Supplement to the
Judges' Benchbook: Black Lung Benefits Act
(2008 Edition)

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In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-__, BRB Nos. 07-0812 BLA and 07-0812 BLA-A (July 30, 2008), the Board reiterated earlier holdings that "each party may submit one rebuttal x-ray interpretation for each x-ray interpretation that the opposing party submits in support of its affirmative case, even if the two affirmative-case interpretations are of the same x-ray." *See also Ward v. Consolidation Coal Co.*, 23 B.L.R. 1-151 (2006).

VI. Medical reports

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

10. Failure to explain why coal dust not contribute to respiratory disease or total disability, opinion not reasoned [new]

In *Island Creek Coal Co. v. Henline*, Case No. 07-1850 (4th Cir. July 9, 2008) (unpub.), the court affirmed the judge's weighing of medical evidence pertaining to the issue of disability causation and stated:

> . . . the ALJ reasonably determined that none of Island Creek's doctors satisfactorily explained why (Claimant's) total disability was not due to a coal-dust induced disease . . .. In employing this analysis, the ALJ did not improperly 'shift[] the burden of proof from the claimant to the employer,' as Island Creek claims he did. (citation omitted). Rather, he merely concluded their analysis was incomplete, and therefore that their opinions were not well-reasoned.

Slip op. at 2. Consequently, the court affirmed the award of benefits on appeal.

See also C.B. v. Bowman Coal Co., BRB No. 07-0320 BLA (July 23, 2008) (unpub.) (the Board upheld the judge's decision to accord the opinion of Employer's expert little weight on grounds that the expert "did not explain his conclusion that claimant's pulmonary condition is entirely attributable to smoking").

Chapter 4

Limitations on Admission of Evidence and the "Good Cause" Standard in Black Lung Claims

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CITATION CORRECTION: *Harris v. Old Ben Coal Co.*, 24 B.L.R. 1-13 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc).

I. Limitation of documentary medical evidence

A. Limitations are mandatory

3. Failure to object to evidence irrelevant [new]

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-__, BRB Nos. 07-0812 BLA and 07-0812 BLA-A (July 30, 2008), the Board held that failure to object to admission of evidence in excess of the limitations at 20 C.F.R. § 725.414 is irrelevant. Rather, such medical evidence in excess of the limitations must be excluded absent a finding of "good cause."

B. An original claim or a claim filed pursuant to 20 C.F.R. § 725.309 (2008)

3. The Department of Labor sponsored Examination, special circumstances

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-__, BRB Nos. 07-0812 BLA and 07-0812 BLA-A (July 30, 2008), with regard to the Department of Labor – sponsored pulmonary evaluation, the Board adopted the Director's position and reiterated its holding in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006) (unpub.), to hold that both Claimant and Employer could submit "rebuttal" to the Department-generated x-ray interpretation which, in this case, was interpreted as positive. Thus, the Board held that it was proper for the administrative law judge to allow Claimant to submit a positive interpretation of the same study as "rebuttal" to the opposing party's case. The Board concluded that,

with regard to the § 725.406 examination, a party is permitted "to respond to a particular item of evidence in order to rebut 'the case' presented by the opposing party."

In *dicta*, the Board also noted that if the Department-sponsored interpretation had been negative, Employer would have been allowed to submit another negative interpretation of the study to "rebut" Claimant's case.

D. Hospitalization and treatment records unaffected

2. Treatment records

a. Rebuttal of

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-__, BRB Nos. 07-0812 BLA and 07-0812 BLA-A (July 30, 2008), the Board held that biopsy evidence generated in the course of a miner's hospitalization or treatment does "not count against the claimant's affirmative and rebuttal biopsy reports under 20 C.F.R. § 724.414(a)(2)(i) and (ii)." Additionally, Employer is not entitled to submit "rebuttal" of treatment or hospitalization records, including biopsies generated as part of treatment or hospitalization. On the other hand, the Board noted that "a party can have its expert evaluate the biopsy tissue slides and submit the report as part of its affirmative evidence."

