Chapter 11
Living Miners' Claims: Entitlement Under 20 C.F.R. Part 718, Official Notice, Stipulations, and the Statute of Limitations at 20 C.F.R. § 725.308

This chapter focuses on the standards and burdens for establishing entitlement under 20 C.F.R. Part 718 (including the presumptions at 20 C.F.R. §§ 718.304 and 718.305) as well as determining whether an original or subsequent miner's claim is time-barred under 20 C.F.R. § 725.308. For principles of weighing medical evidence, and assessing conformity with quality standards, *see* Chapter 3. For law addressing the admissibility of evidence under the amended regulations at 20 C.F.R. Parts 718 and 725, *see* Chapter 4.

I. Applicability of 20 C.F.R. Part 718, generally

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

After promulgation of the regulations at 20 C.F.R. Part 718, if a claimant failed to meet the requirements of entitlement under 20 C.F.R. Part 727, the regulations at 20 C.F.R. Part 718 applied. However, in *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 B.L.R. 1-627 (1981), the Board held that regulatory language making 20 C.F.R. Part 718 applicable "as amended from

time to time," violated statutory intent. Therefore, under *Muncy*, the 20 C.F.R. Part 718 regulations do not apply to any claim filed prior to March 31, 1980; rather, the claim is adjudicated under 20 C.F.R. Part 410.

Five circuit courts of appeals disagreed with the Board's position regarding the applicability of 20 C.F.R. Part 718. The Third, Sixth, Seventh, Eighth, and Eleventh Circuits hold the regulations at 20 C.F.R. Part 718, not 20 C.F.R. Part 410, apply to Part C claims filed prior to March 31, 1980, and adjudicated after March 31, 1980. *Terry v. Director, OWCP*, 956 F.2d 251 (11th Cir. 1992); Oliver v. Director, OWCP, 888 F.2d 1239 (8th Cir. 1989); *Knuckles v. Director, OWCP*, 869 F.2d 996 (6th Cir. 1989); *Caprini v. Director, OWCP*, 824 F.2d 283 (3rd Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987). Thus, if a claimant cannot meet the requirements of entitlement under 20 C.F.R. Part 727 in these circuits, the claim must be adjudicated under 20 C.F.R. Part 718.

II. Official notice and stipulations

A. Official notice

1. Procedure used

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

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

Id. at 1-546.

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

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

3. Examples of official notice

a. Medical opinion; no official notice

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

b. Unreliability of early Social Security records

In *Calfee v. Director, OWCP*, 8 B.L.R. 1-7, 1-9 (1985), the Administrative Law Judge properly noted early Social Security records are not wholly reliable, when weighing Claimant's testimonial evidence and affidavits against such records to resolve disparities.

c. Dictionary of Occupational Titles

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

In *Snorton v. Zeigler Coal Co.*, 9 B.L.R. 1-106, 1-108 (1986), the Administrative Law Judge erred in concluding that the miner engaged in heavy labor based on the job description contained in the *Dictionary of Occupational Titles*. The Board explained that the Administrative Law Judge

failed to comply with the requirements for taking official notice.

d. Directory of Medical Specialists

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

e. Criminal conviction of a physician

In *Boyd v. Clinchfield Coal Co.*, 46 F.3d 1122, 1995 WL 10226 (4th Cir. 1995) (table), it was proper for an Administrative Law Judge to take official notice of Dr. Vinod Modi's criminal conviction. Moreover, citing to *Adams v. Canada Coal Co.*, Case No. 91-3706 (6th Cir. July 13, 1992)(unpub.) (the Administrative Law Judge "was obviously justified" in not crediting the testimony of Dr. Modi because of his conviction), the *Boyd* court upheld the Administrative Law Judge's decision to accord no weight to Dr. Modi's medical opinion in light of his conviction for tax evasion. For additional discussion regarding taking official notice of criminal convictions, *see* Chapter 3.

B. Stipulations

1. Binding regardless of underlying evidence

In *Consolidation Coal Co. v. Director, OWCP [Burris]*, ___ F.3d ___, Case No. 12-1330 (7th Cir. Oct. 8, 2013), the court affirmed the award of benefits to a miner with a 45-pack-year smoking history, a number of health problems including heart and lung disease, and 23 years of coal mine employment, where the miner's work for Employer was at a surface mine rather than at an underground mine site. The miner's first claim was abandoned under 20 C.F.R. § 725.409. At the hearing before the Administrative Law Judge, Employer conceded the presence of a totally disabling respiratory impairment in the second claim, and conceded the threshold requirement (of establishing an element of entitlement previously adjudicated against the miner) was demonstrated under 20 C.F.R. § 725.309 in this subsequent claim.

On appeal, Employer argued that the threshold requirement under 20 C.F.R. § 725.309 was not met because evidence supported a finding of total disability in the miner's first, abandoned claim, but the court disagreed for three reasons. First, the court held:

> [S]tipulations and concessions bind those who make them and Consolidation is therefore bound by its concession below that Burris is totally disabled and has met his burden of demonstrating a change in one of the conditions of entitlement.

Second, in the subsequent claim, the miner was not required to present medical evidence that differed qualitatively from evidence presented in the prior claim, *i.e.* evidence showing progression or worsening of the miner's condition. The miner's first claim was abandoned, which operated as a denial on all grounds. As a result, for purposes of the threshold determination in the second claim, the miner was required only to present evidence sufficient to establish an element of entitlement previously adjudicated against him—here, evidence of a totally disabling respiratory impairment. Third, the court reiterated that the 15-year presumption that the miner suffers from a total disability due to pneumoconiosis also may be used to satisfy the threshold requirement of 20 C.F.R. § 725.309 as in this case.

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

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

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

Administrative Law Judge did not offer "specific and persuasive reasons" for crediting Dr. Spagnolo's opinion.

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

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

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

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

3. Stipulation of pneumoconiosis in miner's claim, effect of in survivor's claim

In *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996), a case involving a living miner’s claim, the Director stipulated coal workers' pneumoconiosis was present. The court held it was error, therefore, for the Administrative Law Judge to find the record did not support a finding of the disease in the survivor's claim. The court further stated the stipulation was binding even though presence of the disease was not "manifest from the medical records." The court then remanded the case to the Administrative Law Judge for a determination of whether coal workers' pneumoconiosis hastened the miner's death. *See also Spangler v. Donna Kay Coal Co.*, 24 B.L.R. 1-183 (2010) (stipulation of complicated pneumoconiosis in the miner’s claim is binding in the survivor’s claim).

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

4. Stipulation of pneumoconiosis does not constitute stipulation of impairment

In the survivor's claim of *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622 (4th Cir. 1999), Employer stipulated to the presence of coal workers' pneumoconiosis, but argued the disease did not hasten the miner's death. In weighing the autopsy evidence of record, the Administrative Law Judge credited Claimant's physicians' opinions over physicians' opinions offered by Employer, who found only a "'mild' or 'minimal" level of simple coal workers' pneumoconiosis. The Administrative Law Judge reviewed the definition of pneumoconiosis as "a chronic dust disease of the lung and its sequelae, *including respiratory and pulmonary impairments*, arising out of coal mine employment . . .." 20 C.F.R. § 718.201 (emphasis added). From this, the Administrative Law Judge concluded, "Because Clinchfield stipulated that Mr. Fuller had pneumoconiosis, . . . it must also have stipulated that his pneumoconiosis was impairing . . .." The court disagreed, and held 20 C.F.R. § 718.201 does not contain a requirement that "coal dust-specific diseases . . . attain the status of an 'impairment' to be classified as 'pneumoconiosis.'" The court noted the definition of pneumoconiosis is satisfied "whenever one of these diseases is present in the miner at a detectable level; whether the particular disease exists to such an extent as to be compensable is a separate question." As a result, the case was remanded to the Administrative Law Judge to re-weigh the autopsy evidence to determine whether the disease hastened the miner's death.

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

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

6. Stipulation that claim timely filed, binding on employer

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

7. Application of 20 C.F.R. § 725.309(d)(4)

a. Applies to stipulations in claims filed

after January 19, 2001

In *Harris v. Cannelton Industries, Inc.*, 24 B.L.R. 1-217 (2011), counsel for the Director and Employer argued the Administrative Law Judge "erred in finding that employer's stipulation (of coal mine employment) in the 1982 claim is binding in this (subsequent claim) pursuant to Section 725.309(d)(4) (2010)." In support of its position, the Director stated the language regarding stipulations at 20 C.F.R. § 725.309(d)(4) first appeared in the December 20, 2000 amendments to the regulations such that it was error to apply the regulatory provision "retroactively to find that employer's 1986 stipulation is binding." Citing to the preamble at 65 Fed. Reg. 80054 (Dec. 20, 2000), the Board agreed and held:

> The provision of Section 725.309(d)(4) (2010), making a party's stipulations in a prior claim binding in a subsequent claim, in concert with 20 C.F.R. § 725.2, is not to be applied retroactively to stipulations made in claims filed on or before January 19, 2001.

Id. at 1-223.

b. Immediately preceding claim

By unpublished decision in *D.R. v. Jewell Ridge Mining Corp.*, BRB 08-0661 BLA (May 27, 2009) (unpub.), a case arising in the Fourth Circuit, counsel for the Director argued 20 C.F.R. § 725.309(d)(4) "applies only to the prior claim that *immediately precedes* the pending subsequent claim." *Slip op*. at 4, n. 4 (italics added). Thus, in the miner's third claim, the Director maintained, because no stipulations were made in the miner's second claim, the Administrative Law Judge could not incorporate stipulations made in the miner's first claim. However, the Board declined to rule on the merits of this position based on its finding that the Administrative Law Judge erred in finding Employer stipulated to the existence of pneumoconiosis in the first claim.

8. Pre-PPACA length of coal mine employment stipulation not binding in post-PPACA claim

In *Styka v. Jeddo-Highland Coal Co.*, 25 B.L.R. 1-61 (2012), the Board held "fundamental fairness and due process would require relief from . . . a formal stipulation made prior to change in the law effectuated by passage of (the PPACA),[2] and the reallocation of the burden of proof to employer on rebuttal under amended Section 411(c)(4), if applicable."

9. Stipulation of complicated pneumoconiosis

In *Spangler v. Donna Kay Coal Co.*, 24 B.L.R. 1-183 (2010), the Board denied Employer's motion for dismissal as the operator responsible for payment of benefits. In a letter to the Administrative Law Judge, Employer withdrew its controversion of the miner's claim stating that "autopsy evidence establishe[d] complicated pneumoconiosis," and the "miner's entitled to the irrebuttable presumption" at 20 C.F.R. § 718.304. As a result, the Board held "employer stipulated to its own liability by conceding that the autopsy report established complicated pneumoconiosis and entitlement to the irrebuttable presumption at 20 C.F.R. § 718.304."

III. Elements of entitlement under 20 C.F.R. Part 718

A. For claims filed on or before January 19, 2001

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

B. For claims filed after January 19, 2001

The amended regulations, at 20 C.F.R. § 725.202(d)(2), provide that a miner meets the requirements for entitlement by establishing that s/he: (1) has pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) suffers from a totally disabling respiratory or pulmonary standpoint; and (4) the pneumoconiosis contributes to the total disability. 20 C.F.R. § 725.202(d)(2).

2 The Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 § 1556 (2010) was enacted on March 23, 2010.

IV. The existence of pneumoconiosis

A. "Pneumoconiosis" defined

1. The regulatory provisions

a. For claims filed on or before January 19, 2001

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

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

20 C.F.R. § 718.201 (2000).

b. For claims filed after January 19, 2001

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

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

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

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

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

A pulmonary or respiratory disease constitutes statutory pneumoconiosis if it is significantly related to, or aggravated by, dust exposure in coal mine employment. "Clinical" or "medical" pneumoconiosis is typically diagnosed via analog or digital chest x-rays, CT-scans, or autopsy or biopsy evidence. Through these forms of evidence, the physician determines the presence or absence of specific nodules, opacities, or lesions attributable to a chronic dust disease of the lungs, *i.e.* pneumoconiosis.

20 C.F.R. § 718.202(a)(1) and (a)(2).

At this point, the issue of whether the observed “clinical” or “medical” pneumoconiosis is caused by dust exposure arising from coal mine employment remains unresolved. By definition, "pneumoconiosis" is a chronic dust disease of the lungs. And, there are a variety of non-compensable causes of "clinical" or "medical" pneumoconiosis, such as asbestos exposure from working as a pipefitter on a barge, or uranium exposure from working in a uranium mine. Sometimes, a miner will have a history of multiple exposures. Thus, where "clinical" pneumoconiosis is diagnosed, the fact-finder must apply the regulatory provisions at 20 C.F.R. § 718.203 to determine whether the disease stems from employment in the coal mines. Here, miners with ten or more years of coal mine employment are entitled to a rebuttable presumption that the diagnosed disease is caused, at least in part, by dust exposure from such employment. Miners with fewer than ten years of coal mine employment must present medical evidence sufficient to demonstrate causation by a preponderance of the evidence.

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

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

The Fourth Circuit cautions that an Administrative Law Judge "must bear in mind when considering medical evidence that physicians generally use 'pneumoconiosis' as a *medical or clinical* term that comprises merely a small subset of the afflictions compensable under the Act."

The fact-finder, however, must review evidence in light of the much broader legal definition. *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995).

As an example, in *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the Administrative Law Judge discredited four out of five physicians who found no pneumoconiosis because the miner's "impairment was obstructive in nature." The court agreed these opinions were not probative, noting the definition of *legal* pneumoconiosis "may consist of an obstructive impairment." After reviewing comments of the physicians who stated, *inter alia*, pneumoconiosis is associated with restrictive impairments, and smoking is associated with obstructive impairments, the court concluded such comments "supported the ALJ's findings that the employer's physicians were overwhelmingly focused on clinical rather than legal pneumoconiosis."

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

a. Pneumoconiosis is progressive

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

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

The court stated, "[T]he tenet that pneumoconiosis is non-progressive is simply inconsistent with the 'assumption of [disease] progressivity that underlies much of the statutory regime.'" Moreover, the court observed, even assuming the disease was not progressive, absence of a "clinically significant" pulmonary impairment two and one-half years prior to the miner's death "certainly does not establish that Kramer had incurred no damage to his lung tissue and no pulmonary burden of any degree whatsoever as a result of his occupational exposure." The court further noted, "[N]othing in the evidence that Consolidation points to would negate the conclusion that a preexisting pulmonary burden, albeit insufficient standing alone to result in measurable loss of lung function, could nonetheless in combination with a further affront to the pulmonary system through advancing cancer have decreased to some degree the lungs' ability to continue to compensate."

