Supplement to the 2008 Edition of the *Judges' Benchbook: Black Lung Benefits Act*

Seena Foster, Editor
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NOTE: Citations to the 2008 edition of the Code of Federal Regulations in the *Benchbook* is intended to reflect reference to the December 20, 2000 regulatory amendments, which were subsequently modified on December 15, 2003 to implement the United States Circuit Court of Appeals decision in *National Mining Ass'n. v. Chao*, 292 F.3d 849 (D.C. Cir. 2002) (*see* 68 Fed. Reg. 69,930–69,935). Therefore, a subheading in the *Benchbook* stating "Prior to applicability of 20 C.F.R. Part 718 (2008)" or "Prior to applicability of 20 C.F.R. Part 725 (2008)" is intended to reference the pre-amendment regulations found at 20 C.F.R. Parts 718 and 725 (2000).

Moreover, unpublished decisions of the circuit courts or Benefits Review Board are not binding. However, they *may* be persuasive and are cited in the *Benchbook* or its supplement because the appellate tribunal adopted the position of the Director, OWCP, or multiple opinions containing similar holdings on an issue were issued by the tribunal.

Chapter 1
Introduction to the Claims Process and Research Tools

I. Filing the claim and adjudication by the district director

F. Party qualified to pursue claim

In *F.L. v. Zeigler Coal Co.*, BRB No. 08-0302 BLA (Jan. 29, 2009) (unpub.), Employer moved to dismiss the black lung claim on grounds that there was no "proper party-in-interest to proceed with its adjudication." Counsel for Claimant maintained that the "miner's grandson ha[d] an interest in protecting the award of benefits because there were costs incurred by the miner in pursuing the claim, there could be outstanding benefits due the miner's estate, and there could be a claim against the miner's estate for the overpayment of benefits." Counsel also asserted that Illinois law did not require probate of the miner's estate such that the grandson "did not have letters of administration to submit to the administrative law judge."

Nonetheless, the judge subsequently "advised claimant's counsel to provide her with a copy of the death certificate and the letters of administration that authorized the miner's grandson to represent the miner's estate." In response, the administrative law judge noted receipt of the death certificate, obituary, and "a letter from a law firm that referenced a trust agreement that was not in the record." In particular, the law firm's letter provided that there "was no probate administration of the miner's estate because all of the miner's assets at the time of his death were held by his grandson as the trustee of a revocable living trust agreement." The Board noted that "[a]lthough the administrative law judge determined that this documentation was lacking in some respects regarding the authority of the miner's grandson to represent the miner's estate, she found that the miner's estate would remain the named party in the case." The Board upheld the judge's finding and concluded that, under 20 C.F.R. § 725.360, "it was not unreasonable for the administrative law judge to find that the miner's estate qualified as a party to the claim . . .."

II. The request for a formal hearing

Under the facts of *W.L. v. Director, OWCP*, 24 B.L.R. 1-___, BRB No. 08-0122 BLA (Sept. 30, 2008) (pub.), the district director's service sheet stated that his proposed decision and order denying benefits was mailed to the parties on October 14, 2005. However, the envelope containing the proposed decision was postmarked October 19, 2005 and Claimant filed a hearing request on November 18, 2005. Before the administrative law judge, counsel for the Director, OWCP argued that Claimant's

hearing request was untimely. However, the Board noted that the Director changed positions on appeal:

> The Director notes that he took a contrary position before the administrative law judge as to the timeliness of the hearing request 'without fully considering the ramifications of the district director's late service of the proposed decision and order . . . which renders the hearing request timely.

Slip op. at 4.

Citing to 20 C.F.R. § 725.419(a), the Board noted that a hearing must be requested within 30 days of the "date of issuance of a proposed decision and order . . .." 20 C.F.R. § 725.419(a) (2008). Here, although the service sheet of the *Proposed Decision and Order* indicated that it was mailed on October 14, 2005, the postmark date on the envelope was October 19, 2005. The Board concluded that the postmark date was controlling and, therefore, Claimant's November 18, 2005 hearing request was timely.

Chapter 2
Introduction to the Medical Evidence

[No updates at this time.]

Chapter 3
General Principles of Weighing Medical Evidence

CITATION UPDATES:

K.J.M. v. Clinchfield Coal Co., 24 B.L.R. 1-40 (2008).

III. Chest roentgenogram evidence

F. Digital x-rays and CT-scans considered separately from chest x-ray evidence

In *B.S. v. Itmann Coal Co.*, BRB No. 08-0309 BLA (Jan. 29, 2009) (unpub.), the Board reiterated that, prior to considering digital x-rays as evidence of the presence or absence of pneumoconiosis, the administrative law judge must determine whether "the proponent of the evidence has established that digital x-rays are 'medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits' as provided in 20 C.F.R. § 718.107(b)." From this, the Board held that it was error for the judge to "determine[] that because the digital x-ray readings in the treatment records were performed for diagnostic purposes, they are implicitly medically acceptable," while discrediting the digital x-ray readings developed for purposes of litigation based on a party's failure to "satisfy the requirements of 20 C.F.R. § 718.107(b)." The Board reasoned:

> . . . the relevant inquiry concerns the medical acceptability and relevance of digital x-ray technology as it pertains to the diagnosis of pneumoconiosis. It does not concern the identity of the reader or the purpose for which the digital x-ray reading was performed.

Slip op. at 6.

