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SUPPLEMENT TO JUDGES' BENCHBOOK: BLACK LUNG BENEFITS ACT
[to be placed behind the *Supplement* tab]
[discard prior supplement]

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Editor-in-Chief

Use of claimant's initials

SPECIAL NOTE: On January 30, 2007, the Department of Labor amended the black lung provisions at 20 C.F.R. § 725.477(b) to remove the requirement that parties' names be included in black lung decisions:

> A decision and order shall contain a statement of the basis of the order, findings of fact, conclusions of law, and an award, rejection or other appropriate paragraph containing the action of the administrative law judge, his or her signature and the date of issuance . . ..

72 Fed. Reg. 4204 (Jan. 30, 2007). The amendment is primarily designed to protect the privacy interests of black lung claimants whose decisions are now published to the Department's web site. In its comments, the Department further noted that existing regulations implementing the Longshore and Harbor Workers' Compensation Act at 20 C.F.R. Part 702 do not contain any requirement that the parties' names be included in decisions.

The case of *Doe v. Chao*, 511 F.3d 461 (4th Cir. 2007) stemmed from the Office of Administrative Law Judges' use of Social Security numbers on multi-captioned notices of hearings in black lung claims. As noted by the court, the Secretary of Labor acknowledged that "the DOL had run afoul of the limits set by the Privacy Act" at 5 U.S.C. § 552a(b). At issue on this third appeal to the circuit court was the propriety of the district court's award of attorney's fees to counsel for the Appellants. The circuit court affirmed the district court's finding that no attorney's fees would be awarded for work performed on the cross-motions for summary judgment "in light of the fact that Buck Doe recovered no damages."

On the other hand, the circuit court reversed the district court's award of $5,887.50 in attorney's fees for work performed on a contempt motion as well as an award of $10,000 for "work performed on the appellate phase of the merits litigation." In particular, it was determined that the district court violated the circuit court's mandate and "improperly went further and addressed two matters that were not before it for consideration"—namely, fees requested for work performed on the contempt motion and on appeal. The Fourth Circuit noted:

> This court remanded *Doe V* for the limited purpose of requiring the district court to assess the reasonableness of Buck Doe's fee award under the Privacy Act for work performed on summary judgment. Once the district court determined that the reasonable fee for that work was zero, the mandate rule required that it go no further.

Audio-visual coverage of hearings

The regulatory provisions at 29 C.F.R. § 2.13(c) provide that, upon objection by any party, the Department "shall not permit audiovisual coverage" of "[a]dversary hearings under the Longshoremen's and Harbor Workers' Compensation Act . . . and related Acts, which determine an employee's right to compensation."

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In *Jeffrey v. Mingo Logan Coal Co.*, BRB Nos. 05-0107 BLA and 05-0107 BLA-A (Sept. 22, 2005) (unpub.), the Administrative Law Judge properly found that Dr. Hussain, who conducted the Department of Labor-sponsored examination of Claimant, did not provide a reasoned opinion regarding the presence or absence of clinical pneumoconiosis. Notwithstanding this deficiency in the report, the Board agreed with the Director that his duty to provide a complete, credible pulmonary evaluation under § 725.406 was discharged. In particular, Dr. Hussain also found that Claimant was not totally disabled and the ALJ relied on this component of Dr. Hussain's opinion, along with other medical evidence of record, to deny benefits.

In *Broughton v. C & H Mining, Inc.*, BRB No. 05-0376 BLA (Sept. 23, 2005)(unpub.), the ALJ properly discredited the opinion of Dr. Simpao, who conducted the Department of Labor-sponsored examination of Claimant, on grounds that Dr. Simpao's diagnosis was based on 18 years of coal mine employment where the ALJ found 8.62 years established on the record. However, the Board denied Claimant's request that the claim be remanded for another pulmonary evaluation under § 725.406. In particular, the Board agreed with the Director that Claimant was provided with a pulmonary evaluation in compliance with § 725.406 but "Dr. Simpao's reliance on an incorrect coal mine employment history was not a flaw attributable to Dr. Simpao, but instead was an inaccuracy provided by claimant who reported his employment history to the physician."

In *Lovins v. Arch Mineral Corp.*, BRB No. 05-0201 BLA (Sept. 30, 2005) (unpub.), the Board denied the miner's request that his claim be remanded for another department-sponsored pulmonary evaluation where the ALJ "did not discredit Dr. Hussain's disability opinion entirely," but found only that it was outweighed by a contrary opinion of record.

III. The adjudicative process

A. Circuit court jurisdiction

Actual receipt of Board decision not required to commence appeal period

In *Mining Energy, Inc. v. Director, OWCP [Powers]*, 391 F.3d 571 (4th Cir. 2004), the court dismissed Employer's appeal as untimely where Employer filed a petition for review with the court on October 28, 2002, which was 151 days after the Benefits Review Board (Board) denied relief requested by Employer on reconsideration by order dated May 30, 2002.

The court noted that, under 33 U.S.C. § 921(c), a petition for review must be filed within 60 days of the date the Board issues its decision. Employer maintained that it did not have *actual* notice of the May 2002 order until September 23, 2002, "when it received notification from the Department of Labor . . . regarding payment of benefits." Indeed, the court noted that Employer was not properly served with the Board's May 2002 order. Employer argued that a

Board decision is not properly served under Section 921(c) "until and unless it has been both filed with the Board *and* properly served on the parties via certified mail, or until the party has received actual notice." (italics in original).

Citing to the plain language of the regulations at 20 C.F.R. § 802.410(a), the court held that the 60 day period for filing a petition for review commences to run "when a Board decision is *filed* with the Clerk of the Board," without regard to whether the parties receive *actual* notice of the decision. As a result, the appeal was dismissed as untimely. However, in so holding, the court stated that "[o]ur conclusion on this point does not negate the seriousness of the Board's failure to properly conduct its affairs, nor our disapproval of it."

II. Rules of general application

B. The "later evidence" rule

2. Ventilatory studies

In *Andruscavage v. Director, OWCP*, Case No. 93-3291 (3rd Cir. Feb. 1, 1994) (unpub.), the court held that the ALJ properly accepted four qualifying studies "as having been conducted in accordance with the quality standards" but found these earlier tests "were not the most reliable indicators of the claimant's respiratory condition." In so holding, the ALJ noted that the most recent test of record yielded non-qualifying values and he found:

> Unexpectedly, here the most recent of the five studies in question resulted in substantially higher values than the others. However, pulmonary function testing is effort-dependent and spurious low volumes can result, but spurious high volumes are not possible. Based on above, I find the higher results achieved by the claimant in the (latest) testing is the best indicator of the claimant's respiratory or pulmonary condition.

The court determined that the ALJ acted within his discretion as the trier-of-fact in rendering the foregoing findings.

C. The "hostile-to-the-Act" rule

In *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 902 (7th Cir. 2005), the circuit court determined that it was proper to accord less weight to a medical opinion that is "influenced by the physician's 'subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions.'" In particular, the court agreed that Dr. Shelby's view that coal mine employment had "preserved" the miner's lung function and had a "positive effect" on his health was contrary to the provisions at 20 C.F.R. § 718.201(c) that pneumoconiosis can be latent and progressive.

III. Chest roentgenogram evidence

Digital x-ray interpretations considered "other evidence" at § 718.107

In *Webber v. Peabody Coal Co*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring), the Board adopted the Director's position and held that digital x-ray interpretations are not considered "chest x-ray" evidence under 20 C.F.R. §§ 718.101(b), 718.102, 718.202(a)(1), and Appendix A to Part 718 as they do not satisfy the quality standards at Appendix A. As a result, the Board held that digital chest x-rays are "properly considered under 20 C.F.R. § 718.107, where the Administrative Law Judge must determine, on a case-by-case basis, pursuant to 20 C.F.R. § 718.107(b), whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement." *See also Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-273 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc).

A. Physicians' qualifications

1. Dually-qualified physicians

In *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 842-43 (7th Cir. 1997), the ALJ properly accorded greater weight to the interpretation of a dually-qualified physician over the interpretation of a B-reader, who was not board-certified in radiology. *See also Bethenergy Mines, Inc. v. Cunningham*, Case No. 03-1561 (4th Cir. July 20, 2004)(unpub.); *Peranich v. Director, OWCP*, BRB No. 87-3158 BLA (Nov. 27, 1990) (unpub.) (it is proper to accord greater weight to the opinion of a dually-qualified physician over a physician who is a board-certified radiologist but not a B-reader).

E. Film Quality

In the main text of the *Benchbook*, the decision of *Gober v. Reading Anthracite Co.*, 12 B.L.R. 1-67 (1988) is cited for the proposition that an interpretation may be accorded little weight if the film quality is "poor" or "unreadable." More accurately, the Board remanded the case for reconsideration where the ALJ credited the positive reading of an A-reader over a B-reader's finding that the film was of unacceptable quality. The Board was not persuaded by the ALJ's conclusion that the A-reader found the study readable and "'more likely than not' would have ordered another x-ray if the film quality was unacceptable." The Board stated the following:

> We hold that the administrative law judge's rejection of (the B-reader's) re-reading was arbitrary. A radiologist's reading for film quality requires no explanation inasmuch as such conclusion can only indicate that the physician found the film to be unclear and of such poor quality from a visual perspective that it was not susceptible to expert interpretation. It is difficult to determine what further comments the administrative law judge would have required, and, how the administrative law judge could have utilized such comments, made by a medical expert, to gauge the credibility of the reader's assessment of the quality of the x-ray film.

Slip op. at 2. *See also Peranich v. Director, OWCP*, BRB No. 87-3158 BLA (Nov. 27, 1990) (unpub.) (the ALJ properly accorded greater weight to Dr. Greene's conclusion that the most recent x-ray was of unreadable film quality over Dr. Gill's positive interpretation of that film based on Dr. Greene's superior qualifications); *Arch on the North Fork, Inc. v. Bolling*, Case No. 97-3694 (6th Cir. Apr. 30, 1998) (unpub.) (the ALJ did not err in considering a physician's statement that his 0/1 interpretation of one film was due to poor film quality, but his reading of another film of superior quality was positive such that a preponderance of the studies demonstrated the presence of pneumoconiosis).

If film quality is not noted on an interpretation, then the fact that a physician interprets the study sufficiently establishes that, in the absence of contrary proof, the film was of suitable quality to be read. *Consolidation Coal Co. v. Director, OWCP [Chubb]*, 741 F.2d 968 (7th Cir. 1984).

F. The ILO classification form, interpretation of [new]

Alternative versus additional diagnosis

Contribution by: Bridget Dooling, Attorney-Advisor

The Board holds that an administrative law judge may treat an x-ray reading with a profusion level of 1/0 or greater as positive for pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1, 1-4 (1999) (en banc on recon.). The BRB has encountered at least two types of comments that an interpreting physician might make along with a profusion of 1/0 or greater.

Alternative diagnosis. First, a physician might comment that another disease cannot be ruled out, as in *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991) (en banc) (a case involving complicated pneumoconiosis). In this situation, the physician's comment calls the diagnosis of pneumoconiosis into question. *Id*. at 1-37. Those comments should be evaluated within an administrative law judge's 20 C.F.R. § 718.202(a)(1) analysis about the presence of pneumoconiosis. If the comments suggest an alternative diagnosis, the "internal inconsistencies" may "detract from the credibility of the x-ray interpretation under 20 C.F.R. § 718.202(a)(1)." *Cranor*, 22 B.L.R. at 1-5 (discussing *Melnick*).

Additional diagnosis. Second, a physician might find a profusion greater than 1/0 but make a note that the disease is "not CWP etiology unknown," as was the case in *Cranor*. *Id*. at 1-4. In that situation, the physician's comments are directed not to the presence of pneumoconiosis, but the etiology of the diagnosed pneumoconiosis. *Id*. at 1-5, 1-6. Accordingly, and administrative law judge should consider those comments under 20 C.F.R. § 718.203 regarding the etiology of the claimant's pneumoconiosis.

Notably, in *Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-246 (2006), the Board reaffirmed its decision in *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1, 1-5 (1999) (en banc) and held that it was proper for the administrative law judge to conclude that Dr. Halbert's classification of a x-ray as Category 1/1 was positive for the presence of pneumoconiosis under § 718.202(a)(1) of the regulations. In a narrative report accompanying the ILO classification form, Dr. Halbert indicated that he "found opacities consistent with pneumoconiosis of some type (such as asbestosis) but no CWP." The Board agreed with the Director's position that the administrative law judge properly considered Dr. Halbert's comments under § 718.203 as "Section 718.202(a)(1) does not require that claimant prove the cause of the clinical pneumoconiosis diagnosed by chest x-ray."

VI. Medical reports

General note: It is improper to accord greater weight to certain medical opinions of record based solely on numerical superiority. In Stalcup v. Peabody Coal Co., 477 F.3d 482 (7th Cir. 2007), the court vacated the administrative law judge's denial of benefits on grounds that it was not sufficiently reasoned. In particular, the judge concluded that the qualifications and expertise of the physicians offering opinions were equal and held:

> Drs. Castle, Tuteur and Dahhan found no pneumoconiosis, while Drs. Cohen and Koenig found the existence of the disease. Because these opinions are entitled to equal weight, I now find that [the miner] has not established the existence of pneumoconiosis.

The court noted that black lung claims "often turn on science and involve conflicting medical opinions" such that a "scientific dispute must be resolved on scientific grounds." In this vein, the court held that "when an ALJ is faced with conflicting evidence from medical experts, he cannot avoid the scientific controversy by basing his decision on which side has more medical opinions in its favor." The court stated that "[t]his unreasoned approach, which amounts to nothing more than a 'mechanical nose count of witnesses,' . . . would promote a quantity-over-quality

approach to expert retention, requiring parties to engage in a race to hire experts to insure victory."

B. Undocumented and unreasoned opinion of little or no probative value

Opinion based on generalities

In *Consolidation Coal Co. v. Director, OWCP [Beeler]*, ___ F.3d ___, Case No. 07-1884 (7th Cir. Apr. 3, 2008), the court affirmed the administrative law judge's award of benefits based on a finding that the miner suffered from totally disabling chronic obstructive pulmonary disease stemming from 13 years of coal mine employment. The court noted:

> What complicates this case is that (the miner) was also a smoker. He started smoking cigarettes at age 18 or 19, averaging one to one-half pack per day at varying times. He quit at age 54, after about 35 years of smoking.

The record further revealed that, by 2005, the miner was totally dependent on supplemental oxygen and "was taking three nebulizer treatments a day."

While noting that the regulations recognize the existence of "legal" pneumoconiosis, the court emphasized that the miner carried the burden of demonstrating "that his COPD was caused, at least in part, by his work in the mines, and not simply his smoking habit." In this vein, the court cited to medical opinions in the record supporting a finding that coal dust contributed to the miner's COPD, but it also noted the following:

> . . . Dr. Tuteur examined (the miner) . . .; he diagnosed severe COPD solely due to smoking. He concluded that coal dust exposure did not cause or contribute to (the miner's disease), noting that miners with no smoking history rarely have COPD, while smokers have a one in five chance of developing a severe obstruction. Dr. Renn reviewed the medical records and issued a report in 2004 where he diagnosed COPD due solely to smoking.

The administrative law judge accorded little weight to the opinions of Drs. Tuteur and Renn in this claim and the court agreed:

> First, the essence of (Dr. Tuteur's) opinion was a three sentence comment that presented a personal view that (the miner's) condition had to be caused by smoking because miners rarely have clinically significant obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust. However, the Department of Labor reviewed the medical literature on this issue and found that there is consensus among scientists and researchers that coal dust-induced COPD is clinically significant. This medical authority indicates that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners. 65 Fed. Reg. 79,938. Second, Dr. Tuteur did not rely on information particular to (the miner) to conclude that smoking was the only cause of his obstruction. Third, he did not cite a single article in the medical literature to support his propositions.

The court then rejected Employer's argument that Dr. Tuteur merely states that development of coal dust induced COPD is rare in miners:

> . . . the Department of Labor report does not indicate that this causality is merely

> rare. And even if the causation is rare, Dr. Tuteur does not explain why (the miner) could not be one of these 'rare' cases. This flaw is endemic to the entire opinion, because Dr. Tuteur did not appear to analyze any data or observations specific to (the miner).

On the other hand, the court approved of the administrative law judge's crediting of Dr. Cohen's report, which supported the miner's entitlement to benefits:

> First, it was based on objective data and a substantial body of peer-reviewed medical literature that confirms the causal link between coal dust and COPD. Second, he reviewed studies that were even more recent than the aforementioned Department of Labor study. Third, he linked these studies with (the miner's) symptoms, physical examination findings, pulmonary function studies, and arterial blood gas studies. Finally, he explained that (the

> miner's) pulmonary function studies showed 'minimal reversibility after administration of bronchodilator' and that he had an 'abnormal diffusion capacity,' all of which is consistent with a respiratory condition related to coal dust exposure.

Failure to adequately address causation

In *Cannelton Industries, Inc. v. Director, OWCP [Frye],* Case No. 03-1232 (4th Cir. Apr. 5, 2004) (unpub.), the court concluded that the ALJ properly accorded less weight to the opinion of Dr. Forehand, who found that the miner was totally disabled due to smoking-induced bronchitis, but failed to explain "how he eliminated (the miner's) nearly thirty years of exposure to coal mine dust as a possible cause" of the bronchitis. In affirming the ALJ, the court noted that "Dr. Forehand erred by assuming that the negative x-rays (underlying his opinion) necessarily ruled out that (the miner's) bronchitis was caused by coal mine dust . . .."

Reversibility on pulmonary function testing; residual disability

In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the court upheld the ALJ's finding that reversibility of pulmonary function values after use of a bronchodilator does not preclude the presence of disabling coal workers' pneumoconiosis. In particular, the court noted the following:

> All the experts agree that pneumoconiosis is a fixed condition and therefore any lung impairment caused by coal dust would not be susceptible to bronchodilator therapy. In this case, although Swiger's condition improved when given a bronchodilator, the fact that he experienced a disabling residual impairment suggested that a combination of factors was causing his pulmonary condition. As a trier of fact, the ALJ 'must evaluate the evidence, weigh it, and draw his own conclusions.' (citation omitted). Therefore, the ALJ could rightfully conclude that the presence of the residual fully disabling impairment suggested that coal mine dust was a contributing cause of Swiger's condition. (citation omitted).

Slip op. at 8.

C. Physicians' qualifications

1. Treating physician

b. After applicability of 20 C.F.R. Part 718 (2001)

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004), the ALJ improperly accorded less weight to the treating physician's conclusion that coal workers' pneumoconiosis was present. The court reasoned as follows:

> The ALJ stated that he did not credit Dr. Karlavage's opinion as that of a treating physician because Dr. Karlavage had only seen Soubik three times over six months. That was, of course, three more times and six months more than Dr. Spagnolo saw him. So easily minimizing a treating physician's opinion in favor of a physician who has never laid eyes on the patient is not only indefensible on this record, it suggests an inappropriate predisposition to deny benefits. It is well-established in this circuit that treating physicians' opinions are assumed to be

> more valuable than those of non-treating physicians. *Mancia v. Director, OWCP*, 130 F.3d 579, 590-91 (3rd Cir. 1997). The ALJ nevertheless ignored Dr. Karlavage's clinical expertise; an expertise derived from many years of diagnosing and treating coal miners' pulmonary problems. The ALJ did so without making any effort to explain why Dr. Spagnolo's board certification in pulmonary medicine was a more compelling credential than Dr. Karlavage's many years of 'hands on' clinical training.

On the other hand, in *Parsons v. Wolf Creek Collieries*, 23 B.L.R. 1-29 (2004) (en banc on recon.), the Board held that the administrative law judge improperly accorded less weight to the opinion of Dr. Tuteur solely because of his status as a consulting physician. Moreover, it was improper to "mechanically" accord greater weight to the opinion of Claimant's treating physician. In this vein, the Board noted that "[w]hile a treating physician's opinion may be entitled to special consideration, there is neither a requirement nor a presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians."

D. Equivocal or vague conclusions

Should "work in a dust-free environment" held insufficient

See White v. New White Coal Co., 23 B.L.R. 1-1 (2004).

Class II Impairment held insufficient

In *Jeffrey v. Mingo Logan Coal Co.*, BRB Nos. 05-0107 BLA and 05-0107 BLA-A (Sept. 22, 2005) (unpub.)1, Dr. Baker examined Claimant and concluded that he suffered from a "Class II impairment" under the *Guides to the Evaluation of Permanent Impairment* and had "a second impairment, based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent." As a result, Dr. Baker stated that "[t]his would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations."

In view of the foregoing, the Board determined that the ALJ properly rejected the opinion:

> Because Dr. Baker did not explain the severity of such a diagnosis or address whether such an impairment would prevent claimant from performing his usual coal mine employment, his diagnosis of a Class II impairment is insufficient to support a finding of total disability. (citation omitted). Moreover, since a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment,. . . the administrative law judge permissibly found that this portion of Dr. Baker's opinion is insufficient to support a finding of total disability.

In addition, the Board stated:

> [I]n view of our holding that the administrative law judge properly found Dr. Baker's opinion insufficient to support a finding of total disability, we reject

1 It is noted that, in recent weeks, there have been a series of unpublished Board decisions with the same holdings as set forth in this summary.

> claimant's assertion that the administrative law judge erred by not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.

Presumption at § 718.203, effect of

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.

In a case involving complicated pneumoconiosis, the Fourth Circuit affirmed use of the presumption at § 718.203 in determining whether large opacities viewed on chest x-rays are due to coal dust exposure. In *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007), the court held that the fact-finder has a two step process in determining whether the miner is entitled to benefits based on a finding of complicated pneumoconiosis: (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.

E. Physician's report based on premises contrary to ALJ's findings

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004)2, the court held that a physician'sfailure to diagnose the presence of coal workers' pneumoconiosis would have an adverse effect on his or her ability to assess whether a miner's death was due to the disease. In *Soubik*, Dr. Spagnolo opined that, even if the miner suffered from pneumoconiosis, it would not have hastened his death. The court stated the following with regard to considering Dr. Spagnolo's opinion on the issue of causation:

2 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.

