosis and was not totally disabled, then it "need not decide whether Dr. Saiz's 1982 report adequately constituted a medical determination of total disability due to pneumoconiosis . . .."

2. Held inapplicable

The Board holds that the statute of limitations applies only to the first claim filed. *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990). *But see Stolitza v. Barnes and Tucker Co.*, 23 B.L.R. 1-93 (2005) (second claim denied on grounds of *res judicata* where first claim was denied as untimely).

E. Hearing required prior to dismissal for untimeliness where issue of fact exists

By unpublished decision, *Wright v. Manning Coal Corp.*, BRB No. 93-0838 BLA (July 27, 1994)(unpub.), the Board held that an administrative law judge's dismissal of a claim as untimely was improper even where counsel conceded that the claimant was informed by a physician that he was totally disabled and that he suffered from coal workers' pneumoconiosis. In so holding, the Board noted that the record was devoid of evidence that the miner had "actual physical receipt" of the physician's written opinion. Moreover, while the physician diagnosed coal workers' pneumoconiosis and total disability, the Board found that, in his report, he did "not in fact specifically attribute claimant's total disability to pneumoconiosis arising out of coal mine employment." Thus, the Board concluded that "inasmuch as a determination regarding rebuttal of the timeliness presumption is fact-specific and depends on the administrative law judge's credibility assessments of the documentary and testimonial evidence . . . and an administrative law judge should not dismiss a case without a *de novo* hearing pursuant to 20 C.F.R. § 725.451."

F. Commencement of the three-year period

1. Written communication required

The Board, in *Adkins v. Donaldson Mine Co.*, 19 B.L.R. 1-34 (1993), noted that, although the Secretary's regulations contain additional language not found in the statute, such language is in line with the benevolent purpose of the Act. The Board held that the requirement of a "medical determination of total disability due to pneumoconiosis" must be strictly construed such that a determination which merely states that the claimant has coal workers' pneumoconiosis is insufficient. Moreover, the Board stated that the clause requiring that the determination be "communicated to the miner" means that a written report be "actually received" by the miner. If a written report diagnosing total disability due to pneumoconiosis was actually received by the miner, the administrative law judge must then determine the level of the miner's comprehension, *i.e.* whether he or she was truly aware that there was a "viable claim for benefits", which requires a finding as to whether the miner could read and, if so, whether the miner's level of reading enabled him or her to understand the report.

2. Written communication not required

In *Island Creek Coal Co. v. Henline*, 456 F.3d 421 (4th Cir. 2006), Employer sought to bar the miner's claim on the basis of his testimony at the hearing that physicians told him he was totally disabled due to pneumoconiosis more than three years prior to the date he filed a claim for benefits. When the claim was on appeal to the Board, it did not consider the administrative law judge's reasons for finding that the miner's testimony was not sufficiently reliable to trigger the limitations period at § 725.308; rather, the Board cited to *Adkins v. Donaldson Mine Co.*, 19 B.L.R. 1-34 (1993) and held that Employer did not demonstrate that Claimant was provided *written* communication of total disability due to pneumoconiosis more than three years before he filed his claim for benefits and, as a result, the claim was not barred by 20 C.F.R. § 725.308.

The Fourth Circuit dismissed the Board's reasoning and adopted the Director's position that the plain language of § 725.308(a) does not require *written* communication to the miner for the limitations period to commence to run. The court then remanded the claim to the Board for consideration of the bases for the administrative law judge's dismissal of Employer's statute of limitations defense, *to wit*: (1) Claimant admitted that his memory was poor due to the fact that he suffered from a stroke; (2) the miner's testimony was inconsistent; and (3) the testimony "'primarily entailed a series of short responses of 'Yes, ma'am.'"