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

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

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

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

> [W]hile the amendments to Section 718.201 did not alter claimant's burden of proving that he suffers from

> pneumoconiosis arising out of coal mine employment by a preponderance of the evidence and without the benefit of any presumption of latency or progressivity, the regulations and the *NMA* decision[4] do not require that a miner separately prove he suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that his disease actually progressed. (citations omitted). As we explained in *Workman v. Eastern Assoc. Coal Corp.*, 23 B.L.R. 1-22 (2004) (order on recon.) (en banc), because the potential for progressivity and latency is inherent in every case, a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a progressive nature.

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

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

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

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

3. "Legal" coal workers' pneumoconiosis

a. Established

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

Similarly, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). *See also Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-139 (1999) (chronic bronchitis and emphysema fall within the definition of pneumoconiosis if they are related to coal mine employment).

b. Not established

On the other hand, if a physician diagnoses a condition set forth in the definition of pneumoconiosis, but fails to attribute the condition to coal dust exposure, then the report does not support a finding of compensable pneumoconiosis. For example, by unpublished decision in *C.E.S. v. Consolidation Coal Co.*, BRB No. 07-0329 BLA (Jan. 31, 2008) (unpub.), the physician diagnosed silico-tuberculosis, but failed to attribute it to coal dust exposure. While the Administrative Law Judge correctly noted silico-tuberculosis was among the possible forms of legal pneumoconiosis under the regulations, he improperly concluded the miner established compensable pneumoconiosis. Rather, the Board held the physician must attribute the silico-tuberculosis to coal dust exposure. Otherwise, the Administrative Law Judge has "impermissibly shifted the burden of proof in requiring employer to rule out the presence of legal pneumoconiosis."

4. "Clinical" or "medical" pneumoconiosis on autopsy or biopsy under 20 C.F.R. § 718.202(a)(2)

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

In *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113 (1988), the Board held the quality standards are not mandatory, and failure to comply with the standards goes to the reliability and weight of the evidence. In *Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536 (11th Cir. 1993), the Eleventh Circuit held a biopsy need only be in "substantial compliance" with the quality standards at 20 C.F.R. § 718.106 to be admissible. Specifically, a biopsy report diagnosing anthracosis, which did not include the surgical report, is in "substantial compliance" with the regulations.

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

a. Pigment with associated fibrosis, required

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

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

20 C.F.R. § 718.202(a)(2).

On the other hand, observations of black pigment *with associated fibrosis* would qualify as a diagnosis of the disease. Similarly, anthracotic pigment with associated fibrosis is the equivalent of anthracosis, which satisfies the definition of pneumoconiosis under 20 C.F.R. § 718.202(a).

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

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

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

b. Anthracosis in lymph nodes must be considered

- Generally

By unpublished decision in *Taylor v. Director, OWCP*, BRB No. 01-0837 BLA (July 30, 2002) (unpub.), a physician concluded no pneumoconiosis was present on autopsy, but he observed "minimal anthracosis in the mediastinal lymph nodes." As a result, the Board remanded the case to the Administrative Law Judge to determine whether the definition of pneumoconiosis at 20 C.F.R. § 718.201, which includes anthracosis, was satisfied. The Board held "anthracosis found in lymph nodes may be sufficient to establish the existence of pneumoconiosis."

- 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 vacated a denial of benefits. Citing to *Clites v. J&L Steel Corp.,* 663 F.2d 14 (3rd Cir. 1981), the Board held 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 consider statements by Drs. Naeye and Hippensteel; namely, because there were no lesions greater than 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, if complicated pneumoconiosis is present, the Administrative Law 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)."

c. Finding of no pneumoconiosis on biopsy not preclude finding of pneumoconiosis

Under the regulations, negative biopsy evidence does not preclude a finding of pneumoconiosis using other medical data:

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

20 C.F.R. § 718.106(c).

5. Use of blood gas and pulmonary function testing

a. Blood gas testing

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

b. Pulmonary function testing

Pulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis; they address the existence and nature of any respiratory impairment. *Burke v. Director, OWCP*, 3 B.L.R. 1-410 (1981). In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), a medical opinion, which attributed the miner's respiratory impairment to his smoking history because pulmonary function testing produced a purely obstructive defect, was not well-reasoned. The court stated:

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

impairment.

Likewise, in *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the Administrative Law Judge discredited four out of five physicians rendering opinions where the physicians concluded pneumoconiosis was not present because the miner's "impairment was obstructive in nature." The court agreed with the Administrative Law Judge, and noted the definition of *legal* pneumoconiosis "may consist of an obstructive impairment." After reviewing comments of the physicians who stated, *inter alia*, pneumoconiosis is associated with restrictive impairments and smoking is associated with obstructive impairments, the court concluded such comments "supported the ALJ's findings that the employer's physicians were overwhelmingly focused on clinical rather than legal pneumoconiosis."

6. Admission against interest

In *Johnson v. Royal Coal Co.*, 326 F.3d 421 (4th Cir. 2003), *rev'g.*, 22 B.L.R. 1-132 (2000), the court held 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 the miner 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 a 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 "thereafter (Claimant) *did* enter the admissions, thus making them effective." (italics in original). As a result, the court reversed the Board's judgment to the contrary, and remanded the claim for the payment of benefits.

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

B. Regulatory methods of establishing pneumoconiosis

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

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

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

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

For further discussion of issues related to application of the “Tobias rule,” see Chapter 10.

2. Weighing evidence together versus weighing evidence separately

a. Benefits Review Board

Over the years, the Board held pneumoconiosis may be established by operation of presumption, or by a preponderance of the evidence at any one of the individual subsections at 20 C.F.R. § 718.202(a)(1), (a)(2), or (a)(4). For example, in *Jones v. Badger Coal Co.*, 21 B.L.R. 1-103 (1998) (*en banc*), it was proper for the Administrative Law Judge to separately evaluate the x-ray evidence at 20 C.F.R. § 718.202(a)(1), and find no evidence of pneumoconiosis, but conclude the medical opinion evidence at 20 C.F.R. § 718.202(a)(4) did support a finding of the disease.

Employer argued, under 20 C.F.R. § 718.202(a), "all relevant evidence must be weighed together to determine whether claimant suffers from the disease," and it cited to the Third Circuit's holding in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3rd Cir. 1997). The Board countered to note the claim in *Jones* it did not arise in the Third Circuit, such that the *Williams*

decision was not controlling. Moreover, the Board observed that the circuit court failed to distinguish between clinical and legal pneumoconiosis. In this vein, the Board reasoned legal pneumoconiosis "is a broader category which is not dependent upon a determination of clinical pneumoconiosis, and the absence of clinical pneumoconiosis does not necessarily influence a physician's diagnosis of legal pneumoconiosis."[5]

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

b. Third Circuit

In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3rd Cir. 1997), the Third Circuit stated the following with regard to establishing pneumoconiosis pursuant to the methods set forth at 20 C.F.R. § 718.202(a):

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

[5] All evidence relevant to the existence of pneumoconiosis must be considered and weighed. In *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986), Claimant failed to demonstrate the presence of pneumoconiosis, even though the x-ray evidence of record was positive. The Board concluded the "Administrative Law Judge's assignment of less weight to the record's positive x-rays was rational and based on substantial evidence," where "the weight of other medical evidence indicat[ed] that claimant's impairment was due to interstitial fibrosis of unknown etiology." *Id*. at 1-68.

relevant evidence.

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

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

c. Fourth Circuit

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

> [W]eighing all of the relevant evidence together makes common sense. Otherwise, the existence of pneumoconiosis could be found even though the evidence as a whole clearly weighed against such a finding. For example, suppose x-ray evidence indicated that the miner had pneumoconiosis, but autopsy evidence established that the miner did not have any sort of lung disease caused by coal dust exposure. In such a situation, if each type of evidence were evaluated only within a particular subsection of § 718.202(a) to which it related, the x-ray

> evidence could support an award for benefits in spite of the fact that more probative evidence established that benefits were not due. *See Griffith v. Director, OWCP*, 49 F.3d 184, 187 (6th Cir. 1995) (noting that autopsy evidence is generally accorded greater weight than x-ray evidence).

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

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

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

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

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

d. Sixth Circuit

In *Dixie Fuel Co. v. Director, OWCP [Hensley]*, 700 F.3d 878 (6th Cir. 2012), the Sixth Circuit followed *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000) and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3rd Cir. 1997) and held, although 20 C.F.R. § 718.202(a) sets forth four distinct methods of establishing pneumoconiosis, the Administrative Law Judge ultimately must weigh all of the evidence together under 20 C.F.R.

§ 718.202(a) when determining whether the miner suffers from the disease.[6]

Under the facts of the claim, the Administrative Law Judge found chest x-ray evidence was preponderantly positive, but the biopsy data was negative, the CT-scans were inconclusive, and "several physicians testified against an award of benefits." The circuit court stated:

> This is not to say that the ALJ must reconsider his prior judgment with respect to any one piece of contrary evidence or end up with a different conclusion. All of that is up to the ALJ in the first instance.

e. Eleventh Circuit

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

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

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

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[6] Notably, the Director argued all evidence must be weighed together under 20 C.F.R. § 718.202(a) prior to finding pneumoconiosis present.

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

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

And, if a miner or survivor presents evidence sufficient to invoke the irrebuttable presumptions of total disability and/or death due to pneumoconiosis at 20 C.F.R. § 718.304, then evidence that the miner's disability or death is unrelated to pneumoconiosis is not relevant, *i.e.* the miner is totally disabled due to a stroke, or the miner died due to traumatic injury, suicide, or cancer. *See e.g., Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999).

1. The "equivalency" determination

The regulations at 20 C.F.R. § 718.304 provide the following regarding complicated pneumoconiosis:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray (see § 718.202 concerning the standards for X-rays and the effect of interpretations of X-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C in:
>
> (1) The ILO-U/C International Classification of Radiographs of the Pneumoconioses, 1971, or subsequent revisions thereto; or
>
> (2) the International Classification of the Radiographs of the Pneumoconioses of the International Labour Office, Extended Classification (1968) (which may be referred to as the 'ILO Classification (1968)'); or
>
> (3) The Classification of the Pneumoconioses of the

Union Internationale Contra Cancer/Cincinnati "UICC/Cincinnati (1968) Classification'); or

(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section had diagnosis been made as therein described; *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. § 718.304.

a. An overview

Considerable litigation has ensued regarding the meaning of each of the three methods of demonstrating complicated pneumoconiosis, *i.e.* chest x-rays, autopsy or biopsy, and "by means other than" x-rays and autopsy or biopsy evidence. The Board and some circuit courts hold an "equivalency" determination is necessary to assess whether lesions found in the lung on autopsy or biopsy would correspond to opacities that are greater than one centimeter when viewed on an x-ray, or whether opacities observed on "other evidence" at 20 C.F.R. § 718.107 (such as CT scans) would equate to A, B, or C opacities by chest x-ray.

For example, some physicians maintain a chest x-ray will record only the central part of the actual lesion and, therefore, a lesion must be larger than one centimeter on autopsy to constitute a greater than one centimeter opacity on a chest x-ray. Other physicians argue technological advances have resulted in increased accuracy on chest x-rays such that a one centimeter lesion on autopsy would be equal to a greater-than-one-centimeter opacity on chest x-ray. This disparity must be resolved on a case-by-case basis. The following constitutes an overview of appellate tribunal positions on this issue:

For a miner who is last employed in coal mines in Pennsylvania, New Jersey, or Delaware, the **Third Circuit** requires an "equivalency determination" if complicated pneumoconiosis is diagnosed by other means under 20 C.F.R. § 718.304(c). *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14 (3rd Cir. 1981). If the miner last engaged in coal mine employment in Virginia, West Virginia, North Carolina, South Carolina, or Maryland, then the **Fourth Circuit** requires that a medical expert provide an "equivalency determination" if diagnosing complicated pneumoconiosis under 20 C.F.R. § 718.304(b) or (c) (biopsy/autopsy evidence and other means such as CT-scans). *Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d

250 (4th Cir. 2000). For miners last engaged in coal mine employment in Ohio, Kentucky, Tennessee, or Michigan, the **Sixth Circuit** requires either (1) an "equivalency determination" if diagnosing complicated pneumoconiosis under 20 C.F.R. § 718.304(c) (other means), or (2) a finding of "massive lesions" under 20 C.F.R. § 718.304(b) (biopsy/autopsy). *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999). If the miner last engaged in coal mine work in Kansas, Oklahoma, Wyoming, Colorado, Utah, or New Mexico, the **Tenth Circuit** determined it will follow the decision of the Eleventh Circuit such that an "equivalency determination" is not required. *Bridger Coal Co. v. Director, OWCP [Ashmore]*, 669 F.3d 1183 (10th Cir. 2012). If a miner last engaged in coal mine employment in Florida, Georgia, or Alabama, the **Eleventh Circuit** holds complicated pneumoconiosis may be established independently under any one of three subsections at 20 C.F.R. § 718.304, and an "equivalency determination" is not required. *Pittsburgh & Midway Coal Mining Co. v. Director, OWCP*, 508 F.3d 975 (11th Cir. 2007).

b. Additional case law summaries

- Benefits Review Board

In *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 B.L.R. 1-1264 (1984), the evidence did not support a finding of complicated pneumoconiosis, even though a doctor indicated that "the lung parenchyma also has underspread black modules, which vary up to 0.9 to 1.2 centimeters." Similarly, the equivalency determination was lacking in *Smith v. Island Creek Coal Co.*, 7 B.L.R. 1-734 (1985), where the doctor who performed the autopsy indicated the presence of two nodular areas measuring 1.2 to 1.3 centimeters, but no attempt was made to equate the lesions found on autopsy with the size of x-ray opacities required by 20 C.F.R. § 718.304(a). *See also Reilly v. Director, OWCP*, 7 B.L.R. 1-139 (1984).

On the other hand, in *Braenovich v. Cannelton Industries, Inc.*, 22 B.L.R. 1-236 (2003), the Administrative Law Judge properly found a 1.5 centimeter lesion on autopsy would constitute a 1.0 centimeter or greater opacity on a chest x-ray, thus establishing the presence of complicated pneumoconiosis under 20 C.F.R. § 718.304. In support of the Administrative Law Judge's finding, the Director argued the autopsy prosector and a reviewing pathologist found a lesion larger than one centimeter in the miner's lungs. The Director stated, although another reviewing pathologist, Dr. Naeye, found a 0.9 centimeter lesion on the slides, this would not "disprove the existence of a nodule larger than one centimeter in the miner's lungs." The Director noted one of Employer's experts, Dr. Kleinerman, "acknowledged that a tissue sample shrinks by

about 10 - 15% when prepared for a slide . . .." *See also Hawker v. Zeigler Coal Co.*, 22 B.L.R. 1-168 (2000).