> Common sense suggests that it is usually exceedingly difficult for a doctor to properly assess the contribution, if any, of pneumoconiosis to a miner's death if he/she does not believe it was present. The ALJ did not explain why Dr. Spagnolo's opinion was entitled to such controlling weight despite Dr. Spagnolo's conclusion that Soubik did not have the disease that both parties agreed was present.

See also Tapley v. Bethenergy Mines, Inc., BRB No. 04-0790 BLA (May 26, 2005) (unpub.) (it was proper for the ALJ to discredit the opinions of Drs. Crisalli and Zaldivar with regard to disability causation where these physicians concluded that the miner did not suffer from either legal or clinical pneumoconiosis contrary to the ALJ findings).

I. Reliance on non-qualifying or nonconforming testing

In *Clonch v. Southern Ohio Coal Co.*, 2006 WL 3409880, Case No. 05-3133 (6th Cir. Nov. 27, 2006) (unpub.), a physician's opinion that the miner suffered from a moderately severe respiratory impairment under § 718.204(b)(2)(iv) could not be discredited on grounds that the pulmonary function study underlying the opinion yielded non-qualifying results. The court reasoned that the purpose of subsection (b)(2)(iv) (addressing medical opinions) is "clear" and is designed "to provide a more flexible approach than is otherwise allowed under paragraphs (b)(2)(i)-(iii)" (addressing blood gas and pulmonary function studies).

J. Extensive medical data versus limited data

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the court held that it was proper for the ALJ to accord greater weight to a physician who "integrated all of the objective evidence" as opposed to other physicians of record, particularly where the physician considered "test results showing diffusion impairment, reversibility studies, and blood gas readings."

L. Death certificates

In *Hill v. Peabody Coal Co.*, Case No. 03-3321 (6th Cir. Apr. 7, 2004) (unpub.), the Sixth Circuit held that a treating physician's notation on a death certificate that pneumoconiosis was a cause of the miner's death, without explanation, was insufficient to meet the standard at 20 C.F.R. § 718.205 (2001). The court reiterated its holding in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509 (6th Cir. 2003) that treating physicians' opinions "get the deference they deserve based on their general power to persuade." Citing to the Fourth Circuit's decision in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 (4th Cir. 2000), the Sixth Circuit determined that a physician's conclusory statement on a death certificate, without further elaboration, is insufficient to meet Claimant's burden as to the cause of death.

N. Medical literature and studies

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the ALJ properly discredited a physician's report that "referenced parts of the medical literature that deny that coal dust exposure can ever cause pneumoconiosis" and where the physician stressed the absence of chest x-ray evidence of the disease and erroneously relied on "the absence of pulmonary problems at the time of (the miner's) retirement from coal mining." The court held that this was contrary to the premise that pneumoconiosis may be latent and progressive.

O. CT-scan evidence

CT-scan evidence should be weighed separately from the chest x-rays. *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991)(en banc).

P. Digital chest x-rays [new]

Considered "other evidence" at § 718.107

In *Webber v. Peabody Coal Co*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring), the Board adopted the Director's position and held that digital x-ray interpretations are not considered "chest x-ray" evidence under 20 C.F.R. §§ 718.101(b), 718.102, 718.202(a)(1), and Appendix A to Part 718 as they do not satisfy the quality standards at Appendix A. As a result, the Board held that digital chest x-rays are "properly considered under 20 C.F.R. § 718.107, where the Administrative Law Judge must determine, on a case-by-case basis, pursuant to 20 C.F.R. § 718.107(b), whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement."

Admissibility

In *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-98 (2006)(en banc)(J. McGranery and J. Hall, concurring and dissenting), *aff'd.*, 23 B.L.R. 1-273 (2007) (en banc on recon.), a case arising under the amended regulations in the Seventh Circuit, Dr. Wiot used the standard ILO classification form to conclude that a digital x-ray "contained no parenchymal or pleural abnormalities consistent with pneumoconiosis." On the other hand, Dr. Ahmed declined to interpret the study stating that NIOSH has "indicated that the ILO system does not permit the classification of digital x-rays for pneumoconiosis." In support of his statement, Dr. Ahmed attached a letter from NIOSH stating the following:

> The ILO system does not at this time permit the classification of digital films for pneumoconiosis. However, NIOSH is aware that digital systems are increasingly utilized for medical imaging and patient information. We are, therefore, also soliciting input and experience related to digital chest imaging for dust-related changes.

Slip op. at 7, n. 6. As a result, the Administrative Law Judge concluded that Dr. Wiot's interpretation was entitled to "little weight" based on Dr. Ahmed's statement. As in its decision in *Webber*, the Board concluded in *Harris* that the digital x-ray should be considered under, and weighed with, "other medical evidence" under § 718.107. As a result, it was error for the administrative law judge to accord little weight to Dr. Wiot's interpretation under § 718.202(a)(1) on grounds that it did not comply with the quality standards for standard film x-rays.

On reconsideration en banc, in *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-273 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc), the Board affirmed its prior decision and reiterated certain holdings. First, the Board held that interpretations of digital x-rays must be considered under 20 C.F.R. § 718.107 and "an administrative law judge must consider whether the readings of the digital x-ray that a party seeks to admit are `medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits' pursuant to Section 718.107(b)." The Board declined to modify this holding despite Claimant's argument that "the digital x-ray was recorded on film." The Board also rejected Employer's argument that "digital film technology is not in dispute" such

that a fact-finder need not be required to determine its reliability on a case-by-case basis. The Board found Employer's argument unpersuasive:

> . . . in light of the fact that the National Institute of Occupational Safety and Health has not approved the use of digital x-rays to diagnose pneumoconiosis, as quality standards applicable to this technology have not yet been developed by the International Labor Organization.

Slip op. at 4.

Q. Cannot be weighed based on "numerical superiority"

It is improper to accord greater weight to certain medical opinions of record based solely on *numerical superiority*. In *Stalcup v. Peabody Coal Co.*, 477 F.3d 482 (7th Cir. 2007), the court vacated the administrative law judge's denial of benefits on grounds that it was not sufficiently reasoned. In particular, the judge concluded that the qualifications and expertise of the physicians offering opinions were equal and held:

> Drs. Castle, Tuteur and Dahhan found no pneumoconiosis, while Drs. Cohen and Koenig found the existence of the disease. Because these opinions are entitled to equal weight, I now find that [the miner] has not established the existence of pneumoconiosis.

The court noted that black lung claims "often turn on science and involve conflicting medical opinions" such that a "scientific dispute must be resolved on scientific grounds." In this vein, the court held that "when an ALJ is faced with conflicting evidence from medical experts, he cannot avoid the scientific controversy by basing his decision on which side has more medical opinions in its favor." The court stated that "[t]his unreasoned approach, which amounts to nothing more than a 'mechanical nose count of witnesses,' . . . would promote a quantity-over-quality approach to expert retention, requiring parties to engage in a race to hire experts to insure victory."

VII. Autopsy reports

For related issues pertaining to complicated pneumoconiosis, *see also* ***Chapter 11:* Living Miner's Claims: Entitlement Under Part 718**.

In *Energy West Mining Co. v. Director, OWCP [Jones]*, Case No. 03-9575 (10th Cir. July 9, 2004) (unpub.), the court held that the ALJ committed harmless error in a survivor's claim when he did not "explicitly weigh the medical reports of physicians who examined the miner during his lifetime . . . because other evidence relied upon by the ALJ was largely based upon the miner's autopsy records and slides, which are more reliable because they allow for more complete examination of the lungs." In this vein, the court cited to *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985) wherein the Board held that an ALJ's deference to autopsy evidence over X-ray evidence was reasonable because "autopsy evidence is the most reliable evidence of the existence of pneumoconiosis."

C. "Report of autopsy" and "rebuttal" of report of autopsy defined under amended regulations [new]

"*Report of autopsy*"

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board adopted the Director's position that "a report by a pathologist who has reviewed the autopsy tissue slides is in substantial compliance with the Section 718.106 quality standards and . . . can constitute a report of an autopsy for the purposes of Section 25.414(a)(2)(i) and (a)(3)(i)." The Board agreed with the Director that "since only claimant is likely to produce an autopsy prosector's report, this interpretation of the regulations is the most practical approach to satisfying the inclusive nature of Section 725.414(a)(2)(i), (a)(3)(i), which allows for both parties to submit an affirmative report of an autopsy. This represents a departure from the Board's unpublished decision in *Kalist v. Buckeye Coal Co.*, BRB No. 03-0743 BLA (July 23, 2004) (unpub.), wherein the Board adopted the Director's position at the time to hold that only the prosector's report constitutes a "report of autopsy" under the regulations.

"Rebuttal" of a report of autopsy

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board again adopted the position of the Director and held that "rebuttal" of a report of autopsy must be limited to consideration of the pathological evidence (autopsy report and slides). The "rebuttal" opinion cannot take into consideration clinical evidence, such as medical opinions and CT-scan interpretations.

Notably, in defining "rebuttal" evidence, the Board cited to the Department's comments to the regulations at 65 Fed. Reg. 79990 (Dec. 20, 2000) to state that the "regulations contemplate that an opinion offered in rebuttal of the case presented by the opposing party will analyze or interpret the evidence to which it is responsive." In this vein, the Board held that any portion of Dr. Bush's "rebuttal" autopsy opinion that is based on "materials beyond the scope of Dr. Plata's autopsy," should be redacted. Thus, on remand, the Board directed that the Administrative Law Judge review the "rebuttal opinion and address those portions of his opinion that exceed the scope of the autopsy submitted by claimant."

It is unclear how the holding in this opinion can be reconciled with the Board's unpublished decision in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006) wherein the Board held that "rebuttal" evidence need only refute "the case" presented by the opposing party as opposed to refuting a particular piece of evidence. In particular, the Board held that the Administrative Law Judge should have allowed Claimant's positive x-ray rereading to "rebut" a positive x-ray interpretation underlying the § 725.406 pulmonary evaluation. The Board reasoned that such evidence constituted "rebuttal" as it was "responsive" to "the case presented by the opposing party."

I. Limitations of documentary medical evidence

B. On modification

In a petition for modification, *Rose v. Buffalo Mining Co.*, 23 B.L.R. 1-221 (2007), the Board adopted the Director's position that the § 725.310(b) evidentiary limitations "supplement," rather than "supplant," the § 725.414 limitations. The Board reasoned:

> [W]here a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. § 725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit additional medical evidence allowed by 20 C.F.R. § 725.310(b).

Slip op. at pp. 6-7.

C. Hospitalization and treatment records unaffected

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), the Board held that treatment records, containing multiple pulmonary function and blood gas studies that exceed the limitations at § 725.414, are properly admitted. This is so regardless of whether the records are offered by a claimant or an employer. It is noted, however, that the Board required that, on remand, the administrative law judge must "analyze each set of records and made a specific finding as to its (sic) admissibility under § 725.414(a)(4)."

No rebuttal of treatment records permitted. By unpublished decision in *Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006), the Board held that the provisions at § 725.414 do not allow for the rebuttal of treatment records. As a result, the Board vacated the administrative law judge's ruling that Employer could submit a rebuttal interpretation of a chest x-ray reading contained in the miner's treatment records.

Treatment record versus "affirmative" evidence. In *R.L. v. Consolidation Coal Co.*, BRB No. 07-0127 BLA (Oct. 31, 2007), the Board held that it was error to exclude Employer's re-readings of certain CT-scans found in treatment records. The administrative law judge excluded Employer's proffer of the evidence on grounds that rebuttal of treatment records is not permitted under *Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006)(unpub.). The Board adopted the Director's position and concluded that Employer's proffer did not constitute "rebuttal" of treatment records in contravention of *Henley*. Rather, as noted by the Director, Employer was entitled to submit the CT scan re-readings as its "affirmative" evidence. The Board reiterated that the regulations do not limit the number of separate CT scans that may be admitted into the record, but "a party can proffer only one reading of each separate scan." The Board also directed that, with regard to consideration of the CT-scan evidence on remand, the administrative law judge must "initially consider whether the party proffering the CT scan evidence has established its medical acceptability under Section 718.107."

Treatment record versus "medical report." In *Presley v. Clinchfield Coal Co.*, BRB No. 06-0761 BLA (Apr. 30, 2007) (unpub.), the Board adopted the Director's position and held that a letter from the miner's treating physician, Dr. Robinette, constituted a medical report as defined at 20 C.F.R. § 725.414(a)(1) as opposed to a treatment record. The Director maintained that Dr. Robinette's letter was provided to the miner's counsel in anticipation of litigation and it contained a "written assessment of claimant's respiratory condition based on a review of his treatment records and test results" such that it was subject to the evidentiary limitations at § 725.414(a)(2)(i) of the regulations. In agreeing that the letter was a "medical report" under the regulations, the Board found:

> In his January 10, 2005 letter to claimant's attorney, Dr. Robinette stated that he had been claimant's treating physician for several years, and reported claimant's symptoms, the medications he was taking, and the results from a chest x-ray and CAT scan. (citation omitted). Dr. Robinette concluded that the claimant is disabled from his usual coal mine employment, and has complicated coal workers' pneumoconiosis based on his chest x-ray abnormalities and CAT scan findings.

The Board concluded that the tenor and structure of Dr. Robinette's letter resulted in its classification as a "medical report" subject to the evidentiary limitations as opposed to a treatment note, the admission of which is not limited under the amended regulations.

D. "Good cause" standard for admitting evidence over limitations

In *Brasher v. Pleasant View Mining Co.*, 23 B.L.R. 1-141 (2006), the Board held that it was improper for the administrative law judge to strike all of a party's evidence in a category on grounds that the party submitted evidence in excess of the limitations at § 725.414. The Board stated:

> Although Section 725.456(b)(1) provides that medical evidence in excess of the limitations contained in Section 725.414 shall not be admitted into the hearing record in the absence of good cause, the regulations do not authorize an administrative law judge to exclude properly submitted evidence based upon the fact that a party has submitted excessive evidence. Consequently, an administrative law judge should not exclude all of a party's submitted evidence merely because that party submits evidence that exceeds the limitations set forth at 20 C.F.R. § 725.414.

Slip op. at pp. 5-6. In its appeal brief, Employer argued that the excess evidence should be admitted on grounds of "good cause." However, the Board agreed with the administrative law judge in finding that Employer waived this argument when it did not argue "good cause" at the time it sought admission of the excess evidence at the hearing.

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), the Board held that "good cause" was not established solely on grounds that "the excess evidence was relevant." The Board noted that Employer "did not explain why the admitted evidence of record was insufficient to distinguish IPS from coal workers' pneumoconiosis, or indicate how (additional medical evidence) would assist the physicians."

In *Smith v. Martin County Coal Corp.*, 23 B.L.R. 1-69 (2004), the parties agreed to waive the evidentiary limitations at 20 C.F.R. § 725.414 (2004) and the ALJ admitted proffered evidence without further discussion. The Board held that this constituted error as the provisions

at 20 C.F.R. § 725.456(b)(1) (2004) mandate that an ALJ must find "good cause" prior to lifting the evidentiary restrictions at 20 C.F.R. § 725.414 (2004). *See also Phillips v. Westmoreland Coal Co.*, BRB No. 04-0379 BLA (Jan. 27, 2005) (unpub.).

By unpublished decision in *H.M. v. Clinchfield Coal Co.*, BRB No. 07-0288 BLA (Dec. 31, 2007) (unpub.), the Board upheld an administrative law judge's exclusion of x-ray interpretations offered by Employer in excess of the evidentiary limitations as well as the judge's redaction of a physician's opinion that referenced the inadmissible x-ray interpretations. The Board held that "good cause" to exceed the evidentiary limitations was not established where Employer asserted that the "excess films are relevant" to the issue of whether Claimant suffered from complicated pneumoconiosis. Moreover, the fact that the physician "specifically requested to review additional x-rays in order to provide a reasoned opinion as to the presence or absence of complicated pneumoconiosis" did not compel a finding of "good cause." In this vein, the Board held that the administrative law judge "fashioned a permissible remedy for (the physician's) review of inadmissible evidence . . . by determining to redact only those portions of (the physician's) opinion that relied on the excluded x-ray readings."

In *Teague v. Apple Coal Co.*, BRB No. 05-0489 BLA (Feb. 15, 2006) (unpub.), the Board affirmed the ALJ's finding that Employer failed to demonstrate "good cause" for exceeding the evidentiary limitations at 20 C.F.R. § 725.414. As an initial matter, the Board rejected application of the Fourth Circuit's decision in *Underwood v. Elkay Mining,* 105 F.3d 946 (4th Cir. 1997) on grounds that (1) *Teague* arose in the Sixth Circuit and (2) *Underwood* was decided under the pre-amendment regulations, which did not include the evidentiary limitations at § 725.414. In addition, the ALJ correctly concluded that Employer failed to carry its burden to demonstrate "good cause" in support of admitting evidence in excess of the § 725.414 limitations. In this vein, the Board held that Employer's arguments that the excess evidence was (1) developed in conjunction with the state workers' compensation claim, (2) relevant and probative, and (3) equally available to the parties, were not sufficient to establish "good cause." In rejecting Employer's arguments, the Board cited to the published comments underlying the amended regulations to state that a purpose of § 725.414 "was to enable administrative law judges to focus on the quality, rather than the quantity, of evidence."

[The following case is reported for instructive purposes]

In *Howard v. Valley Camp Coal Co.*, Case No. 03-1706 (4th Cir. Apr. 14, 2004) (unpub.), the court upheld the ALJ's exclusion of certain exhibits offered by Claimant stating that she did not establish "good cause" for failing to exchange the exhibits with Employer at least 20 days prior to the scheduled hearing. In this vein, the court noted that Claimant's counsel argued before the ALJ that he was not aware that he had the exhibits and he was not aware that the exhibits "weren't already in the record." The court concluded that "[a]s a matter of law, this explanation, which was tantamount to an admission of inattentiveness, was insufficient to establish `good cause' for failing to meet the deadline for exchange of documents not made part of the record before the district director."

F. "Other evidence" limited under 20 C.F.R. § 725.414 (2001) [new]

By unpublished decision in *H.M. v. Clinchfield Coal Co.*, BRB No. 07-0288 BLA (Dec. 31, 2007) (unpub.), the Board addressed the issue of admitting "other evidence" under 20 C.F.R. § 718.107. Citing to its decision in *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006), *aff'd. on recon.*, 24 B.L.R. 1-1 (2007) (en banc), the Board held that "the regulations do not limit the number of separate CT scans that may be admitted into the record; rather, the parties are limited only to one affirmative reading of each separate scan." Moreover, the Board noted that

each party is entitled to "one rebuttal reading (of each CT-scan), as necessary to respond to the opposing party's affirmative reading."

In *R.L. v. Consolidation Coal Co.*, BRB No. 07-0127 BLA (Oct. 31, 2007), the Board held that it was error to exclude Employer's re-readings of certain CT-scans found in treatment records. The administrative law judge excluded Employer's proffer of the evidence on grounds that rebuttal of treatment records is not permitted under *Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006)(unpub.). The Board adopted the Director's position and concluded that Employer's proffer did not constitute "rebuttal" of treatment records in contravention of *Henley*. Rather, as noted by the Director, Employer was entitled to submit the CT scan re-readings as its "affirmative" evidence. The Board reiterated that the regulations do not limit the number of separate CT scans that may be admitted into the record, but "a party can proffer only one reading of each separate scan." The Board also directed that, with regard to consideration of the CT-scan evidence on remand, the administrative law judge must "initially consider whether the party proffering the CT scan evidence has established its medical acceptability under Section 718.107."

By unpublished decision in *Mullins v. Plowboy Coal Co.*, BRB No. 06-0900 BLA (Aug. 30, 2007), the Board issued instructive holdings regarding application of certain evidentiary limitation provisions at 20 C.F.R. § 725.414. Citing to its decision in *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006) (*en banc*) (J. Boggs, concurring), *aff'd. on recon.*, 23 B.L.R. 1-261 (2007) (*en banc on recon.*), the Board addressed the admissibility of multiple interpretations of a single CT-scan. Under the facts of the case, four readings of an April 2, 2001 CT-scan were proffered as evidence. The Administrative Law Judge admitted (1) one reading as a "treatment" record under 20 C.F.R. § 725.414(a)(4), (2) one readings offered by Claimant as his case-in-chief reading under 20 C.F.R. § 725.414(a)(2)(i), and (3) one reading offered by Employer as its rebuttal to Claimant's case-in-chief reading. The Administrative Law Judge then excluded a second reading of the CT-scan proffered by Employer on grounds that it exceeded the evidentiary limitations and that rebuttal of the "treatment" record is not permitted.

While the Board concluded that the Administrative Law Judge properly admitted three readings of the CT-scan, it held that it was error to exclude the Employer's second reading. The Board held that "[c]ontrary to the administrative law judge's ruling, . . . employer was entitled to submit, in addition to its rebuttal reading, one affirmative CT scan reading."

In *Webber v. Peabody Coal Co*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring), *aff'd. on recon.*, 23 B.L.R. 1-261 (2007) (*en banc on recon.*) the Board noted that the amended regulatory provisions at § 725.414 do not provide specific limitations to the admission of evidence under 20 C.F.R. § 718.107. Nevertheless, in *Webber*, the Board adopted the Director's position that "the use of singular phrasing in 20 C.F.R. § 718.107" requires that "only one reading or interpretation of each CT scan or other medical test or procedure to be submitted as affirmative evidence." The Board noted the Director's argument that:

> [L]imiting the affirmative evidence under 20 C.F.R. § 725.107 (sic) is consistent with the Secretary of Labor's goal of limiting evidence in order to avoid repetition, reduce the costs of litigation, focus attention on quality rather than quantity, and level the playing field between employers and claimants.

Slip op. at 8, n. 15. As a result, the Administrative Law Judge was instructed on remand to require each party to select one CT-scan reading and one interpretation of each digital x-ray. Further, the proffering party must provide evidence to support a finding under § 718.107(b) that the test or procedure is "medically acceptable and relevant to entitlement." Notably, *Webber*

differs from the Board's earlier decision in *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47, 1-59 (2004)(en banc), which held that the evidentiary limitations did not apply to "other medical evidence" under § 718.107 such as CT-scans. *See also Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-98 (2006)(en banc)(J. McGranery and J. Hall, concurring and dissenting).