In addition, the Board adopted the Director's position and extended its holdings pertaining to autopsy evidence in *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc) to biopsy evidence to conclude that "a biopsy slide review can be in substantial compliance with 20 C.F.R. § 718.106 even if it does not include a gross macroscopic description of the tissue samples."

G. Autopsy and biopsy reports

3. Report of biopsy, defined

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-__, BRB Nos. 07-0812 BLA and 07-0812 BLA-A (July 30, 2008), the Board held that biopsy evidence generated in the course of a miner's hospitalization or treatment does "not count against the claimant's affirmative and rebuttal biopsy reports under 20 C.F.R. § 724.414(a)(2)(i) and (ii)." Additionally, Employer is not entitled to

submit "rebuttal" of treatment or hospitalization records, including biopsies generated as part of treatment or hospitalization. On the other hand, the Board noted that "a party can have its expert evaluate the biopsy tissue slides and submit the report as part of its affirmative evidence."

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

2. "Good cause," interpretations of 20 C.F.R. § 725.456(b)(1) (2008)

c. Evidence generated by opposing party [new]

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-__, BRB Nos. 07-0812 BLA and 07-0812 BLA-A (July 30, 2008), the Board declined to find "good cause" for Claimant to submit a positive x-ray interpretation obtained by Employer based on Claimant's argument that the "x-ray interpretation was generated by employer and the result was against employer's interest."

III. Witness testimony

A. Limitations on expert medical testimony

4. Right of cross-examination of treating physician [new]

In *L.P. v. Amherst Coal Co.*, 24 B.L.R. 1-__, BRB No. 07-0183 BLA (July 23, 2008) (on recon. en banc), the Board adopted the Director's position and held that a party has the right to cross-examine a physician whose report is admissible under 20 C.F.R. § 718.104(d), regardless of whether the physician prepared one of the two affirmative "medical reports" for a party. In so holding, the Board stated that Employer's cross-examination of the miner's treating

physician was necessary "to ensure the integrity and fundamental fairness of the adjudication of the survivor's claim *and* for a full and true disclosure of the facts." However, the Board circumscribed its decision as follows:

> In rendering this holding, we have recognized only a right to cross-examine a physician whose report is admissible under Section 725.414(a)(4), if the physician's report is material and cross-examination is necessary to ensure the integrity and fundamental fairness of the adjudication of the claim and for a full and true disclosure of the facts. We decline to address the question of whether there is a general right to rebut the evidence admitted under Section 725.414(a)(4) because the circumstances of this case do not squarely present the issue.

Slip op. at 7-8.

The Board further noted that "adoption of the evidentiary limitations set forth in Section 725.414 represented a shift from a system that favored the admission of all relevant evidence to a system that balanced this preference with a concern for fairness and the need for administrative efficiency." From this, the Board concluded:

> Consistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations, therefore, if the administrative law judge determines that the evidentiary limitations preclude that consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties should then have the opportunity to make good cause arguments under Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

Slip op. at 8.

Chapter 7

Designation of Responsible Operator

V. Requirements for responsible operator designation

F. Cumulative employment of one year or more and the 125-day rule

7. Time spent accruing workers' compensation not count towards one year of employment [new]

In *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), the administrative law judge found that Employer was properly designated as the responsible operator although Claimant subsequently worked for another operator (Double B Mining Company) for six months and then received workers' compensation from Double B for nine years due to a back injury.

The Board affirmed the judge's opinion and noted that "claimant did not receive any pay from Double B after 1985 and did not engage in coal mine employment after he 'was retired' on January 26, 1986 as a consequence of his back injury." From this, the Board held that "the administrative law judge acted within her discretion as fact-finder in determining that because claimant was not 'on an approved absence, such as vacation or sick leave,' employer, rather than Double B, was the operator for whom claimant had most recently worked for at least one year" under 20 C.F.R. § 725.101(a)(32).