G. "Rebuttal" of affirmative interpretation [new]

In *J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 B.L.R. 1-78 (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

A. Well-documented, well-reasoned opinion defined

1. Use of preamble to amended regulations in weighing conflicting opinions upheld [new]

In *Westmoreland Coal Co. v. Amick*, Case No. 06-2171 (4th Cir. Aug. 18, 2008) (unpub.), the court upheld the

administrative law judge's award of benefits based on a finding that the miner was totally disabled due to coal dust-induced and smoking-induced chronic obstructive pulmonary disease. Under the facts of the case, the miner had a 33 year coal mine employment history as well as a history of smoking one pack of cigarettes per day from 1941 until 1988. A dispute arose among the medical experts regarding whether the miner's chronic obstructive pulmonary disease stemmed solely from his smoking history, or whether it was due both to smoking and coal dust exposure. In resolving conflicting medical literature cited by the medical experts, the court held that the judge properly noted that "the Department of Labor already reviewed the medical and scientific literature before promulgating its revised regulations." As a result, the court concluded:

> The ALJ's decision to credit Drs. Cohen and Koenig for their thorough discussion of the medical literature was therefore valid, in that it was, as the ALJ and BRB made clear, more consistent with the Department of Labor's findings that pneumoconiosis is latent and progressive and that an obstructive impairment may be 'legal pneumoconiosis.'

In line with this reasoning, the court held that the judge properly discredited the opinions of two of Employer's physicians who concluded that the miner's impairment could not have been caused by coal dust exposure because the miner stopped working in 1983 and his condition began to deteriorate in 1991.

In *W.C. v. Aberry Coal Co.*, BRB No. 07-0974 BLA (Sept. 8, 2008) (unpub.), the Board affirmed an administrative law judge's use of the preamble to the December 20, 2000 regulatory amendments in weighing the medical opinion evidence of record. Notably, in a footnote, the Board stated the following:

> Employer . . . objects to the administrative law judge's citation to 65 Fed. Reg. 79937-79945, asserting that, in quoting from comment (f) to 65 Fed. Reg. 79938, she omitted comments (d) and (k) respecting claimant's affirmative burden of proof. Decision and Order at 20-21. However, employer does not assert that the administrative law judge either misquoted or misinterpreted any specific

> regulation or comment. Rather, the administrative law judge related the Department of Labor's position that '[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis . . . . [t]he risk is additive with smoking,' and that medical literature 'supports the theory that dust-related emphysema and smoke-induced emphysema occur through similar mechanisms. *See* Decision and Order at 20-21, citing 65 Fed. Reg. 79940, 79943 (Dec. 21, 2000). She further remarked that 'medical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is not clinically significant, are, therefore, contrary to the premises underlying the regulations.' (citation omitted). In discussing the regulatory framework of the Act in the context of evaluating the conflicting medical evidence of record, the administrative law judge's remarks were entirely proper.

Slip op. at 7 (fn. 8).

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

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

In *Westmoreland Coal Co. v. Amick*, Case No. 06-2171 (4th Cir. Aug. 18, 2008) (unpub.), the court upheld the administrative law judge's award of benefits based on a finding that the miner was totally disabled due to coal dust-induced and smoking-induced chronic obstructive pulmonary disease. Under the facts of the case, the miner had a 33 year coal mine employment history as well as a history of smoking one pack of cigarettes per day from 1941 until 1988. A dispute arose among the medical experts regarding whether the miner's chronic obstructive pulmonary disease stemmed solely from his smoking history, or whether it was due both to smoking and coal dust exposure. In affirming the administrative law judge's weighing of the medical opinions, the court concluded that it was proper for the judge to accord greater weight to physicians who recognized

and discussed the latent and progressive nature of pneumoconiosis.

The court also held it was proper to accord less weight to physicians who did not take into account both cigarette smoking and coal mine dust exposure as potential causes of the miner's chronic obstructive pulmonary disease. Specifically, the judge found that Employer's experts failed to explain "why no part of (the miner's) disability was due to thirty-three of coal dust exposure." The court held that this did not improperly shift the burden to Employer as Claimant's medical experts "supported their conclusions that (the miner's) disability impairment was due, at least in part, to thirty-three years of coal mine dust exposure."

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").

11. Physician's acknowledgement of latent and progressive nature of pneumoconiosis probative [new]

In *Westmoreland Coal Co. v. Amick*, Case No. 06-2171 (4th Cir. Aug. 18, 2008) (unpub.), the court upheld the administrative law judge's award of benefits based on a finding that the miner was totally disabled due to coal dust-induced and smoking-induced chronic obstructive pulmonary disease. Under the facts of the case, the miner had a 33 year coal mine employment history as well as a history of smoking one pack of cigarettes per day from 1941 until 1988. A dispute arose among the medical experts regarding whether the miner's chronic obstructive pulmonary disease stemmed solely from his smoking history, or whether it was due both to smoking and coal dust exposure. In affirming the administrative law judge's weighing of the medical opinions, the court concluded that it was proper for the judge to accord greater weight to physicians who recognized and discussed the latent and progressive nature of pneumoconiosis.

The court held that, while the regulations do not require that a physician discuss the latent and progressive nature of pneumoconiosis:

> . . . considering that both the black lung regulations as well as numerous, long-standing decisions of the courts of appeals recognize the progressivity of pneumoconiosis, the ALJ was not precluded from considering as more persuasive the opinions of those doctors who took that characteristic of pneumoconiosis into account. This is especially true in this case, given that the worsening of (the miner's) symptoms did not occur until eight years after he retired from his coal mining employment.