- Fourth Circuit

In *Perry v. Mynu Coals Inc.*, 469 F.3d 360 (4th Cir. 2006), *reh'g. denied* (4th Cir. Feb. 16, 2007), the Administrative Law Judge improperly denied the presence of complicated pneumoconiosis on three grounds: (1) the prosector's statements with regard to what size the four and six centimeter nodules would be on x-ray were "equivocal"; (2) the prosector was unfamiliar with the miner's smoking history; and (3) the prosector failed to identify pneumoconiosis as a cause of death. As noted by the court, the prosector testified, although he "was not a hundred percent sure," he thought that the four and six centimeter lesions would appear greater than one centimeter on an x-ray, and the lesions were related to coal dust exposure and cancer. The court held this was sufficient to invoke the irrebuttable presumption at 20 C.F.R. § 718.304 of the regulations, and the bases for the Administrative Law Judge's rejection of the prosector's opinion were erroneous.

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

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

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

- It is error to accord greater weight to the opinion of

the prosector solely because s/he conducted the autopsy and observed the miner's entire respiratory system (*see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186 (4th Cir. 2000));

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

- The Administrative Law Judge properly found the prosector's report supported a finding of massive lesions in the lungs based on a dictionary definition of "massive" as meaning "extensive or severe."

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

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

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

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

- Sixth Circuit

In *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999), a miner who died of a self-inflicted gunshot wound nevertheless may be awarded black lung benefits if he suffered from complicated pneumoconiosis and, therefore, invoked the irrebuttable presumption of total disability and death due to the disease. The court then reviewed the record to determine whether it supported a finding of complicated pneumoconiosis. Here, the court noted a diagnosis of the disease may be made based on chest x-ray evidence revealing opacities greater than one centimeter in diameter, or by autopsy or biopsy evidence demonstrating "massive lesions." Notably, the court held x-ray evidence of opacities measuring at least one centimeter does not, standing alone, trigger the irrebuttable presumption where conflicting autopsy evidence exists. Moreover, the "one-centimeter standard applicable to x-rays simply does not apply to autopsy evidence." The court stated x-rays are the "least accurate method" of diagnosing complicated pneumoconiosis such that "all relevant evidence" must be weighed prior to invocation of the presumption. Under the facts of *Gray*, the autopsy evidence did not support a finding of complicated pneumoconiosis as Dr. Kleinerman testified "that the lesions on the lung-tissue slides would not appear as opacities of greater than one centimeter on an x-ray," and the nodules observed in the miner's lung on autopsy did not constitute "massive lesions" as required by the regulation.

- Tenth Circuit

In *Bridger Coal Co. v. Director, OWCP*, 669 F.3d 1183 (10th Cir. 2012), the Tenth circuit declined to require a ”equivalency determination,” where Claimant relied on autopsy or biopsy evidence at 20 C.F.R. § 718.304(b) to establish complicated pneumoconiosis. Following the Eleventh Circuit’s

holding in *Pittsburgh & Midway Coal Mining Co. v. Director, OWCP*, 508 F.3d 975 (11th Cir. 2007), the Tenth Circuit concluded Claimant may establish complicated pneumoconiosis under any one of the three prongs without the necessity of demonstrating "equivalency." However, the court also stated:

> [R]egardless of whether equivalency determinations are required, the ALJ is not relieved of its obligation to consider 'all relevant evidence' in making a benefits determination. *See* 30 U.S.C. § 923(c).

On review of the autopsy evidence, the Administrative Law Judge properly accorded greater weight to the prosector, Dr. Dobersen, who diagnosed complicated pneumoconiosis over the contrary opinions of Drs. Crouch and Tomashefski. The court observed:

> The ALJ provided four reasons for preferring the opinion of Dr. Dobersen: his board certifications in the most sub-disciplines of pathology, his position as prosector, his detailed findings, and his demonstrated understanding of complicated and simple pneumoconiosis. Dr. Dobersen's opinion included an observation of a 2.5 inch (6.35 cm) lesion of anthracotic scarring in Lambright's lung, which was consistent with one of (Employer's) doctor's observation of a 'large node' on earlier CT scans.
>
> . . .
>
> …[T]he other reasons (Employer) advances for preferring the opinions of its experts over that of Dr. Dobersen might be persuasive on *de novo* review, but they ultimately amount to invitations to re-weigh the evidence, which this court may not do.

- Eleventh Circuit

In *The Pittsburgh & Midway Coal Mining Co. v. Director, OWCP*, 508 F.3d 975 (11th Cir. 2007), the prosector identified "massive lesions" as well as "[m]ultiple scattered fibroanthracotic nodules measuring up to 1.2 cm" and stated that the "microscopic features are consistent with a complicated pneumoconiosis, as defined by the Black Lung Program Guidelines . . .." The prosector then testified "pathologists are best able to make a diagnosis of complicated pneumoconiosis when they perform both a gross and microscopic examination because 'the things you see grossly are not . . . necessarily in toto represented on the slides . . .." Employer

submitted a contrary report, wherein a reviewing pathologist concluded the largest nodule he could find on the autopsy slides measured 0.9 centimeters, which did not qualify for a diagnosis of complicated pneumoconiosis.

On appeal, Employer argued, because the miner died due to congestive heart failure, the provisions at 20 C.F.R. § 718.205(c)(4) (that a survivor is not entitled to benefits where the principal cause of death is unrelated to pneumoconiosis) mandated denial of the survivor's claim. The court disagreed, and held the provisions at 20 C.F.R. § 718.304 are mandatory. These provisions state there "*shall* be an *irrebuttable* presumption" of the cause of death, where it is established that the miner suffered from complicated pneumoconiosis.

Turning to the medical evidence, Claimant did not produce chest x-ray evidence sufficient to invoke the irrebuttable presumption at 20 C.F.R. § 718.304. With regard to the autopsy evidence, one of Employer's experts maintained "'massive lesions' refers to lesions the size of a chicken egg or one-third of one lung, significantly larger than the 1.2 centimeter lesion found by" the prosector. The Director disagreed, and stated the "chicken-egg standard has no medical basis, and that '[t]he term massive lesions is merely one of several ways of describing the condition known as complicated pneumoconiosis.'"

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

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

Here, the prosector's identification of multiple nodules, including a nodule measuring 1.2 centimeters, was sufficient to support a finding of complicated pneumoconiosis. In this vein, the court declined to follow *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 242 (4th Cir. 1999),

wherein Claimant was required to demonstrate that the lesion on autopsy would show as an opacity greater than one centimeter in diameter on x-ray. The Eleventh Circuit held the regulations do not require such an "equivalency determination." In a footnote, the court further stated, "[B]ecause [the prosector] found at least one lesion as large as 1.2 centimeters in diameter, . . . we are satisfied that 1.2 centimeters is sufficiently greater than 1 centimeter to qualify as 'massive'" in support of a finding of complicated pneumoconiosis.

2. Chest x-ray evidence

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

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

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

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

b. Cause of the opacities

If the fact-finder determines that a size A, B, or C opacity is present,

then it must be determined whether the opacity is related to coal dust exposure. For a discussion of the impact of 20 C.F.R. § 718.203 on this analysis, see the proper subsection of this chapter.

- Claimant's burden

In *Looney v. Shady Lane Coal Corp.*, BRB No. 06-0508 BLA (Feb. 28, 2007)(unpub.), the Board held the following:

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

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

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

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

- Alternative etiologies, effect of

By unpublished decision in *Reed v. Markfork Coal Co.*, BRB No. 10-0170 BLA (Feb. 22, 2011)(unpub.), the Board upheld the Administrative Law Judge's decision to accord little weight to the "multiple negative readings" of Dr. Wheeler as well as the readings by Dr. Scatarige. The Administrative Law Judge determined the miner's treatment records "did not support the alternative etiologies advanced by either Dr. Wheeler or Dr. Scatarige for claimant's radiographic changes." These "alternative etiologies" included tuberculosis, histoplasmosis, or another granulomatous disease. The Board noted the Administrative Law Judge's consideration of interpretations by Drs. Wheeler and Scatarige did not fun afoul of its holding in *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999)(en banc on recon.):

> The present case is distinguishable as, in contrast to the readings at issue in *Cranor*, Drs. Wheeler and Scatarige did not classify the x-rays as containing a large opacity consistent with an ILO classification of complicated pneumoconiosis, which they then explained was not consistent with complicated coal workers' pneumoconiosis. (citation omitted). Rather, Drs. Wheeler and Scatarige suggested that what they observed on claimant's x-rays was not properly classified as a large opacity under the ILO system. Because their comments were relevant to whether they accurately determined that the films contained no large opacities consistent with pneumoconiosis, we discern no error . . ..

Slip op. at 13-14. The Administrative Law Judge also addressed non-qualifying blood gas and pulmonary function testing in light of his finding of complicated pneumoconiosis, and the Board stated:

> The administrative law judge acknowledged that, although it may be unusual for a miner to have complicated pneumoconiosis and no respiratory impairment, . . . he was not persuaded that the mere absence of an impairment precluded a finding of complicated pneumoconiosis, as defined in the Act and regulations, noting that even Dr. Castle admitted that there are times when a miner may have a Category A opacity on x-ray and no disability demonstrated on his pulmonary function testing.

Slip op. at 12.

- Need to "rule out" another etiology, effect of

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 contrary conclusion. 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 20 C.F.R. § 718.304(c), the Board upheld the Administrative Law 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 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 quoted, with approval, to the Administrative Law 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 Administrative Law Judge's weighing of the evidence, and affirmed a finding of complicated pneumoconiosis.

- Alternative diagnoses unsupported by treatment records

In *Westmoreland Coal Co. v. Director, OWCP [Cox]*, 602 F.3d 276 (4th Cir. 2010), the court affirmed the Administrative Law Judge's award of benefits based on a finding of complicated coal workers' pneumoconiosis. The Administrative Law Judge properly weighed all of the medical evidence. As noted by the court:

> [T]here was no dispute that the x-rays showed at least one mass measuring more than three centimeters in the upper part of Cox's right lung. This finding was also supported by several CT scans and other medical tests. Westmoreland's experts did not dispute the existence of a large mass. Instead, they asserted that the mass was likely due to one of a number of other possible diseases. The ALJ rejected their conclusions as equivocal and speculative, and found that they did not constitute affirmative evidence sufficient to show that the opacities were not due to pneumoconiosis.

. . .

> The ALJ also reasoned that because the 2005 biopsy showed signs of pneumoconiosis . . ., and cancer had since been ruled out, the record strongly indicated that pneumoconiosis was what caused the opacities found in Cox's tests. Finally, the ALJ noted that none of Westmoreland's experts had reviewed the 2005 biopsy or questioned its results.

As Claimant demonstrated 30 years of coal mine employment, the Administrative Law Judge properly found he was entitled to invocation of the 20 C.F.R. § 718.203 presumption (his disease arose from coal mine employment).

The court disagreed with Employer's argument that the Administrative Law Judge erred in rejecting expert opinions that the opacities were likely due to tuberculosis, histoplasmosis, granulomatous disease, or sarcoidosis. The court noted Drs. Wheeler, Scott, Scatarige, and Hippensteel offered "speculative alternative diagnoses that were not based on evidence that Cox suffered from any of the diseases suggested." The court found, "None of the doctors discussed whether any of the diseases could occur in conjunction with pneumoconiosis," and "none of them pointed to evidence that Cox was suffering from any of the alternative diseases mentioned or discussed," or "whether the tests showed any signs inconsistent with those diseases." Further, the court stated "none of the doctors reviewed or opined upon the results of the 2005 biopsy." In the end, the court agreed with the Administrative Law Judge "that the experts' opinions did not constitute affirmative evidence sufficient to weaken the claimant's x-ray evidence showing large opacities that satisfied the statutory definition of complicated pneumoconiosis."

- <u>Equivocal opinion regarding cause of opacity, not probative</u>

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

> The ALJ . . . explained that he was according less weight to Drs. Scott and Wheeler because their opinions were equivocal on the abnormalities shown on Fife's X-rays, in that they could only opine that such spots were 'compatible with' or 'probably' tuberculosis. (citation omitted). Moreover, Scott and Wheeler

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

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

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

3. Autopsy or biopsy evidence

Under 20 C.F.R. § 718.304(b), complicated pneumoconiosis may be

diagnosed based on a finding of "massive lesions" in the lung. To determine whether an "equivalency" determination is required in a particular claim, *see* the discussion under "Equivalency determination," *supra*, in this chapter.

a. Progressive massive fibrosis

Progressive massive fibrosis equates to a diagnosis of "massive lesions" resulting from pneumoconiosis under 20 C.F.R. § 718.304(b). *Pruett v. Chisholm Coal Co*., BRB No. 09-0410 BLA, slip op. at 7 (Feb. 24, 2010) (unpub.) (*citing Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 B.L.R. 2-304 (4th Cir. 1995). In *Pruett*, the Board acknowledged the term "progressive massive fibrosis" is generally considered the equivalent of "complicated pneumoconiosis." *Slip op.* at 7, n.5 (*citing* 65 Fed. Reg. 79,951 (Dec. 20, 2000)). Under the facts of *Pruett, t*he Board was discussing biopsy evidence (and the equivalency requirement) under 20 C.F.R. § 718.304.

b. Lesions must be comprised of pigment related to coal dust exposure

By unpublished decision in *M.G. v. Elkay Mining Co.*, BRB No. 09-0117 BLA (Oct. 28, 2009) (unpub.), lesions identified on autopsy must be "comprised solely of anthracotic or pneumoconiotic material in order to invoke the irrebuttable presumption." The Board affirmed the Administrative Law Judge's award of benefits under 20 C.F.R. § 718.304 because he properly "reweighed the evidence to determine whether claimant established a mass or lesion, consisting entirely of pneumoconiotic material, that would appear as an opacity greater than one centimeter if viewed on x-ray." The Board noted a lesion containing a mixture of pneumoconiosis and cancer would not satisfy the requirements at 20 C.F.R. § 718.304 of the regulations. Moreover, the Administrative Law Judge properly applied the ten-year presumption at 20 C.F.R. § 718.203 to his finding of complicated pneumoconiosis on autopsy which, in turn, supported entitlement to benefits.

c. Two centimeter lesion not required

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 vacated a denial of benefits. Citing to *Clites v. J&L Steel Corp.,* 663 F.2d 14 (3rd Cir. 1981), the Board held 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 consider statements by Drs. Naeye and Hippensteel, who asserted that, because there were no lesions greater than two centimeters in diameter on biopsy, there was no evidence of complicated pneumoconiosis. The Board took issue with this premise and stated:

> 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, if complicated pneumoconiosis is present, the

Administrative Law 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)." *See also Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000).