On reconsideration en banc, in *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-273 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc), the Board held that the amended regulations at § 725.414 "permits the parties to submit one reading of each CT scan undergone by claimant in support of a party's affirmative case and that reading need not be the original or first reading." Slip op. at 6.

Evidence under § 718.107 must be medically acceptable and relevant

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the ALJ did not abuse his discretion in excluding CT-scan evidence proffered by the employer based on the employer's failure to demonstrate that the test was (1) medically acceptable, and (2) relevant to establishing or refuting the claimant's entitlement to benefits. In accepting the Director's position on this issue, the Board held that, because CT-scans are not covered by specific quality standards under the regulations, the proffering party bears the burden of demonstrating that the CT-scans were "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." *See* 20 C.F.R. § 718.107(b) (2004). *See also Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-273 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc).

G. Evidence generated in conjunction with state claim [new]

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), the Board held that state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at § 725.414. In so holding, the Board noted that such records (1) "do not fall within the exception for hospitalization or treatment records," and (2) "they are not covered by the exception for prior federal black lung claim evidence" at 20 C.F.R. § 725.309(d)(1) (2001).

H. Substitution of medical evidence [new]

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), once Employer designated two medical reports in support of its affirmative case, the ALJ did not abuse his discretion in refusing to permit Employer to withdraw one of the reports at the hearing and substitute the report of another physician. In this vein, the ALJ "reasonably considered claimant's objection that he had relied on employer's prior designation of its two medical reports in developing his medical evidence." On the other hand, the Board concluded that the ALJ properly allowed Employer to substitute Dr. Wiot's reading of an October 2002 x-ray study for that of Dr. Bellotte. In a footnote, the Board stated that "Claimant (did) not argue that he uniquely relied on Dr. Bellotte's reading in developing his rebuttal of the October 2, 2002 x-ray." *See also Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-246, 1-259 n. 18 (2006) (it was proper for the administrative law judge to deny employer's request to substitute a chest x-ray report more than one year after the hearing in the claim).

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 permitted Claimant to designate two medical reports (out of three reports filed) in support of his claim as

permitted by 20 C.F.R. § 725.414. In this vein, the court cited to the Board's decision in *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) with approval.

I. Requiring identification of evidence more than 20 days prior to hearing [new]

In *Dempsey v. Sewell Coal Co.,* 23 B.L.R. 1-47 (2004) (en banc), the Board concluded that it was proper for the ALJ to "rule on claimant's motions to exclude and order employer to identify which items of evidence it would rely on as its affirmative case pursuant to Section 725.414(a)(3)(i)" more than 20 days in advance of the hearing "because claimant explained that he was unable to proceed with development of admissible evidence under Section 725.414 until his motions to exclude excess evidence were decided." The Board noted that the ALJ left the record open for 45 days for Employer to respond and he "admitted two of the four items of post-hearing evidence that employer submitted in response to claimant's late evidence."

J. ALJ not required to retain proffered exhibits that are not admitted [new]

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), the Board held that an ALJ is not required to "retain the large number of excluded exhibits in the record." Citing to 20 C.F.R. §§ 725.456(b)(1) and 725.464 (2001) as well as 29 C.F.R. §§ 18.47 and 18.52(a), the Board concluded that the "procedural regulations do not impose a duty to associate with the record proffered exhibits that are not admitted as evidence."

K. Data underlying medical opinion must be admissible [new]

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board emphasized that a medical opinion must be based on evidence that is "properly admitted" in a claim. If a report is based on evidence not admitted in the claim, then the administrative law judge must "address the impact of Section 725.414(a)(2)(i), (a)(3)(i)." The Board noted that the administrative law judge has several options in handling a report based, in part or in whole, on evidence not admitted in the claim such as excluding the report, redacting the objectionable content, asking the physician to submit a new report, or "factoring in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled." The Board specifically stated, however, that "exclusion is not a favored option, because it may result in the loss of probative evidence developed in compliance with the evidentiary limitations."

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), the ALJ properly declined to consider one of two reports admitted as part of Employer's affirmative case. In particular, Dr. Bellotte issued a medical opinion based, in part, on his interpretation of a chest x-ray study. Because Employer opted not to utilize Dr. Bellotte's x-ray reading as one of the two permitted in its affirmative case, it was permissible not to consider Dr. Bellotte's medical opinion regarding the existence of pneumoconiosis. The ALJ found that the opinion was "inextricably tied to [Dr. Bellotte's] chest x-ray interpretation, which was previously excluded from the record." The Board concluded that any chest x-ray referenced in a medical report must be admissible. The Board further noted that "[t]he same restriction applies to a physician's testimony."

The Board then noted that "[t]he regulations do not specify what is to be done with a medical report or testimony that references an inadmissible x-ray." However, it stated that "[r]eview of Dr. Bellotte's opinion reflects that his opinion regarding the absence of coal workers' pneumoconiosis was closely linked to his reading of the July 19, 2001 x-ray" such that the ALJ properly declined to consider it. In this vein, the Board held that the Seventh Circuit's holding in *Peabody Coal Co. v. Durbin*, 165 F.3d 1126 (7th Cir. 1999), requiring that an ALJ consider an

expert medical opinion even if it was based on evidence outside the record, was inapplicable to claims arising under the amended regulations. In so holding, the Board noted that the *Durbin* court "emphasized the absence of any regulation imposing limits on expert testimony in black lung claims" in rendering its opinion at the time.

In *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-98 (2006)(en banc)(J. McGranery and J. Hall, concurring and dissenting), *aff'd.*, 23 B.L.R. 273 (2007) (en banc on recon.), a case arising under the amended regulations in the Seventh Circuit, the Board held that a physician's medical opinion must be based on evidence that is admitted into the record in accordance with 20 C.F.R. § 725.414. In this vein, the Board concluded that the Seventh Circuit's decision in *Peabody Coal Co. v. Durbin*, 165 F.3d 1126 (7th Cir. 1999), was not applicable to a claim filed under the amended regulations. In *Durbin*, the Seventh Circuit held that a medical opinion could be fully credited even if the physician refers to evidence that is not in the record. Because *Durbin* was decided prior to promulgation of the amended regulations, the Board concluded that it is not controlling. Rather, the Board stated that "[w]ithin this new regulatory framework, requiring an administrative law judge to fully credit an expert opinion based upon inadmissible evidence could allow the parties to evade both the letter and the spirit of the new regulations by submitting medical reports in which the physicians have reviewed evidence in excess of the evidentiary limitations."

Importantly, the Board held that "an administrative law judge is granted broad discretion in resolving procedural issues, particularly where the statute and the regulations do not provide explicit guidance as to the sanction that should result when the requirements of a regulation are not satisfied." Consequently, the Board stated that "a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion."

The Board noted that, when an Administrative Law Judge is confronted with an opinion that considers evidence not admitted into the formal record, then he or she may exclude the report, redact the objectionable content, ask the physicians to submit revised reports, or consider the physicians' reliance on inadmissible evidence in deciding the probative value to accord their opinions. In *Harris*, the Board held that the Administrative Law Judge "appropriately indicated that exclusion is not a favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations."

The Board affirmed these holdings on reconsideration in *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-273 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc). The Board reiterated that it would not apply the Seventh Circuit's holding in *Peabody Coal Co. v. Director, OWCP [Durbin]*, 165 F.3d 1126 (7th Cir. 1999) to a claim filed after January 19, 2001. The Board reasoned that "[r]equiring an administrative law judge to fully credit an expert opinion based on inadmissible evidence could allow the parties to evade the limitations set forth in the new regulations (at § 725.414), by submitting medical reports in which the physicians have reviewed evidence in excess of the evidentiary limitations."

L. "Report of autopsy" and "rebuttal" of report of autopsy defined under amended regulations [new]

"*Report of autopsy*"

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board adopted the Director's position that "a report by a pathologist who has reviewed the autopsy tissue slides is in substantial compliance with the Section 718.106 quality standards and . . . can

constitute a report of an autopsy for the purposes of Section 25.414(a)(2)(i) and (a)(3)(i)." The Board agreed with the Director that "since only claimant is likely to produce an autopsy prosector's report, this interpretation of the regulations is the most practical approach to satisfying the inclusive nature of Section 725.414(a)(2)(i), (a)(3)(i), which allows for both parties to submit an affirmative report of an autopsy. This represents a departure from the Board's unpublished decision in *Kalist v. Buckeye Coal Co.*, BRB No. 03-0743 BLA (July 23, 2004) (unpub.), wherein the Board adopted the Director's position at the time to hold that only the prosector's report constitutes a "report of autopsy" under the regulations.

"Rebuttal" of a report of autopsy

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board again adopted the position of the Director and held that "rebuttal" of a report of autopsy must be limited to consideration of the pathological evidence (autopsy report and slides). The "rebuttal" opinion cannot take into consideration clinical evidence, such as medical opinions and CT-scan interpretations.

Notably, in defining "rebuttal" evidence, the Board cited to the Department's comments to the regulations at 65 Fed. Reg. 79990 (Dec. 20, 2000) to state that the "regulations contemplate that an opinion offered in rebuttal of the case presented by the opposing party will analyze or interpret the evidence to which it is responsive." In this vein, the Board held that any portion of Dr. Bush's "rebuttal" autopsy opinion that is based on "materials beyond the scope of Dr. Plata's autopsy," should be redacted. Thus, on remand, the Board directed that the Administrative Law Judge review the "rebuttal opinion and address those portions of his opinion that exceed the scope of the autopsy submitted by claimant."

It is unclear how the holding in this opinion can be reconciled with the Board's unpublished decision in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006) wherein the Board held that "rebuttal" evidence need only refute "the case" presented by the opposing party as opposed to refuting a particular piece of evidence. In particular, the Board held that the Administrative Law Judge should have allowed Claimant's positive x-ray rereading to "rebut" a positive x-ray interpretation underlying the § 725.406 pulmonary evaluation. The Board reasoned that such evidence constituted "rebuttal" as it was "responsive" to "the case presented by the opposing party."

M. Report of "biopsy" defined under amended regulations [new]

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), where Employer offered the opinion of Dr. Bush under 20 C.F.R. § 725.414(a)(3)(i) as a "biopsy" report, the ALJ properly admitted the report only to the extent that Dr. Bush did not refer to inadmissible evidence and the report was considered only to the extent that it offered "an assessment of claimant's biopsy tissue for the existence of pneumoconiosis." The report could not be considered as a medical opinion under § 725.414(a)(1) because Employer had designated the reports of two other physicians under this category. As a result, Dr. Bush's opinion on disability causation was inadmissible.

N. Two medical reports, definition of [new]

Two separate examinations by the same physician

In *Brasher v. Pleasant View Mining Co.*, 23 B.L.R. 1-141 (2006), the Board agreed with the administrative law judge's finding that Dr. Broudy's 2001 and 2002 physical examination

reports constituted two separate medical reports for purposes of Employer's affirmative case evidentiary limitations. The Board stated:

> Where a physician's reports constitute two separate written assessments of the claimant's pulmonary condition at two different times, an administrative law judge may properly decline to construe them as a single medical report under the evidentiary limitations.

Distinction between treatment note and medical report

By unpublished decision in *Stamper v. Westerman Coal Co.*, BRB No. 05-0946 BLA (July 26, 2006) (unpub.), the Board upheld the ALJ's finding that Dr. Baker's October 2000 report was a "supplemental opinion, in that it simply expounds on Dr. Baker's May 29, 1997 examination and report, which was admitted as one of claimant's affirmative medical reports pursuant to 20 C.F.R. § 725.414(a)(2)(i)." However, the Board held that it was error to consider a particular physician's letter to be a treatment note such that it was admissible under § 725.414(a)(4) and it reasoned as follows:

> Dr. Ducu's letter summarizes claimant's condition as it has developed since she began treating the miner in 1999, it contains her rationale for her diagnosis of black lung disease, and attempts to explain to the reader why she believes claimant is 100% totally and permanently disabled due to pneumoconiosis. As such, Dr. Ducu's letter constitutes a 'physician's written assessment of the miner's respiratory and pulmonary condition,' and not a simple record of the miner's 'medical treatment for a respiratory or pulmonary or related disease' as contemplated by 20 C.F.R. § 725.414(a)(4).

In another unpublished decision, *Presley v. Clinchfield Coal Co.*, BRB No. 06-0761 BLA (Apr. 30, 2007) (unpub.), the Board adopted the Director's position and held that a letter from the miner's treating physician, Dr. Robinette, constituted a medical report as defined at 20 C.F.R. § 725.414(a)(1) as opposed to a treatment record. The Director maintained that Dr. Robinette's letter was provided to the miner's counsel in anticipation of litigation and it contained a "written assessment of claimant's respiratory condition based on a review of his treatment records and test results" such that it was subject to the evidentiary limitations at § 725.414(a)(2)(i) of the regulations. In agreeing that the letter was a "medical report" under the regulations, the Board found:

> In his January 10, 2005 letter to claimant's attorney, Dr. Robinette stated that he had been claimant's treating physician for several years, and reported claimant's symptoms, the medications he was taking, and the results from a chest x-ray and CAT scan. (citation omitted). Dr. Robinette concluded that the claimant is disabled from his usual coal mine employment, and has complicated coal workers' pneumoconiosis based on his chest x-ray abnormalities and CAT scan findings.

The Board concluded that the tenor and structure of Dr. Robinette's letter resulted in its classification as a "medical report" subject to the evidentiary limitations as opposed to a treatment note, the admission of which is not limited under the amended regulations.

O. Evidence in living miner's claim not automatically admitted in survivor's claim unless complies with § 725.414 [new]

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board determined that, while miners' and survivors' claims may be consolidated for purposes of a hearing under § 725.460, evidence must be specifically designated in each claim in compliance with the limitations at 20 C.F.R. § 725.414. In so holding, the Board agreed "with the Director's reasonable position . . . that the parties must designate the claim that each piece of evidence supports, and the administrative law judge should consider this evidence on the specific issues of entitlement in each claim." The only exception to this limitation is the admission of treatment or hospitalization records pertaining to the miner's pulmonary or respiratory disease. The Board stated that these records are not limited under 20 C.F.R. § 724.414(a)(4) and may be considered in both claims. The Board also noted that § 725.456(b)(1) permits the admission of evidence in excess of the limitations for "good cause." *See also Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA-A (Apr. 8, 2005) (unpub.) (holding that evidence admitted in a living miner's claim is not automatically admitted in the survivor's claim).

P. Admission of evidence from prior claim in a subsequent claim under 20 C.F.R. § 725.309 [new]

In *Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA-A (Apr. 8, 2005) (unpub.), the Board held that "when a living miner files a subsequent claim, all evidence from the first miner's claim is specifically made part of the record. *See* 20 C.F.R. § 725.309(d)."

Q. Rebuttal of chest x-ray evidence [new]

1. Generally

By published decision in *Ward v. Consolidation Coal Co.*, 23 B.L.R. 1-151 (2006), the Board held that, under § 725.414, each party is entitled to submit one x-ray *interpretation* for each x-ray *interpretation* offered by the opposing party. Under the facts of the case, Claimant offered two *interpretations* of a single x-ray *study*. The administrative law judge permitted one *rebuttal interpretation* of the study because § 725.414(a)(3)(ii) provides that Employer may "submit, in rebuttal of the case presented by the claimant, no more than one physician's *interpretation* of each chest X-ray . . . submitted by the claimant under paragraph (a)(2)(i) . . .." (emphasis added). Since Claimant submitted two interpretations of one study, the administrative law judge reasoned that the plain language of the regulations dictated that Employer was entitled to only one rebuttal interpretation of the study.

In vacating the judge's decision, the Board adopted the Director's position on appeal and held that, under the circumstances of the case and consistent with the *intent* of the chest x-ray rebuttal provisions at § 725.414(a)(3)(ii), Employer should be permitted to submit two rebuttal interpretations of the study. *See also Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278, 23 B.L.R. 2-430 (4th Cir. 2007).

2. Rebuttal of treatment records not permitted

By unpublished decision in *Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006), the Board held that the provisions at § 725.414 do not allow for the rebuttal of treatment records. As a result, the Board vacated the administrative law judge's ruling that Employer could submit a rebuttal interpretation of a chest x-ray reading contained in the miner's treatment records.

3. "Rebuttal" of x-ray underlying DOL-sponsored

examination, defined

By unpublished decision in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006), the Board concluded that Claimant should be allowed to submit a positive x-ray interpretation to "rebut" the positive x-ray interpretation provided in conjunction with the Department-sponsored pulmonary evaluation. In so holding, the Board rejected Employer's argument that admitting Claimant's positive re-reading of the x-ray study "would be to ignore the plain meaning of the word `rebut,' which is to contradict or refute." As summarized by the Board, the Director argued that:

> . . . the language of the regulation does not limit a party to rebutting a particular item of evidence, rather, it permits a party to respond to a particular item of evidence in order to rebut `*the case presented by the party opposing entitlement.*' (citation omitted) [emphasis added].

The Board stated that the Director's interpretation, as summarized above, was reasonable and persuasive. However, without explanation, the Board then held that "rebuttal evidence submitted by a party pursuant to 20 C.F.R. § 725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it is responsive, but rather, need only refute `the case' presented by the *opposing party*." (emphasis added). Thus, while the Director proposed that rebuttal evidence constitutes evidence that is responsive to "the case presented by the *party opposing entitlement,*" the Board held rebuttal evidence may be used to respond to "'the case' presented by the *opposing party*." (emphasis added).

But see Keener v. Peerless Eagle Coal Co., 23 B.L.R. 1-229 (2007) (en banc), *supra.*

R. Application of limitations to the Director [new]

In a footnote in *Brasher v. Pleasant View Mining Co.*, 23 B.L.R. 1-141 (2006), the Board cited to § 725.414(a)(3)(iii) and noted that, in cases where no responsible operator has been identified as potentially liable, the district director is entitled to exercise the rights of a responsible operator, *i.e.* the right to submit two medical opinions and two sets of objective testing, as affirmative evidence. However, if there is a designated operator, then the district director is not automatically entitled to exercise the rights of the responsible operator.

S. Evidence generated by adverse, dismissed party [new]

By unpublished decision in *Henley v. Cowin & Co.*, BRB No. 05-0788 BLA (May 30, 2006) (unpub.), the Board held that where the district director dismisses a responsible operator in a claim that is subject to the amended regulations, then any medical evidence submitted by the dismissed operator must be excluded unless a party specifically designates the evidence as part of its case under § 725.414 of the regulations.

II. Responsible operator designation

B. Evidence related to responsible operator designation excluded absent "extraordinary circumstances"

In *Weis v. Marfork Coal Co.*, 23 B.L.R. 1-182 (2006) (en banc) (JJ. McGranery and Boggs, dissenting), it was undisputed that Claimant suffered from complicated pneumoconiosis and was entitled to benefits under the Act. Employer, however, challenged its designation as the operator responsible for the payment of benefits by submitting x-ray evidence demonstrating that

Claimant suffered from complicated pneumoconiosis prior to the time of his employment with Employer.

A majority of the Board agreed with the Administrative Law Judge's finding that Employer waived its right to contest liability by not doing so in a timely fashion before the district director as required at 20 C.F.R. § 725.412(a)(2). Moreover, the Board upheld exclusion of the x-ray evidence at the formal hearing as the Judge concluded that Employer failed to demonstrate "extraordinary circumstances" pursuant to 20 C.F.R. § 725.456(b)(1), which provides, in part, that "[d]ocumentary evidence pertaining to the liability of a potentially liable operator . . . which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." Citing to this regulation, and the Department's comments underlying its promulgation, a majority of the Board held that § 725.456(b)(1) applies to the x-ray evidence offered by Employer to the Administrative Law Judge. The majority agreed that the comments to the regulation, at 65 Fed. Reg. 79999 to 80000 (Dec. 20, 2000), do not "explicitly address the submission of 'medical records' as a means of escaping liability for the payment of benefits," but "the comments reveal the Department's intent that operators be required to submit 'any evidence' relevant to the liability of another party while the case is before the district director." As a result, the majority held that "x-ray interpretations and other medical records are included in the term 'documentary evidence' referenced in 20 C.F.R. § 725.456(b)(1)."3

III. Witness testimony

C. By deposition

1. Must provide "medical report"

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the ALJ properly excluded the deposition testimony of Dr. Jerome Wiot, a radiologist, based on the provisions at § 725.414(c), which provide that "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim . . . by deposition." Because Dr. Wiot offered only chest x-ray interpretations and did not provide a "medical opinion" as defined under the regulations, then his deposition testimony was not admissible.

2. Treating physician's deposition not automatically admitted

In *Gilbert v. Consolidation Coal Co.*, BRB Nos. 04-0672 BLA and 04-0672 BLA-A (May 31, 2005) (unpub.), the Board held that the evidentiary limitations set forth at 20 C.F.R. § 725.414 are mandatory and, absent a finding of "good cause," it was proper for the ALJ to exclude the deposition testimony offered by Employer of Claimant's treating physician, Dr. Altmeyer. First, Employer already had medical opinions from two other physicians offered as evidence. Second, the Board rejected Employer's argument that Claimant waived his right to object to admissibility of the deposition because he participated in the deposition. The Board noted that § 725.456(b)(1) did not "include a waiver provision for evidence submitted under Section

3 The Board held that, if evidence is excluded under 20 C.F.R. § 725.456(b)(1) (requiring that documentary evidence pertaining to designation of an operator not be admitted at the formal hearing in the absence of "extraordinary circumstances"), then it cannot be admitted under 20 C.F.R. § 725.456(b)(2) (providing that, subject to the limitations at § 725.456(b)(1), evidence not submitted to the district director may be received at the hearing if it is exchanged with all parties at least 20 days prior to the hearing).

725.414." Finally, although Dr. Altmeyer's treatment records were admitted as evidence under § 725.414(a)(4), the record did not contain a "medical report prepared by Dr. Altmeyer pursuant to 20 C.F.R. § 725.414(a)(3)(i)" such that his deposition was inadmissible under these provisions as well.