In resolving conflicting medical literature cited by the medical experts, the court held that the judge properly noted that "the Department of Labor already reviewed the medical and scientific literature before promulgating its revised regulations." As a result, the court concluded:

> The ALJ's decision to credit Drs. Cohen and Koenig for their thorough discussion of the medical literature was therefore valid, in that it was, as the ALJ and BRB made clear, more consistent with the Department of Labor's findings that pneumoconiosis

is latent and progressive and that an obstructive impairment may be 'legal pneumoconiosis.'

In line with this reasoning, the court held that the judge properly discredited the opinions of two of Employer's physicians who concluded that the miner's impairment could not have been caused by coal dust exposure because the miner stopped working in 1983 and his condition began to deteriorate in 1991.

G. Inconsistent reports

In *J.L.S. v. Eastern Associated Coal Co.*, BRB No. 08-0146 BLA (Oct. 24, 2008) (unpub.), the judge properly concluded that the evidence of record did not demonstrate the presence of a totally disabling respiratory impairment. Notably, the judge accorded little probative value to Dr. Rasmussen's finding of total disability on grounds that the physician failed to adequately explain his finding in light of the non-qualifying blood gas testing underlying his report. On the other hand, the Board upheld the judge's conclusion that Dr. Zaldivar's finding of no total disability was reasoned and documented in that it "integrates all aspects of the medical and work requirement evidence," including the non-qualifying ventilatory and blood gas testing of record.

N. Medical literature and studies

1. Medical opinion supported by literature may be probative

In *J.P. v. Peabody Coal Co.*, BRB No. 08-0256 BLA (Dec. 23, 2008) (unpub.), the Board upheld the judge's award of benefits based, in part, on an opinion by Dr. Cohen that was supported by "medical and scientific studies confirming a link between occupational exposure to coal dust and obstructive lung disease and emphysema." In this vein, the Board noted that the judge "explained how Dr. Cohen integrated the medical and scientific studies with claimant's medical record to conclude that coal dust exposure contributed to his obstructive lung disease." The judge further noted that Dr. Cohen's diagnosis was supported by Claimant's objective test results, *i.e.* pulmonary function testing revealing severe obstructive lung disease and blood gas testing revealing abnormal gas exchange, and the premises for his diagnosis was consistent with the position of the Department of Labor. Dr. Cohen attributed the miner's COPD to

coal dust exposure based partly on the "fact that claimant's lung function continued to decline significantly after he stopped smoking."

On the other hand, the Board held that the judge properly accorded less weight to the opinions of Drs. Tuteur and Repsher on grounds that the premises of these physicians' opinions were contrary to prevailing medical opinion and statistical data relied upon by Dr. Tuteur had "no basis in the medical literature" according to Dr. Cohen. The Board found that the judge "properly found that Dr. Tuteur's opinion, like that of Dr. Repsher, was based on views about the relationship between chronic obstructive pulmonary disease and coal dust exposure which 'are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.'"

Chapter 4
Limitations on Admission of Evidence and the "Good Cause" Standard in Black Lung Claims

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. 1-78 (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. 1-78 (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. 1-78 (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. 1-78 (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."

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. 1-78 (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. 1-55 (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:

> <blockquote>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 5
What is the Applicable Law?

[No updates at this time.]

Chapter 6
Definition of Coal Miner and Length of Coal Mine Employment

[No updates at this time.]

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).

J. Due process rights of employer violated; Trust Fund held liable for payment of benefits

1. Lost records

In *Energy West Mining Co. v. Director, OWCP [Oliver]*, ___ F.3d ___, Case No. 07-9588 (10th Cir. Feb. 20, 2009), the court addressed Employer's argument that its due process rights were violated because OWCP destroyed the miner's original 1980 claim, which compromised Employer's ability to defend against the subsequent claim. In considering the miner's 2002 subsequent claim, the court noted that OWCP had, in fact, destroyed the miner's 1980 claim "pursuant to its record-retention policy." As a result, the court stated that it knew "very little about the claim's adjudication aside from the fact that it was denied":

> The destruction of (the miner's) 1980 claim file threw a wrench into these procedures. Because OWCP destroyed it, the evidence associated with the prior claim was not made a part of the record as § 725.309(d)(1) requires.
>
> . . .
>
> Instead, (the miner) was forced to establish *all three* elements of his claim by new evidence rather than just one, while Energy West was forced to *defend* all three elements without the ability to counter or impeach new evidence with old.

Slip op. at 6-7.

Nevertheless, the court rejected Employer's argument that it be dismissed from the case on grounds that it "was unable to mount a meaningful defense to (the miner's) present claim." The court noted that there are some circumstances where an employer should be dismissed on due process grounds, such as when "the government entirely fails to give notice of a claim, or delays so excessively in providing notice that the party's ability to mount a defense is impaired . . .." However, in this case, the court concluded that OWCP did not act in bad faith when it destroyed the contents of the 1980 claim file; rather, "[t]he undisputed evidence is that OWCP destroyed the file because it thought it would no longer be useful after nineteen years gathering dust." The court concluded that "the 1980 claim file cannot be said to be . . . 'critical' to this adjudication." Indeed, Employer conceded in the subsequent claim that the miner had established coal workers' pneumoconiosis in the prior claim, but had not demonstrated that he was totally disabled by the disease.