4. Medical opinion evidence

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

5. "Other evidence" under 20 C.F.R. § 718.107, consideration of

a. Generally

Consideration of "other evidence," such as digital x-rays and CT-scans, is permitted in determining whether complicated pneumoconiosis exists. This evidence is properly weighed under 20 C.F.R. § 718.304(c). In some jurisdictions, an "equivalency determination" must be made regarding whether the opacity seen on a CT-scan would equate to a one centimeter or greater opacity on a chest x-ray. *See* the discussion on "Equivalency determination," *supra*, in this chapter.

By unpublished decision in *Mullins v. Plowboy Coal Co.*, BRB No. 06-0900 BLA (Aug. 30, 2007)(unpub.), the Board held CT-scan evidence is weighed under 20 C.F.R. § 718.304(c), and the Administrative Law Judge "must determine whether the CT scan evidence under Section 718.304(c) tends to independently establish both a chronic dust disease of the lung, and an opacity or mass that would appear as greater than one centimeter if seen on x-ray, which would satisfy the regulatory definition of complicated pneumoconiosis." And, the Board affirmed the Administrative Law Judge's decision to weigh medical opinion evidence addressing the existence of complicated pneumoconiosis under 20 C.F.R. § 718.304(c). Finally, the Board instructed, once the Administrative Law Judge weighs evidence separately under subsections (a), (b), and (c) of 20 C.F.R. § 718.304, then s/he must "weigh the entirety of the evidence . . . together before determining whether claimant has complicated pneumoconiosis and before finding that claimant is entitled to invocation of the irrebuttable

presumption."

By unpublished decision in *C.E.S. v. Consolidation Coal Co.*, BRB No. 07-0329 BLA (Jan. 31, 2008) (unpub.), arising in the Fourth Circuit, 74the Board remanded the claim for reconsideration of evidence pertaining to the existence of complicated pneumoconiosis. Specifically, the Administrative Law Judge accorded greater weight to a positive x-ray interpretation of complicated pneumoconiosis by Dr. Patel because it was supported by Dr. Groten's CT-scan interpretation. The Board noted:

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

Slip op. at 4.

b. Background of Category 2 or 3 pneumoconiosis is not required

By unpublished decision in *Keene v. G&A Coal Co.*, BRB No. 96-1689 BLA-A (Sept. 27, 1996) (unpub.), the Board affirmed a finding of complicated pneumoconiosis under 20 C.F.R. § 718.304. Under the facts of the case, the Administrative Law Judge properly found a chest x-ray, in conjunction with CT-scan findings, was sufficient to find complicated pneumoconiosis. As noted by the Administrative Law Judge, physicians reviewing a CT-scan "confirm(ed) the presence of a large irregular density or mass greater than one centimeter in diameter." The Board held a finding of complicated pneumoconiosis need not be accompanied by findings of Category 2 or Category 3 simple pneumoconiosis, contrary to Employer's argument. Moreover, the Administrative Law Judge properly concluded "Dr. Wheeler's opinion, that claimant's large opacity is compatible with tuberculosis, (did) not negate its compatibility with complicated pneumoconiosis."

6. Weighing the evidence as a whole

a. No complicated pneumoconiosis established under (a)-(c), not preclude finding of disease based on weighing evidence as a whole

By unpublished decision in *Clark v. Westmoreland Coal Co.*, BRB No. 10-0407 BLA (Apr. 15, 2011)(unpub.), the Board affirmed the Administrative Law Judge's finding that a 3.4 centimeter mass observed on a CT-scan would yield an opacity of greater than one centimeter by chest x-ray. Employer argued that the Administrative Law Judge "substituted his 'untrained medical judgment' for that of the physician, . . . who failed to render this equivalency determination."

The Board disagreed, and stated the Fourth Circuit "has consistently held that *the administrative law judge* must render the requisite equivalency determination, which must be supported by substantial evidence." *Slip op.* at 5 (italics in original). The Administrative Law Judge determined the x-ray evidence was insufficient to demonstrate complicated pneumoconiosis at 20 C.F.R. § 718.304(a), and there was no biopsy evidence such that 20 C.F.R. § 718.304(b) was inapplicable. He also found the digital x-rays and medical opinions were insufficient to demonstrate the condition under 20 C.F.R. § 718.304(c). The Board stated:

> After addressing all of the relevant evidence pursuant to Section 718.304(a)-(c), and noting that (the physician) concluded that the changes observed on the CT scan were 'typical of' and 'suggestive of' complicated pneumoconiosis, . . . the administrative law judge acted within his discretion in finding that the pulmonary mass measuring 3.4 centimeters that (the physician) observed would be equivalent to a 'greater than one centimeter opacity' if seen on x-ray, and that (the physician's) interpretation of the . . . CT scan was sufficient to establish complicated pneumoconiosis.

In further support of his equivalency finding, the Administrative Law Judge noted some radiologists interpreting the chest x-rays diagnosed the presence of a size A mass "measuring up to 3 [centimeters]," even though other radiologists did not identify such a mass. As noted by the Board:

> . . . the administrative law judge was particularly persuaded by the comments of a dually qualified physician, . . . that the mass seen on x-ray was 'partially obscured by the clavicle;' the recommendations of several radiologists that a CT scan was

> necessary for further evaluation; and the observation of Dr. Hippensteel that 'when markings are obscured . . . a CT scan can provide 'extra information.'

Slip op. at 6. Consequently, the Board affirmed the Administrative Law Judge's finding of complicated pneumoconiosis based on the uncontradicted CT-scan interpretation, which outweighed contrary evidence.

Similarly, by unpublished decision in *Gosnell v. Eastern Associated Coal Corp.*, BRB No. 10-0384 BLA (Mar. 11, 2011)(unpub.), a case arising in the Fourth Circuit, the Board affirmed the Administrative Law Judge's award of benefits under 20 C.F.R. § 718.304. Notably, the Administrative Law Judge did not find complicated pneumoconiosis present under any of the individual prongs at § 718.304(a)-(c), which includes x-ray evidence, biopsy or autopsy data, or "other means" of diagnosing the disease. On appeal, the Director, OWCP urged that the Board affirm the decision. The Board noted:

> While all of the physicians interpreting the x-rays identified a large mass in claimant's right upper lung, they disagreed as to whether the mass represented a Category A large opacity or another disease process, such as tuberculosis, histoplasmosis, pneumonia, or cancer.

Slip op. at 4.

The Administrative Law Judge found the chest x-rays produced conflicting interpretations and, standing alone, this evidence did not establish the presence of complicated pneumoconiosis under 20 C.F.R. § 718.304(a). Moreover, biopsy data of the large mass yielded some evidence of pneumoconiosis, but was insufficient, in isolation, to demonstrate complicated pneumoconiosis under 20 C.F.R. § 718.304(b). Under 20 C.F.R. § 718.304(c), the Administrative Law Judge weighed available CT-scan and PET-scan evidence and associated medical opinions.

He found this data also yielded conflicting interpretations by medical experts and, therefore, was inconclusive.

As a last step, however, the Administrative Law Judge weighed all of the evidence together, including the series of medical opinions by the miner's treating physician, Dr. Robinette. It was at this juncture that "several potential causes of the large mass in claimant's right lung were eliminated, such that the evidence that was inconclusive when viewed in isolation was no longer inconclusive, but rather, supported a finding of complicated pneumoconiosis." *Slip op.* at 7. The Administrative Law Judge

emphasized his consideration of examinations and testing by the miner's treating physician, Dr. Robinette, over time. As observed by the Board:

> Specifically, the administrative law judge noted that both a bronchial washing and a skin test were negative for tuberculosis. (citation omitted). In addition, the administrative law judge noted that a serology test was negative for fungal infection. The administrative law judge also found that the CT scan evidence did not reveal calcification associated with the large mass, a condition that Dr. Scott observed would indicate granulomatous disease. The administrative law judge also relied upon Dr. DePonte's opinion that the September 27, 2005 CT scan did not reveal the fine, calcified nodular opacities associated with histoplasmosis.

Slip op. at 8. Dr. Robinette based his diagnosis of complicated pneumoconiosis on the foregoing testing as well as a needle biopsy of the lung mass, which did not demonstrate malignancy, but did produce evidence of anthracosis and associated fibrosis.

Employer argued Claimant did not sustain his burden under any one of the individual prongs at 20 C.F.R. § 718.304(a)-(c). Specifically, it maintained the Administrative Law Judge erred in finding the disease present based on Dr. Robinette's medical opinions. The Board disagreed, and held Dr. Robinette's opinion was not based on a single test, "but rather upon a comprehensive review of all of the evidence, viewed in the context of claimant's complete clinical presentation."

b. Non-qualifying ventilatory and blood gas testing, effect of

The lack of respiratory impairment on ventilatory and blood gas testing is properly considered in the context of whether complicated pneumoconiosis is established; however, the regulations at 20 C.F.R. § 718.304 do not require qualifying ventilatory or blood gas values prior to invocation of the presumptions. *See Reed v. Markfork Coal Co.,* 2011 WL 1089292, BRB No. 10-0170 BLA (Feb. 22, 2011)(unpub.) (the Administrative Law Judge acted within his discretion in finding the physicians "consider[ed] only their medical definitions of pneumoconiosis," and did not fully acknowledge that the absence of a respiratory impairment does not preclude a finding of complicated pneumoconiosis, as defined in the Act and the implementing regulations"); *C.E.S. v. Consolidation Coal Co.*, 2009 WL 2458539, BRB No. 08-0781 BLA (July 30, 2009) (unpub.) (the Administrative Law Judge "acknowledged that the pulmonary function and arterial blood gas study

evidence did not demonstrate a breathing impairment", but "noted that there was evidence that claimant suffered from breathing problems," and a finding of complicated pneumoconiosis was affirmed).

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

1. A background

In the early years, for claims filed prior to January 1, 1982,[7] a claimant had access to the rebuttable presumptions of total disability and/or death due to pneumoconiosis where: (1) the claimant presented evidence establishing that the miner suffered from a totally disabling respiratory impairment under 20 C.F.R. § 718.204; and (2) the miner had 15 years of "qualifying" coal mine employment. 20 C.F.R. § 718.305. This became known as the "15 year presumption."

With the passage of time, the 15-year presumption applied to fewer and fewer claims until, ultimately, the regulatory provisions lay dormant. Enactment of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 § 1556 (2010) on March 23, 2010 revived the 15-year presumption for all claims filed after January 1, 2005, and which are pending on or after March 23, 2010.

For these purposes, it is important to keep in mind that a petition for modification filed under 20 C.F.R. § 725.310 does not constitute a "claim" that is "filed"; rather, the modification petition *relates back to* an originally filed claim, or a subsequent claim. *Garcia v. Director, OWCP*, 12 B.L.R. 1-24 (1988). *See also Stacy v. Cheyenne Coal Co.*, 21 B.L.R. 1-111 (1999) (a subsequent claim under 20 C.F.R. § 725.309 requires filing a formal "claim" form; modification may be initiated through more informal communication). *See also* 20 C.F.R. § 725.2(c).

Therefore, the provisions at 20 C.F.R. § 718.305 apply to a post-January 1, 2005 petition for modification only if it *relates back to* an original claim or subsequent claim filed after January 1, 2005. A petition for modification that is (1) filed *after* January 1, 2005, but (2) *relates back* to an original claim or subsequent claim filed *on or prior to* January 1, 2005, would not meet the requirements for application of 20 C.F.R. § 718.305.

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7 In *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995), the court reiterated, under 20 C.F.R. § 718.305, "[o]n claims filed before January 1, 1982, where a miner has fifteen years of employment and a totally disabling respiratory impairment, it is presumed that pneumoconiosis is a contributing cause of his impairment."

As of the date of revision of this *Benchbook*, the Secretary of Labor engaged in notice-and-comment rulemaking to issue revised regulations at 20 C.F.R. § 718.305 implementing Section 1556 of the PPACA. 77 Fed. Reg. 19,456 (Mar. 30, 2012). The foregoing provisions were promulgated on September 25, 2013, and are located at 78 Fed. Reg. 59,102. The Department's amendments are as follows:

> **§ 718.305 Presumption of pneumoconiosis.**
> (a) *Applicability.* This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.
> (b) *Invocation.* (1) The claimant may invoke the presumption by establishing that—
>
> (i) the miner engaged in coal-mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof; and
>
> (ii) the miner or survivor cannot establish entitlement under section 718.304 by means of chest x-ray evidence; and
>
> (iii) the miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to § 718.204, except that § 718.204(d) shall not apply.
>
> (2) The conditions in a mine other than an underground mine will be considered ''substantially similar'' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there.
> (3) In a claim involving a living miner, a miner's affidavit or testimony, or a spouse's affidavit or testimony, may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment.
> (4) In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.
> (c) *Facts presumed.* Once invoked, there will be rebuttable presumption—
> (1) In a miner's claim, that the miner is totally disabled due to

pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of death; or

(2) In a survivor's claim, that the miner's death was due to pneumoconiosis.

(d) *Rebuttal.*

(1) *Miner's Claim.* In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner did not have:

(A) Legal pneumoconiosis as defined in § 718.202(a)(2); and

(B) Clinical pneumoconiosis as defined at § 718.201, arising out of coal mine employment (*see* § 718.203); or

(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined at § 718.201.

(2) *Survivor's Claim.* In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner did not have:

(A) Legal pneumoconiosis as defined in § 718.202(a)(2); and

(B) Clinical pneumoconiosis as defined at § 718.201(a)(1), arising out of coal mine employment (*see* § 718.203); or

(ii) Establishing that no part of the miner's death was caused by pneumoconiosis as defined in § 718.201.

(3) The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

2. General structure

Under 20 C.F.R. § 718.305, if a miner was employed for fifteen years or more in one or more underground coal mines, or under "substantially similar" conditions at a surface mine, and where evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis. 20 C.F.R. § 718.305(a). A spouse's affidavit or testimony may not be used by itself to establish the applicability of the presumption. 20 C.F.R. § 718.305(a).