3. Radiologist's deposition testimony admitted for limited purpose

In *Webber v. Peabody Coal Co*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring), the Board upheld the Administrative Law Judge's consideration of Dr. Wiot's deposition testimony under § 718.107(b) with regard to the medical acceptability and relevance of CT-scans and digital x-rays. The Board concluded that the "administrative law judge further acted within his discretion in severing and separately considering Dr. Wiot's additional testimony pertaining to the medical acceptability and relevance of these tests from the rest of his opinion regarding whether the miner in this case suffers from pneumoconiosis . . .." In so holding, the Board stated the following:

> We agree with the Director that where a physician's statement or testimony offered to satisfy the party's burden of proof at 20 C.F.R. § 718.107(b) also contains additional discussion, if the additional comments are not admissible pursuant to 20 C.F.R. §§ 725.414 or 725.456(b)(1), the administrative law judge need not exclude the deposition or statement in its entirety, but may sever and consider separately those portions relevant to 20 C.F.R. § 718.107(b).

Slip op. at 10.

VI. The three year statute of limitations

C. Commencement of the three year period

See also ***Chapter 24:*** **Multiple Claims Under § 725.309** (Part VI).

Diagnosis communicated to counsel, claim not time-barred

In *Ken Lick Coal Co. v. Director, OWCP [Lacy]*, Case No. 06-4512 (appeal pending before the Sixth Circuit Court of Appeals), the administrative law judge and Board refused to find the miner's claim time-barred under 20 C.F.R. § 725.308(a) on grounds that a physician's opinion of total disability due to pneumoconiosis was communicated to the miner's *attorney* more than three years before the miner filed his claim for benefits. The Director is arguing on appeal that the administrative law judge was correct in finding the claim timely filed as Employer failed to demonstrate that the physician's opinion was communicated to the miner or a party responsible for the care of the miner as required by the regulations.

The Director's brief was due on March 22, 2007.

VII. Address and phone numbers of circuit courts; jurisdiction

Name correction: Federal Circuit Court of Appeals
Jan Horbaly, Clerk of the Court

II. Coal miner; defined under Parts 718 and 727

B. Three prong test

- ***Sixth and Seventh Circuits.*** Citation correction: *Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 926 (6th Cir. 1989).

III. Length of coal mine employment

There are two types of calculations in determining the length of a miner's employment. One calculation serves to determine (1) application of certain "entitlement" presumptions (20 C.F.R. § 718.203), or (2) probative value of a medical opinion (*i.e.* whether the physician based his or her opinion on an accurate coal mine employment history), or (3) whether a miner has worked for an operator for a cumulative period of one year. This calculation may be based on "any reasonable method" such as affidavits of co-workers, testimony of the miner, payroll stubs, W-2 forms, or Social Security records. When calculating the length of a miner's employment for "entitlement" purposes or the like, the fact-finder may include time on an employer's payroll even while sick or on vacation for example. Note, however, the 125 day rule is *not* to be used in this calculation unless the miner last worked in the Seventh or Eighth Circuits and the claim was filed prior to the effective date of the amended regulations, *i.e.* January 19, 2001. *See Landes v. Director, OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993); *Yauk v. Director, OWCP*, 912 F.2d 192, 195 (8th Cir. 1989).

In its comments to the amended regulations, the Department noted its disagreement with *Landes* and *Yauk* that 125 days of employment with an operator translates into one year of employment for that employer. *See* 65 Fed. Reg. 79960 (Dec. 20, 2000).

The second type of calculation is used to determine *actual exposure* to coal dust while working for an operator. Here, the 125 day rule is utilized in pre- and post-amendment claims. In post-amendment claims, if Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual* is utilized, a copy must be in the record or attached to the decision. *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007). Importantly, once the fact-finder has determined that a miner was on the operator's payroll for a period of one calendar year, or partial periods totaling one year, then it must be established that the miner spent an actual 125 working days at the operator's mine site. This requirement is designed to demonstrate that the miner suffered from "regular" exposure to coal dust while in the employ of the operator.

A. Prior to applicability of 20 C.F.R. Part 718 (2001)

In *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007), the court concluded that, in order for an operator to be held responsible for the payment of benefits, (1) it must have employed the miner for at least one calendar year, and (2) during the calendar year the miner must have actually spent a minimum of 125 working days at the mine site. The Benefits Review Board and Director, OWCP asserted that "regular employment" with an operator for a period of one year may be demonstrated if a miner demonstrates 125 working days at the

mine site over the entire course of his employment with the operator. The court disagreed:

> Under the view of the Board and director, 'regular employment' under § 725.493(b) is established if an employee works a total of 125 days over the course of his entire period of employment, even if that employment lasts a decade or more. So long as the employee worked a total of at least 125 days in or around a coal mine or tipple at *any* time during his employment, he will be deemed to have been 'regularly employed in or around a coal mine.' (citations omitted). We have not interpreted § 725.493 in such a manner nor, as we noted in (*Armco, Inc. v. Martin*, 277 F.3d 468, 473 (4th Cir. 2002)), nor do the intervening amendments to the regulations support such an interpretation . . ..

The court concluded that, in naming an operator responsible for the payment of benefits, it is the Director's burden to demonstrate that the miner worked for the company for one calendar year *during which* the miner spent a minimum of 125 working days at the mine site.

B. After applicability of 20 C.F.R. Part 725 (2001)

2. Bureau of Labor Statistics table

If Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual* is utilized, a copy must be in the record or attached to the decision. *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007).

V. Requirements for responsible operator designation

There are two types of calculations in determining the length of a miner's employment. One calculation serves to determine application of certain "entitlement" presumptions (20 C.F.R. § 718.203), or to determine the probative value of a medical opinion (*i.e.* whether the physician based his or her opinion on an accurate coal mine employment history), or to determine whether a miner has worked for an operator for a cumulative period of one year. This calculation may be based on "any reasonable method" such as affidavits of co-workers, testimony of the miner, payroll stubs, W-2 forms, or Social Security records. When calculating the length of a miner's employment for "entitlement" purposes or the like, the fact-finder may include time on an employer's payroll even while sick or on vacation for example. Note, however, the 125 day rule is *not* to be used in this calculation unless the miner last worked in the Seventh or Eighth Circuits and the claim was filed prior to the effective date of the amended regulations, *i.e.* January 19, 2001. *See Landes v. Director, OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993); *Yauk v. Director, OWCP*, 912 F.2d 192, 195 (8th Cir. 1989).

In its comments to the amended regulations, the Department noted its disagreement with *Landes* and *Yauk* that 125 days of employment with an operator translates into one year of employment for that employer. *See* 65 Fed. Reg. 79960 (Dec. 20, 2000).

The second type of calculation is used to determine *actual exposure* to coal dust while working for an operator. Here, the 125 day rule is utilized in pre- and post-amendment claims. Importantly, once the fact-finder has determined that a miner was on the operator's payroll for a period of one calendar year, or partial periods totaling one year, then it must be established that the miner spent an actual 125 working days at the operator's mine site. This requirement is designed to demonstrate that the miner suffered from "regular" exposure to coal dust while in the employ of the operator.

F. Cumulative employment of one year or more

In *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007), the court concluded that, in order for an operator to be held responsible for the payment of benefits, (1) it must have employed the miner for at least one calendar year, and (2) during the calendar year the miner must have actually spent a minimum of 125 working days at the mine site. The Benefits Review Board and Director, OWCP asserted that "regular employment" with an operator for a period of one year may be demonstrated if a miner demonstrates 125 working days at the mine site over the entire course of his employment with the operator. The court disagreed:

> Under the view of the Board and director, `regular employment' under § 725.493(b) is established if an employee works a total of 125 days over the course of his entire period of employment, even if that employment lasts a decade or more. So long as the employee worked a total of at least 125 days in or around a coal mine or tipple at *any* time during his employment, he will be deemed to have been `regularly employed in or around a coal mine.' (citations omitted). We have not interpreted § 725.493 in such a manner nor, as we noted in (*Armco, Inc. v. Martin*, 277 F.3d 468, 473 (4th Cir. 2002)), do the intervening amendments to the regulations support such an interpretation . . ..

The court concluded that, in naming an operator responsible for the payment of benefits, it is the Director's burden to demonstrate that the miner worked for the company for one calendar year *during which* the miner spent a minimum of 125 working days at the mine site.

Further, the court held that the amended provisions at § 725.101(a)(32)(iii) are not applicable to a claim arising prior to January 19, 2001 and, under the facts of the present case, they could not be used as a "guide." In support of its holding, the court reasoned as follows:

> By its terms, the (amended) regulation may be used in situations where the miner's employment lasted less than one year or 'the beginning and ending dates of the miner's coal mine employment' cannot be established. (citation omitted). Here, the record contains documentary evidence of Mitchell's employment by Mesa, including 'payroll registers listing the specific dates on which the miner was dispatched to the coal mine tipples, his hours, and his pay.' (citation omitted). The formula's calculation is also to be based upon BLS average daily earnings for the coal mine industry and any calculation thereunder 'shall' be accompanied by a copy of the BLS table. Here, the ALJ did not attach the table and did not explain her calculation. Nor does it appear that she took into account the undisputed evidence that Mitchell, by virtue of the character of his work for Mesa, was paid tipple wages at inflated overtime rates. In short, § 725.101(a)(32)(iii) is not applicable to the responsible operator inquiry in this case, nor would we affirm its use as a 'guide' given the multiple deficiencies present in its application; its use as a 'guide' in this case could not help but yield an unreliable and unfair result.

Slip op. at 20.

The court determined that there was insufficient evidence to designate Daniels as the responsible operator. Indeed, the court noted that evidence established that the miner was employed by Daniels from September 1974 to February 1988, "but not as a miner." Rather, Daniels operated a "fabrication shop" that "engaged in the business of building material handling systems for various coal processing plants . . .." Daniels did not, however, operate a coal mine or coal tipple, nor did it "provide services or perform work at or near any such facility." From this, the court concluded that "Daniels could not be designated a responsible operator under the Act because it is not engaged in coal mine or coal tipple work, nor did (Claimant) technically perform any such work or receive wages for it from Daniels."

The court noted that, on occasion from 1979 to 1986, the miner performed sporadic, part-time work at the tipples for Daniels' sister company, Mesa. However, it determined that, if Claimant was viewed as an employee of Mesa, then the "first step of the 'responsible operator' inquiry would not be met; namely, the evidence did not demonstrate that Claimant worked for Mesa for a period of one year or partial periods totaling one year. The court then noted that, if Claimant was viewed as an employee of Daniels, then the "first step" of the inquiry would be satisfied, *i.e.* evidence establishes that the miner worked for Daniels for a period of one year, or partial periods totaling one year from 1974 to 1988. However, the "second step" of the inquiry would remain unsatisfied; *to wit*, the evidence does not support a finding that Claimant spent an actual 125 working days at the mine site *during* a calendar year of his employment with Daniels.

K. Liability of guaranty association where carrier insolvent [new]

In *Boyd and Stevenson Coal Co. v. Director, OWCP [Slone]*, 407 F.3d 663 (4th Cir. 2005), the named responsible operator was "automatically terminated for failing to file annual reports with the Commonwealth of Virginia" and the responsible carrier was later declared insolvent. As

a result, the Director sought payment of survivor's black lung benefits from the Virginia Property and Casualty Insurance Guarantee Association (VPCIGA). VPCIGA is statutorily liable for unpaid "covered claims" filed against insolvent insurers in the Commonwealth. Va. Code Ann. §§ 38.2-1603 and 38.2-1606(A)(1). Although VPCIGA asserted that it was not liable for the payment of benefits in this case, the court disagreed.

In particular, VPCIGA argued that, pursuant to Va. Code Ann. § 38.2-1606-A.1.b, the claim was untimely because:

> . . . a covered claim shall not include any claim filed with the Guaranty Association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.

From this, VPCIGA noted that the bankruptcy notice for the insolvent carrier provided that a Proof of Claim must be filed "not later than" August 26, 1992. Consequently, because the survivor's claim was filed in April 1999, VPCIGA posited that it could not be held liable for the payment of benefits.

The court held that, although the survivor is required to independently establish entitlement to benefits, her claim was "derivative of her husband's claim which was filed before the August 26, 1992 deadline" for purposes of the VPCIGA statutory provisions. In particular, the court found that the survivor's claim arose "out of the same injury as the miner's claim and therefore both VPCIGA and (the responsible carrier) knew that once the miner died, the payments would not necessarily cease, but instead that the claim would continue if the miner had a surviving spouse or dependent." The court concluded that the survivor claim "should be considered timely if the miner's original claim is timely filed."

The court cited to a contrary result in *Uninsured Employer's Fund v. Mounts*, 484 S.E.2d 140 (Va. Ct. App. 1997) where the miner did not file his claim until after the deadline for making claims to the insolvent carrier had passed. As a result, the Virginia appellate court concluded that VPCIGA could not be held liable for the payment of benefits.

L. Intervention of surety or carrier when employer insolvent [new]

In *Old Ben Coal Co. v. Director, OWCP [Melvin]*, 476 F.3d 418 (7th Cir. 2007), a case involving the bankrupt Old Ben Coal Company and its parent, Horizon Natural Resources Company, the Seventh Circuit held that an insurance company or surety should be permitted to intervene on behalf of the defunct company in order to protect its interests. The court reasoned that "[a]ny entity, such as an insurance company or a surety that would be prejudiced by an award of black lung benefits, is entitled to intervene in an administrative proceeding with the rights of a party." The court further noted that the insurance company or surety would have to intervene as "[i]t could not protect (its) interest by directing its lawyer to represent a named party (Old Ben Coal Company) that was not a real party in interest."

By unpublished decision in *Jude v. Wolf Creek Collieries*, BRB No. 06-0659 BLA (May 23, 2007), the Board affirmed the administrative law judge's handling of procedural matters related to a defunct employer. Of relevance here, while the case was pending before the OALJ, Employer's counsel withdrew citing that the employer's parent company, Horizon Natural Resources Incorporated, had been liquidated in bankruptcy.

Upon request of the Director, the OALJ held the claim in abeyance pending the Director's

investigation that a surety bond issued by St. Paul Fire and Marine Insurance Company (St. Paul) would secure Employer's liability for benefits. Moreover, pursuant to a Joint Liquidation Plan approved by the bankruptcy court, Horizon Liquidating Trust (Horizon) was also liable for the payment of any benefits owed by Employer. The Director provided St. Paul and Horizon with "a copy of his pleading in order to notify them of their right to request that they be permitted to intervene in the case pursuant to 20 C.F.R. § 725.360(d)." St. Paul's counsel filed a motion to be dismissed from the claim, which was denied by the administrative law judge. Although counsel for St. Paul was present at the hearing, he advised that "St. Paul would not intervene as a party to the case" and asked that its name be removed from the caption. Counsel also requested that the record be held open for 60 days "in the event that there was some interested party that wished to submit evidence to defend against the claim."

The administrative law judge granted St. Paul's motion that it be removed from the caption of the claim, but denied its request that the record be left open for 60 days. Moreover, the judge did not dismiss St. Paul from the claim. The administrative law judge then awarded benefits and held Employer liable for payment of the benefits. The Board held that the administrative law judge "properly deemed employer capable of assuming liability for benefits based on the assurances of the Director that there has been a surety bond posted on behalf of Horizon and its subsidiaries." The Board also noted that assessing liability against Employer was consistent with the terms of the liquidation trust of the bankruptcy court.

Further, the Board held that the administrative law judge properly declined to dismiss St. Paul "as such an action would preclude the Department of Labor from exercising its enforcement remedies in district court." The Board reasoned that, "[w]hile the Black Lung Disability Trust Fund may ultimately be required to pay benefits, the Director must have an award of benefits issued against employer in order to enforce liability on the surety bond."

Finally, the Board declined to entertain St. Paul's arguments on appeal that it did not have adequate notice or opportunity to be heard on the claim. The Board noted that, "because St. Paul refused to exercise its right to intervene as a party to the case while the case was before the administrative law judge, . . . and St. Paul has not filed a motion to intervene as a party before the Board, . . .St. Paul does not have standing in this appeal to challenge the administrative law judge's award of benefits or his determination that employer is liable for benefits."

M. Entering appearance on behalf of bankrupt employer not permitted [new]

In *Lemon v. Zeigler Coal Co.*, BRB No. 06-0305 BLA (Oct. 31, 2006) (unpub.) (Hall, dissenting), a case involving a subsidiary of the bankrupt Horizon Natural Resources Company (HNRC), the administrative law judge denied an attorney's appearance on behalf of Employer on grounds that "it failed to submit any documentation authorizing such representation and its client, St. Paul Travelers Companies, Incorporated (St. Paul), failed to intervene as a party in accordance with 20 C.F.R. § 725.360." Employer argued on appeal that St. Paul was not required to petition to become a party under 29 C.F.R. § 18.10(c) in order to represent Employer and 20 C.F.R. § 725.360 does not require intervention by St. Paul in order to defend Employer.

A majority of the Board panel disagreed with the administrative law judge and held the following:

> [C]ontrary to the administrative law judge's finding, the pertinent regulation does not require an attorney to file a document that authorizes his or her

> representation of a party. In her August 17, 2005 *Order*, the administrative law judge noted, `[b]y letter of May 13, 2005, [the law firm] entered a `Limited Appearance of Counsel' on behalf of the defunct Employer for the limited purpose of contesting the eligibility of the Claimant.' August 17, 2005 Order at 2. Consequently, since the law firm has satisfied the criteria set forth in Section 725.362(a) for representing employer, we hold that the administrative law judge erred in denying the law firm's appearance of counsel, on the ground that the law firm failed to submit any documentation authorizing its representation of employer.

Slip op. at 5-6. However, see the summary of *Old Ben Coal Co. v. Director, OWCP [Melvin]*, 476 F.3d 418 (7th Cir. 2007), *supra.*

III. Rebuttal of the interim presumption of total disability due to pneumoconiosis

C. Means of rebuttal

3. Total disability did not arise in whole or in part out of coal mine employment

a. Standard for establishing subsection (b)(3) rebuttal

NOTICE: The following language in quotations in the main text of the *Benchbook*, "the party opposing entitlement must rule out the causal relationship between the miner's total disability and his coal mine employment" may not be a quote from the cited case.

- ***Sixth Circuit.*** *See also Edmiston v. F&R Coal Co.*, 14 B.L.R. 1-65 (1990) (in the Sixth Circuit, "it is employer's burden to rule out pneumoconiosis as a contributing factor to the miner's total disability"); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179 (6th Cir. 1989).

- ***Seventh Circuit.*** In *Gulley v. Director, OWCP*, 397 F.3d 535 (7th Cir. 2005), the court held that black lung benefits were precluded where the miner was totally disabled due to blindness. The court noted that, under § 727.203(b)(3), a miner "cannot recover benefits if he was totally disabled by an unrelated, non-pulmonary condition notwithstanding his probable pneumoconiosis." The Seventh Circuit did state, however, that if the amended regulatory provisions at 20 C.F.R. § 718.204(a) (2004) had been applicable, then Claimant's blindness would not have precluded an award of black lung benefits.

III. The existence of pneumoconiosis

A. "Pneumoconiosis" defined

2. After applicability of 20 C.F.R. Part 718 (2001)

a. Claimant not required to establish a particular form of pneumoconiosis is latent

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 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 Workman v. Eastern Assoc. Coal Corp.*, 23 B.L.R. 1-22 (2004) (order on recon.) (en banc) (the Board noted

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

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").

b. Proper to accord less weight to an opinion that is in conflict with the regulations

In *Blake v. Elm Grove Coal Co.,* BRB Nos. 04-0186 BLA and 04-0186 BLA-S (Dec. 28, 2004) (unpub.), it was proper for the ALJ to "discredit a medical opinion which is premised upon a view inconsistent with the regulations." In particular, the physician opined that "only clinical pneumoconiosis is progressive," which the Board concluded was inconsistent with 20 C.F.R. § 718.201(c)." As a result, the medical opinion was not well-reasoned based on the following comments to the amended regulations:

> [I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period. Because the legal definition of pneumoconiosis includes impairments that arise from coal mine employment, regardless of whether a miner shows X-ray evidence of pneumoconiosis, this evidence of deterioration of lung function among miners, including miners who did not smoke, is significant.
>
> 65 Fed. Reg. 79971 (Dec. 20, 2000).

Slip op. at 9.

In *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992 (7th Cir. 2005), the circuit court determined that it was proper to accord less weight to a medical opinion that is "influenced by the physician's 'subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions.'" In particular, the court agreed that Dr. Shelby's view that coal mine employment had "preserved" the miner's lung function and had a "positive effect" on his health was contrary to the provisions at 20 C.F.R. § 718.201(c) that pneumoconiosis can be latent and progressive.

c. Clinical versus legal pneumoconiosis

Separate diagnoses of clinical and legal pneumoconiosis must be considered

In *Martin v. Ligon Preparation Co.*, 400 F.3d 302 (6th Cir. 2005), the Sixth Circuit held that the ALJ's crediting of Drs. Broudy's and Fino's opinions over the opinion of Dr. Rasmussen to deny benefits was not supported by substantial evidence. Initially, the ALJ accorded less weight to Dr. Rasmussen's diagnosis of coal workers' pneumoconiosis because it was based on a positive x-ray interpretation, where the ALJ found that a preponderance of the chest x-ray evidence was negative for the disease. The court held that this was error because, although Dr. Rasmussen's finding of *clinical* pneumoconiosis was not supported by the record, he also diagnosed *legal* pneumoconiosis based on a physical examination of the miner as well as a diffusing capacity test, arterial blood gas studies, and Claimant's personal and occupational histories. The court further stated the following:

> [E]ven if Dr. Rasmussen had diagnosed 'only' clinical pneumoconiosis, as the BRB

> concluded, such a diagnosis would not disqualify Martin from receiving benefits under the BLBA. '[C]linical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act.' (citation omitted). Thus, an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis as well. (citation omitted).

Slip op. at pp. 3-4.

The court then stated that the ALJ's reliance on Dr. Broudy's opinion was "perhaps the most perplexing aspect of this case." Dr. Broudy opined that a drop in the miner's oxygen level during exercise on blood gas testing would be indicative of an interstitial lung disease such as pneumoconiosis and, as noted by the court, Claimant's blood gas testing demonstrated "exactly the drop in oxygen level as described by Dr. Broudy." Similarly, the court found that Dr. Fino's opinion was lacking because he did not consider the miner's qualifying blood gas testing values after exercise even though he also concluded that such values would be required to assess the miner's impairment.