Chapter 8
Living Miner's Claims: Entitlement under Part 410

[No updates at this time.]

Chapter 9
Living Miner's Claims: Entitlement under Section 410.490

[No updates at this time.]

Chapter 10
Living Miner's Claims: Entitlement under Part 727

[No updates at this time.]

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).

CITATION UPDATES:

W.C. v. Whitaker Coal Corp., 24 B.L.R. 1-20 (2008).

IV. The existence of pneumoconiosis

A. "Pneumoconiosis" defined

6. Admission against interest

CITATION UPDATE: On appeal in *Johnson v. Royal Coal Co.*, 326 F.3d 421 (4th Cir. 2003), *rev'g.*, 22 B.L.R. 1-132 (2000), the court held that 29 C.F.R. § 18.20 (addressing admissions) applies to black lung proceedings and "since Royal failed to deny or otherwise respond to (Claimant's) request for admissions, Royal has admitted that (Claimant) is entitled to benefits." In so holding, the court concluded that Claimant did not waive his right to rely on the "admissions" by failing to object to litigation of the entitlement issues at the hearing. Rather, the court noted that Claimant's failure to object to Employer's contest of the existence of pneumoconiosis and disability causation at the hearing "occurred before the admissions were entered" but that "thereafter (Claimant) *did* enter the admissions, thus making them effective." (italics in original). As a result, the court reversed the Board's judgment and remanded the claim for the payment of benefits.

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

The Board vacated a denial of benefits in *D.S. v. Westmoreland Coal Co.*, BRB No. 07-1000 BLA (Sept. 30, 2008) (unpub.), a case arising in the Third Circuit. Citing to *Clites v. J&L Steel Corp.,* 663 F.2d 14 (3rd Cir. 1981), the Board held that the administrative law judge must determine whether findings on biopsy of lymph nodes ranging in size from one to two centimeters "would appear on x-ray as opacities greater than

one centimeter in diameter," thus demonstrating the presence of complicated pneumoconiosis under the regulations.

Further, in weighing the evidence, the administrative law judge must also consider statements by Drs. Naeye and Hippensteel that, because there were no lesions greater then two centimeters in diameter on biopsy, there was no evidence of complicated pneumoconiosis. The Board noted, to the contrary, the following:

> The Department of Labor has declined to adopt the view that a 2 centimeter lesion on autopsy or biopsy is a prerequisite for a diagnosis of complicated pneumoconiosis, noting that there is no consensus among physicians that this criterion is valid. 65 Fed. Reg. 79,936; *Gollie v. Elkay Mining Corp.*, 22 B.L.R. 1-306, 1-311 (2003).

Finally, the Board held that, if complicated pneumoconiosis is present, the judge "must determine whether the evidence establishes that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c)."

In *J.P.L. v. Shady Lane Coal Corp.*, BRB No. 07-0941 BLA (Aug. 28, 2008) (unpub.), the Board upheld the administrative law judge's award of benefits based on a finding of complicated pneumoconiosis. With regard to the x-ray evidence, the Board stated that Dr. Sargent noted the presence of Category A opacities on the ILO classification form, but provided additional notations on the form of the need to "rule out" granulomatous disease. Employer argued that Dr. Sargent's interpretation did not support a finding of complicated pneumoconiosis. However, the Board agreed with the administrative law judge's conclusion that, because Dr. Sargent specifically marked a box supporting the presence of a Category A opacity, his comments about "ruling out 'associated granulomatous disease' did not indicate that he was questioning the existence of large opacities consistent with pneumoconiosis . . .."

Moreover, under § 718.304(c), the Board upheld the judge's conclusion that Dr. Forehand's diagnosis of complicated pneumoconiosis was more probative than the contrary opinions of Drs. Castle and Hippensteel. While noting that underlying CT-scan evidence was not probative of the presence or absence of

complicated pneumoconiosis, the Board affirmed Dr. Forehand's finding of complicated pneumoconiosis where his opinion was based on CT-scan evidence as well as "claimant's work history, smoking history, and negative TB test results." The Board cited, with approval, to the judge's discussion as follows:

> [M]y determination to credit Dr. Forehand as the treating physician [does] not rest upon his status alone, but rather upon the unique circumstances of this case, where a number of speculative possibilities have been suggested to explain the [c]laimant's x-ray and CT-scan abnormalities. In the course of Dr. Forehand's treatment of [c]laimant, he did not find the [c]laimant to have any malignancy, tuberculosis, sarcoidosis, or other form of granulomatous disease, and he ran appropriate tests to exclude these other possibilities. I find Dr. Forehand's opinion that the [c]laimant suffers from complicated coal workers' pneumoconiosis to be entitled to significant weight.

The Board agreed with the judge's weighing of the evidence and affirmed a finding of complicated pneumoconiosis.

V. Etiology of the pneumoconiosis

A. Applicability

2. Applies to complicated pneumoconiosis

In *D.S. v. Westmoreland Coal Co.*, BRB No. 07-1000 BLA (Sept. 30, 2008) (unpub.), a case arising in the Third Circuit, the Board held that, if complicated pneumoconiosis is present, the judge "must determine whether the evidence establishes that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c)."