The presumption may be rebutted by establishing either: (1) the miner does not have pneumoconiosis (clinical or legal), or (2) his or her totally disabling respiratory or pulmonary impairment did not arise out of coal mine

employment. The presumption can never be rebutted, however, on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of *unknown* origin. 20 C.F.R. § 718.305(d). *See e.g., Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995) (rebuttal was not established where the autopsy report and related opinions "do not identify the origin of (the miner's) diseases" in light of the broad legal definition of pneumoconiosis).

3. Constitutionality of Section 1556 of the PPACA

In *Keene v. Consolidation Coal Co.*, 645 F.3d 844 (7th Cir. 2011), the circuit court held revival of the 15-year presumption at 20 C.F.R. § 718.305 through Section 1556 of the PPACA was constitutional.

In *Owens v. Mingo Logan Coal Co.*, 25 B.L.R. 1-1 (2011), *aff'd. sub. nom. on other grounds,* 724 F.3d 550 (4th Cir. 2013) (*see* page 11.54 of this chapter), the Board addressed Employer's challenges regarding application of Section 1556 of the PPACA to a miner's claim. Specifically, Employer argued:

> . . . the presumption of total disability due to pneumoconiosis at Section 411(c)(4) is not applicable to this case because the rebuttal provisions apply to the Secretary of Labor, and not to responsible operators.

The Board adopted the positions of the Claimant and Director to find Section 411(c)(4), as implemented by 20 C.F.R. § 718.305, applies to responsible operators:

> We reject employer's allegation that the rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. As claimant and the Director have indicated, the courts have consistently ruled that Section 411(c)(4), including the language pertaining to rebuttal, applies to operators, despite the reference to "the Secretary." (citations omitted) Therefore, we reject employer's assertion that Section 411(c)(4) does not apply to a responsible operator.

The Board also rejected Employer's argument that Section 1556 of the PPACA is unconstitutional because the statute's "retroactive application denies employer the right to due process and constitutes a taking of private property." Here, the Board cited its prior decisions in *Mathews v. United Pocahontas Coal Co.*, 24 B.L.R. 1-193 (2010), *recon. denied*, BRB No.

09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) and *Stacy v. Olga Coal Co.*, 24 B.L.R. 1-207 (2010), *aff'd sub nom., West Virginia CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011). *See also Copley v. Buffalo Mining Co.*, 25 B.L.R. 1-81 (2012) (application of the 15-year presumption is constitutional in a survivor's claim).

4. Method of calculating length of coal mine employment

In *Muncy v. Elkay Mining Co.*, 25 B.L.R. 1-21 (2011), the Board addressed the Administrative Law Judge's length of coal mine employment calculation for purposes of the 15-year presumption. The Administrative Law Judge calculated the length of employment based on "an employment history form, employment records from claimant's former employers, and Social Security Administration (SSA) earnings records." Claimant maintained the Administrative Law Judge erred because he "should have applied a formula set forth at 20 C.F.R. § 725.101(a)(32)(iii)" to calculate the length of the miner's employment, which would have produced a greater length of employment. The Board rejected Claimant's argument and stated:

> In determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation. (citation omitted). Contrary to claimant's contention, the administrative law judge was not required to use the calculation method set forth in Section 725.101(a)(32)(iii). The regulation provides only that an administrative law judge 'may' use such method.

Id. at 1-27.

5. Underground mine versus surface mine, an important distinction

a. Generally

In *Muncy v. Elkay Mining Co.*, 25 B.L.R. 1-21 (2011), the Board addressed the Administrative Law Judge's determination regarding whether the miner's aboveground coal mine employment was "qualifying" for purposes of invoking the 15-year presumption. Citing to *Alexander v. Freeman United Coal Mining Co.*, 2 B.L.R. 1-497 (1979)(Smith, Chairman, dissenting), the Board held, if aboveground employment occurs at an underground mine, then the miner is "not required to show comparability of environmental conditions in order to take advantage of [the Section 411(c)(4)] presumption." Rather, aboveground employment at an underground mine is "qualifying" for purposes of invocation of the presumption. As a result, the Board remanded the claim, and directed that the Administrative Law Judge determine whether Claimant's aboveground employment occurred at an underground mine.

In *Kanawha Coal Co. v. Director, OWCP [Kuhn]*, ___ Fed. Appx. ___, 2013 WL 4828724 (4th Cir. Sept. 11, 2013)(unpub.)(per curiam), the court held a miner who performs work above ground at an underground mine site "was not required to prove that his work conditions were substantially similar to the work conditions in an underground mine" in order to invoke the 15-year presumption.

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

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

not wield a pickaxe and a shovel while he worked.

In *Consolidation Coal Co. v. Director, OWCP [Bailey]*, 721 F.3d 789 (7th Cir. 2013), the circuit court upheld an award of benefits based on application of the 15-year presumption in a subsequent miner's claim. In addressing whether the miner's years of employment on the surface "were substantially similar to conditions in an underground mine," the court held they were. Based on testimony of the miner about the dusty conditions under which he worked, the court held the Administrative Law Judge's finding that the miner engaged in "substantially similar" employment was "in line with case law concerning outdoor but excessively dusty coal environments." After concluding Employer did not present evidence sufficient to rebut the presumption, the award of benefits in the post-PPACA subsequent claim was affirmed.

b. "Substantially similar" conditions at a surface mine, deference to the Administrative Law Judge

In *Blakley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995), the Seventh Circuit held, under 20 C.F.R. § 725.305(a), Claimant must demonstrate that "he worked for fifteen years in an underground mine or in a surface mine with dust conditions substantially similar to those found in underground mines." The court further held Claimant "bears the burden of establishing comparability but must only establish that he was exposed to sufficient coal dust in his surface mine employment." The court stated, generally, it will defer to the expertise of the Administrative Law Judge in determining the similarity of surface and underground mine conditions. *See also Consolidation Coal Co. v. Director, OWCP [Burris]*, ___ F.3d ___, Case No. 12-1330 (7th Cir. Oct. 8, 2013) (the Administrative Law Judge properly analyzed the miner's testimony and found the miner provided "sufficient evidence of the surface mining conditions in which he worked"; using his "expertise," the Administrative Law Judge compared the surface mining conditions to "conditions known to prevail in underground mines" to find the miner's work on the surface was under conditions that were "substantially similar" to conditions found underground).

6. Rebuttal

Once invoked, the presumption at 20 C.F.R. § 725.305(a) may be rebutted if the employer demonstrates, by a preponderance of the evidence: (1) the miner does not, or did not, have pneumoconiosis, or (2) the respiratory or pulmonary impairment did not arise out of coal mine employment.

a. Apply rebuttal standards at 20 C.F.R. § 727.203(b)(3) and (b)(4)

Case law interpreting the rebuttal burdens under 20 C.F.R. §§ 727.203(b)(3) (total disability did not arise from coal mine employment) and 727.203(b)(4) (the miner does not suffer from pneumoconiosis) may be utilized to determine whether rebuttal is demonstrated under 20 C.F.R. § 718.305. For case law interpreting these regulations, *see* Chapter 10.

Notably, in *DeFore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988), the Board addressed the burden of the party opposing entitlement in rebutting the 15-year presumption:

> We reject employer's argument that the administrative law judge imposed an improper rebuttal standard at Section 718.305(d). While the wording in Section 727.203(b) and Section 718.305(d) may differ slightly, the provisions relevant to the cause of claimant's disability are identical in substance to those in Section 411(c)(4) of the Act, *i.e.*, employer must rebut the presumption provided for at Section 411(c)(4) by establishing that the totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. (citations omitted). Since this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, rebuttal based on evidence that total disability was not caused by claimant's coal mine employment must comport with the holding in *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984).
>
> We also reject employer's contention that, in considering the x-ray evidence to determine whether employer has established that claimant does not suffer pneumoconiosis pursuant to Section 718.305(d), the administrative law judge is required to reject x-ray evidence because the original x-rays are not available for rereading as provided by Section 718.102(d). The Board has recently held that the quality standards set forth in Subpart B of Part 718 as they apply to medical reports, pulmonary function studies, blood gas studies, autopsy and biopsy evidence should be considered by the administrative law judge, but such standards are not binding on the administrative law judge. (citations omitted). Similarly, we hold that the quality standards provided for x-ray evidence in Section 718.102 do not mandate the exclusion of x-ray evidence that fails to

> comply with those standards from consideration by the administrative law judge. To hold that these standards are binding on the administrative law judge would result in the exclusion of otherwise relevant probative and reliable evidence from consideration by the administrative law judge. Therefore, the standards set forth in Section 718.102 should be used as guidelines by the administrative law judge and we encourage such a practice. (citation omitted). In reviewing the x-ray evidence, the administrative law judge should determine whether the missing information is essential to the reliability or the probative value of the x-ray report. If so, the administrative law judge may reject the report. If the missing information is not essential, the administrative law judge may consider and accept the report. Such a determination can only be made by the administrative law judge, as fact-finder, based on the unique facts of each case.

See also Colley & Colley Coal Co. v. Breeding, 59 Fed. Appx. 563, 2003 WL 1007197 (4th Cir. 2003)(unpub). Note, however, the Sixth, Seventh, and Eleventh Circuit Courts utilize a "contributing cause" standard under 20 C.F.R. § 727.203(b)(3).

In *Blakley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995), the Seventh Circuit cited to *Shelton v. Director, OWCP*, 899 F.2d 690 (7th Cir. 1990), and stated, with regard to rebuttal of disability causation, if an employer establishes that the miner would have been disabled notwithstanding his exposure to coal dust, then his disability did not arise out of coal mine employment. Although the experts in *Blakley* did not conclusively "rule out" coal workers' pneumoconiosis as a possible factor in the claimant's condition, rebuttal of the presumption was nevertheless accomplished by Employer since the record evidenced the miner would have been disabled, notwithstanding any complications arising from his exposure to coal mine dust.

In *Consolidation Coal Co. v. Director, OWCP [Burris]*, ___ F.3d ___, Case No. 12-1330 (7th Cir. Oct. 8, 2013), the court affirmed the award of benefits to a miner with a 45-pack-year smoking history, a number of health problems including heart and lung disease, and 23 years of coal mine employment at the surface. Finding the 15-year presumption was properly invoked, the court held, on rebuttal, Employer must demonstrate either the miner does not suffer from clinical or legal pneumoconiosis, or pneumoconiosis was not a "contributing cause" to the miner's disability. The court stated, "In rebutting the presumption, we have noted that the employer faces an uphill battle." When weighing medical opinions on

rebuttal, the court held it was proper to accord less weight to a physician who "relied on general statistics without relating them to (the miner) in particular," and less weight also may be accorded a physician's opinion that is premised on an underestimation of the miner's exposure to coal mine dust.

b. Applicability of rebuttal to employer

In *Muncy v. Elkay Mining Co.*, 25 B.L.R. 1-21 (2011), the Board addressed analysis of a miner's claim under the 15-year presumption revived by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Initially, the Board addressed applicability of the rebuttal provisions to Employer and noted:

> Employer contends that, because amended Section 411(c)(4) provides 'the Secretary' can rebut the presumption by making certain showings, but does not refer to coal mine operators, the rebuttable presumption of Section 411(c)(4) does not apply to responsible operators. (citation omitted). The Board rejected the identical argument in *Owens v. Mingo Logan Coal Co.*, 25 B.L.R. 1-1 (2011). We, therefore, reject it here for the same reasons set forth in *Owens*.

Id. at 1-26.

On the other hand, in *Mingo Logan Coal Co. v. Director, OWCP [Owens]*, 724 F.3d 550 (4th Cir. 2013), Employer argued the Administrative Law Judge erred in limiting rebuttal to either the existence of pneumoconiosis, or disability causation, once the 15-year presumption was invoked. In support of this argument, Employer cited the plain language of the statute at 30 U.S.C. § 921(c)(4) and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 35 (1976) which, according to Employer, limits the Secretary of Labor's rebuttal, not Employer's rebuttal. The court noted Claimant and the Director "argue that even though the statute does not, by its terms, limit employers to the two specified methods of rebuttal, logic does, and therefore the ALJ and the Board articulated the correct legal standard." The court resolved the claim on other grounds. Notably, however, in a concurring opinion, Circuit Judge Niemeyer disagreed with the position offered by the Director, OWCP and Claimant; *to wit*, Employer is limited to two methods of rebuttal. Rather, Circuit Judge Niemeyer stated the plain language of the statute limits the *Secretary of Labor* to two methods of rebuttal under 20 C.F.R. § 718.305 and, as a result, an employer should not be subjected to this limitation.

c. Rebuttal in the miner's claim, case law examples

In *Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473 (6th Cir. 2011), the court vacated a denial of benefits, and remanded the claim for further consideration in the wake of enactment of the Patient Protection and Affordable Care Act § 1556 (2010) (PPACA). Although the court directed the Administrative Law Judge to reweigh evidence on the issue of total disability, it accepted the Director's position that the 15-year presumption revived by the PPACA would apply to Morrison's claim:

> . . . because Morrison's February 22, 2007, claim was filed and pending within the applicable time period, Morrison worked underground for more than twenty-two years, and the ALJ found Morrison to be totally disabled . . ..

The chest x-ray evidence was negative for the presence of clinical pneumoconiosis, but the court held, standing alone, negative x-ray evidence is insufficient to rebut the presumption. The court further declined to find the medical opinion evidence, which did not contain a diagnosis of pneumoconiosis, was sufficient to rebut the presumption:

> [I]n this circuit, it is not enough to simply show that the medical evidence does not include a well-documented opinion of pneumoconiosis.

Rather, the court cited to its opinion in *Hatfield v. Sec'y. of Health and Human Services*, 743 F.2d 1150, 1157 (6th Cir. 1984), *overruled on other grounds by Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987), and stated:

> [R]ebuttal requires an affirmative showing . . . that the claimant does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work.

The *Morrison* court concluded, "[b]ecause the record . . . does not contain an affirmative showing that Morrison does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work, the medical opinion evidence is insufficient to rebut the § 921(c)(4) presumption."

If, on remand, the Administrative Law Judge determines total disability is established, then the 15-year presumption would apply. Under these circumstances, the court directed that the parties be afforded an opportunity "to submit additional medical evidence" on remand that is "consistent with the evidentiary limitations imposed by 20 C.F.R. § 725.414."

d. Rebuttal in a survivor's claim, death causation

In *Copley v. Buffalo Mining Co.*, 25 B.L.R. 1-81 (2012), the Administrative Law Judge applied the 15-year presumption to award benefits in a survivor's claim. Upon finding the PPACA's revival of the 15-year presumption was constitutional, the Board affirmed the Administrative Law Judge's invocation of the presumption based on findings of 28 years of underground coal mine employment, and a totally disabling respiratory impairment under 20 C.F.R. § 718.204. Turning to rebuttal, the Administrative Law Judge "did not specifically summarize the x-ray and CT scan readings," but concluded Employer failed to rebut the existence of pneumoconiosis as the pathologists agreed that the disease was present on autopsy. The Board determined it was "harmless error" not to summarize the x-ray, and CT scan evidence as "the administrative law judge permissibly credited the autopsy evidence, since it is 'highly reliable' for diagnosing the presence or absence of pneumoconiosis."