Chapter 11

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

CITATION CORRECTION: *Harris v. Old Ben Coal Co.*, 24 B.L.R. 1-13 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc).

IX. Applicability of 20 C.F.R. § 725.308, statute of limitations for filing a miner's claim

F. Commencement of the three-year period

1. Written communication not required

a. Miner's testimony not probative, limitations period not commence [new]

In *Island Creek Coal Co. v. Henline*, Case No. 07-1850 (4th Cir. July 9, 2008) (unpub.), the court affirmed the administrative law judge's finding that Employer failed to present evidence sufficient to rebut the presumption that Claimant timely filed his claim for benefits under 20 C.F.R. § 725.308. The judge concluded that no physician provided Claimant with a "reasoned" opinion of total disability due to pneumoconiosis more than three years prior to the filing of his claim. Additionally, the judge discredited Claimant's testimony that a physician informed him that he was totally disabled due to the disease more than three years prior to the filing of his claim on grounds that Claimant "admitted that a stroke had left him with a poor memory" as well as the fact that the miner's testimony "was inconsistent and composed primarily of 'yes' answers."

In concluding that the miner's claim was timely filed, the court declined to rule on whether a "reasoned" opinion is required to trigger the limitations period. Rather, the court held that the judge "discredited the only testimony that (the miner) received any medical

opinion—reasoned or unreasoned—that would have triggered the limitations clock more than three years prior to the claim . . ..”

Chapter 18

Overpayment, Waiver, and Recovery

VI. Recovery of the overpayment

E. Federal district court jurisdiction, certification of facts by the administrative law judge [new]

By unpublished decision in *Itmann Coal Co. v. Scalf*, Civil Action No. 5:07-cv-00940 (S.D. W.Va. July 10, 2008) (unpub.), the district court dismissed Employer's motion for default judgment in an action "seeking enforcement of an order by the District Director for the Office of Workers' Compensation awarding (Employer) recoupment of an overpayment of black lung benefits to (Claimant)." In support of this opinion, the district court determined that it lacked subject matter jurisdiction over the action.

Citing to 33 U.S.C. § 921(d), which is incorporated into the Black Lung Benefits Act at 30 U.S.C. § 932(a), the court noted that these statutory provisions allow beneficiaries of compensation awards to enforce the awards in federal district court. These provisions do not, on the other hand, "authorize employers to bring an action in federal district court to recover alleged overpayment of benefits."

The court did note that it would have jurisdiction to enforce an order directing recovery of an overpayment under 33 U.S.C. § 927(b), which requires that the administrative law judge certify the facts to the district court:

> For a court to retain jurisdiction under (§ 927(b)), a person must first 'disobey[] or resist[] any lawful order or process' of the ALJ, and the ALJ must certify the facts to the district court regarding the alleged violation of the order. § 927(b). Although (Employer) here seeks to enforce a lawful order of the ALJ that was allegedly breached by (Claimant), . . . nowhere in the Complaint or any other filings does (Employer) present a certification of facts from the ALJ. Without a certification of facts from

> the ALJ, the requirements of § 927(b) are not met and the Court may not retain jurisdiction.

Slip op. at 2.

Chapter 19
Medical Benefits Only (BMO) and
Black Lung Part B Claims (BLB)

II. Black Lung Part B (BLB) Claims

C. Disabled child [new]

Must be disabled before 22 years of age

In the matter of *R.L.H.*, ARB Case No. 08-075, 2007-BLA-5279 (ARB, July 30, 2008), the Administrative Review Board (Board) affirmed the administrative law judge's denial of an adult disabled child's claim for benefits. The Board stated, "To be eligible for survivor's benefits under Part B, claimant must establish that her SSA-adjudicated disability began before she was twenty-two" under 20 C.F.R. § 410.370. Claimant maintained that she was entitled to benefits as the surviving daughter of the deceased miner and his deceased wife because she is disabled and unmarried and "needs the benefits to sustain her livelihood." The Board rejected these arguments and noted that Claimant conceded that "she was not disabled before she was twenty-two but became disabled . . . at age forty-five." The Board further concluded that the adverse financial circumstances asserted by Claimant "do not change the regulatory requirement that she prove disability before she was twenty-two." As a result, the Board affirmed denial of the claim.