3. Inapplicable to finding of "legal" pneumoconiosis

In *Energy West Mining Co. v. Director, OWCP [Oliver]*, ___ F.3d ___, Case No. 07-9588 (10th Cir. Feb. 20, 2009), the court held that the ten year rebuttable presumption at 20 C.F.R. § 718.203 does not apply to a diagnosis of legal pneumoconiosis; rather, a physician must state that the miner's chronic

respiratory disease was caused, at least in part, from coal mine employment. The court stated:

> Though COPD is not one of the diseases doctors call pneumoconiosis, it can nevertheless qualify under the legal definition of the term if it arises out of coal mining employment. A longstanding interpretation of the BLBA recognizes that Congress intended to compensate miners for 'a broader class of lung diseases that are not pneumoconiosis as that term is used by the medical community.' (citations omitted).
>
> . . .
>
> Because COPD is most frequently caused by cigarette smoking and is commonly found among the general population, we have held that a miner whose claim to black lung benefits is based on COPD is not entitled to the ordinary rebuttable presumption that his or her disease arose out of coal mine employment provided he worked in the mines for at least ten years (under 20 C.F.R. § 718.203).

Slip op. at 4.

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

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

In *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, ___ F.3d ___, Case No. 08-3311 (6th Cir. Feb. 17, 2009), the court held that the three year statute of limitations at 20 C.F.R. § 725.308 does not begin to run based on a medical opinion of total disability due to pneumoconiosis submitted in a claim that is ultimately outweighed by other medical evidence in the claim. As a consequence, the favorable medical opinion from the miner's first claim (filed in 1988) was deemed a "misdiagnosis" such that it did not bar the filing of a subsequent claim in 1993 under 20 C.F.R. § 725.309. To this end, the court held that any suggestion to the contrary in *Tennessee Consolidation Coal Co.*

v. Kirk, 264 F.3d 602, 607 (6th Cir. 2001) is *dicta* and is not binding.

In *Energy West Mining Co. v. Director, OWCP [Oliver]*, ___ F.3d ___, Case No. 07-9588 (10th Cir. Feb. 20, 2009), Employer posited that "materials in the (destroyed) 1980 claim file might reveal that (the miner) received a communication of total disability from a physician long ago, 'thereby rendering his current application untimely'" under 20 C.F.R. § 725.308. The court disagreed:

> Because black lung is a progressive disease, miners are permitted to file successive claims; if a claimant is not found to be totally disabled at the time of their initial claim for benefits, he or she can re-file at a later time and demonstrate that the disease has advanced to the point of incapacity. For this reason, we have previously recognized that 'a final finding . . . that a claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary,' and resets the statute of limitations for filing a black lung claim. As our sister circuit has explained, a new limitations period begins after every denial of a black lung claim, 'provided the miner works in the coal mines for a substantial period of time after the denial and a new medical opinion of total disability due to pneumoconiosis is communicated [to him].' *Sharondale,* 42 F.3d at 996.

Slip op. at 20. From this, the court held that, despite destruction of the 1980 claim record, the miner's subsequent claim was timely filed as:

> . . . there can be no doubt that (the miner's) limitations period has reset. The denial of his previous claim invalidated whatever medical opinions formed the basis of that adjudication. More importantly, (the miner) continued to perform mining work for Energy West for thirteen years after the denial of his original claim—unquestionably a substantial period. And it is not disputed here that his present claim was filed within three years of a

> new disability diagnosis being communicated to him by Dr. Morgan. That is all the regulations require.

Slip op. at 20.

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 . . .."

3. Receipt of communication by miner [new]

In *W.C. v. Benham Coal, Inc.*, 24 B.L.R. 1-50 (2008) (Boggs, J., concurring), the Board held that issuance of an administrative law judge's decision and order to a miner, wherein the judge described a reasoned opinion of total disability due to pneumoconiosis by a physician, is not sufficient to commence the three-year limitations period under 20 C.F.R. § 725.308(a) and *Tennessee Consolidated Coal Co. v. Kirk,* 264 F.3d 602 (6th

Cir. 2001). In a separate, concurring opinion, Judge Boggs noted the following:

> The true holding in this case is that neither communication with claimant's counsel, nor issuance of a judicial opinion without evidence of receipt by claimant, constitutes communication to claimant for purposes of 20 C.F.R. § 725.308(a).

Chapter 12
Introduction to Survivor's Claims

[No updates at this time.]

Chapter 13
Survivors' Claims: Entitlement Under Part 410

[No updates at this time.]

Chapter 14
Survivors' Claims: Entitlement Under § 410.490

[No updates at this time.]

Chapter 15
Survivors' Claims: Entitlement Under Part 727

[No updates at this time.]

Chapter 16
Survivors' Claims: Entitlement Under Part 718

[No updates at this time.]

Chapter 17
Onset, Augmentation, Termination, and Interest

[No updates at this time.]

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."

Chapter 20
Medical Treatment Dispute (BTD)

[No updates at this time.]

Chapter 21
Interest on Past Due Medical Bills (BMI) and Penalties

[No updates at this time.]

Chapter 22
Transfer of Liability to the Trust Fund

[No updates at this time.]

Chapter 23
Petitions for Modification Under 20 C.F.R. § 725.310

CITATIONS UPDATES:

D.S. v. Ramey Coal Co., 24 B.L.R. 1-33 (2008).