The Administrative Law Judge then concluded Employer failed to rebut disability causation, and benefits were awarded. Counsel for the Director argued this constitutes error in a survivor's claim. As noted by the Board:

> The Director contends that 'invocation of amended Section 411(c)(4) by a survivor results *only* in a presumption of death due to pneumoconiosis' and '[c]onsequently, the presumption is rebutted by proving that the miner did not suffer from pneumoconiosis or that the miner's death was wholly unrelated to his coal mine employment.'

Slip op. at 6 (emphasis in original). The Board reviewed statutory history and held the following:

> [W]e conclude that invocation of the amended Section 411(c)(4) presumption, in a survivor's claim filed after January 1, 2005, gives rise to a presumption that the miner's death was due to pneumoconiosis. In order to rebut this presumption, therefore, the party opposing entitlement must establish either that the miner did not have pneumoconiosis, or that his death did not arise from his coal mine employment.

The Board further stated its holding is consistent with the standard set forth by the Department in its *proposed* amendments to 20 C.F.R. § 718.305, implementing amended Section 411(c)(4), which provides the following:

§ 718.305 Presumption of pneumoconiosis

* * *

(d) Rebuttal . . .

(2) Survivor's Claim. In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by establishing that

(i) the miner did not have pneumoconiosis, as defined in section 718.201; or
(ii) the miner's death did not arise in whole or in part out of dust exposure in the miner's coal mine employment.

77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012). For the text of the finally-promulgated regulation, *see* page 11.47.

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

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

F. Reasoned medical opinions

1. Generally

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

20 C.F.R. § 718.202(a)(4).

The Board emphasizes, under 20 C.F.R. § 718.202(a)(4), "the administrative law judge must consider and weigh all relevant medical evidence to ascertain whether or not claimant has established the presence of pneumoconiosis by a preponderance of the evidence . . .." *Perry v. Director, OWCP*, 9 B.L.R. 1-1, 1-2 (1986). Where the medical opinions are in conflict, the Administrative Law Judge must discuss the conflicting evidence, and provide a rationale for choosing one physician's opinion over the opinion of another physician. *McGinnis v. Freeman United Coal Mining Co.*, 10 B.L.R. 1-4 (1987).

2. No "cohesive theory" required

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

V. Etiology of the pneumoconiosis

Once an Administrative Law Judge finds the miner suffers (or suffered) from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203.

A. Applicability

1. Applies to "clinical" pneumoconiosis

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

In *Hapney v. Peabody Coal Co.*, 22 B.L.R. 1-104 (2001)(en banc),

a case arising in the Fourth Circuit, the Board held a finding of "anthracosis" on biopsy was sufficient to support a finding of pneumoconiosis under the Act, despite preponderantly negative chest x-ray findings. Notably, the Board affirmed the Administrative Law Judge's finding that the biopsy findings of anthracosis were credible, and fell within the regulatory definition of pneumoconiosis at 20 C.F.R. § 718.202(a)(2). The Board then adopted the Director's position that the etiology of the miner's lung condition as diagnosed on biopsy "is properly considered, not pursuant to the regulation at 20 C.F.R. § 718.202(a), but pursuant to the regulation at 20 C.F.R. § 718.203." Here, because the miner demonstrated more than ten years of coal mine employment, Employer had the burden of rebutting the presumption by demonstrating the miner's diagnosed anthracosis did not arise from exposure to coal dust.

2. Applies to complicated pneumoconiosis

In *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007), when assessing whether a miner suffers from complicated coal workers' pneumoconiosis, the court held that the fact-finder has a two step process: (1) whether there are radiographic, or other findings consistent with complicated pneumoconiosis under the provisions at 20 C.F.R. § 718.304(a)-(c); and, if so (2) whether the pneumoconiosis arose at least in part out of coal mine employment at 20 C.F.R. § 718.203(a). The court emphasized the causation element is not "subsumed" in a finding that the miner suffers from complicated pneumoconiosis. Rather, a miner with ten years or more of coal mine employment is entitled to a rebuttable presumption that his complicated pneumoconiosis arose out of coal dust exposure, whereas a miner with fewer than ten years of employment must present medical evidence to establish causation. *See also W.L.C. v. Westmoreland Coal Co.*, BRB No. 06-0927 BLA (June 26, 2007) (unpub.).

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, if complicated pneumoconiosis is present, the Administrative Law 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 *Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-246, 1-259 n. 18 (2006), where the Administrative Law Judge finds the presence of "legal" pneumoconiosis, the Board cited to *Andersen v. Director, OWCP*, 455 F.3d 1102 (10th Cir. 2006) and *Henley v. Cowan & Co.*, 21 B.L.R. 1-147, 1-151 (1999) and adopted the Director's position to hold the Administrative Law

Judge need not separately determine the etiology of the disease at 20 C.F.R. § 718.203 because findings of "legal" pneumoconiosis under 20 C.F.R. § 718.202(a)(4) will necessarily subsume that inquiry.

In *Energy West Mining Co. v. Director, OWCP [Oliver]*, 555 F.3d 1211 (10th Cir. 2009), the court held 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 conclude 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).

B. Differential diagnosis or apportionment; causation

1. Benefits Review Board

In *Stover v. Peabody Coal Co.*, 24 B.L.R. 1-159 (2010) (en banc on recon.), Employer argued the Sixth Circuit's toxic tort opinion in *Best v. Lowe's Home Centers, Inc*., 563 F.3d 171 (6th Cir. 2009) is applicable to black lung claims. Employer maintained, in claims where there are multiple (differential) diagnoses, it is incumbent on the medical expert to use "diagnostic techniques to rule out alternative causes in order to reach a conclusion as to which cause of injury is most likely." As a result, Employer asserts "this test constitutes a new legal standard that is applicable to black lung claims under general standards for evaluating the credibility of medical opinion evidence."

Under the facts of *Stover,* Drs. Simpao and Baker diagnosed smoking-induced and coal dust-induced lung disease. Employer argued the Administrative Law Judge failed to apply the *Best* standard to evaluate the physicians' opinions such that the decision awarding benefits must be vacated. The Board disagreed.

Adopting the position of the Director, the Board held the *Best* standard is not applicable, and it does not "present a new standard for evaluating disability causation opinions in black lung cases." The Director noted the *Best* decision was premised on the application of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Because the Federal Rules of Evidence do not apply to administrative proceedings, the Board concluded the Sixth Circuit's decision in *Best* is not controlling in black lung claims. The Board noted:

> In cases involving the evaluation of medical opinions that attributed a miner's disabling respiratory impairment to smoking, or to coal dust exposure, or both, where the physicians disagreed as to whether the role of each exposure could be differentiated, the Sixth Circuit has consistently upheld the administrative law judge's credibility determinations, if supported by substantial evidence, where the adjudicator has examined 'the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based.'

As a result, the award of benefits was affirmed.

In *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.), a physician's opinion that coal workers' pneumoconiosis constituted one of two causes of Claimant's totally disabling respiratory impairment satisfied the disability causation standard at 20 C.F.R. § 718.204(c)(1). Citing to *Gross v. Dominion Coal Corp.*, 23 B.L.R. 1-8, 1-17 to 1-19 (2004), the Board noted, because the physicians concluded pneumoconiosis "was one of two causes" of the miner's total disability, Claimant presented evidence sufficient to meet the "substantially contributing cause" standard.

2. Fourth Circuit

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

In *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the court disagreed with Employer's argument that there was insufficient evidence to conclude the miner's respiratory disability was due to pneumoconiosis because the physicians "could not apportion the relative effects of tobacco use and coal mine dust exposure . . .." Citing to *Cornett v. Benham Coal, Inc.,* 227 F.3d 569, 576 (6th Cir. 2000) with approval, the court held physicians are not required to precisely determine the percentages of contribution to total disability; rather, "[t]he ALJ needs only to be persuaded, on the basis of all available evidence, that pneumoconiosis is a contributing cause of the miner's disability."

3. Sixth Circuit

In *Crockett Collieries, Inc. v. Director, OWCP [Barrett]*, 478 F.3d 350 (6th Cir. 2007) (J. Rogers, concurring), the Administrative Law Judge's award of black lung benefits was affirmed. In the case, both Drs. Baker and Dahhan concluded that the miner suffered from a respiratory impairment. They disagreed, however, whether the impairment "could all be due to cigarette smoking or could be due to a combination of cigarette smoking and coal dust exposure." Dr. Baker concluded coal dust exposure "probably contributes to some extent in an undefinable portion" to the miner's

pulmonary impairment. After invoking the rebuttable presumption that the miner's legal pneumoconiosis arose out of coal dust exposure at 20 C.F.R. § 718.203(b), the court held Dr. Baker's opinion was sufficient to support a finding that the miner suffered from the disease, and it was not too equivocal. The court further noted:

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

The court agreed with the Administrative Law Judge's analysis, and affirmed the award of benefits.

4. Tenth Circuit

In *Energy West Mining Co. v. Hunsinger,* 2010 WL 982910, Case No. 09-9550 (10th Cir. July 29, 2010)(unpub.), the Administrative Law Judge properly determined that Claimant, who had a 25-pack-year smoking history and a 24-year history of coal mine employment, was totally disabled due to legal coal workers' pneumoconiosis. In affirming the award, the court held it was proper to rely on a medical expert's "fifteen years of experience and several epidemiological studies" in crediting his opinion that "it was the significant coal dust exposure that caused Mr. Hunsinger's lung disease despite the absence of any fibrotic changes visible via x-ray." Citing to the Sixth Circuit's decision in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the Tenth Circuit agreed a physician is not required to apportion relative causes of the miner's lung disease (smoking and coal dust exposure), and the miner is not required to demonstrate that coal dust exposure is the "only cause" of his respiratory condition.

C. Ten years or more coal mine employment

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

D. Fewer than ten years of coal mine employment

1. Claimant's burden

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

2. Case law

a. Benefits Review Board

The burden of proof is met under 20 C.F.R. § 718.203(c) when "competent evidence establish[es] that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment." *Shoup v. Director, OWCP*, 11 B.L.R. 1-110, 1-112 (1987).

b. Third Circuit

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

c. Sixth and Seventh Circuits

The miner must establish his or her pneumoconiosis arose "in part" from coal mine employment. *See Stomps v. Director, OWCP*, 816 F.2d 1533, 10 B.L.R. 2-107 (11th Cir. 1987); *Southard v. Director, OWCP*, 732 F.2d 66, 6 B.L.R. 2-26 (6th Cir. 1984).

3. Medical evidence required

Absent operation of the ten-year presumption at 20 C.F.R. § 718.203, the record must contain *medical* evidence establishing a relationship between the miner's pneumoconiosis and coal mine employment. Moreover, "the administrative law judge (cannot) reasonably infer a relationship based merely upon claimant's employment history." *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986). And, "the judge's sole reliance on lay testimony to find § 718.203(c) satisfied . . . is erroneous." *Tucker v.*

Director, OWCP, 10 B.L.R. 1-35, 1-39 (1987).

4. Inaccurate employment history, opinion less probative

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

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

VI. Establishing total disability

A. For claims filed on or before January 19, 2001

A miner is totally disabled if s/he has complicated pneumoconiosis (20 C.F.R. § 718.304 - irrebuttable presumption), or if pneumoconiosis prevents the miner from doing his usual coal mine employment, or comparable and gainful employment (20 C.F.R. § 718.204). For a discussion of the factors to consider in determining whether a miner is able to perform "comparable and gainful employment," *see* Chapter 10.

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

Mines Corp., 9 B.L.R. 1-195, 1-198 (1986).

B. For claims filed after January 19, 2001

Under the new regulations, the definitions of total disability and disability causation have been modified. For this reason, in *National Mining Ass'n. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), the circuit court held the amendments at 20 C.F.R. § 718.204 were valid, but the amended provisions addressing disability causation could not be applied to claims filed on or before January 19, 2001. The court reasoned the amended provisions codify the Fourth Circuit's holding in *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994) over the contrary holding of the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994) such that the regulation would be impermissibly retroactive. Twenty C.F.R. § 718.204 provides, in relevant part, the following:

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

20 C.F.R. § 718.204(a).

In its comments to this regulatory amendment, the Department rejected the concept of compensation based upon "whole person disability," and stated the following:

> [O]nly respiratory and pulmonary impairments are relevant in determining whether the miner is totally disabled for purposes of the Black Lung Benefits Act, and identifying the causes of that disability.
>
> . . .
>
> The Department has consistently taken the position that proof of a totally disabling respiratory or pulmonary impairment is an essential element of a miner's claim for black lung benefits.

> (citations omitted). Adoption of a 'whole person' definition of total disability would greatly expand the black lung benefits program and transform it into a general disability program for coal miners.

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

C. Methods of demonstrating total disability

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

1. Ventilatory and blood gas testing measure different types of impairment

The Board and some circuit courts have emphasized pulmonary function and blood gas testing measure different types of impairment. In *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993), the court noted the Board holds the results of blood gas and pulmonary function testing "may consistently have no correlation since coal workers' pneumoconiosis may manifest itself in different types of pulmonary impairment.'" The court cited to *Gurule v. Director, OWCP*, 2 B.L.R. 1-772, 1-777 (1979), *aff'd.*, 653 F.2d 1368 (10th Cir. 1981). *See also Sheranko v. Jones and Laughlin Steel Corp*., 6 B.L.R. 1-797, 1-798 (1984) (blood gas studies and ventilatory studies measure different types of impairment).

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

2. Pulmonary function (ventilatory) studies

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

The quality standards under the amended regulations at 20 C.F.R. § 718.103(b) also require the submission of a flow-volume loop. This additional quality standard is required for tests conducted after January 19, 2001. 20 C.F.R. § 718.101(b).

3. Blood gas studies

The quality standards for blood gas studies are found at 20 C.F.R. § 718.105. The standards require no blood gas study shall be performed if medically contraindicated. 20 C.F.R. § 718.105(a). A blood gas study shall initially be administered at rest and in a sitting position. If the results of the blood gas test at rest do not satisfy the requirements of Appendix C, an exercise blood gas test shall be offered unless medically contraindicated. 20 C.F.R. § 718.105(b).