D. Proceedings are non-adversarial [new]

In *R.L.H.*, ARB Case No. 08-075, 2007-BLA-5279 (ARB, July 30, 2008), the Administrative Review Board (Board) noted that Part B proceedings are non-adversarial pursuant to 20 C.F.R. §§ 410.623(a), 410.625, and 410.632 such that it was error for the Director's counsel to enter an appearance in the claim before the administrative law judge. Nonetheless, the Board held that the Director's "mistake" was harmless in this case because Claimant did not allege any prejudice to her case as a result of the Director's entry of appearance and the Board found no prejudice.

E. Appellate jurisdiction lies with the Administrative Review Board [new]

In the matter of *R.L.H.*, ARB Case No. 08-075, 2007-BLA-5279 (ARB, July 30, 2008), the Administrative Review Board (Board) accepted jurisdiction of the appeal of a Part B survivor's claim pursuant to the provisions of the Black Lung Consolidation and Administrative Responsibility Act of 2002, 116 Stat. 1925 (2002) and "Section 4(c)(44) of the Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002)," which provides that the Board "has the authority to act for the Secretary of Labor when a statute enacted after September 24, 2002 states that the Secretary of Labor is the final decision maker on an appeal of a decision issued by an ALJ."

IV. Review by the administrative law judge

C. Proper review of the record

3. "Mistake in a determination of fact"

j. Application of collateral estoppel [new]

In *V.M. v. Clinchfield Coal Co.*, 24 B.L.R. 1-__, BRB No. 07-0822 BLA (July 29, 2008), the Board held that it was proper to apply collateral estoppel to establish coal workers' pneumoconiosis in the survivor's claim where there was an award of benefits in the miner's claim and no autopsy evidence was offered.

Notably, in this particular claim, the first administrative law judge to adjudicate the survivor's claim concluded that, despite the fact that there was no autopsy evidence offered in the survivor's claim, collateral estoppel could not be applied because the miner's claim was awarded prior to issuance of *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000) (requiring that evidence submitted under § 718.202(a)(1)-(4) be weighed together prior to finding the presence of pneumoconiosis) whereas the survivor's claim was filed after issuance of *Compton*. The judge denied benefits in the survivor's claim.

The survivor subsequently filed a petition for modification. A second administrative law judge reviewed the claim to assess whether a mistake in a determination of fact had been made. The judge concluded that collateral estoppel should have been applied in the survivor's claim pursuant to *Collins v. Pond Creek Mining Co*., 468 F.3d 213 (4th Cir. 2006) after also determining that application of the doctrine would not be unfair to Employer under the factors set forth in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979) and *Polly v. D & K Coal Co.*, 23 B.L.R. 1-77 (2005). Upon consideration of evidence in the claim, benefits were awarded.

The Board adopted the Director's position and held that it was proper to find a mistake in a determination of fact in the original adjudication of benefits in the survivor's claim; namely, that coal workers' pneumoconiosis was established via application of collateral estoppel on modification. Moreover, because coal workers' pneumoconiosis was established in the survivor's claim, the Board held that it was proper for the judge to accord less weight to medical opinions of physicians who did not find the disease present.

Chapter 25

Principles of Finality

IV. Collateral estoppel

G. Miner's and survivor's claims, existence of pneumoconiosis

See V.M. v. Clinchfield Coal Co., 24 B.L.R. 1-__, BRB No. 07-0822 BLA (July 29, 2008) (application of collateral estoppel on modification of survivor's claim upheld).