I. Generally

C. Petition for modification of the denial of a subsequent claim, standard of review [new]

In a case arising under the pre-amendment regulations, *J.P.L. v. Shady Lane Coal Corp.*, BRB No. 07-0941 BLA (Aug. 28, 2008) (unpub.), the Board held that in "considering a request for modification of the denial of a duplicate claim, which was denied based upon a failure to establish a material change in conditions, the administrative law judge must determine whether the evidence developed in the duplicate claim, including any evidence submitted with the request for modification, establishes a material change in conditions."

II. Procedural issues

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

In *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, ___ F.3d ___, Case No. 08-3311 (6th Cir. Feb. 17, 2009), the court held that Employer was barred from re-litigating the issue of its untimely controversion on modification at 20 C.F.R. § 725.310. The court reasoned that "there would be little use in having a default provision (at § 725.413(b)) in the first place if everything could be reopened by a subsequent request for modification."

Under the facts of the case, the court noted that, in connection with the miner's 1993 subsequent claim, Employer failed to file a controversion within the prescribed 30-day time period. As a result, the administrative law judge awarded benefits. The court upheld the finding that Employer failed to timely controvert the miner's 1993 claim such that the miner was entitled to benefits. Moreover, the court held that Employer's explanation that "notice of the initial award got 'lost-in-the-shuffle'" did not constitute "good cause" sufficient to waive the 30 day time deadline at 20 C.F.R. § 725.413(b) (1993). The court stated:

> To this day, Arch has offered little to support its good-cause argument—there are no affidavits or other evidence in the record that would provide

> some detail to the attorney's vague assertion of a personnel problem.
>
> . . .
>
> Here, without any evidence explaining why or how the purported personnel problems caused the missed deadline or any evidence of the counsel's diligence once the problem was identified, it cannot be said that the ALJ abused her discretion in denying Arch's request to file an untimely controversion.

Id.

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. 1-65 (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 24
Multiple Claims Under 20 C.F.R. § 725.309

[No updates at this time.]

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. 1-65 (2008) (application of collateral estoppel on modification of survivor's claim upheld).

7. Applies to findings of clinical *and* legal coal workers' pneumoconiosis [new]

In *A.H.A. v. Eastern Coal Corp.*, BRB No. 08-0476 BLA (Jan. 30, 2009) (unpub.), a survivor's claim with no autopsy evidence of record, the Board held that collateral estoppel applies to findings of *clinical* as well as *legal* coal workers'

pneumoconiosis made in support of a final award in the miner's claim. Here, an administrative law judge concluded that legal coal workers' pneumoconiosis was established in the miner's finally awarded claim, but x-ray evidence did not demonstrate the presence of clinical pneumoconiosis. Thus, in the survivor's claim, Employer was collaterally estopped from re-litigating the existence of legal coal workers' pneumoconiosis which, in turn, affected the weighing of medical opinions addressing the cause of the miner's death.

Chapter 26
Motions

CITATION UPDATES:

W.C. v. Whitaker Coal Corp., 24 B.L.R. 1-20 (2008).

II. Remand to the district director

A. District Director's obligation to provide complete evaluation

7. Authority to remand for defective evaluation [new]

In *R.B. v. Southern Ohio Coal Co.*, BRB No. 08-0465 BLA, ALJ Case No. 2007-BLA-5136 (Feb. 19, 2009)(unpub.), the Board has scheduled oral argument in Pittsburgh, Pennsylvania on Tuesday, April 21, 2009 to hear the parties' positions on the following issues:

> Whether the authority of an administrative law judge under 20 C.F.R. § 725.456(e) to remand a claim to the district director for a complete pulmonary evaluation pursuant to 20 C.F.R. § 725.406 may be exercised prior to the assembly of the evidentiary record at the formal hearing?
>
> Whether the administrative law judge erred in issuing an Order of Remand without prior notice to the parties?

> Whether the concession of the Director, Office of Workers' Compensation Programs, for the first time on appeal, that the pulmonary evaluations of (certain named coal miners) are incomplete, requires that liability for benefits in these cases be transferred to the Black Lung Disability Trust Fund?

Id.

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.

XIV. Miscellaneous procedural motions and orders

D. Reconsideration

3. Benefits Review Board's jurisdiction [new]

In *J.L.S. v. Eastern Associated Coal Co.*, BRB No. 08-0146 BLA (Oct. 24, 2008) (unpub.), the Board held that it had jurisdiction to consider Claimant's appeal, which was filed within 30 days of the administrative law judge's denial of his *second* motion for reconsideration. In so holding, the Board rejected Employer's argument that the second motion for reconsideration did not toll the time for filing an appeal with the Board. Citing to *Jones v. Illinois Central Gulf Railroad*, 846 F.2d 1099, 11 B.L.R. 2-150 (7th Cir. 1988) and *Tucker v. Thames Valley Steel*, 41 B.R.B.S. 62 (2007), the Board held that, for "internal

administrative appeals within an agency," the 30 day time period for Claimant to file an appeal did not commence to run until the judge finally disposed of the claim which, in this case, was upon denial of Claimant's second motion for reconsideration.

Chapter 27
Representative's Fees and Representation Issues

CITATION UPDATE:

B&G Mining Inc. v. Director, OWCP [Bentley], 522 F.3d 657 (6th Cir. 2008).

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.