Finally, the court questioned the ALJ's crediting of Dr. Fino's opinion based on his "excellent qualifications." The court noted that Dr. Fino's qualifications were not necessarily superior to Dr. Rasmussen's qualifications. In this vein, it was noted that, although Dr. Fino is board-certified in internal medicine and pulmonary diseases and Dr. Rasmussen is board-certified in internal medicine only, "Dr. Rasmussen's curriculum vitae establishes his extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis."

Legal pneumoconiosis, establishment of

By unpublished decision in *C.E.S. v. Consolidation Coal Co.*, BRB No. 07-0329 BLA (Jan. 31, 2008) (unpub.), the Board held that legal pneumoconiosis was not demonstrated where 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, a physician must attribute it 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."

Chronic obstructive pulmonary disease

In *Consolidation Coal Co. v. Director, OWCP [Beeler]*, ___ F.3d ___, Case No. 07-1884 (7th Cir. Apr. 3, 2008), the court affirmed the administrative law judge's award of benefits based on a finding that the miner suffered from totally disabling chronic obstructive pulmonary disease stemming from 13 years of coal mine employment. The court noted:

> What complicates this case is that (the miner) was also a smoker. He started smoking cigarettes at age 18 or 19, averaging one to one-half pack per day at varying times. He quit at age 54, after about 35 years of smoking.

The record further revealed that, by 2005, the miner was totally dependent on supplemental oxygen and "was taking three nebulizer treatments a day."

While noting that the regulations recognize the existence of "legal" pneumoconiosis, the court emphasized that the miner carried the burden of demonstrating "that his COPD was caused, at least in part, by his work in the mines, and not simply his smoking habit." In this vein, the court cited to medical opinions in the record supporting a finding that coal dust

contributed to the miner's COPD, but it also noted the following:

> . . . Dr. Tuteur examined (the miner) . . .; he diagnosed severe COPD solely due to smoking. He concluded that coal dust exposure did not cause or contribute to (the miner's disease), noting that miners with no smoking history rarely have COPD, while smokers have a one in five chance of developing a severe obstruction. Dr. Renn reviewed the medical records and issued a report in 2004 where he diagnosed COPD due solely to smoking.

The administrative law judge accorded little weight to the opinions of Drs. Tuteur and Renn in this claim and the court agreed:

> First, the essence of (Dr. Tuteur's) opinion was a three sentence comment that presented a personal view that (the miner's) condition had to be caused by smoking because miners rarely have clinically significant obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust. However, the Department of Labor reviewed the medical literature on this issue and found that there is consensus among scientists and researchers that coal dust-induced COPD is clinically significant. This medical authority indicates that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners. 65 Fed. Reg. 79,938. Second, Dr. Tuteur did not rely on information particular to (the miner) to conclude that smoking was the only cause of his obstruction. Third, he did not cite a single article in the medical literature to support his propositions.

The court then rejected Employer's argument that Dr. Tuteur merely states that development of coal dust induced COPD is rare in miners:

> . . . the Department of Labor report does not indicate that this causality is merely rare. And even if the causation is rare, Dr. Tuteur does not explain why (the miner) could not be one of these 'rare' cases. This flaw is endemic to the entire opinion, because Dr. Tuteur did not appear to analyze any data or observations specific to (the miner).$$$

On the other hand, the court approved of the administrative law judge's crediting of Dr. Cohen's report, which supported the miner's entitlement to benefits:

> First, it was based on objective data and a substantial body of peer-reviewed medical literature that confirms the causal link between coal dust and COPD. Second, he reviewed studies that were even more recent than the aforementioned Department of Labor study. Third, he linked these studies with (the miner's) symptoms, physical examination findings, pulmonary function studies, and arterial blood gas studies. Finally, he explained that (the

miner's) pulmonary function studies showed 'minimal reversibility after administration of bronchodilator' and that he had an 'abnormal diffusion capacity,' all of which is consistent with a respiratory condition related to coal dust exposure.

d. Finding of pneumoconiosis based on medical opinions despite negative chest x-rays

In *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992 (7th Cir. 2005), the circuit court upheld the administrative law judge's finding that Claimant suffered from coal workers' pneumoconiosis notwithstanding the preponderantly negative chest x-ray evidence of record. Moreover, the court determined that it was proper to accord less weight to a medical opinion that is "influenced by the physician's 'subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions.'" In particular, the court agreed that Dr. Shelby's view that coal mine employment had "preserved" the miner's lung function and had a "positive effect" on his health was contrary to the provisions at 20 C.F.R. § 718.201(c) that pneumoconiosis can be latent, progressive, and have deteriorating effects on a miner's health.

3. Evidence relevant to finding pneumoconiosis

a. Anthracosis and anthracotic pigment

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. Finally, in light of the Fourth Circuit's holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the Board remanded the case and held that the administrative must weigh all of the evidence under 20 C.F.R. § 718.202(a) together to determine whether the miner suffers from pneumoconiosis.

e. Pulmonary function studies not diagnose presence of pneumoconiosis

In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the the ALJ 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 upheld the ALJ 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."

f. Stipulations

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004)5, the ALJ 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 ALJ did not offer "specific and persuasive reasons" for crediting Dr. Spagnolo's opinion.

g. Admission against interest [new]

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 ALJ'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 ALJ 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.

h. The ILO classification form, interpretation of [new]

Alternative versus additional diagnosis

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5 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.

Contribution by: Bridget Dooling, Attorney-Advisor

The Board holds that an administrative law judge may treat an x-ray reading with a profusion level of 1/0 or greater as positive for pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1, 1-4 (1999) (en banc on recon.). The BRB has encountered at least two types of comments that an interpreting physician might make along with a profusion of 1/0 or greater.

Alternative diagnosis. First, a physician might comment that another disease cannot be ruled out, as in *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991) (en banc) (a case involving complicated pneumoconiosis). In this situation, the physician's comment calls the diagnosis of pneumoconiosis into question. *Id*. at 1-37. Those comments should be evaluated within an administrative law judge's 20 C.F.R. § 718.202(a)(1) analysis about the presence of pneumoconiosis. If the comments suggest an alternative diagnosis, the "internal inconsistencies" may "detract from the credibility of the x-ray interpretation under 20 C.F.R. § 718.202(a)(1)." *Cranor*, 22 B.L.R. at 1-5 (discussing *Melnick*).

Additional diagnosis. Second, a physician might find a profusion greater than 1/0 but make a note that the disease is "not CWP etiology unknown," as was the case in *Cranor*. *Id*. at 1-4. In that situation, the physician's comments are directed not to the presence of pneumoconiosis, but the etiology of the diagnosed pneumoconiosis. *Id*. at 1-5, 1-6. Accordingly, and administrative law judge should consider those comments under 20 C.F.R. § 718.203 regarding the etiology of the claimant's pneumoconiosis.

Notably, in *Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-246 (2006), the Board reaffirmed its decision in *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1, 1-5 (1999) (en banc) and held that it was proper for the administrative law judge to conclude that Dr. Halbert's classification of a x-ray as Category 1/1 was positive for the presence of pneumoconiosis under § 718.202(a)(1) of the regulations. In a narrative report accompanying the ILO classification form, Dr. Halbert indicated that he "found opacities consistent with pneumoconiosis of some type (such as asbestosis) but no CWP." The Board agreed with the Director's position that the administrative law judge properly considered Dr. Halbert's comments under § 718.203 as "Section 718.202(a)(1) does not require that claimant prove the cause of the clinical pneumoconiosis diagnosed by chest x-ray."

B. Regulatory methods of establishing pneumoconiosis

3. Weighing evidence together versus weighing evidence separately

o ***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, U.S. Steel's argument would still fail" because the ALJ did weigh the x-ray and medical opinion evidence together prior to finding pneumoconiosis present.

C. Presumptions related to the existence of pneumoconiosis

1. Complicated pneumoconiosis

Citation update. *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. "Opacity" defined

By unpublished decision in *McCoy v. Holly Beth Coal Co.*, BRB No. 05-0818 BLA (May 25, 2006) (unpub.), the Board has taken a decidedly different approach to the issue of establishing complicated pneumoconiosis by chest x-ray evidence. In particular, a 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 evidence. 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.

The Board reasoned that "'opacity' is a term of art used to classify pneumoconiosis" and is not based on the "size of any finding." Thus, where a physician finds a large "mass" or "nodule," but does not specifically check a box that it is a size A, B, or C "opacity," then the x-ray interpretation does not support a finding of complicated pneumoconiosis.

b. Cause of opacities

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.

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.

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.

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."

c. Size of opacity standing alone, held insufficient

In *H.M. v. Clinchfield Coal Co.*, BRB No. 07-0288 BLA (Dec. 31, 2007) (unpub.), the Board remanded the case to the administrative law judge for further analysis of the merits of the claim, *i.e.* whether Claimant presented evidence sufficient to demonstrate the presence of complicated pneumoconiosis under 20 C.F.R. § 718.304 and *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000). 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."

By unpublished decision in *Mullins v. Plowboy Coal Co.*, BRB No. 06-0900 BLA (Aug. 30, 2007)(unpub.), the Board reviewed the Administrative Law Judge's consideration of x-ray evidence under the provisions related to complicated pneumoconiosis at 20 C.F.R. § 718.304. Specifically, the Board held that that "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 an opacity size A, B, or C, is not sufficient to assist claimant in establishing complicated pneumoconiosis pursuant to Section 718.304(a)." Moreover, 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."

d. On autopsy

See also Chapter 3: General Principles of Weighing Medical Evidence.

Fourth Circuit—equivalency determinination 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 opined that the four and six centimeter lesions would appear greater than one centimeter on an x-ray and they were related to coal dust exposure and cancer. The court held that 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.

Eleventh Circuit—no equivalency determination 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 (complicated pneumoconiosis). 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.

e. Applicability of § 718.203

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.

In *W.L.C. v. Westmoreland Coal Co.*, BRB No. 06-0927 BLA (June 26, 2007) (unpub.), the Board cited to *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337 (4th Cir. 2007) stating that, if it is determined that the miner suffers from complicated pneumoconiosis under 20 C.F.R. § 718.304, then the fact-finder must assess whether the large opacities were caused by exposure to coal dust. In this vein, the Board held that the provisions at 20 C.F.R. § 718.203 apply and a miner with ten or more years of coal mine employment is entitled to a rebuttable presumption that his complicated pneumoconiosis arose from such employment.

f. Consideration of medical reports

In *S.P.W. v. Peabody Coal Co.*, BRB No. 07-0278 BLA (Dec. 27, 2007)(unpub.), a case involving complicated pneumoconiosis, 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.

g. CT-scans, equivalency determination or dimensions of opacity required

By unpublished decision in *C.E.S. v. Consolidation Coal Co.*, BRB No. 07-0329 BLA (Jan. 31, 2008) (unpub.), in a claim 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.

IV. Etiology of pneumoconiosis

A. Ten years or more of coal mine employment

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. On the other hand, with regard to *legal* pneumoconiosis, the miner must demonstrate that his respiratory ailment, *i.e.* chronic obstructive pulmonary disease, was caused by coal dust exposure without use of the ten year presumption.

2. Impact on weighing medical opinions

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.

3. 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.).

4. 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.

V. Establishing total disability

B. After applicability of 20 C.F.R. Part 718 (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). These provisions state, in part, that "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." The court further clarified that its holding in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), wherein the court 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.

C. Methods of demonstrating total disability

4. Reasoned medical opinions

a. Burden of proof

Citation correction ("comparable and gainful work"): 20 C.F.R. § 718.204(b)(2) (2000) or 20 C.F.R. § 718.204(b)(1)(ii) (2001).

Physician must understand job duties

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 that he suffered from 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.

VI. Etiology of total disability

The paragraph should be corrected to read as follows: Unless one of the presumptions at 20 C.F.R. §§ 718.304, 718.305, or 718.306 (2000) and (2001) is applicable, a 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 (2001)

- ***Sixth Circuit.*** 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).

- ***Eleventh Circuit.*** 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, to the amended regulatory provisions at 20 C.F.R. § 718.204(c)(1) (2001).

2. After applicability of 20 C.F.R. Part 718 (2001)

Percentage of contribution to total disability 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 ALJ 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 had 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.

C. Weighing medical opinion evidence

Physician not diagnose pneumoconiosis contrary to ALJ's finding

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the Board held that it was proper for the ALJ to discredit the opinions of Drs. Crisalli and Zaldivar with regard to disability causation where these physicians concluded that the miner did not suffer from either legal or clinical pneumoconiosis contrary to the ALJ findings. *See also* ***Chapter 3:*** **Principles of Weighing Medical Evidence**.

Cross-reference: For possible application of collateral estoppel in a survivor's claim, *see* ***Chapter 25:*** **Principles of Finality**.

II. Qualifying for benefits

A. Surviving spouse and surviving divorced spouse

2. Spouse – dependency upon the miner

Citation correction: The regulatory citation at paragraph 2(b) is incorrect and should read as follows:

> (b) the individual was dependent upon the miner for support or the miner has been ordered by a court to contribute to such individual's support (§ 725.233);
> . . .

Moreover, the citation of 20 C.F.R. § 725.2**15** (2000) and (2001) is corrected to 20 C.F.R. § 725.2**18** (2000) and (2001).

In *Lombardy v. Director, OWCP*, 355 F.3d 211 (3rd Cir. 2004), the ALJ properly found that a surviving divorced spouse's reliance on social security benefits, deriving from the miner's employment, did not qualify her as a "dependent" of the miner for purposes of receiving black lung benefits. The court cited to *Taylor v. Director, OWCP*, 15 B.L.R. 1-4, 1-7 (1991) as well as *Director, OWCP v. Ball*, 826 F.2d 603 (7th Cir. 1987), *Director, OWCP v. Hill*, 831 F.2d 635 (6th Cir. 1987), and *Director, OWCP v. Logan*, 868 F.2d 285, 286 (8th Cir. 1989) to hold that Social Security benefits are not part of the miner's property and do not constitute a "contribution" to the survivor for purposes of establishing dependency under the Black Lung Benefits Act.

B. Child

1. Child—relationship to miner

In *Varney v. Steven Lee Enterprises, Inc.*, 23 B.L.R. 1-213 (2006)6, the Board held that, in determining issues of paternity, the law of the state where the miner is domiciled at the time of adjudication controls the issue of determining whether paternity is established. Here, DNA testing demonstrated that the miner's son was the father of the child and, although the miner was listed as the child's father on the birth certificate as well as in a subsequent divorce decree, the Board held that the child was not entitled to benefits under the Act as:

> Applicable Kentucky statutory law and precedent . . . establish that genetic testing with statistical probability equal to or exceeding 99% for paternity, which is present here, . . . is dispositive of the paternity issue where, as in the instant case, claimant has proffered no evidence tending to rebut the presumption of paternity in favor of the miner's son, Darrell Varney. (state citations omitted).

6 This decision was originally issued as "unpublished." However, by *Order* dated July 28, 2006, the Board determined that it would be published.

Consequently, the administrative law judge erred in finding that claimant is a ‘child' of the deceased miner, Danny Varney, notwithstanding the uncontroverted genetic testing evidence of record showing Darrell Varney to be claimant's father, because ‘the courts have no discretion in these instances.'

II. Standards of entitlement

B. Survivor's claim filed prior to January 1, 1982 and there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982

2. Lay evidence

Citation correction: 20 C.F.R. § 725.204(c)(5) (2000) is incorrect in the first paragraph of this subsection of the *Benchbook*. The citation should be 20 C.F.R. § 718.204(c)(5) (2000).

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004)7, the court stated that its decision in *Hillibush v. Dep't. of Labor*, 853 F.2d 197, 205 (3rd Cir. 1988) provides that the survivor may prove her claim using "medical evidence alone, non-medical evidence alone, or the combination of medical and non-medical evidence . . .." Thus, *Hillibush* required that the ALJ consider lay evidence in determining whether the miner had a pulmonary or respiratory impairment, but "[e]xpert testimony will usually be required to establish the necessary relationship between . . . observed indicia of pneumoconiosis and any underlying pathology." As a result, the court determined that it was error for the ALJ to accord less weight to a medical opinion because it was based, in part, on lay evidence.

D. Survivor's claim filed on or after January 1, 1982 where there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982

2. "Hastening death" standard

b. After applicability of 20 C.F.R. Part 718 (2001)

In *Bailey v. Consolidation Coal Co.*, BRB No. 05-0324 BLA (Sept. 30, 2005) (unpub.), the ALJ properly discredited physicians' opinions that x-ray and CT-scan evidence revealed the presence of possible self-healing tuberculosis, histoplasmosis, inflammatory disease, tumor, sarcoidosis, or idiopathic interstitial fibrosis on grounds that these opinions "were not supported by the miner's hospital treatment records which did not make any reference to these other conditions." In so holding, the Board rejected Employer's argument that the ALJ's weighing of the evidence "erroneously shifted the burden of proof to employer to disprove the existence of pneumoconiosis by requiring (that the physicians) conclusively establish alternative diagnoses in order to rule out the existence of pneumoconiosis."8

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7 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.

8 Notably, the Board has issued inconsistent holdings regarding whether discrediting a physician's diagnosis on grounds that it is not supported by the miner's hospitalization and treatment records impermissibly shifts the burden to the employer to affirmatively demonstrate that the miner suffers from a disease other than coal workers' pneumoconiosis. Hopefully, the Board will consider issuing a published decision on this issue.

In addition, the Board upheld the ALJ's finding that coal workers' pneumoconiosis substantially contributed to the miner's pneumonia which, in turn, caused his death. In so holding, the Board stated:

> We note that as the Secretary observed when promulgating Section 718.205(c)(5), the proposition that persons weakened by pneumoconiosis may expire quicker from other diseases *is* a medical point, with some empirical support. *See* 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000).

Slip op. at 6 (emphasis in original).

III. Treatment related to the miner's black lung condition

A. Burden of persuasion/production

1. Prior to applicability of 20 C.F.R. Part 725 (2001)

◦ ***Fourth Circuit.*** In *Lewis Coal Co. v. Director, OWCP [McCoy]*, 373 F.3d 570 (4th Cir. 2004), the court upheld the presumption set forth in *Doris Coal Co. v. Director, OWCP*, 938 F.2d 492, 494 (4th Cir. 1991). Moreover, the court affirmed the administrative law judge's finding that the company was responsible for medical expenses related to treatment of the miner's coal-dust-related chronic bronchitis. The miner had been diagnosed with chronic bronchitis in 1971, and had been awarded monthly black lung benefits by the Social Security Administration under Part B of the Act in 1973. The miner later applied for Part C medical benefits under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 11, 92 Stat. 95, 101 (1978), and in 1981 the company waived its right to contest the claim and conceded that the miner was entitled to medical benefits. Years later, however, the company refused to pay for treatment of the miner's chronic bronchitis, arguing that the disease was not pneumoconiosis. In rejecting the company's argument, the court held that the company's 1981 concession precluded it from asserting that the miner's chronic bronchitis was not pneumoconiosis.

Chapter 23
Petitions for Modification Under § 725.310

I. Generally

A. ALJ's discretionary ruling on procedural issue not subject to modification

By unpublished decision in *Bowman v. Director, OWCP*, BRB No. 03-0720 BLA (Sept. 10, 2004) (unpub.), the Board held that an ALJ's "discretionary determination that the Director established good cause for the untimely submission of Dr. Green's report is not subject to modification because (the ALJ) was resolving a procedural matter that is not within the scope of issues that are subject to modification, *i.e.*, issues of entitlement." The Board further stated that the "proper recourse for correction of error, if any, would have been a timely appeal or motion for reconsideration, neither of which were timely pursued."

B. Evidentiary limitations, application of

In a petition for modification, *Rose v. Buffalo Mining Co.*, 23 B.L.R. 1-221 (2007), the Board adopted the Director's position that the § 725.310(b) evidentiary limitations "supplement," rather than "supplant," the § 725.414 limitations. The Board reasoned:

> [W]here a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. § 725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit additional medical evidence allowed by 20 C.F.R. § 725.310(b).

Slip op. at pp. 6-7.

II. Procedural issues

A. One year time limitation

2. After applicability of 20 C.F.R. Part 725 (2001)

Citation update: *Gross v. Dominion Coal Corp.*, 23 B.L.R. 1-8 (2003).

E. Restrictions on medical re-examination on modification

In *Cumberland River Coal Co. v. Caudill*, 2006 WL 3345416, Case No. 05-3680 (6th Cir. Nov. 17, 2006) (unpub.), the court held that Employer is not entitled to "de novo" discovery, including requiring Claimant to submit to an Employer-sponsored pulmonary evaluation, simply because it files a petition for modification under § 725.310 of the regulations.

With regard to the submission of evidence on modification, the court noted that § 725.310(b) limits each party's submission of initial evidence "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414" (emphasis in original). The court concluded that "[t]he portions of § 725.414 that are specifically incorporated into modification proceedings by § 725.310(b) apply only to *rebuttal*

evidence, ..." (emphasis in original).

F. Failure to timely controvert; limitation on scope of modification

In *Eastern Assoc. Coal Corp. v. Director, OWCP [Duelley]*, Case No. 03-1604 (4th Cir. July 29, 2004) (unpub.), the court held that, where an employer fails to establish "good cause" for its failure to timely controvert a claim, then it cannot seek to have the merits of the claim reconsidered by filing a petition for modification. The court reasoned that an employer "may not use a motion for modification to circumvent the consequences of its failure to file a timely controversion." The only issue properly considered on modification under the circumstances was whether the adjudication officer properly found that "good cause" was not established for failure to timely controvert the original claim.

IV. Review by the administrative law judge

C. Proper review of the record

Diligence, motive, and futility [new]

In *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007), the court noted that, "[i]mportantly, the modification of a black lung claim does not necessarily flow from a finding that a mistake was made on an earlier determination of fact." Under the facts of the case, Employer filed a petition for modification on a living miner's claim two months after the miner died and nearly seven years after a decision of the Benefits Review Board (Board) affirming that the miner was entitled to benefits on the basis that he suffered from complicated pneumoconiosis. In the meantime, the widow also filed a claim. Upon consolidating the claims, the administrative law judge initially concluded that Employer had failed to present new evidence sufficient to establish that the miner did not suffer from complicated pneumoconiosis. As a result, Employer's petition for modification of the miner's claim was denied and benefits were awarded in the survivor's claim.

