

## PART IV

### ADMINISTRATIVE PROCESSING OF CLAIMS, POWERS AND DUTIES OF THE ADMINISTRATIVE LAW JUDGE

#### D. EVALUATION AND WEIGHING OF EVIDENCE

##### 3. SPECIFIC EVIDENTIARY PRINCIPLES

###### a. *Blevins* Test for Admissibility

Where a medical expert evaluates a miner's condition and attributes at least part of any respiratory problem to cigarette smoking rather than pneumoconiosis, the medical opinion must meet the "*Blevins*" test as a "reasoned medical judgment" to support the opposing party's burden of rebuttal. *Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983)[*Blevins III*]; see also *Drumond Coal Co. v. Freeman*, 733 F.2d 1523, 6 BLR 2-73 (11th Cir. 1984); *Peabody Coal Co. v. Lowis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983); *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

The "*Blevins*" test requires that medical opinion(s) must be used to show that any disability is due to smoking rather than pneumoconiosis. *Smith v. Consolidation Coal Co.*, 4 BLR 1-522 (1982). Moreover, a medical opinion attributing cause of disability to smoking should be unequivocal. A tentative or qualified opinion may be rejected. See *Wilson v. The Youghioghny & Ohio Coal Co.*, 8 BLR 1-73 (1985). *Blevins* has been most frequently applied in cases involving rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(3), and failure to meet this test renders an opinion insufficient to meet opposing parties' burden to establish rebuttal by that method. *Blevins* criteria do not apply when respiratory impairment is not attributed to smoking or attributed to non-respiratory dysfunction. *Buttermore v. Duquesne Light Co.*, 7 BLR 1-604 (1984), *recon. granted on other grounds*, 8 BLR 1-36 (1985)(Smith, J., dissenting).

The Board has stressed that the *Blevins* test is not a rule of substantive law but merely exemplifies the evidentiary requirements necessary to qualify an expert witness. Its purpose is to prevent rebuttal on the basis of medical opinions that are speculative or equivocal. *Blevins III*, 6 BLR at 1-755.

Historically, the Board once required that such an opinion be phrased in terms of "a reasonable degree of medical certainty." Additionally, the opinion had to satisfy a

strict four prong foundational test of admissibility. See *Blevins v. Peabody Coal Co.*, 1-BLR 1-1023 (1978), *rev'd on other grounds mem. sub nom. Peabody Coal Co. v. Director, OWCP*, 644 F.2d 886 (6th Cir. 1981)[*Blevins II*]. The Board has since rejected the "reasonable degree of medical certainty" standard, holding that an opinion constituting "reasoned medical judgment" is sufficient. Moreover, the four prong test is no longer to be strictly construed; only the information critical to establishing a witness' qualifications and the bases for the opinion must be in the record. *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501 (1984).

Note that where an administrative law judge applies the *Blevins II* standard to cases decided prior to the Board's decision in *Blevins III*, the Board has held that an opinion sufficient under the stringent *Blevins II* criteria also satisfies the more lenient *Blevins III* standard. *Crow v. Peabody Coal Co.*, 11 BLR 1-54 (1988)(Ramsey, C.J., concurring); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985).

### CASE LISTINGS

[subsection (b)(3) rebuttal must be based on medical opinion where attempt to show smoking, not pneumoconiosis, caused disability] *Smith v. Consolidation Coal Co.*, 4 BLR 1-522 (1982).

[Seventh Circuit held that opinion attributing disability to smoking need not be phrased in terms of a "reasonable degree of medical certainty"] *Peabody Coal Co. v. Lewis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983).

[Third Circuit approved Board's holding in *Burns v. Pittsburg & Midway Coal Co.*, 4 BLR 1-489 (1982) for reviewing medical evidence attributing part of respiratory problem to smoking] *Mathies Coal Co. v. Simonazzi*, 733 F.2d 283, 6 BLR 2-48 (3d Cir. 1984).

[Eleventh Circuit followed Seventh Circuit and Board's decision in *Blevins III*] *Drummond Coal Co. v. Freeman*, 733 F.2d 1523, 6 BLR 2-73 (11th Cir. 1984).

[*Blevins II* not applicable to opinion of no pneumoconiosis on rebuttal under subsection (b)(4)] *Honaker v. Habco Coal Co.*, 6 BLR 1-408 (1983).

[diagnosis of smoking as cause of impairment may be sufficient to rebut as long as not speculative or equivocal; "reasonable degree of medical certainty" *Blevins II* standard overruled and "four prong test" not to be strictly construed] *Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983)[*Blevins III*].

[medical opinion must be supported by proper foundation to establish disability due to cigarette induced emphysema rather than pneumoconiosis] *Cosalter v. Mathies Coal*

Co., 6 BLR 1-1182 (1984).

[**Blevins III** does not require special evidentiary standard] **Morgan v. Bethlehem Steel Corp.**, 7 BLR 1-226 (1984).

[Board restates rejection of **Blevins II** standard] **Pickett v. Black Diamond Coal Mining Co.**, 7 BLR 1-778 (1985); **Shapell v. Director, OWCP**, 7 BLR 1-304 (1984).

[under **Blevins III**, medical opinion attributing total disability to cigarette-induced condition rather than pneumoconiosis must comply with four-part evidentiary foundation testy to constitute reasoned medical judgment] **Hoole v. Republic Steel Corp.**, 7 BLR 1-453 (1984).

[where adjudicator found opinions failed to comply with evidentiary requirements of **Blevins III**, use of **Blevins II** test harmless error] **Shaw v. Bradford Coal Co.**, 7 BLR 1-462 (1984).

[adjudicator's erroneous application of **Blevins II** test harmless where opinion otherwise insufficient to establish subsection (b)(3) rebuttal; medical opinion as to etiology of respiratory impairment must satisfy proper evidentiary foundation requirements under **Blevins III** to constitute a reasoned medical judgment] **Tenney v. Badger Coal Co.**, 7 BLR 1-589 (1984).

[medical opinion constitutes "reasoned medical judgment" sufficient to establish subsection (b)(3) rebuttal; argument that opinion based on statistical probability rather than clinical evidence rejected] **Maypray v. Island Creek Coal Co.**, 7 BLR 1-683 (1985).

[medical opinion improperly rejected where medical expert's qualifications and basis for opinion established under **Blevins III**] **Crisp v. Ligon Preparation Co.**, 7 BLR 1-824 (1985).

[**Blevins** criteria do not apply when respiratory impairment not attributed to smoking or attributed to non-respiratory dysfunction] **Buttermore v. Duquesne Light Co.**, 7 BLR 1-604 (1984), *recon. granted on other grounds*, 8 BLR 1-36 (1985)(Smith, J., dissenting).

[**Blevins III** states that medical opinion attributing causation to cigarette smoking should be unequivocal; adjudicator properly concluded that report he found "tentative and qualified" did not meet this standard] **Wilson v. The Youghiogheny & Ohio Coal Co.**, 8 BLR 1-73 (1985).

[adjudicator may properly reject opinion attributing respiratory condition to smoking where testimony on issue generalized and not specifically focused upon claimant] **Knizner v. Bethlehem Mines Corp.**, 8 BLR 1-296, *recon. denied*, 8 BLR 1-5 (1985).

## DIGESTS

The administrative law judge erred in citing *Blevins II* instead of *Blevins III*, but this is harmless error as the administrative law judge did not discredit any medical opinions thereunder. ***Crow v. Peabody Coal Co.***, 11 BLR 1-54 (1988)(Ramsey, CJ., concurring).

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