Chapter 28

Rules of Evidence and Procedure

I. Applicability of the Federal Rules of Civil Procedure

H. Discovery of communications between counsel and medical experts [new]

Permitted

By published decision in *V.B. v. Elm Grove Coal Co.*, 24 B.L.R. 1-___, 2009 WL 571027, BRB No. 08-0515 BLA (Feb. 27, 2009), the Board noted that, pursuant to the Fourth Circuit's decision in this claim in *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278 (4th Cir. 2007), discovery of communications between a party's counsel and the party's testifying experts was permitted "and was necessary for a proper cross-examination" of the party's experts. Under the facts of the case, Employer maintained that "claimant's counsel had gone beyond merely providing drafting assistance to Drs. Lenkey and Cohen, such that the opinions expressed were those of claimant's attorney, and not of the physicians."

Claimant's counsel responded with an affidavit stating that, with regard to Dr. Lenkey, "he and his paralegal drafted a report that was consistent with Dr. Lenkey's views and submitted it to Dr. Lenkey, along with copies of all the relevant records so that Dr. Lenkey could review them again." Dr. Lenkey would then send a final report to counsel.

With regard to Dr. Cohen, Claimant's counsel explained that his office prepared a draft report "to summarize the record in the form that Dr. Cohen likes to use." From this, counsel stated that Dr. Cohen then "added to and revised the drafts to produce his opinion."

In regard to assisting both doctors, Claimant's counsel stated that "the summaries of the evidence and draft reports that he and his paralegal provided were based on his communications with the doctors, and that this assistance was provided to both reduce the time these two busy doctors had to spend on the case, and to reduce the miner's litigation costs." Counsel maintained in his affidavit that "the doctors' opinions expressed in the resulting reports 'were, in fact, the doctors' opinions of [the miner's] condition."

Employer argued that counsel's affidavit should not have been admitted under Illinois Rule of Professional Conduct 3.7, which governs a lawyer acting as a witness because, "by filing an affidavit, Mr. Johnson compromised his role as advocate, and, therefore, either his affidavit should have been stricken from the record, or Mr. Johnson should have been required to withdraw from the case." The Board disagreed to hold that the administrative law judge is "not bound by statutory rules of evidence or by technical or formal rules of procedure" except as provided by the Administrative Procedure Act and 20 C.F.R. Part 725. To this end, the judge "is granted broad discretion in resolving procedural issues, including the admission of hearsay evidence." The board reasoned that the APA does not bar the consideration of hearsay evidence and "because Mr. Johnson was available for cross-examination, the administrative law judge found that his affidavit was admissible."

Moreover, the Board held that the judge properly noted that Illinois Rule of Professional Conduct 3.7 provides that an attorney need not withdraw if it would result in "substantial hardship on the client." In this vein, the judge concluded that "because of Mr. Johnson's longstanding association with the case, and his familiarity with the facts and its procedural posture, requiring him to withdraw at this stage of the litigation would result in a substantial hardship to claimant."

However, the Board held that the judge improperly denied Employer's request to "re-depose" Drs. Lenkey and Cohen in light of information contained in Mr. Johnson's affidavit and communications between counsel and the experts. In his denial of Employer's request, the judge stated that "[t]he issue of the mechanics of the drafting of the expert opinions is tangential to the issue of whether the reports are well reasoned, well documented, and credible." The judge then stated that "[b]oth

Drs. Lenkey and Cohen have testified under oath and personally explained, in detail, the basis for their opinions" such that Employer "had ample opportunity to question both physicians, and the record will not be re-opened for cross-examination."

On this point, the Board concluded that the judge erred and remanded the claim to allow Employer the opportunity to cross-examine Drs. Lenkey and Cohen based on its access to communications between Claimant's counsel and the experts. Further, in reconsidering evidence on remand, the Board instructed that the judge "must qualify all of the evidence as 'reliable, probative, and substantial,' including Mr. Johnson's affidavit, before relying upon it, pursuant to the standard set forth in *United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389 (4th Cir. 1999)."

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.

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.

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. 1-55 (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:

> 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.

Medical Articles, Literature, and Studies cited in the Department of Labor's Comments to the Amended Regulations 65 Fed. Reg. 79,920-80,045 (Dec. 20, 2000)

Location in the Federal Register	Authors/Editors	Article/Literature/Studies
65 Fed. Reg. 79,943 (Dec. 20, 2000)	N/A	"One commenter repeatedly accuses the Department of not supporting its definitional change with 'peer-reviewed' scientific and medical studies, but does not point to any study or article in particular. The Department rejects this assertion. Each of the articles and studies cited . . ., as well as the majority relied upon by NIOSH in the *Criteria* document, appeared in a peer-reviewed journal: American Review of Respiratory Disease, American Journal of Industrial Medicine, Thorax, Journal of Occupational Medicine, Lancet, British Journal of Industrial Medicine, Occupational and Environmental Medicine, Environmental Research, and others. The textbooks relied upon are authored and edited by highly respected professionals in the field. Textbook editors serve as peer-reviewers of the relevant published literature because they comprehensively survey, evaluate the validity of, and comment on, the literature. Seaton's review in Morgan and Seaton's *Occupational Lung Disease* is a good example. Moveover, the NIOSH *Criteria* document, Rulemaking Record, Exhibit 2-1, received extensive peer review prior to its publication.