On appeal, the Board held that the administrative law judge erred in relying on findings of fact rendered by the previous judge and the Board directed that, on remand, the miner's claim must be reviewed *de novo*. On remand, the judge modified the miner's claim (more than four years after his death) and denied the miner's and survivor's claim. In so doing, the court noted that the judge applied the misguided remand instructions of the Board and "only assessed the factual accuracy of the complicated pneumoconiosis finding and failed to evaluate the other pertinent factors." The court stated that the administrative law judge and Board mistakenly assumed that Employer "had a right to modification of the living miner's claim upon simply establishing a mistake of fact." The court observed:

> [N]one of the decisions on the Modification Request addressed the fact that Westmoreland waited nearly seven years to file the Request, none questioned Westmoreland's motive in filing its apparent response to the survivor's claim, and none otherwise addressed whether a reopening of the matter would render justice.

Here, the court focused on the discretionary language at 20 C.F.R. § 725.310(a) (2000) that, "[u]pon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director *may* . . . reconsider the terms of an award or denial of benefits." (emphasis added). The court noted that the administrative law judge's denial of benefits on remand only addressed one of the "factors relevant to an exercise of sound discretion"; *to wit,* whether a mistake of fact was made in the original decision on the miner's claim.

Citing to *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 547 (7th Cir. 2002), the Fourth Circuit noted the Seventh Circuit has "recognized that the diligence of a party seeking modification should be considered in a modification determination." *See also McCord v. Cephas*, 532 F.2d 1377, 1378 (D.C. Cir. 1976) (remanding for assessment of whether reopening would "render justice under the act" in light of the employer's four-plus years delay in pursuing modification). The Fourth Circuit held that, in addition to diligence, the adjudicator must consider a party's motive in seeking modification and whether the modification petition is futile or moot (*i.e.* in this case the miner had no estate and any overpayment could not be recovered by the employer).

In *M.L.K. v. Expansion Coal Co.*, BRB No. 06-0933 BLA (Sept. 25, 2007) (unpub.), Employer filed a petition for modification and submitted a physician's report that reviewed evidence in the record at the time the claim was originally adjudicated. The Board noted that:

> . . . the administrative law judge found that, because (the physician's) opinion was not based upon any new evidence, employer could have submitted (the physician's) report when the case was previously before Judge Smith. (citation omitted).

Slip op. at 6. The Board then concluded that "the administrative law judge did not abuse his discretion in considering the fact that employer could have developed and submitted (the physician's) report at an earlier date."

Although the administrative law judge considered the physician's opinion, he accorded the opinion diminished weight based on the foregoing reason as well as the fact that the opinion was equivocal and the physician only offered a peremptory rejection of certain medical literature submitted in the case. The Board affirmed the administrative law judge's finding that Employer failed to demonstrate a mistake in a determination of fact based on consideration of all evidence of record.

2. "Mistake in a determination of fact"

a. Defined to include challenge to ultimate issues of entitlement

º ***Seventh Circuit.*** Citation correction: *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Chapter 24
Multiple Claims Under § 725.309

I. Generally

A. Re-filing more than one year after prior denial

Pneumoconiosis may be latent and progressive

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."

B. Survivors

A petition for *writ of certiorari* was filed in *Coleman v. Director, OWCP*, 345 F.3d 861 (11th Cir. 2003). The Department maintains that *certiorari* should be denied because the court of appeals correctly upheld an ALJ's dismissal of a survivor's second claim under 20 C.F.R. § 725.309. The petitioning survivor counters that she was deprived of her constitutional due process rights because she did not receive adequate notice of the reason for denial of her previous claims by the district director.

In *Boden v. G.M. & W. Coal Co.*, 23 B.L.R. 1-38 (2004), the Board held that a multiple survivor's claim was properly denied. The Board noted that "[b]ecause the condition of entitlement that claimant failed to demonstrate in her initial claim related solely to the miner's physical condition at the time of death, *i.e.*, whether the miner's death was due to pneumoconiosis, the administrative law judge properly found that entitlement was precluded."

In *Tucker v. Director, OWCP*, 23 B.L.R. 1-42 (2004), the Board vacated an award of benefits and denied a multiple divorced survivor's claim under 20 C.F.R. § 725.309(d) (2001) where "Claimant's prior claim was denied solely because the evidence did not show that she was dependent on the miner at the time of the miner's death." The Board noted that "dependency" is determined based on the "factual situation prior to the miner's death" such that "there is no opportunity for the dependency relationship to change after the miner dies." As a result, the Board concluded that the survivor's multiple claim must be denied.

E. Constitutionality upheld [new]

By unpublished decision in *Wilce v. Director, OWCP*, Case No. 04-3998 (3rd Cir. July 8, 2005), the court rejected a widow's challenge to the subsequent claims provisions at 20 C.F.R. § 725.309 as "discriminatory against women in violation of the equal protection guarantee applicable to the federal government through the Fifth Amendment." The widow argued that § 725.309 "allows a miner to file a duplicate claim where he or she can establish a material change in his or her condition, but bars a survivor claim unless it is a request for modification . . .." She

posits that since most "survivors" are women, the regulation is discriminatory.

The court determined that, although more women file survivors' claims than men, the regulation was "facially neutral." Given that pneumoconiosis is a latent and progressive disease, the provisions at § 725.309 properly reflect that a miner should be able to file a subsequent claim based on a change in his or her condition. On the other hand, the "relevant conditions of entitlement" are not subject to change in a survivor's claim since the miner is deceased.

IV. Proper review of the record

A. Prior to applicability of 20 C.F.R. Part 725.309 (2001)- "material change in conditions"

In *U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977 (11th Cir. 2004), the Eleventh Circuit adopted the "one element" standard for establishing a "material change in condition" as set forth by the Third, Fourth, and Eighth Circuit Courts of Appeals. It noted that the "Director's standard gives full credit to the *finality* of the original denial, but plainly recognizes that pneumoconiosis is a latent and progressive disease, and that a miner's condition can change over time." The court further cited to the amended regulatory provisions at 20 C.F.R. § 725.309(d) (2001) with approval.

In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir. 2003), a multiple claim arising under the pre-amendment regulations at 20 C.F.R. § 725.309 (2000), the court reiterated that its decision in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) requires that the ALJ resolve two specific issues prior to finding a "material change" in a miner's condition: (1) whether the miner has presented evidence generated since the prior denial establishing an element of entitlement previously adjudicated against him; and (2) whether the newly submitted evidence differs "qualitatively" from evidence previously submitted. Specifically, the *Flynn* court held that "miners whose claims are governed by this Circuit's precedents must do more than satisfy the strict terms of the one-element test, but must also demonstrate that this change rests upon a qualitatively different evidentiary record." Once a "material change" is found, then the ALJ must review the entire record *de novo* to determine ultimate entitlement to benefits.

In *Flynn*, the ALJ properly held that the miner demonstrated a "material change in conditions" based on a comparison of the restrictions listed in Dr. Martin Fitzhand's 1980 and 1984 medical reports. In the 1980 report, which was submitted with the first claim, Dr. Fitzhand determined that the miner could perform "mild activity at best"; whereas by 1984, in the second claim, Dr. Fitzhand opined that the miner could do "no more than sedentary activity." The ALJ reasonably noted that the miner's last coal mining job, although light-duty work, required more than sedentary activity. The court stated that this "downgraded assessment" was further supported by underlying objective testing, including physical examinations, pulmonary function studies, and blood gas studies. As a result, it upheld the ALJ's finding of "material change in conditions."

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the circuit court found that Claimant established that he was totally disabled in the fourth claim, which was sufficient to find a "material change in conditions" since denial of his third claim.

By unpublished decision in *McNally Pittsburgh Manufacturing Co. v. Director, OWCP*, Case No. 03-9508 (10th Cir. Feb. 10, 2004) (unpub.), the court clarified its "material change" standard in *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1511 (10th cir. 1996) to state that "in order for an administrative law judge to determine whether a claimant establishes this necessary

change in his or her physical condition, the administrative law judge should determine whether evidence obtained after the prior denial demonstrates a material worsening of those elements found against the claimant." In the case before it, the miner filed a petition for modification of the district director's denial of his original claim. The claim was denied on modification and, after more than one year, the miner filed a second claim. The court determined that, when assessing whether a "material change in conditions" is established, the administrative law judge must use the date of denial of the original claim, not the date of denial on modification.

B. After applicability of 20 C.F.R. Part 725.309 (2001)

1. Establishing an element of entitlement previously denied

In *White v. New White Coal Co.*, 23 B.L.R. 1-1 (2004), the Board upheld the ALJ's denial of the miner's multiple claim on grounds that the miner failed to establish that he was totally disabled or that he suffered from pneumoconiosis. With regard to the elements of causation, the Board stated the following:

> Although the administrative law judge did not render findings on the two other 'requirements for entitlement,' . . . claimant has not raised any further allegations of error. We, therefore, affirm the administrative law judge's finding that this claim fails pursuant to Section 725.309 because claimant has not established that one of the applicable elements of entitlement has changed since the date of the denial of the prior claim . . ..

Slip op. at 7.

Failure to establish any element of entitlement in prior claim

In *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-98 (2006)(en banc)(J. McGranery and J. Hall, concurring and dissenting), a case arising under the amended regulations in the Seventh Circuit, the Board held that, in a subsequent claim, the miner must demonstrate one of the "applicable conditions of entitlement" upon which the prior denial was based. Because Claimant failed to establish any element of entitlement in his initial claim, he "had to submit new evidence establishing at least one of these elements to proceed with his claim." In finding that the miner was now total disabled, the Board held that treatment notes recorded two to four years prior to the hearing were less probative as the miner's condition at the time of the hearing "is the relevant point in time for assessing claimant's ability to perform his usual coal mine employment."

Disability causation—element capable of change

In *M.F. v. Sullivan Brothers Coal Co.*, BRB No. 07-0554 BLA (Mar. 31, 2008) (unpub.), the Board held that disability causation is an element of entitlement that is capable of change under 20 C.F.R. § 725.309. As a result, where the miner's prior claim was denied on grounds that he failed to demonstrate that his totally disabling respiratory impairment was due to pneumoconiosis, it was proper for the administrative law judge to consider whether disability causation was established as a threshold matter in the subsequent claim.

No "qualitative" analysis required for threshold determination

In a 2003 subsequent claim arising in the Sixth Circuit, *J.R. v. Tennessee Coal Co.*, BRB

No. 07-0569 BLA (Mar. 31, 2008) (unpub.), the Board rejected Employer's position that the administrative law judge was required to conduct a "qualitative" analysis of the old and new medical evidence, as required by *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), to determine whether the miner's condition had worsened. Rather, the Board adopted the Director's position and held that the claim was governed by the amended regulatory provision at 20 C.F.R. § 725.309(d)(3), "which requires only that a claimant establish a change in one of the elements of entitlement previously adjudicated against him to proceed with his claim."

C. Evidence withheld by opposing party in prior claim [new]

In *Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997), the Board held that, in reviewing the evidence to determine whether a "material change in condition" is established, it was proper for the administrative law judge to refuse to consider evidence "in existence at the time the first claim was decided on grounds that such evidence 'is not applicable in determining whether there has been a change in condition since the denial.'" The Board reasoned:

> Claimant's argument that the first claim should be reopened since employer withheld the results of Dr. Zaldivar's report in violation of 20 C.F.R. § 725.414, which requires that all evidence be submitted to the district director when the case is pending before the district director . . . has no merit since Dr. Zaldivar's report was generated . . . when the case was before Judge Patton, not before the district director.

The Board indicated that Claimant could have requested a copy of the report pursuant to 29 C.F.R. § 18.18(b)(4), but did not do so. *Slip op.* at 4, n. 3. Claimant, during discovery, requested "medical information obtained by employer which employer did not intend to introduce into evidence and considered 'privileged.'" The Board declined to find that Federal Rule of Civil Procedure 26(b)(4)(B) applied to black lung claims. Indeed, it determined that the federal procedural rules "for discovery do not apply to administrative proceedings, unless specifically provided by statute or regulation." However, the Board held that, on remand, the "ALJ should reconsider his Order Denying Motion to Compel in accordance with the standard for the scope of discovery provided at 29 C.F.R. § 18.14 in conjunction with the provisions of 20 C.F.R. § 725.455" under his "discretionary authority." The Board further stated:

> We reject, however, as overbroad, claimant's interpretation of Section 725.455 that an 'ALJ has an obligation to fully develop the record, develop the evidence, get all the evidence in . . ..'
>
> We also reject the position of claimant and the Director that the provision of 20 C.F.R. § 725.414, which requires the operator to submit evidence obtained to the district director and all parties, is extended to the administrative law judge.

VI. Effect of the three-year statute of limitations

See also ***Chapter* 5: What is the applicable law?**

Benefits Review Board. By *Order* dated January 30, 2006, the Board concluded that it would publish its *per curium* decision in *Stolitza v. Barnes and Tucker Co.*, 23 B.L.R. 1-93 (2005) wherein the Administrative Law 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 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 acknowledged 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 as 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.

◦ ***Fourth Circuit.*** 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. Rather than considering 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, the Board cited to *Adkins v. Donaldson Mine Co.*, BRB No. 89-2902, 1993 WL 13021683 (May 27, 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.'"

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 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.

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." Notably, however, the court did not automatically conclude that the statute of limitations does not apply to subsequent claims filed under 20 C.F.R. § 725.309. *Compare Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990).

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), the Board declined to apply the three year statute of limitations to a subsequent claim filed under 20 C.F.R. § 725.309 (2001) in a case arising in the Fourth Circuit. Citing to its decision in *Faulk v. Peabody Coal Co.*, 14 B.L.R. 1-18 (1990), the Board concluded that applying the statute of limitations only to an initial claim "satisfies the purpose of the statute of limitations by ensuring that employer is provided with notice of the current claim and of the potential for liability for future claims, in view of the progressive nature of pneumoconiosis."

In *Westmoreland Coal Co. v. Amick*, Case No. 04-1147 (4th Cir. Dec. 6, 2004) (unpub.), the court rejected the Board's holding that the three year limitations period set forth at 20 U.S.C. § 932(f) and 20 C.F.R. § 725.308(a) does not apply to subsequent claims filed under 20 C.F.R. § 725.309. In so holding, the court noted that "[n]either the statute nor the regulation . . . makes any distinction between initial and duplicate claims." The court noted that the subsequent claim was filed in March 2000 such that Employer would have to establish that a diagnosis of total disability due to pneumoconiosis was communicated to the miner before March 1997 in order for the claim to be time-barred. The court then reviewed the miner's testimony and concluded that no communication triggering the three year limitations period had been demonstrated.

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." 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. Said differently, 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). 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.

◦ ***Sixth Circuit.*** 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.

In *Ken Lick Coal Co. v. Director, OWCP [Lacy]*, Case No. 06-4512 (appeal pending before the Sixth Circuit Court of Appeals), the administrative law judge and Board refused to find the miner's claim time-barred under 20 C.F.R. § 725.308(a) on grounds that a physician's opinion of total disability due to pneumoconiosis was communicated to the miner's *attorney* more than three years before the miner filed his claim for benefits. The Director is arguing on appeal that the administrative law judge was correct in finding the claim timely filed as Employer failed to demonstrate that the physician's opinion was communicated to the miner or a party responsible for the care of the miner as required by the regulations. The Director's brief is due on March 22, 2007.

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.

Again, in a case arising in the Sixth Circuit, *Furgerson v. Jericol Mining, Inc.*, BRB Nos. 03-0798 BLA and 03-0798 BLA-A (Sept. 20, 2004) (unpub.), the Board vacated the ALJ's finding that a physician's opinion did not commence the running of the limitations period at § 725.308 after applying *Peabody Coal Co. v. Director, OWCP [Dukes]*, Case No. 01-3043 (6th Cir. Oct. 2, 2002)(unpub.). The Board held that it was improper for the ALJ to apply the *Dukes* holding, *to wit*: the statute of limitations is not triggered by a medical determination submitted in conjunction with a claim that is ultimately denied as that opinion would be in error. The Board noted that the Sixth Circuit declined to publish the panel decision in *Dukes* despite a motion to do so. Rather, the Board concluded that the *published* panel decision in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001) was controlling and it directed that "the administrative law judge must determine if (the physician) rendered a well-reasoned diagnosis of total disability due to pneumoconiosis such that his report constitutes a 'medical determination of total disability due to pneumoconiosis which has been communicated to the miner'" under § 725.308 of the regulations. *See also Bowling v. Whitaker Coal Corp.*, BRB Nos. 04-0651 BLA and 04-0651 BLA-A (Apr. 14, 2005) (unpub).

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.

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 (ALJ) decision . . . and the medical evidence of record."

▪ ***Seventh Circuit***. 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.

Chapter 25
Principles of Finality

I. Appellate decisions

C. Law of the case

By unpublished decision in *Mitchell v. Daniels Co.*, BRB Nos. 01-0364 BLA and 03-0134 BLA (Feb. 12, 2004) (unpub.), the Board held that the "law of the case" doctrine does not apply to a modification proceeding; rather, all judicially determined facts, including length of coal mine employment and designation of the proper responsible operator, must be reviewed *de novo* on modification. This is so even where the findings were previously affirmed by the Board on appeal. On appeal, the circuit court agreed in *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007).

III. Res judicata and collateral estoppel

A. Generally

Res judicata not applicable in subsequent claim. In *Sellards v. Director, OWCP*, 17 B.L.R. 1-77 (1993), the administrative law judge adjudicating a miner's second claim adopted the findings of fact made by another administrative law judge in the first claim, *to wit*, that the claimant worked as a "miner" and established ten years of coal mine employment in the first claim. The Board agreed with the Director that the adoption of these findings this constituted error and reasoned:

> The doctrine of *res judicata* generally has no application in the context of a duplicate claim, as the purpose Section 725.309(d) is to provide relief from the principles of *res judicata* to a miner whose physical condition worsens over time. (citation omitted). In addition, as the Director has noted, one of the criteria that must be met before the doctrine can be applied is that the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. (citation omitted). The Director was not able to fully litigate the issue of whether the miner was a coal miner, as the Director was not adversely affected by the prior Decision and Order denying benefits and, therefore, did not have standing to appeal the administrative law judge's finding that the labor performed by claimant constituted qualifying coal mine employment. (citations omitted). Thus, we vacate the administrative law judge's finding that claimant established at least ten years of coal mine employment and remand the case to the administrative law judge for further consideration of this issue.

Id. at 1-78.

B. Collateral estoppel

2. Examples of application

f. Miner's and survivor's claims—existence of pneumoconiosis

Prior award in miner's claim and no autopsy evidence

- Citation update: *Benefits Review Board. Collins v. Pond Creek Mining Co.*, 22 B.L.R. 1-229 (2003).
- Citation update: *Third and Fourth Circuits; special considerations*. *Sturgill v. Old Ben Coal Co.*, 22 B.L.R. 1-315 (2003).
- Citation update: On appeal, in *Howard v. Valley Camp Coal Co.*, Case No. 03-1706 (4th Cir. Apr. 14, 2004) (unpub.), the Fourth Circuit affirmed the decision of the Board and held that, because of an intervening change in the law, Employer was not collaterally estopped from re-litigating the existence of pneumoconiosis in a survivor's claim where benefits were awarded in the miner's earlier claim. Specifically, the court noted that, at the time benefits were awarded in the miner's claim, pneumoconiosis could be established under any one of the four methods set forth at 20 C.F.R. § 718.202(a)(1)-(4). Subsequently, however, the court issued *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2003), which required that the fact-finder weigh evidence under all four methods together to determine the presence of pneumoconiosis. As a result, the court held that "the requirement of identicality of issues was not satisfied" in the survivor's claim due to this intervening change in the law.

Miner's claim awarded under pre-2000 regulations

By unpublished decision in *Lester v. Royalty Smokeless Coal Co.*, BRB Nos. 06-0640 BLA and 06-0640 BLA-A (Mar. 27, 2007) (unpub.), the Board held that it is proper to apply collateral estoppel regarding the issue of pneumoconiosis where the miner's claim was awarded under regulations in effect prior to 2000 but the survivor's claim was filed after January 19, 2001 such the evidentiary limitations at 20 C.F.R. § 725.414 (2001) were in effect. In footnote 6 of its opinion, the Board stated:

> As noted by the administrative law judge, there were changes in the law since Judge Brenner's decision in the living miner's claim, based on the new regulations that became effective on January 19, 2001. (reference omitted). However, contrary to the administrative law judge's finding, the new evidentiary limitations at 20 C.F.R. § 725.414, and the amendment to the definition of pneumoconiosis at 20 C.F.R. § 718.201, did not change the method of proving pneumoconiosis under 20 C.F.R. § 718.202(a)(1)-(4).

Slip op. at 6, fn. 6.

Offensive non-mutual collateral estoppel

Fourth Circuit. In the survivor's claim of *Collins v. Pond Creek Mining Co.*, 468 F.3d 213 (4th Cir. 2006), the widow sought to rely on collateral estoppel to establish the presence of coal workers' pneumoconiosis in her claim based on the fact that the miner was awarded benefits under the Act in his claim. No autopsy evidence was offered in the survivor's claim. The Fourth Circuit cited to *Ziegler Coal Co. v. Director, OWCP*, 312 F.3d 332, 334 (7th Cir. 2002) and held that it agreed "with the Seventh Circuit that a coal miner's widow seeking survivor's benefits under the Black Lung Act may generally rely on the doctrine of offensive nonmutual collateral estoppel to establish that, as a result of his work in the mines, her deceased husband had developed pneumoconiosis."

Previously in the case, the Benefits Review Board cited to its unpublished decision in

Howard v. Valley Camp Coal Co., BRB No. 00-1034 (Aug. 22, 2001 (unpub.), *aff'd.*, 94 F.d App'x. 170 (4th Cir. 2004) (per curiam) to hold that collateral estoppel could not be applied in the survivor's claim because the miner's claim had been adjudicated prior to issuance of *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000)—when the miner could establish presence of the disease through any one of four methods at § 718.202(a) without weighing all the evidence together. Under *Compton*, however, the court required that all evidence be weighed together to determine whether pneumoconiosis is present. The Board held that this change in the legal standard for establishing the presence of pneumoconiosis was significant enough that the survivor could not use collateral estoppel to preclude re-litigation of the issue in her post-*Compton* claim.