VI. Medical examinations

F. Limitations on requiring miner to travel for examination [new]

In *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), because Claimant was a Florida resident, the Board held that Employer was not entitled to have him examined in Virginia despite Employer's argument that Claimant "travels regularly to Virginia and was examined by physicians in Virginia in connection with all three of his claims . . .." The Board held that the provisions at 20 C.F.R. § 725.414(a)(3)(i) mandate that an employer "may not require the miner to travel more than 100 miles from his or her place of residence, or the distance traveled by the miner in obtaining the complete pulmonary evaluation" under 20 C.F.R. § 725.406. Here, Claimant was a resident of Florida and his pulmonary evaluation under § 725.406 was conducted within 100 miles of his residence.

Chapter 27

Representative's Fees and Representation Issues

II. Fee petitions

F. Proponent of petition carries burden to establish appropriateness of hourly rates and necessity of services [new]

In *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), the Board held that it is the burden of the proponent of a petition to establish the reasonableness of the fee requested in light of the factors set forth at 20 C.F.R. § 725.366(b). As a result, the Board concluded that the judge erred in assessing the number of hours awarded based on whether Employer demonstrated that the services were unnecessary or duplicative. The Board concluded that "the administrative law judge (improperly) shifted the burden of proof to employer . . .." As a result, the fee award was vacated and the judge was instructed to reconsider the reasonableness of the number of hours claimed on remand.

IV. Augmentation or enhancement based on unique circumstances

C. Risk of loss and delay in payment

In *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), the Board noted that "risk of loss" is a "constant factor in black lung litigation and, therefore, is deemed incorporated into the hourly rate and is not evaluated separately." On the other hand, the Board concluded that enhancement of the hourly rate to reflect "delay in payment" of the fee is an appropriate factor to consider.

D. Billing method

In *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.), the Board affirmed the judge's approval of use of quarter-hour increments in billing.

II. Authority of the administrative law judge

D. Overpayment and repayment

Certification of the facts under 29 C.F.R. § 18.29 [new]

By unpublished decision in *Itmann Coal Co. v. Scalf*, Civil Action No. 5:07-cv-00940 (S.D. W.Va. July 10, 2008) (unpub.), the district court dismissed Employer's motion for default judgment in an action "seeking enforcement of an order by the District Director for the Office of Workers' Compensation awarding (Employer) recoupment of an overpayment of black lung benefits to (Claimant)." In support of this opinion, the district court determined that it lacked subject matter jurisdiction over the action.

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The court did note that it would have jurisdiction to enforce an order directing recovery of an overpayment under 33 U.S.C. § 927(b), which requires that the administrative law judge certify the facts to the district court:

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> the ALJ, the requirements of § 927(b) are not met and the Court may not retain jurisdiction.

Slip op. at 2.

XV. Right of cross-examination

E. Expert treating physician, right to cross-examination under the amended regulations [new]

In *L.P. v. Amherst Coal Co.*, 24 B.L.R. 1-__, BRB No. 07-0183 BLA (July 23, 2008) (on recon. en banc), the Board adopted the Director's position and held that a party has the right to cross-examine a physician whose report is admissible under 20 C.F.R. § 718.104(d). In so holding, the Board stated that Employer's cross-examination of the miner's treating physician was necessary "to ensure the integrity and fundamental fairness of the adjudication of the survivor's claim *and* for a full and true disclosure of the facts." However, the Board circumscribed its decision as follows:

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The Board further noted that "adoption of the evidentiary limitations set forth in Section 725.414 represented a shift from a system that favored the admission of all relevant evidence to a system that balanced this preference with a concern for fairness and the need for administrative efficiency." From this, the Board concluded:

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> judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties should then have the opportunity to make good cause arguments under Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

Slip op. at 8.