		See Criteria, Rulemaking Record, Exhibit 2-1 at xxii-xxiv."
65 Fed. Reg. 79,937 (Dec. 20, 2000)	N/A	"Congress created NIOSH as a source of expertise in occupational disease research."
65 Fed. Reg. 79,944 (Dec. 20, 2000)	N/A	". . . the relevant scientific and medical information available on these topics has been thoroughly reviewed by highly-qualified experts, including NIOSH, the advisor designated by Congress to consult with the Department in developing criteria for total disability due to pneumoconiosis under the Black Lung Benefits Act."
65 Fed. Reg. 79,951 (Dec. 20, 2000)	N/A	"The Department . . . considers NIOSH's view particularly significant in evaluating the conflicting medical opinions concerning the 'hastening death' standard especially since its views are consistent with other studies submitted into the record."
65 Fed. Reg. 79,936, 79,944, 79,945 (Dec. 20, 2000)	Kleinerman, *et al*.	"Pathologic Criteria for Assessing Coal Workers' Pneumoconiosis," *Archives of Pathology and Laboratory Medicine* (1979)
65 Fed. Reg. 79,938, 79,939, 79,940, 79,941, 79,942, 79,943, 79,944, 79,950, 79,951, 79,970 (Dec. 20, 2000)	NIOSH	"Criteria for a Recommended Standard, Occupational Exposure to Respirable Coal Mine Dust" (1995) (in the Department's comments, it stated that "[t]his publication provides the most exhaustive review and analysis of the relevant scientific and medical evidence through 1995, including its evaluation of the evidence regarding the role smoking plays in a coal miner's respiratory status"—65 Fed. Reg. 79,939 (Dec. 20, 2000)).
65 Fed. Reg. 79,939,	Morgan, WKC, Seaton A, eds.	"Occupational Lung Diseases" (1995)

79,942, 79,970 (Dec. 20, 2000)		
65 Fed. Reg. 79,939 (Dec. 20, 2000)	Murray J, Nadel J, Becklake	*Textbook of Pulmonary Medicine* (1988)
65 Fed. Reg. 79,939 (Dec. 20, 2000)	Oxman AD, Muir DCF, Shannon HS, Stock SR, Hnizdo E, Lange HJ	"Occupational dust exposure and chronic obstructive pulmonary disease: A systematic overview of the evidence" Am. Rev. Resp. Dis., 148: 38-48 (1993)
65 Fed. Reg. 79,939, 79,941, 79,942, 79,951 (Dec. 20, 2000)	Coggon D, Newman Taylor A	"Coal mining and chronic obstructive pulmonary disease: a review of the evidence" Thorax 53:398-407, 400 (1998)
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65 Fed. Reg. 79,940, 79,941 (Dec. 20, 2000)	Attfield MD, Hodous TK	"Pulmonary function of U.S. coal miners related to dust exposure estimates" Am. Rev. Resp. Dis., 145: 605-609 (1992)
65 Fed. Reg. 79,940 (Dec. 20, 2000)	Seixas NS, Robins TG, Attfield MD, Moulton LH	"Exposure-response relationships for coal mine dust and obstructive lung disease following enactment of the Federal Coal Mine Health and Safety Act of 1969" Am. J. Ind. Med. 21:715-732 (1992)
65 Fed. Reg. 79,940 (Dec. 20, 2000)	Attfield MD	"Longitudinal decline in FEV_1 in United States coal miners" Thorax 40:132-137 (1985)
65 Fed. Reg. 79,940 (Dec. 20, 2000)	Love RG, Miller BG	"Longitudinal study of lung function in coal miners" Thorax 37: 193-197 (1982)
65 Fed. Reg. 79,941 (Dec. 20, 2000)	Brewis RAL, Corrin B, Geddes DM, Gibson GJ, eds.	*Respiratory Medicine* (1995), Morgan WKC, "Pneumoconiosis"
65 Fed. Reg. 79,941 and	Green FHY, Vallyathan V	"Coal Workers' Pneumoconiosis and Pneumoconiosis Due to Other

79,751 (Dec. 20, 2000)		Carbonaceous Dusts" in Chung A and Green FHY, eds., *Pathology of Occupational Lung Disease* (1998)
65 Fed. Reg. 79,941 (Dec. 20, 2000)	Hasleton PS, ed.	"Occupational Lung Disease" in *Spencer's Pathology of the Lung* (1996)
65 Fed. Reg. 79,941 (Dec. 20, 2000)	Roy TM, *et al.*	"Cigarette Smoking and Federal Black Lung Benefits in Bituminous Coal Miners" J. Occ. Med. 31(2):100 (1989)
65 Fed. Reg. 79,941, 79,971 (Dec. 20, 2000)	Surgeon General, U.S. Department of Health and Human Services	"Respiratory Disease in Coal Miners, The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace" 313 (1985)
65 Fed. Reg. 79,941, 79,942 (Dec. 20, 2000)	Cockcroft A, Wagner JC, Ryder R, Seal RME, Lyons JP, Andersson N	"Post-mortem study of emphysema in coalworkers and non-coalworkers" Lancet 2:600-603 (1982)
65 Fed. Reg. 79,941, 79,942 (Dec. 20, 2000)	Leigh J, Outhred KG, McKenzie HI, Glick M, Wiles AN	"Quantified pathology of emphysema, pneumoconiosis and chronic bronchitis in coal workers" Br. J. Indust. Med. 40:258-263 (1983)
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65 Fed. Reg. 79,971, 79,972 (Dec. 20, 2000)	Dimich-Ward H, Bates DV	"Reanalysis of longitudinal study of pulmonary function in coal miners in Lorraine France" Am. J. Ind. Med. 25:613-623 (1994)