On further consideration of *Howard*, the Fourth Circuit concluded that it was incorrect. The court reasoned that, in *Compton*, it "left unaltered the legal definition of pneumoconiosis, the methods by which a claimant may establish the existence of pneumoconiosis, and the statutory requirement that a claimant must prove that the coal miner developed pneumoconiosis by a preponderance of the evidence." As a result, the court concluded that the legal standard had not been changed and collateral estoppel could be applied in the survivor's claim to preclude re-litigation of the issue of the existence of coal workers' pneumoconiosis.

Having determined that the requirements for applying collateral estoppel in the survivor's claim were met, the court held that it must also determine whether application of the doctrine would be "unfair" to Employer. Citing to the Supreme Court's opinion in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), the court noted that the factors to be considered are: (1) whether the survivor could easily have joined in the earlier proceeding; (2) whether the employer "had an incentive in the prior action to have defended the action fully and vigorously"; (3) whether the employer has ever obtained a ruling that the miner did not suffer from pneumoconiosis; and (4) whether procedural opportunities are available to the employer in the survivor's claim and that were unavailable to the employer in the proceeding involving the living miner's claim.

In analyzing the factors, the court determined that the survivor could not have joined the proceeding involving her husband's claim because "spouses of living miners with pneumoconiosis are not entitled to seek benefits under the Act." The court further held that Employer had an incentive to present a vigorous defense in the miner's claim and that there was no finding subsequent to the award of benefits in the miner's claim that the miner did not suffer from pneumoconiosis. Finally, the court held that no procedural opportunities were available to Employer in the survivor's claim, which were not available to it in the miner's claim. Consequently, application of offensive non-mutual collateral estoppel to preclude re-litigation of the existence of coal workers' pneumoconiosis in the survivor's claim would not be "unfair" to Employer.

Seventh Circuit. In *Polly v. D & K Coal Co.*, 23 B.L.R. 1-77 (2005), the Board held that offensive collateral estoppel, where the plaintiff seeks to prevent a defendant from re-litigating issues decided against the defendant in an action brought by a different plaintiff, may be applied in a survivor's claim to establish coal workers' pneumoconiosis based on an award of benefits in the miner's claim.

Benefits Review Board. In previous decisions, the Board has made clear that collateral estoppel may be applied where (1) no autopsy evidence is offered in the survivor's claim, *Collins v. Pond Creek Mining Co.*, 22 B.L.R. 1-229 (2003), and (2) the legal standard for establishing coal workers' pneumoconiosis in the miner's claim is the same as that required for the survivor's claim, *Sturgill v. Old Ben Coal Co.*, 23 B.L.R. 1-159 (2003). However, in agreement with the Director's position on appeal, the Board remanded the claim and directed that the ALJ must

consider the employer's argument that "there had been no financial incentive for employer to vigorously litigate the miner's claim" since his federal award was fully offset by the state award received by the miner.

Citing to *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 4 (1979), the Board held that application of offensive non-mutual collateral estoppel "may be unfair in certain circumstances" even though the technical requirements of collateral estoppel have been met. The Board noted that the fact-finder is vested with "broad discretion" in determining whether application of the doctrine is "fair." As a result, the claim was remanded to the ALJ to consider whether use of offensive collateral estoppel would be "fair."

h. Untimely claim, application of *res judicata* to bar additional filings

In *Stolitza v. Barnes and Tucker Co.*, 23 B.L.R. 1-93 (2005), the Board held that the district director's denial of a prior claim on grounds that it was untimely under 20 C.F.R. § 725.308 "is *res judicata* and its effect is to bar the filing of the instant subsequent claim. Under the facts of the case, Claimant filed a petition for modification asserting that the district director incorrectly concluded that his prior claim was untimely. The Board held that the administrative law judge "erroneously considered the issue to be the propriety of the district director's 1992 denial of the prior claim as untimely filed . . .." As a result, the Board vacated his decision and reversed the administrative law judge's award of benefits.

[Additional case law has been added throughout this supplement chapter.]

II. Remand to the district director

A. District director's obligation to provide complete examination

See also Chapter 1: Introduction to the Claims Process, I(B), "Development of the record." Also II(H) of this Chapter.

1. Report credible on only one issue

In *Jeffrey v. Mingo Logan Coal Co.*, BRB Nos. 05-0107 BLA and 05-0107 BLA-A (Sept. 22, 2005) (unpub.)9, the Board upheld the ALJ's finding that Dr. Hussain, who conducted the Department of Labor-sponsored examination of Claimant, did not provide a reasoned opinion regarding the presence or absence of clinical pneumoconiosis. Notwithstanding this deficiency in the report, the Board agreed with the Director that his duty to provide a complete, credible pulmonary evaluation under § 725.406 was discharged. In particular, Dr. Hussain also found that Claimant was not totally disabled and the ALJ relied on this component of Dr. Hussain's opinion, along with other medical evidence of record, to deny benefits.

2. Reliance on erroneous information provided by claimant; no re-evaluation required

In *Broughton v. C & H Mining, Inc.*, BRB No. 05-0376 BLA (Sept. 23, 2005)(unpub.), the ALJ properly discredited the opinion of Dr. Simpao, who conducted the Department of Labor-sponsored examination of Claimant, on grounds that Dr. Simpao's diagnosis was based on 18 years of coal mine employment where the ALJ found 8.62 years established on the record. However, the Board denied Claimant's request that the claim be remanded for another pulmonary evaluation under § 725.406. In particular, the Board agreed with the Director that Claimant was provided with a pulmonary evaluation in compliance with § 725.406 but "Dr. Simpao's reliance on an incorrect coal mine employment history was not a flaw attributable to Dr. Simpao, but instead was an inaccuracy provided by claimant who reported his employment history to the physician."

H. Further evidentiary development—not permitted unless evidence incomplete as to an issue

The ALJ remanded a claim to the district director for further evidentiary development. The Board held that this was error where "the administrative law judge did not find the evidence to be incomplete on any issue before him but rather required the development of cumulative evidence." The Board determined that, "unless mutually consented to by the parties . . ., further development of the evidence by the administrative law judge is precluded." *Morgan v. Director, OWCP*, 8 B.L.R. 1-491, 1-494 (1986).

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9 It is noted that, in recent weeks, there have been a series of unpublished Board decisions with the same holdings as set forth in this summary.

V. Motions for discovery and proffers of evidence

B. Medical examinations

1. Development of evidence

a. District director's failure to act on request for medical examination

The ALJ properly resolved confusion caused by the district director's failure to act on Claimant's request for a medical examination by permitting the development of additional evidence. *Lefler v. Freeman United Coal Co.*, 6 B.L.R. 1-579, 1-580 and 1-581 (1983).

b. Director has standing to contest issue of whether claimant provided with complete pulmonary examination

The Director had standing to contest the issue of whether Claimant was provided a complete pulmonary examination at the Department of Labor's expense. *Hodges v. Bethenergy Mines, Inc.*, 18 B.L.R. 1-84 (1994).

c. Notice of examination must be provided to claimant's representative

Claimant's due process rights were violated where his representative was not served with notice, in contravention of 20 C.F.R. § 725.364, of the Director's request that Claimant undergo a medical examination. As a result, the Board struck the physician's report. *Casias v. Director, OWCP*, 6 B.L.R. 1-438, 1-444 (1983).

Similarly, the Board held that the ALJ properly refused to admit a non-qualifying blood gas study offered by Employer because the study was scheduled by Carrier without notifying Claimant's counsel. Although Employer provided more than 20 day's notice of its intent to proffer the evidence at the hearing, the ALJ concluded "that the procuring of the blood gas study without first notifying claimant's attorney effectively circumvented claimant's right to legal representation" in contravention of 20 C.F.R. § 725.364. It was also proper for the ALJ to deny Employer the opportunity to acquire another blood gas study because, under § 725.455, the ALJ is under no affirmative duty to seek out and receive all relevant evidence. *McFarland v. Peabody Coal Co.*, 8 B.L.R. 1-163, 1-165 (1985).

2. Requiring post-hearing examination

a. No "good faith" effort by employer to examine claimant at district director's level

In *Scott v. Bethlehem Steel Corp.*, 6 B.L.R. 1-760 (1984), the Board held that ALJ erred in requiring Claimant to submit to a post-hearing examination conducted by a physician of Employer's choice after determining that, while the claim was pending before the district director, Employer failed "to undertake a good faith effort to develop its evidence and, consequently, had waived its right to have . . . Claimant examined by a physician of its choice." *See* 20 C.F.R. § 725.414(e)(2). The Board stated:

> The administrative law judge initially determined that the employer had failed to proffer any good reason why it had delayed for almost a year after being apprised

of its potential benefits liability to schedule claimant for an examination.

. . .

> Furthermore, while the fact that the employer did not intentionally obstruct the expedient processing and adjudication of (the) claim is certainly relevant to the issue of whether the employer had made a 'good faith' effort to develop its evidence, that determination, in and of itself, is not sufficient to compel the claimant to submit to a physical exam conducted by employer's physician post-hearing.

Id. at 1-764.

In *Pruitt v. USX Corp.*, 14 B.L.R. 1-129 (1990), the Board held that Employer's failure to engage in "good faith" development of the evidence at the district director's level may result in a waiver of its right to have Claimant examined by a physician of its choice or to have Claimant's evidence reviewed by a physician of its choice. *See also Hardisty v. Director, OWCP*, 7 B.L.R. 1-322 (1984), *aff'd.*, 776 F.2d 129, 8 B.L.R. 2-72 (7th Cir. 1985); *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984); *Bertz v. Consolidation Coal Co.*, 6 B.L.R. 1-820 (1984).

In *Morris v. Freeman United Coal Mining Co.*, 8 B.L.R. 1-505 (1986), the Board held that, because Employer failed to contest the district director's denial of its request to have Claimant examined and took no further action in the two years prior to the hearing, the ALJ properly concluded that Employer waived its right to have Claimant examined.

b. Proper to require post-hearing examination for purpose of filing evidence responsive to late evidence

In *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984), Claimant contended that the ALJ improperly permitted Employer the opportunity to conduct a post-hearing examination. The Board noted that the ALJ admitted an x-ray interpretation offered by Claimant at the hearing, which was not exchanged in accordance with the 20-day rule. As a result, the Board concluded that the ALJ properly left the record open for 60 days to permit Employer the opportunity to submit rebuttal evidence. The Board further determined that Employer had the right to have Claimant re-examined during this period and to submit the post-hearing report before the record closed.

However, in *Owens v. Jewell Smokeless Coal Corp.*, 14 B.LR. 1-47 (1990)(en banc), the Board concluded that an employer's opportunity to respond to evidence not exchanged in accordance with the 20-day rule does not automatically include having Claimant re-examined.

3. ALJ ordered medical evaluation

a. Evaluation/Remand is proper

Record is incomplete

Before the ALJ may order further development of the record, s/he must make a determination that the record is incomplete as to one or more of the contested issues. *Conn v. White Deer Coal Co.*, 6 B.L.R. 1-979 (1984).

The ALJ remanded a claim to the district director for further evidentiary development. The

Board held that this was error where "the administrative law judge did not find the evidence to be incomplete on any issue before him but rather required the development of cumulative evidence." The Board determined that, "unless mutually consented to by the parties . . ., further development of the evidence by the administrative law judge is precluded." *Morgan v. Director, OWCP*, 8 B.L.R. 1-491, 1-494 (1986).

If the ALJ determines that the documentary evidence is incomplete with regard to an issue to be adjudicated, the claim may be remanded to the district director for further processing or the parties may be afforded reasonable time to submit such evidence pursuant to 20 C.F.R. § 725.456(e). *King v. Cannelton Industries, Inc.*, 8 B.L.R. 1-146, 1-148 (1985) (development of additional medical evidence is proper when the ALJ, questioning the validity of blood gas studies and seeking to learn more about Claimant's condition, permitted Employer the opportunity to obtain a post-hearing blood gas study and permitted Claimant 30 days to respond). Further, admission of a post-hearing examination of Claimant under 20 C.F.R. § 725.456(e) was proper where the ALJ wanted to learn more about the effects of Claimant's back injury. *Lefler v. Freeman United Coal Co.*, 6 B.L.R. 1-579 (1983).

Department's obligation to provide complete pulmonary evaluation

The Board has held that the district director has the obligation of providing Claimant with a complete pulmonary examination in an original claim, or in subsequent claims filed under 20 C.F.R. § 725.309 of the regulations. *Hall v. Director, OWCP*, 14 B.L.R. 1-51 (1990)(en banc). *See also Pettry v. Director, OWCP*, 14 B.L.R. 1-98 (1990)(en banc); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 B.L.R. 2-25 (8th Cir. 1984). The Department-sponsored medical evaluation must address all elements of entitlement. *Hodges v. Bethenergy Mines, Inc.*, 18 B.L.R. 1-84 (1994).

Claimant did not cooperate in initial evaluation

The Board remanded a claim where the ALJ failed to discuss Claimant's refusal to attend a medical examination at Employer's request. The ALJ's finding that the issue was moot after concluding that the named Employer was not responsible for the payment of benefits was reversed, and the ALJ was required to address the issue on remand. *Settlemoir v. Old Ben Coal Co.*, 9 B.L.R. 1-109 (1986).

It was proper under 20 C.F.R. § 725.456(e) for the ALJ to order Claimant to undergo a second Employer-procured examination where the pulmonary function study conducted as part of the first examination could not be interpreted due to Claimant's poor effort. *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27 (1987).

However, the Board has also held that Employer received a full and fair hearing despite the fact that the ALJ denied its Motion to Require Claimant's Cooperation on a Pulmonary Function Study. Employer argued that the record contained "ample evidence" that Claimant did not cooperate during a prior pulmonary function study. The Board held that Employer did not establish "substantial prejudice" as a result of the ruling because a nonqualifying study, even if valid, would not have sustained Employer's burden. *Lafferty v. Cannelton Industries, Inc.*, 12 B.L.R. 1-190, 1-192 and 1-193 (1989).

b. Failure to attend ALJ ordered medical examination

Dismissal held to be proper

The ALJ may order Claimant to submit to a post hearing physical examination and may dismiss a claim where the miner unreasonably fails to attend. In *Goines v. Director, OWCP*, 6 B.L.R. 1-897 (1984), Claimants refused to attend physical examinations, which were scheduled by the district director and ordered by the ALJ. In support of their refusal, Claimants submitted two physicians' opinions stating that, due to Claimants' poor health, further stress testing including x-ray studies and pulmonary function and blood gas studies "would be hazardous to the claimants and should be avoided." The Board affirmed the ALJ's requirement that Claimants undergo physical examinations, which did not include stress testing or x-ray studies, and it upheld the ALJ's dismissal of the claims based upon Claimants' failure to comply with his lawful orders.

Dismissal improper; further evaluation contraindicated by treating physician

Dismissal was improper where testimony supported a treating physician's opinion that further blood gas testing was contraindicated. Thus, where Claimant's physician stated that further blood gas testing was not advisable due to Claimant's history of phlebitis and thrombosis, it was proper for the ALJ: (1) to decline to require Claimant to undergo such testing; and (2) to deny Employer's motion to dismiss for Claimant's failure to attend the examination. *Bertz v. Consolidation Coal Co.*, 6 B.L.R. 1-820 (1984).

c. Refusal to attend medical evaluation; refusal to cooperate

In a claim filed prior to January 19, 2001, the Board held that Employer has a right to request a physical examination of Claimant in order to ensure a "full and fair hearing." The Board noted that Employer is not limited to only one examination or to an examination by the same physician. Thus, where the record revealed that the pulmonary function study could not be interpreted by Employer's physician due to poor effort, it was proper for the ALJ to order a second examination. *Blackstone v. Clinchfield Coal Co.*, 10 B.L.R. 1-27, 1-29 (1987).

Employer may have the miner examined more than once, either by the same physician or by different physicians of Employer's choosing. It is within the ALJ's discretion to compel Claimant to submit to a second Employer-procured examination. *King v. Cannelton Industries, Inc.*, 8 B.L.R. 1-146 (1985), *aff'd. mem.*, 811 F.2d 1505 (4th Cir. 1987) (it was proper for the ALJ to order Claimant to submit to further blood gas testing where the validity of testing already conducted was questioned; the ALJ properly left the record open to allow Claimant the opportunity to respond to the post-hearing blood gas study results).

4. Post-hearing submission of medical evaluation

For additional discussion on the submission of pre- and post-hearing depositions, see **Chapter 28: Rules of Procedure and Evidence**.

In *Thomas v. Freeman United Coal Mining Co.*, 6 B.L.R. 1-739 (1984), the Board cited to the factors set forth in *Lee v. Drummond Coal Co.*, 6 B.L.R. 1-544 (1983) (admission of post-hearing depositions) as instructive on the issue of admission of post-hearing medical evaluations. Under *Lee*, post-hearing depositions may be obtained with the permission, and in the discretion, of the ALJ pursuant to 20 C.F.R. § 725.458 of the regulations. The party taking the deposition "bears the burden of establishing the necessity of such evidence." Among the factors to consider in determining whether to admit post-hearing depositions are the following: (1) whether the proffered deposition would be probative, and not merely cumulative; (2) whether the party taking the deposition took reasonable steps to secure the evidence before the hearing or it is

established that the evidence was unknown or unavailable at any earlier time; and (3) whether the evidence is reasonably necessary to ensure a fair hearing. Under the facts of *Lee*, the ALJ properly refused to permit a post-hearing deposition of a physician for the purpose of clarifying his earlier report. On the other hand, it was an abuse of discretion for the ALJ to refuse the physician's post-hearing deposition where he commented on additional medical evidence which was unknown prior to the hearing because the opposing party failed to fully answer interrogatories. Due process would be satisfied in permitting the post-hearing deposition as the opposing party would have an opportunity to cross-examine the physician during the deposition.

Note, however, that submission of a post-hearing report based upon a pre-hearing medical examination should not be automatically excluded as a violation of the 20-day rule. The Board has held that, where Claimant was examined shortly before the 20-day deadline commenced to run, but the report was not available for submission until after the hearing, "good cause" was established for its submission. However, the Board also noted that "[b]ecause employer never received a copy of the report and because the administrative law judge appears to have been unaware of this fact when employer moved to close the record, . . . due process requires that the case be remanded and the record be reopened for 60 days. *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815 (1984).

a. Properly admitted

Evaluation occurred prior to hearing

"Good cause" was established when Claimant submitted a post-hearing report of a medical examination, which occurred more than 20 days prior to the hearing, but the report was not received until after the hearing. Due process was satisfied where the ALJ also gave Employer 60 days in which to submit responsive evidence. *Pendleton v. U.S. Steel Corp.*, 6 B.L.R. 1-815 (1984).

Responsive to evidence filed on eve of 20-day deadline

After the hearing, the ALJ properly admitted re-readings of x-rays by both the Director and Employer "in fairness" to the parties where Claimant's original reading was submitted in compliance with the 20-day rule by only a few days. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

b. Properly excluded

Delay in obtaining evidence

Refusal to reopen the record is proper where Claimant did not establish "good cause" for failure to obtain a physician's affidavit earlier or to make a timely request that the record remain open. In applying the principles of *Lee* to admission of post-hearing documentary evidence, the Board held that the ALJ properly excluded a post-hearing affidavit from consideration where Claimant did not request that the record be left open for submission of the affidavit. The evidence was neither obtained, nor submitted, before the ALJ issued a decision denying benefits. *Thomas v. Freeman United Coal Mining Co.*, 6 B.L.R. 1-739 (1984).

Failure to timely request extension of time

Haer v. Penn Pocahontas Coal Co., 1 B.L.R. 1-579 (1978) (the ALJ properly denied an

untimely written request for extension of time to submit post-hearing evidence). *See also Thomas v. Freeman United Coal Mining Co.*, 6 B.L.R. 1-739 (1984); *Scott v. Bethlehem Steel Corp.*, 6 B.L.R. 1-760 (1984).

5. Failure to consent to release of medical records; exclusion of evidence

It is imperative that due process, *i.e.* notice and an opportunity to be heard, be observed. In *Kislak v. Rochester & Pittsburgh Coal Co.*, 2 B.L.R. 1-249 (1979), the Board held that an ALJ improperly considered evidence that Employer could not review because the miner would not give his consent to a release of medical records.

VII. Dispose of a claim

A. Withdrawal

2. After applicability of 20 C.F.R. Part 725 (2001)

In *Anderson v. Kiah Creek Mining Co.*, BRB No. 03-0828 BLA (May 24, 2004) (unpub.), the Board affirmed the administrative law judge's order granting withdrawal of the miner's claim under 20 C.F.R. § 725.306 (2001) as interpreted in *Lester v. Peabody Coal Co.*, 22 B.L.R. 1-183 (2002)(en banc) and *Clevenger v. Mary Helen Coal Co.*, 22 B.L.R. 1-193 (2002)(en banc). With regard to medical evidence developed in connection with the withdrawn claim, the Board held that such evidence would not be included with the filing of any additional claims by the miner. However, the Board stated that a party would not be "precluded from submitting the evidence developed in (the withdrawn) claim for inclusion in a new claim record, subject to the evidentiary limitations or with a showing of good cause for its inclusion." *See also Feltner v. Whitaker Coal Corp.*, BRB No. 04-0823 BLA (Apr. 27, 2005); *Sizemore v. LEECO, Inc.*, BRB No. 04-0514 BLA (Feb. 7, 2005) (unpub.); *Stamper v. Westerman Coal Co.*, BRB No. 05-0946 BLA (July 26, 2006) (unpub) (in a footnote, the Board cited to *Bailey v. Dominion Coal Corp*., 23 B.L.R. 1-85 (2005) and 20 C.F.R. § 725.306(b) to state that, if a prior claim is withdrawn, "[t]he effect of treating the claim as if it had never been filed precludes the automatic inclusion of the evidence from that claim in the record of any subsequently filed claim").

a. No decision on merits has been issued

In *Keene v. Dominion Coal Co.*, BRB No. 05-0384 BLA (Sept. 30, 2005) (unpub.), the Board held that the ALJ had authority to grant Claimant's request to withdraw his claim where the written request was submitted after the district director issued a schedule for the submission of additional evidence, but prior to the issuance of a decision on the merits.

b. Employer's interests not considered

By published decision in *Bailey v. Dominion Coal Corp.*, 23 B.L.R. 1-85 (2005), the Board affirmed the Administrative Law Judge's granting of Claimant's request to withdraw his claim. Under the facts of the case, Claimant submitted a request to withdraw his claim with the district director after receiving an unfavorable opinion from the physician conducting the Department-sponsored examination. Claimant's representative asserted "[i]t is impossible to win his claim because he does not meet the disability standards" and it would result in "great cost and time to the claimant and to the Department of Labor to continue a case that we feel we cannot win at this time." The district director granted Claimant's request to withdraw on grounds that it was in his best interests and the Administrative Law Judge agreed. Pursuant to 20 C.F.R. § 725.306(b),

the claim was considered not to have been filed and the Administrative Law Judge declined to require automatic admission of medical evidence generated in conjunction with the withdrawn claim if Claimant should again file a claim.