The report of the blood gas study shall specify: (1) date and time of test; (2) altitude and barometric pressure; (3) name and claim number of the claimant; (4) name and signature of the physician; (6) recorded values for PCO_2, PO_2, and pH collected at rest and if performed, during exercise; (7) duration and type of exercise; (8) pulse rate; (9) time between drawing of sample and analysis of sample; and (10) whether the equipment was calibrated before and after each test. 20 C.F.R. § 718.105(c).

4. Cor pulmonale with right-sided congestive heart failure

When a pulmonary disease progresses, and results in greater pulmonary functional derangement, it produces dysfunction of the pulmonary blood vessels. As the resistance to blood flow in the pulmonary vessels rises, there is an elevation in the pressure in the pulmonary artery and severe stress is placed on the right ventricle of the heart, which eventually fails.

Heart disease that is secondary to chronic lung disease is known as cor pulmonale, and this form of failure of circulation is known as congestive heart failure. A miner's total disability may be established where the miner has pneumoconiosis, and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. § 718.204(b)(2)(iii).[8]

5. Reasoned medical opinions

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

a. Burden of proof

In assessing total disability, the fact-finder is required to compare the exertional requirements of the miner's usual coal mine employment with a physician's assessment of the miner's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000) (a finding of total disability

8 Formerly 20 C.F.R. § 718.204(c)(3) (2000).

9 Formerly 20 C.F.R. § 718.204(b)(2) (2000).

may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his or her physical limitations); *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). *See also Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990) (en banc on recon.).

Once it is demonstrated the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made, and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to 20 C.F.R. § 718.204(b)(1)(ii).[10] *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

b. Physician's knowledge of duties important

In *Killman v. Director, OWCP*, 415 F.3d 716 (7th Cir. 2005), the court remanded the claim for further consideration of whether the miner demonstrated "total disability" through the medical opinions at 20 C.F.R. § 718.204(b)(2)(iv). In this vein, the court stressed the importance of determining whether the physicians had an accurate understanding of the duties of the miner's last coal mining job.

Upon review of their reports, the court noted, "The physicians who concluded that Killman was not disabled either misstated Killman's tasks or did not discuss them at all." Some of these physicians reviewed the reports of Dr. Cohen, who concluded the miner was disabled, but the court was not convinced the other physicians clearly understood the miner's job duties:

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

Because the court could not discern the basis of the Administrative Law Judge's weighing of the evidence, it concluded the decision was not supported by substantial evidence, and the claim was remanded for further consideration.

In *Brigance v. Peabody Coal Co.*, 23 B.LR. 1-170 (2006) (en banc),

10 Formerly 20 C.F.R. § 718.204(b)(2) (2000).

the Board upheld the Administrative Law Judge's finding that the miner established a totally disabling respiratory impairment based on medical opinion evidence, despite the fact that ventilatory and blood gas testing was in equipoise. In this regard, the Board noted physicians, who opined the miner was totally disabled, "had knowledge of claimant's usual coal mine employment."

c. Non-respiratory, non-pulmonary impairments irrelevant

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

Similarly, the Board holds non-respiratory and non-pulmonary impairments are irrelevant to establishing total disability under 20 C.F.R. § 718.204(c). *Beatty v. Danri Corp.*, 16 B.L.R. 1-11 (1991), *aff'd.* 49 F.3d 993 (3rd Cir. 1995).[11]

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

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

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

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

and not to claims adjudicated under 20 C.F.R. Part 718.

5. Lay testimony

a. In miner's claims filed after January 1, 1982

In a living miner's claim, lay testimony cannot support finding a totally disabling respiratory impairment in the absence of corroborating medical evidence. For example, in *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122 (1999), the Administrative Law Judge properly found no "material change in conditions" in a miner's subsequent claim filed after 1982 under 20 C.F.R. § 725.309 (2000).

In so holding, the Board rejected Claimant's argument that the Administrative Law Judge's failure to consider Claimant's testimony regarding the miner's extreme difficulty in "'performing even the simplest of tasks'" was error. Rather, the Board held "lay testimony offered by claimant at the hearing . . . is generally insufficient to establish total disability unless it is corroborated by at least a quantum of medical evidence."

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

b. Claim filed prior to January 1, 1982

In a case involving a deceased miner in which a claim was filed prior to January 1, 1982, and where there is no medical or other relevant evidence, affidavits from persons knowledgeable of the miner's physical condition shall be sufficient to establish total disability. 20 C.F.R. § 718.204(d)(1);[12] *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). The medical, or other relevant evidence, must be "relevant to the existence of, or disability due to, a respiratory or pulmonary impairment." *Gessner v. Director, OWCP*, 11 B.L.R. 1-1, 1-3 (1987). The use of lay testimony alone is available only in claims filed prior to January 1, 1982, and only in the case of a deceased miner. In the case of a living miner's claim, a finding of total disability shall

[12] Formerly 20 C.F.R. § 718.204(c)(5) (2000).

not be made solely on the miner's statements or testimony. 20 C.F.R. § 718.204(d)(2) (2000).

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

VII. Etiology of total disability

Unless one of the presumptions at 20 C.F.R. §§ 718.304, 718.305, or 718.306 is applicable, the miner must establish that his or her total disability is due, at least in part, to pneumoconiosis. The Board holds, "It is [the] claimant's burden pursuant to § 718.204 to establish total disability due to pneumoconiosis . . . by a preponderance of the evidence." *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986)(en banc).

A. "Contributing cause" standard

1. For claims filed on or before January 19, 2001

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

a. Benefits Review Board

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

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

b. Third Circuit

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

c. Fourth Circuit

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

d. Sixth Circuit

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

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

> The claimant bears the burden of proving total disability due to pneumoconiosis and . . . this causal link must be more then *de minimus*. (citation omitted). To satisfy the 'due to' requirement of the BLBA and its implementing regulations, a claimant must

> demonstrate by a preponderance of the evidence that pneumoconiosis is 'more than merely a speculative cause of his disability,' but instead 'is a contributing cause of some discernible consequence to his totally disabling respiratory impairment.' (citation omitted). To the extent that the claimant relies on a physician's opinion to make this showing, such statements cannot be vague or conclusory, but instead must reflect reasoned medical judgment. (citation omitted).

e. Seventh Circuit

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

f. Tenth Circuit

Pneumoconiosis be "at least a contributing cause." *Mangus v. Director, OWCP*, 882 F.2d 1527, 1531 (10th Cir. 1989) (emphasis added). By unpublished decision in *Pittsburgh & Midway Coal Mining Co. v. Sanchez*, 2001 WL 997947, Case No. 00-9538 (10th Cir. Aug. 31, 2001) (unpub.), the court declined to apply the causation standard set forth in the amended regulations at 20 C.F.R. § 718.204(c)(1), and stated, in a footnote, "As petitioners concede, . . . we apply the *Mangus* causation standard that was in effect when Sanchez filed for benefits in 1988."[13]

g. Eleventh Circuit

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

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

2. For claims filed after January 19, 2001

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

a. The regulation

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

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

20 C.F.R. § 718.204(c).

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

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

In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the Sixth Circuit interpreted the "materially worsens" standard at 20 C.F.R. § 718.204(c). Under the facts of the case, Employer argued the miner's chronic obstructive pulmonary disease "was primarily, if not entirely, a consequence of the estimated quarter-of-a-million cigarettes

he had smoked." Said differently, Employer maintained "there is no substantial evidence that Kirk's total disability, which was not caused by pneumoconiosis in 1988, had suddenly become caused by this disease in 1992." The court concluded the fact that Claimant's non-coal dust related respiratory disease would have left him totally disabled, even without exposure to coal dust, entitlement to benefits was not precluded. The court held a miner "may nonetheless possess a compensable injury if his pneumoconiosis 'materially worsens' this condition."

B. Blood gas and ventilatory studies not determinative

With respect to the use of blood gas studies and pulmonary function (ventilatory) studies, "the Board consistently has held that pulmonary function studies and blood gas studies are not diagnostic of the etiology of the respiratory impairment, but are diagnostic only of the severity of the impairment." *Tucker v. Director, OWCP*, 10 B.L.R. 1-35, 1-41 (1987). As a result, the Board concluded "a claimant who establishes the existence of total disability pursuant to 20 C.F.R. § 718.204(b)(2) with pulmonary function studies or blood gas studies . . ., has not also established that the total disability is due to pneumoconiosis." *Id*. at 1-41 and 1-42.[14] Rather, a claimant also must establish, by a preponderance of the evidence, the impairment evidenced by pulmonary function studies and blood gas studies was caused by pneumoconiosis.

C. Weighing medical opinion evidence

Underlying finding regarding pneumoconiosis is important

In reviewing the medical opinion evidence regarding etiology, opinions wherein the physicians did, or did not, diagnose the miner as suffering from pneumoconiosis may be accorded little probative value if these diagnoses are contrary to the Administrative Law Judge's findings based on the record as a whole. It is important that the fact-finder consider clinical and legal pneumoconiosis when determining the probative value accorded a physician's opinion in this regard.

Said differently, if an Administrative Law Judge concludes the miner suffers from coal workers' pneumoconiosis, then the expert who concludes that coal workers' pneumoconiosis is absent (both in its clinical and legal forms) generally offers a compromised opinion regarding disability causation. If, however, the expert excludes the existence of only one of the

14 Formerly 20 C.F.R. § 718.204(c)(1) and (c)(2) (2000).

two forms of pneumoconiosis, then his or her disability causation opinion may remain probative. Conversely, if the Administrative Law Judge concludes the miner suffers from neither clinical nor legal pneumoconiosis, then disability causation opinions from experts who found the disease present (in either or both forms) may be accorded less weight.

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

VIII. Applicability of 20 C.F.R. Parts 410 and 727 and § 410.490

As 20 C.F.R. Part 718 contains the permanent black lung regulations for the Department of Labor, a case adjudicated and denied under 20 C.F.R. Part 718 need not be considered under any other regulatory scheme.

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

A. The statute and regulation

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

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which

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

20 C.F.R. § 725.308.[15]

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

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

1. Waiver of challenge to timeliness

a. Withdrawal of contest at hearing

In *Chaffin v. Peter Cave Coal Co.*, 22 B.L.R. 1-294 (2003), Employer argued that the miner's duplicate claim was untimely under 20 C.F.R. § 725.308 because it was not filed within three years of a physician's opinion diagnosing the miner with totally disabling pneumoconiosis. The Board held, however, Employer waived this argument because it withdrew its contest of the issue at the hearing before the Administrative Law Judge (and after the Sixth Circuit issued *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001)). *See also Cabral v. Eastern Assoc. Coal Corp.*, 18 B.L.R. 1-25 (1993) (the opposing party waived reliance on the affirmative defense of timeliness where it raised the issue before the District Director, but withdrew it before the Administrative Law Judge).

b. Stipulation of timeliness at hearing

In *Bethenergy Mines, Inc. v. Cunningham*, Case No. 03-1561 (4th Cir.

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

July 20, 2004) (unpub.), the court held Employer waived its argument that the miner's claim was barred by the three-year statute of limitations because Employer "stipulated at the first hearing before the ALJ that Cunningham's claim was timely."

2. Tolling of statute, considerations for

a. Generally

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

b. A hearing is required

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

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

a *de novo* hearing pursuant to 20 C.F.R. § 725.451."

C. Applicability to initial claim

1. Generally

The Board and circuit courts apply the statute of limitations to originally filed miners' claims.

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

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

> The administrative law judge . . . erroneously considered the issue (at hearing) to be the propriety of the district director's 1992 denial of the prior claim as untimely filed under 20 C.F.R. § 725.308, where that denial is final and not subject to challenge. The pertinent issue is, rather: What effect does the district director's final denial of the prior claim have on the instant subsequent claim? We agree with the employer's argument that the district director's final denial of the prior claim based on its untimeliness is *res judicata* and its effect is to bar the filing of the instant subsequent claim. (citations omitted).

Id. at 1-97.

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

1. Generally

a. Benefits Review Board

In *J.O. v. Helen Mining Co.*, 24 B.L.R. 1-117 (2009), the Board adopted the Director's position, and overruled its holdings in *Faulk v. Peabody Coal Co.*, 14 B.L.R. 1-18 (1990) and *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990) to conclude the three year statute of limitations implemented at 20 C.F.R. § 725.308(a) applies to original claims *as well as* to subsequent claims under 20 C.F.R. § 725.309. The Third Circuit agreed on appeal in *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248 (3rd Cir. 2011).

b. Third Circuit

In *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248 (3rd Cir. 2011), the circuit court held the statute of limitations applies to subsequent claims.

c. Fourth Circuit

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

d. Sixth Circuit

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

> The three-year limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of a miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after

> a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed 'premature' because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period.[16] Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

(italics in original).

2. Medical opinions from prior claim; deemed premature or misdiagnosis

a. Benefits Review Board

In *J.O. v. Helen Mining Co.*, 24 B.L.R. 1-117 (2009), *aff'd. sub nom., Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248 (3rd Cir. 2011), the Board stated the following:

> We . . . agree with the Director, and hold that a medical determination of total disability due to pneumoconiosis predating a prior, final denial of benefits is deemed a misdiagnosis and thus, cannot trigger the statute of limitations for filing a subsequent claim.

Id. 1-122.

b. Third Circuit

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[16] The court referenced a footnote, which reads as follows:

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

In *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248 (3rd Cir. 2011), a medical determination of total disability due to pneumoconiosis predating a prior, final denial of benefits is deemed a "misdiagnosis" and thus, cannot trigger the statute of limitations at 20 C.F.R. § 725.308 for filing a subsequent claim under 20 C.F.R. § 725.309. The court determined the definition of pneumoconiosis at 20 C.F.R. § 718.201 as a latent and progressive disease supports "reading the statute of limitations in an expansive manner to ensure that any miner who has been afflicted with the disease, including its progressive form, is given every opportunity to prove he is entitled to benefits."

c. Fourth Circuit

In *Consolidation Coal Co. v. Director, OWCP [Williams]*, 453 F.3d 609 (4th Cir. 2006), *cert. denied* (Mar. 19, 2007), the court held a miner's subsequent claim was not barred by the three-year statute of limitations at 20 C.F.R. § 725.308 based on a medical opinion finding total disability due to pneumoconiosis submitted in conjunction with his prior denied claim. Citing to *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996), the court reiterated "the legal conclusion attendant with a prior denial—*i.e.,* that the miner was not eligible for benefits at the time of that decision—must be accepted as correct . . .." As a result, a physician's diagnosis of total disability due to pneumoconiosis in the first claim must be treated "as a misdiagnosis in light of the denial of [the] first claim" and the court held that it "must similarly conclude that the (mis)diagnosis had no effect on the statute of limitations for his second claim."