On appeal to the Board, Employer argued that it was not in Employer's best interests to have the claim withdrawn as it "paid to have claimant examined twice, thereby developing evidence that will not be included in the record, because of claimant's request for withdrawal." Moreover, Employer posited that this is a "waste of employer's financial resources and will hamper employer's ability to defend itself in any future claim."

The Board disagreed. It adopted the Director's position that § 725.306(a)(2) allows for withdrawal of a claim, if in the best interests of a claimant, prior to issuance of an effective decision. The Board concluded that the adjudicator is not required to consider Employer's interests. In addition, the Board stated that "employer has not shown a clear and specific basis for denial of claimant's request for withdrawal in this case."

The Board then rejected Employer's argument that evidence generated in conjunction with the withdrawn claim should be automatically included in the record of any subsequent filing without being counted under the evidentiary limitations at § 725.414 of the regulations. Employer reasoned that, in any future claim, it "risks showing the new examining physician too much relevant evidence" unless a ruling is made to specifically include evidence underlying the withdrawn claim. The Administrative Law Judge declined to rule on the issue because she determined that, once the request to withdraw a claim is granted, it is considered not to have been filed under § 725.306(b). As a result, she was without authority to order the automatic inclusion of evidence into the record of any future claim. The Board agreed.

X. Amend the list of contested issues (CM-1025) (revised)

A. Issues listed on the CM-1025

1. Limitation to scope of litigation

The ALJ erred in permitting the Director, without reason, to litigate issues that were easily ascertainable while the case was pending before the district director, but were not checked as contested on referral by the district director. *Thorton v. Director, OWCP*, 8 B.L.R. 1-277, 1-280 (1985). *See* 20 C.F.R. § 725.463(b) (2000) and (2001).

In *Chaffins v. Director, OWCP*, 7 B.LR. 1-431 (1984), the ALJ properly declined to consider the issue of length of coal mine employment where the Director merely argued that because of a clerical error, the issue was not "checked" on the CM-1025. The Director further stated that the issue had been raised in writing before the district director on prior occasions. The Board held:

> [W]e squarely reject the implication of the Director's position on appeal; that he has no duty with respect to identifying the issues to be heard and that the administrative law judge and claimant must look behind the statement of contested issues in the chance that a clerical error was made in its preparation.

Similarly, in *Simpson v. Director, OWCP*, 6 B.L.R. 1-49 (1983), the ALJ erred in considering whether Claimant suffered from pneumoconiosis, where the issue was not listed as contested. *See also Perry v. Director, OWCP*, 5 B.L.R. 1-527 (1982)(pneumoconiosis not listed as contested); *Kott v. Director, OWCP*, 17 B.L.R. 1-9 (1992) (error to deny benefits on grounds that

Claimant failed to establish coal workers' pneumoconiosis where the issues were not listed as contested on the Form CM-1025); *Mullins v. Director, OWCP*, 11 B.L.R. 1-132 (1988)(en banc) (eligibility of survivor conceded if reasonably ascertainable at district director's level but not raised at that level by the opposing party).

In an unpublished decision, *Linton v. Director, OWCP*, Case No. 85-3547 (3rd Cir. June 10, 1986)(unpub.), the Third Circuit held that Claimant could not raise the issue of an employer's failure to timely controvert the claim at the hearing because the issue was reasonably ascertainable while the case was pending before the district director.

2. Permitting new issues to be added at hearing

a. Raising a new issue

If a new issue is presented at the hearing, the ALJ has the option of remanding the claim to the district director for consideration of the new issue, or s/he may refuse to consider the issue at the hearing. *Callor v. American Coal Co.*, 4 B.L.R. 1-687 (1982), *aff'd. sub. nom.*, *American Coal Co. v. Benefits Review Board*, 738 F.2d 387, 6 B.L.R. 2-81 (10th Cir. 1984).

b. Waive challenge to new issue

In *Grant v. Director, OWCP*, 6 B.L.R. 1-619 (1983), Claimant waived his right to challenge litigation of issues not marked as contested because Claimant failed to object when the ALJ expressly stated the issues as those to be decided at the hearing. *See also Prater v. Director, OWCP*, 87 B.L.R. 1-461 (1986) (Claimant's counsel failed to object to Employer's motion to enlarge issues at the hearing).

In *Carpenter v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-784 (1984), the ALJ properly decided certain medical issues, which were not listed as contested on the CM-1025, because the record supported a finding that both parties (1) developed medical evidence on the issues, and (2) were aware of each other's intent to litigate the issues.

3. Amending contested issues while case pending before ALJ

The regulatory provisions at 20 C.F.R. § 725.463(b) permit new issues to be raised before the ALJ if they were not "reasonably ascertainable" while the claim was pending at the district director's level. In *Thorton v. Director, OWCP*, 8 B.L.R. 1-277 (1985), the ALJ erred in adjudicating issues raised one week before the hearing. The Board determined that the issues were ascertainable while the claim was pending before the district director.

B. Error to conduct hearing where issues not specified or developed

It is error for an ALJ to conduct a hearing where the issues were not specified by the district director. Indeed, the Board held that it is proper to remand a claim in accordance with 20 C.F.R. § 725.456(e) to develop the evidence and identify contested issues prior to referral. *Stidham v. Cabot Coal Co.*, 7 B.L.R. 1-97, 1-101 (1984).

C. Error to decide issue that parties agreed not to litigate

Fundamental fairness was violated and resulted in prejudicial error when the ALJ considered an issue which the parties had agreed not to litigate. Specifically, the Board reversed an ALJ's decision to consider length of coal mine employment where (1) it was not listed as an issue on the CM-1025, and (2) it was not submitted as an issue in writing to the district director. As a result, the Board concluded that Claimant was denied due process. *Derry v. Director, OWCP*, 6 B.L.R. 1-553, 1-555 (1983) (the parties stipulated to ten years of coal mine employment).

In *Kott v. Director, OWCP*, 17 B.L.R. 1-9 (1992), the ALJ erred in determining that Claimant did not suffer from pneumoconiosis arising out of coal mine employment. Neither issue was marked as contested on the CM-1025, or raised in writing before the district director. The Board concluded that the Director conceded the issues of pneumoconiosis related to coal mine employment.

D. Remand for payment of benefits; withdrawal of controversion of issues

It is proper to accept the Director's "Motion to Remand for the Payment of Benefits" as a withdrawal of controversion of all issues. *Pendley v. Director, OWCP*, 13 B.L.R. 1-23 (1989)(en banc). On the other hand, Employer's agreement to withdraw its controversion of Claimant's eligibility for medical benefits in return for Claimant's agreement to first submit all future medical expenses to alternative health carriers is illegal. The agreement would deprive Claimant of protection afforded him under the regulations. 20 C.F.R. §§ 725.701-725.707. *Gerzarowski v. Lehigh Valley Anthracite, Inc.*, 12 B.L.R. 1-62 (1988). *See also* **Chapter 28: Rules of Procedure and Evidence.**

D. Failure to file a timely controversion

In *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 B.L.R. 2-238 (6th Cir. 1989), the Sixth Circuit held that it is within the jurisdiction of the ALJ to determine, *de novo*, whether Employer established "good cause" for its failure to timely controvert a claim. The Board adopted this holding in *Krizner v. U.S. Steel Mining Co.*, 17 B.L.R. 1-31 (1992)(en banc), wherein it held that any party dissatisfied with the district director's determination on the issue of timeliness of filing

a controversion or finding "good cause" for an untimely filing is entitled to have the issued decided *de novo* by an ALJ.

If the ALJ finds that Employer failed to timely controvert the claim, then entitlement is established. *See* 20 C.F.R. § 725.413(b)(3) (2000) and § 725.412(b) (2001). *See also* **Chapter 28: Rules of Procedure and Evidence.**

Chapter 27
Representatives' fees and representation issues

I. Entitlement to fees

A. Notice of appearance

In *R.R. v. Marine Terminals Corporation East*, BRB No. 07-0920 (Sept. 17, 2007) (unpub.), a case arising under the Longshore and Harbor Workers' Compensation Act, the Board affirmed the administrative law judge's finding that an attorney who is licensed to practice law in one jurisdiction (Virginia) may represent the claimant in another jurisdiction (North Carolina) pursuant to 29 C.F.R. § 18.34(g)(1).

C. Privacy Act, effect of [new]

In *Doe v. Chao*, 435 F.3d 492 (4th Cir. 2006), a case stemming from a federal black lung claimant's pursuit of damages under the Privacy Act for the "wrongful disclosure of his Social Security number" by this Office, the court affirmed the district judge's finding that "Doe is entitled to costs and reasonable attorney fees even though he suffered no actual damages," and remanded the case for recalculation of attorney fees. The court rejected the government's argument that "because Doe sought money damages from the United States, and was awarded none, the only reasonable attorney fee is no fee at all." However, citing to *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), the court held that, in determining the reasonableness of a fee, the "most critical factor" is the "degree of success obtained." The court reasoned:

> Doe failed to recover any monetary award, despite the fact that damages were the primary goal of his suit. Because his underlying litigation was largely unsuccessful, it is unlikely that Doe may recover significant attorney fees.

Notably, the court concluded that it would not "disturb the district court's calculation of Buck Doe's litigation costs" as 5 U.S.C. § 552a(g)(4)(B) permits an award of "the actual costs of his action unrestrained by any reasonableness inquiry."

In *Doe v. Chao*, 2006 WL 2038442 (W.D. Va. July 19, 2006), the district court awarded $15,000.00 to Buck Doe in attorney's fees under the Privacy Act of 1974 and the Equal Access to Justice Act against the Department of Labor "for its practice of listing social security numbers on black lung multi-captioned hearing notices."

III. Amount of the fee award

A. Generally

2. Enhancement of the fee for delay—proper for employer but not Director, OWCP

Citation update: *Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003).

In *Hawker v. Zeigler Coal Co.*, BRB Nos. 99-0434 BLA and 04-0398 BLA (June 14, 2005) (unpub.), Employer challenged an award of interest on attorney's fees under 20 C.F.R. § 725.608(c) (2004) stating that the Department "lacks the authority to increase an award of attorney fees by assessing interest through a regulation." Employer noted that the claims at

issue were filed before the effective date of the amended regulations and "the previous regulations did not provide for mandatory interest payable from the date of the award of attorney fees. Citing to *Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003), the Board held that "no new burden was imposed upon employer by application of Section 725.608, as attorney's fees paid by responsible operators were subject to enhancement for delay before the regulation's effective date of January 19, 2001."

D. The hourly rate and hours requested

In *J.V. v. Edd Potter Co.*, BRB No. 07-0292 BLA (Jan. 25, 2008) (unpub.), the Board upheld the administrative law judge's award of $250.00 per hour for counsel's services in the successful prosecution of a claim for benefits. The Board rejected Employer's proclaimed "uncontradicted evidence" that the "market rate for black lung attorneys in the geographic region of claimant's practice areas is no more than $140.00 per hour." Rather, the Board held that the "administrative law judge properly determined that Section 725.366(b) is controlling." In applying the factors set forth in the regulation, the administrative law judge noted that he had observed claimant's counsel's "handling of this case" and found that "that quality of representation was very good." Further, the Board upheld the administrative law judge's approval of 47.25 hours of legal services, including the judge's determination "that time counsel spent conferring with his client and explaining decisions issued in this case was reasonable and compensable." *See Marcum v. Director, OWCP*, 2 B.L.R. 1-894 (1980).

In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the court upheld the ALJ's award of $225.00 per hour to Claimant's counsel for successful prosecution of a black lung claim. Employer argued that counsel normally charged $175.00 for most civil litigation matters. The court concluded that the ALJ properly considered the factors set forth at 20 C.F.R. § 725.366(b) in approving of a higher hourly rate.

In *O.R.H. v. Blue Star Coal Corp.*, BRB No. 07-0124 BLA (Oct. 30, 2007) (unpub.), the Board affirmed the administrative law judge's attorney fee award to Claimant's counsel, Mr. Wolfe, at an hourly rate of $300.00. The administrative law judge noted that Claimant's counsel was "highly experienced" in the area of federal black lung and that his office was "one of the few in the area that accepted these types of cases." In affirming the attorney fee award, the Board cited to *Whitaker v. Director, OWCP,* 9 B.L.R. 1-216 (1986) and held that fee decisions in other cases wherein the administrative law judge awarded a lower hourly rate to Claimant's counsel were not binding in this case.

VIII. Qualifications of the representative

<u>*Criminal convictions.*</u> In *United States v. Davis*, 490 F.3d 541 (6th Cir. 2007), the court upheld the criminal convictions of Carolyn Sue and Otis Davis for aiding and abetting in Medicare fraud and obstructing a criminal investigation. The court noted that the charges "stemmed from the Davis's orchestration of and participation in a scheme to supply oxygen to coal miners suffering from black lung disease." The court noted that Ms. Davis "was instrumental in the founding of the Kentucky Black Lung Association . . ., an organization designed to help miners obtain black lung benefits, as well as other goods and services they might need in order to live with the disease."

I. Applicability of Federal Rules of Civil Procedure

Discovery of information conveyed by counsel to expert; FRCP 26(b)(3).

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board upheld the administrative law judge's denial of Claimant's motion to compel discovery from Employer. In particular, Claimant sought certain medical evidence generated by Employer in the claim. The administrative law judge applied 29 C.F.R. § 18.14 to find that, while the information sought by Claimant was not "privileged," Claimant had not demonstrated "substantial need of the materials" or that s/he would be "unable without undue hardship to obtain a substantial equivalent of the materials by other means" as required by § 18.14 of the regulations. It was noted that Claimant "had well-prosecuted his claim" and the evidence sought would not be "admissible given the evidentiary limitations and the quantity of evidence already submitted." *See also Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-71 (1997).

Motion to compel discovery from employer; FRCP 35(b)

In *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc), the Board upheld the administrative law judge's denial of Claimant's motion to compel discovery from Employer. In particular, Claimant sought certain medical evidence generated by Employer in the claim. The administrative law judge applied 29 C.F.R. § 18.14 to find that, while the information sought by Claimant was not "privileged," Claimant had not demonstrated "substantial need of the materials" or that s/he would be "unable without undue hardship to obtain a substantial equivalent of the materials by other means" as required by § 18.14 of the regulations. It was noted that Claimant "had well-prosecuted his claim" and the evidence sought would not be "admissible given the evidentiary limitations and the quantity of evidence already submitted." *See also Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-71 (1997).

The Board further held that the administrative law judge properly declined to grant Claimant's motion to compel under FRCP 35(b). The Board agreed that FRCP 35(b) provides that evidence related to a physical examination of the miner is discoverable without the need to establish "undue hardship" or "substantial need." However, the Board noted that Employer "has asserted that all documents resulting from the physical examination of the miner (had) already been duly exchanged" such that FRCP 35(B) was inapplicable. As a result, the Board affirmed the administrative law judge's denial of Claimant's motion to compel on this ground as well.

II. Authority of the administrative law judge, generally

K. Recusal

In *Consolidation Coal Co. v. Director, OWCP [Williams]*, 453 F.3d 609 (4th Cir. 2006), *cert. denied* (Mar. 19, 2007), the court affirmed the Administrative Law Judge's decision declining to recuse himself. Employer argued that the Judge's comments at the hearing, and in a discovery order, demonstrated bias against coal companies. The court reasoned that "the tone and tenor of frustration expressed in the ALJ's comments do not, in and of themselves, establish bias against Consolidation" and, "given counsel's behavior, it is not surprising that the ALJ became annoyed." The court further denied Employer's challenge to a discovery order as indicative of

bias, reasoning that "judicial rulings alone almost never constitute a valid basis for a bias or partiality ruling."

L. Failure to comply with order

1. Adverse inferences

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 applied an adverse inference of bias to the reports of Employer's medical experts because of Employer's refusal to comply with the judge's discovery orders. Specifically, Employer refused to respond to interrogatories, including how often its medical expert diagnosed pneumoconiosis. Because Employer failed to comply with the Judge's discovery order, the court found that the Administrative Law Judge properly treated Employer's expert medical reports "as if Consolidation had complied with discovery and as if its responses to that discovery had demonstrated significant bias by both witnesses toward employers as a class and [it's law firm's clients as a class]."

XI. Hearsay

D. Evidence that is lost or destroyed

Corrected case summary: In *Lewis v. Consolidation Coal Co.*, 15 B.L.R. 1-37 (1991), the Board held that, where autopsy slides were not available for review by Employer's physicians, Employer's right of cross-examination could be satisfied by deposing the prosector (or presenting the prosector's testimony at the hearing). The Board held that such right of cross-examination is consistent with the standard set forth in *Richardson v. Perales*, 402 U.S. 389, 405 (1971).

In *M.W. v. Director, OWCP*, BRB No. 07-0663 BLA (Mar. 13, 2008) (unpub.), on motion of the Director, the Board vacated the administrative law judge's decision and remanded the claim to the district director on grounds that the district director improperly referred the claim for adjudication under Part C, instead of Part B, of the regulations.10

Notably, the miner was awarded benefits in conjunction with his Part B claim filed on January 9, 1970. He received benefits until his death on October 29, 1982, after which the widow received survivor's benefits until she died on July 31, 2003. The miner's surviving disabled child then filed a claim for benefits on August 7, 2003. The district director determined that, because Claimant had not been receiving Part B benefits "with her mother when her mother died," then her July 2003 claim should be considered under Part C of the Act.

On appeal, the Director cited to 20 C.F.R. § 410.231(d) and asserted that "because claimant's survivor's claim was filed within six months of the widow's death, her claim was also governed by Part B of the Act and . . . the district director and the administrative law judge erred in adjudication this claim under Part C." The Board agreed. Further, the Board agreed with the Director to find that adjudication of the claim under Part C was not "harmless" because:

> . . . unlike Part C claims, in which the Director may participate, submit evidence, and argue against entitlement, SSA black lung hearings were non-adversarial, and, therefore, it was error for the Director to have participated in the proceedings in an adversarial capacity.

As a result, the administrative law judge's denial of benefits was vacated and the claim was remanded to the district director so that it could proceed under Part B.

10 Claims filed prior to July 1, 1973 were adjudicated by the Social Security Administration under "Part B" of the Federal Coal Mine Health and Safety Act at 30 U.S.C. §§ 921-925 and benefits were paid by the federal government. On the other hand, claims filed on or after January 1, 1974 are adjudicated by the Department of Labor under "Part C" of the Act, 30 U.S.C. §§ 931-945, and benefits are paid by the responsible operator or the Black Lung Disability Trust Fund.

VALIDATION OF REGULATIONS

The Department's amended black lung regulations challenged by the National Mining Association were upheld by the D.C. Circuit Court of Appeals in *National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) with the exception of a few provisions found to be impermissibly retroactive and a cost-shifting provision found to be invalid.

Regulatory provision	Case citation	Holding (valid/invalid)
725.101(a)(31)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid, but cannot be retroactively applied (NOTE: The Department revised its amended regulations to comport with the court's holding. *See* the amended language at § 725.2, 68 Fed. Reg. 69,930, 69,935 (Dec. 15, 2003)).
718.104(d)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid
718.201(a)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid
718.201(c)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002). *See also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004) *U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977 (11th Cir. 2004)	Valid (D.C. circuit court noted that this provision "simply prevents operators from claiming that pneumoconiosis is never latent and progressive") Citing with approval in *dicta*
718.204(a)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid, but cannot be retroactively applied (NOTE: The Department revised its amended regulations to comport with the court's holding.

	Midland Coal Co. v. Director, OWCP [Shores], 358 F.3d 486 (7th Cir. 2004)	*See* the amended language at § 718.2, 68 Fed. Reg. 69,930, 69,935 (Dec. 15, 2003)). Regulatory amendment at § 718.204(a) (2001) providing that total disability due to non-coal dust related impairment not preclude coal dust related impairment is valid and was applied in a pre-amendment case
725.205(c)(5)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332 (7th Cir. 2002)	Valid
725.212(b), 725.213(c), 725.214(d), and 725.219(d) dependents and survivors	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid, but cannot be retroactively applied (NOTE: The Department revised its amended regulations to comport with the court's holding. *See* the amended language at § 725.2, 68 Fed. Reg. 69,930, 69,935 (Dec. 15, 2003)).
725.309	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) *U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977 (11th Cir. 2004)	Valid Cited with approval in *dicta*
725.408 725.414	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) *National Mining Ass'n., et al. v.*	Valid

	Dep't. of Labor, 292 F.3d 849 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc); *Consolidation Coal Co. v. Director, OWCP [Williams]*, 453 F.3d 609 (4th Cir. 2006), *cert. denied* (Mar. 19, 2007).	Valid

725.456(b)(1)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid
725.459	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Invalid on its face (related to requiring Employer to pay for questioning Claimant's experts even where Claimant does not prevail) (NOTE: The Department revised its amended regulations to comport with the court's holding. *See* the amended language at § 725.456, 68 Fed. Reg. 69,930, 69,935 (Dec. 15, 2003)).
725.495	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid
725.504	*Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002)	Valid
725.608	*Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003)	Valid
725.701(e)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) *Glen Coal Co. v. Director, OWCP [Seals]*, Case Nos. 01-4014 and 02-3195 (6th Cir., Aug. 5, 2003) (unpub.)	Valid, but cannot be retroactively applied Validity of subsections (e) and (f) affirmed in *dicta*

		(NOTE: The Department revised its amended regulations to comport with the court's holding. *See* the amended language at § 725.2, 68 Fed. Reg. 69,930, 69,935 (Dec. 15, 2003)).