The court noted pneumoconiosis is latent and progressive and, consequently, it concludes "[N]othing bars or should bar claimants from filing claims *seriatim* . . .." The court stressed, under 20 C.F.R. § 725.309, "only new evidence *following* the denial of the previous claim, rather than evidence predating the denial, can sustain a subsequent claim." The court noted:

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

d. Sixth Circuit

In *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472 (6th Cir. 2009), the court held 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, which 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 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.

By unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 2002 WL 31205502 (6th Cir. Oct. 2, 2002)(unpub.),[17] the Sixth Circuit held a subsequent claim filed by a miner under 20 C.F.R. § 725.309 is not barred by the three-year statute of limitations at 20 C.F.R. § 725.308(a) because denial of the miner's first claim on grounds he did not suffer from pneumoconiosis "necessarily renders any prior medical opinion to the contrary invalid . . .." The court reaffirmed its holding in *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001), the three-year statute of limitations does apply to subsequent claims. However, the *Kirk* court also stated prior medical opinions in the miner's favor, which were "premature" because the weight of the evidence did not support entitlement in an earlier claim, were "effective to begin the statutory period." The *Dukes* court concluded this was dicta, and it held to the contrary. Specifically, the *Dukes* court adopted the Tenth Circuit's holding in *Wyoming Fuel Co. v. Director, OWCP [Bandolino]*, 90 F.3d 1502, 1507 (10th Cir. 1996), and concluded the following:

> We agree with the reasoning of the Tenth Circuit and likewise expressly hold that a mis-diagnosis does not equate to a 'medical determination' under the statute. That is, if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes. If he later contracts the disease, he is able to obtain a medical opinion to that effect, which then re-triggers the statute of limitations. In other words, this statute of repose does not commence until a proper medical determination.

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

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

Initially, the miner testified Dr. Modi told the miner he was totally disabled. The Administrative Law Judge determined, however, the physician did not indicate whether the total disability was respiratory or pulmonary in nature such that the medical opinion was insufficient to trigger the statute of limitations. Notably, Dr. Modi diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and back pain. He concluded the miner was totally disabled and, although Dr. Modi advised against further exposure to coal dust, he did not specify the nature of the disability.

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

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

> Contrary to employer's assertion, the Administrative Law Judge did not err by refusing to impute knowledge of the contents of the medical reports of Drs. Sutherland, Forehand, and Robinette to claimant simply because the reports were made a part of the

> record in his prior claim or were sent to his attorney. The Board has held that a medical report must be provided directly to claimant to commence the Act's limitation period, *Daughtery* [*v. Johns Creek Elkhorn Coal Corp.*, 18 B.L.R. 1-95, 1-99 (1993)], and, therefore, information possessed by claimant's attorney does not constitute communication to claimant.

By published decision in a case arising in the Sixth Circuit, *Sturgill v. Bell County Coal Corp.*, 23 B.L.R. 1-159 (2006) (en banc) (J. McGranery, dissenting), the Board held the District Director's preliminary finding of eligibility in conjunction with the miner's 1981 claim did not trigger the three-year statute of limitations at 20 C.F.R. § 725.308 to bar the miner's 2001 subsequent claim. Indeed, the miner continued working in "comparable and gainful employment" after the 1981 award such that he was not entitled to benefits under the Act.

Claimant and the Director maintained a District Director's finding of entitlement did not constitute a medical determination of total disability due to pneumoconiosis as contemplated by 20 C.F.R. § 725.308 of the regulations. On the other hand, Employer maintained the District Director's finding of entitlement in the first claim implicitly meant the medical elements of entitlement were satisfied. Further, Employer argued there were medical opinions in the record, pre-dating the miner's 2001 claim by more than three years, which contained findings of total disability due to pneumoconiosis.

The Board agreed with the Claimant's and Director's position and concluded, under 20 C.F.R. § 725.308, Claimant is entitled to a rebuttable presumption his or her claim is timely filed and, under *Tennessee Consol. Coal Co. v. Kirk,* 264 F.3d 602 (6th Cir. 2001), it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the claimant]" more than three years prior to the filing of a claim. The Board specifically emphasized *Kirk* requires a "trigger of the reasoned opinion of a medical professional" to commence the limitations period.

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

In *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002)(en banc), a case arising in the Sixth Circuit, the Board remanded the case for a determination of whether the statute of limitations applied to the miner's

subsequent claim, which was filed under 20 C.F.R. § 725.309. Citing to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), which was issued after the Administrative Law Judge issued his decision and order, Employer argued the miner's claim was time-barred pursuant to 20 C.F.R. § 725.308 because it was not filed within three years of the date Dr. Kabani's medical determination of total disability due to pneumoconiosis was communicated to the miner.

The Board initially noted there is a presumption that every claim for benefits is timely filed, but Employer has the opportunity to rebut the presumption. The Board concluded, if the Administrative Law Judge determines that the subsequent claim is untimely filed, then "he must give claimant the opportunity to prove that extraordinary circumstances exist that may preclude the dismissal of the claim. 20 C.F.R. § 725.308(c)." The Board issued a related decision in *Abshire v. D&L Coal Co.*, 21 B.L.R. 1-202 (2002)(en banc), a case also arising in the Sixth Circuit.

e. Tenth Circuit

In *Energy West Mining Co. v. Director, OWCP [Oliver]*, 555 F.3d 1211 (10th Cir. 2009), Employer posited "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.

From this, the court held, 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.

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

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

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

3. Inadvisability of return to coal mine work, insufficient to commence running of statute

In *Fields v. Shamrock Coal Co.*, BRB Nos. 05-0603 BLA and 05-0603 BLA-A (Feb. 22, 2006) (unpub.), a case arising within the Sixth Circuit, the Administrative Law Judge properly concluded a 1993 medical opinion from Dr. Baker was insufficient to trigger the three year statute of limitations period for filing claims at 20 C.F.R. § 725.308 using the standard set forth in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). In particular, Dr. Baker diagnosed the presence of coal workers' pneumoconiosis and concluded the miner "should have no further exposure to coal dust." Dr. Baker also noted the miner would "have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to these conditions." The Board stated, "Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment . . . Dr. Baker's opinion . . . is insufficient to support a finding of total disability." As a result, the opinion did not satisfy the requirements at 20 C.F.R. § 725.308 for triggering the statute of limitations period.

4. Failure to attribute condition to coal dust exposure, insufficient

In *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992 (7th Cir. 2005), the circuit court rejected Employer's argument that the miner's claim was time-barred under 20 C.F.R. § 725.308, where physicians in the earlier claim diagnosed emphysema and chronic obstructive pulmonary disease, but they failed to attribute the respiratory ailments to coal dust exposure. The court noted, in the miner's subsequent claim, a physician concluded the miner's totally disabling respiratory ailment was coal dust related, and this opinion was communicated to the miner. As a result, the court determined the requirements of 20 C.F.R. § 725.308 were met, and the statute of limitations commenced to run with the newly generated physician's report.

F. Commencement of the three-year period

1. Written communication

a. Required

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

b. Not required

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

The Fourth Circuit dismissed the Board's reasoning and adopted the Director's position that the plain language of 20 C.F.R. § 725.308(a) does not require *written* communication to the miner for the limitations period to commence to run. The court then remanded the claim to the Board for consideration of the bases for the Administrative Law Judge's dismissal of Employer's statute of limitations defense, *to wit*: (1) Claimant admitted his memory was poor due to the fact that he suffered from a stroke; (2) the

miner's testimony was inconsistent; and (3) the testimony "'primarily entailed a series of short responses of 'Yes, ma'am.'"

The circuit court agreed with the Administrative Law Judge on appeal for the second time, in *Island Creek Coal Co. v. Henline*, Case No. 07-1850 (4th Cir. July 9, 2008) (unpub.). Notably, 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 Administrative Law Judge concluded 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 Administrative Law 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 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 Administrative Law 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 . . .."

2. Nature of medical opinion required

In *Peabody Coal Co. v. Director, OWCP [Brigance]*, 718 F.3d 590 (6th Cir. June 10, 2013), *rev'g. Brigance v. Peabody Coal Co.*, 23 B.L.R. 1-170 (2006) (en banc), the Sixth Circuit held a miner's claim was time-barred where he "admitted that he waited seven years after a medical determination of total disability due to pneumoconiosis was communicated to him" in a state black lung claim before he filed his claim for federal black lung benefits. Citing to its decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 48 F. App'x. 140, 144 (6th Cir. 2002) (per curiam), the court noted the three-year statute of limitations commences to run "upon (1) a medical determination of (2) total disability (3) due to pneumoconiosis (4) which has been communicated to the miner." The *Brigance* court addressed the meaning of "medical determination" and stated:

> Although statutorily undefined, 'medical determination' is not without meaning. 'Medical determination' as used in § 932(f) plainly does not include undiagnosed or self-diagnosed cases of pneumoconiosis, even if the claimant actually has the disease. (citation omitted). The language also requires a diagnosis from a medical professional trained in internal and pulmonary

> medicine—*i.e.* a physician with expertise in diagnosing pneumoconiosis.
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> . . .
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> In addition, because of the progressive nature of the disease, we have held that a misdiagnosis does not constitute a 'medical determination' within the meaning of the statute. *Dukes*, 48 F. App'x. at 146 ('[I]f a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes').

The court added:

> Construing the text of the statute as written, we hold that when a diagnosis of total disability due to pneumoconiosis by a physician trained in internal and pulmonary medicine is communicated to the miner, a 'medical determination' sufficient to trigger the running of the limitations period has been made. No more is required. Additional findings regarding whether the medical determination is well-reasoned or well-documented are not necessary.
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> To hold otherwise would improperly conflate the statute of limitations with the merits of the claim. Statutes of limitation are intended to stave off stale claims, not weak claims.
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> . . .
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> Whether the diagnosis is well-reasoned or otherwise accurate (whether the miner is *in fact* totally disabled due to pneumoconiosis) is irrelevant for purposes of the statute of limitations. The accuracy of the diagnosis is appropriately considered on the merits when determining a miner's entitlement to benefits.

Id.

In *Morgan v. Shamrock Coal Co.*, BRB Nos. 05-0278 BLA and 05-0278 BLA-A (Oct. 24, 2005) (unpub.), the Board vacated application of the three-year statute of limitations at 20 C.F.R. § 725.308 to Dr. Clark's medical determination of total disability due to pneumoconiosis, which was submitted in the miner's first claim. The Director maintained Dr. Clark's medical determination was insufficient to trigger the limitations period because it was

"unreasoned." The Board held "[s]uch a factual finding . . . is up to the administrative law judge based on his review of the prior (administrative law judge's) decision . . . and the medical evidence of record."

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

3. State workers' compensation award, effect of

In *Kessler v. Island Creek Coal Co.,* BRB No. 06-0629 BLA (Mar. 28, 2007) (unpub.), a case arising in the Fourth Circuit, the Administrative Law Judge dismissed the miner's claim as untimely under 20 C.F.R. § 725.308. Specifically, the Administrative Law Judge cited the miner's hearing testimony, wherein the miner stated a physician advised the miner was totally disabled due to pneumoconiosis in 1988, more than three years before he filed his 2003 claim for federal black lung benefits.

The Administrative Law Judge further found the miner received "written notice" in 1994 that he prevailed on a state workers' compensation claim for black lung, and "the documentation indicates that [c]laimant received a medical determination of total disability due to pneumoconiosis." Considering the state workers' compensation award in conjunction with the miner's testimony, the Administrative Law Judge concluded the miner's "understanding was that he was totally disabled due to pneumoconiosis" in 1994, more than three years prior to the filing of his federal claim for black lung benefits.

Citing to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), the Board disagreed, and concluded the presumption at 20 C.F.R. § 725.308 was not successfully rebutted. First, the Board noted, "under the language set forth in *Kirk*, a claimant's mere statement that he was told by a physician that he was totally disabled by black lung is insufficient to trigger the running of the statute of limitations."[18] Thus, the

18 The Board cited to the Fourth Circuit's holding in *Island Creek Coal Co. v. Henline*, 456 F.3d 421 (4th Cir. 2007), wherein the court held the presumption at 20 C.F.R.

Board held "claimant's sole statement, as to what he believed a doctor told him in 1988, may be insufficient to trigger the running of the statute, unless the Administrative Law Judge also finds that claimant received a 'reasoned' diagnosis of total disability due to pneumoconiosis."

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

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

The Board noted x-ray and ventilatory testing was referenced in the state workers' compensation award, but the results of the tests were not disclosed. In sum, the Administrative Law Judge's dismissal of the claim was vacated, and the case was remanded for further consideration regarding whether the presumption at 20 C.F.R. § 725.308 was successfully rebutted.

However, in *Peabody Coal Co. v. Director, OWCP [Brigance]*, 718 F.3d 590 (6th Cir. 2013), *rev'g. Brigance v. Peabody Coal Co.*, 23 B.L.R. 1-170 (2006) (en banc), the Sixth Circuit held a miner's claim was time-barred where he "admitted that he waited seven years after a medical determination of total disability due to pneumoconiosis was communicated to him" in a state black lung claim before he filed his claim for federal black lung benefits. In addressing the issue of whether a medical determination from the miner's state claim may be used to time-bar his federal claim, the court responded that it could. The court cited, with approval, its decision in

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§ 725.308 may be rebutted by a miner's testimony. As a result, the court found 20 C.F.R. § 725.308 does not contain the written notice requirement adopted by the Board in *Adkins v. Donaldson Mine Co.*, 19 B.L.R. 1-36 (1993).

Dukes wherein it was determined a medical determination of total disability due to pneumoconiosis underlying a denied claim was deemed a "misdiagnosis" and, therefore, would not time-bar the filing of a subsequent claim. However, the *Brigance* court observed:

> The misdiagnosis rule applies only 'if a miner's claim is ultimately rejected on the basis that he does not have the disease.' (citation omitted). Here, the record does not reveal the reason for the termination of (state) benefits. And, unlike in *Dukes*, Brigance's prior claim was *not* rejected; the state tribunal awarded him benefits for eight years.

Id.

4. Receipt of communication by miner

In *W.C. v. Benham Coal, Inc.*, 24 B.L.R. 1-50 (2008) (Boggs, J., concurring), the Board held issuance of an Administrative Law Judge's decision and order to a miner, wherein the Administrative Law 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, Appeals 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).