

PART IV

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

D. EVALUATION AND WEIGHING OF EVIDENCE

8. VENTILATORY AND BLOOD GAS STUDIES, QUALITY STANDARDS

Ventilatory or pulmonary function studies and blood gas studies measure the degree of impairment of respiratory or pulmonary function. It should be noted, however, that blood gas studies and ventilatory studies measure different types of impairment. This is important when the administrative law judge is considering medical opinions that are based only on one type of these studies. If the record contains both types of studies and the results of these studies conflict, the administrative law judge may reasonably find that a doctor's opinion that does not address the conflicting results is entitled to less weight. See *Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984); see also *Whitaker v. Director, OWCP*, 6 BLR 1-983 (1984).

For claims adjudicated under 20 C.F.R. Part 410, Subpart D or the interim presumption under 20 C.F.R. §727.203, the applicable quality standards for ventilatory studies are found at 20 C.F.R. §410.430. The Part 410 regulations do not include quality standards for blood gas studies. Under 20 C.F.R. Part 718, the quality standards for pulmonary function tests are found at 20 C.F.R. §718.103 and the quality standards for arterial blood gas studies found at 20 C.F.R. §718.105. These quality standards describe procedures for administering the test to ensure reliable results.

The Board, citing *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3rd. Cir. 1987), held that the quality standards found at Section 718.104 are mandatory (although not rigid), and that while an administrative law judge may accept a medical judgment in a report that does not comply with Section 718.104, the administrative law judge must determine the reliability of that judgment with reference to the documentation requirements of Section 718.104. *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991). An administrative law judge may not apply Part 718 Appendix B requirements himself to find qualifying pulmonary function studies invalid. The Board has held that the interpretation of the medical data is a matter for the medical experts and where the findings of the administrative law judge are not supported by medical evidence of record, they will be vacated. *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

CASE LISTINGS

[quality standards of Section 410.430 apply to all pulmonary function studies in claims filed before March 31, 1980, effective date of Part 718, regardless of date tests were performed or received into evidence] **Sgro v. Rochester and Pittsburgh Coal Co.**, 4 BLR 1-370 (1981).

[pulmonary function study where doctor checks a box on DOL form indicating "poor or unacceptable technique" without further explanation not necessarily unreliable] **Gambino v. Director, OWCP**, 6 BLR 1-134 (1983).

[adjudicator properly found ventilatory test unreliable because spirometer's paper speed was too slow] **Arnoni v. Director, OWCP**, 6 BLR 1-423 (1983).

[because blood gas ventilatory studies measure different types of impairment, medical opinion of no impairment based only on pulmonary function study does not necessarily rule out existence of pulmonary or respiratory impairment] **Sheranko v. Jones and Laughlin Steel Corp.**, 6 BLR 1-797 (1984).

[statement of cooperation and comprehension as "fair" may satisfy Section 410.430 standards] **Laird v. Freeman United Coal Co.**, 6 BLR 1-883 (1984).

[Section 410.430 does not require physician list miner's weight or provide explanation for results; no requirement that paper speed be recorded] **Laird v. Freeman United Coal Co.**, 6 BLR 1-883 (1984).

[pulmonary function study noting "poor" cooperation and comprehension may be conforming but adjudicator may nevertheless assign study no weight on basis results lack sufficient reliability to be credible] **Runco v. Director, OWCP**, 6 BLR 1-945 (1984).

[Section 410.430 requires that MVV (or MBC) and FEV₁ values represent highest of at least three attempts, not that study list results of three attempts; adjudicator can find reported values are highest of three attempts in absence of evidence to the contrary] **Braden v. Director, OWCP**, 6 BLR 1-1083 (1984).

[ventilatory study can be validated by DOL consultant who verified miner's cooperation and understanding] **Inman v. Peabody Coal Co.**, 6 BLR 1-1249 (1984).

[if tracings accompany ventilatory study, adjudicator may presume study's conformance to requirements of 20 C.F.R. §410.430; party challenging conformance must support contentions with expert opinion] **Inman v. Peabody Coal Co.**, 6 BLR 1-1249 (1984).

[adjudicator properly found doctor's comments that claimant "tried to be cooperative"

during a pulmonary function test satisfied quality standards of Section 410.430's regarding comprehension] **Martin v. Director, OWCP**, 7 BLR 1-85 (1984).

[doctor may submit statement as to miner's cooperation after submission of original test results under Section 410.430 quality standards] **Lese v. Bethlehem Mines Corp.**, 7 BLR 1-149 (1984).

[reference to paper speed in 20 C.F.R. §410.430 not mandatory; adjudicator may consider ventilatory study's reliability in light of expert opinion and may consider non-qualifying ventilatory study that failed to conform because of poor cooperation] **Anderson v. The Youghiogeny and Ohio Coal Co.**, 7 BLR 1-152 (1984).

[doctor may note blood gas study unreliable finding it "confusing" because of great discrepancy between at-rest and exercise results] **Mahan v. Kerr-McGee Coal Corp.**, 7 BLR 1-159 (1984).

[ventilatory studies, while relevant to presence or absence of respiratory impairment, are not determinative of causation] **Piniansky v. Director, OWCP**, 7 BLR 1-171 (1984).

[pathologist not *per se* less competent than internist or pulmonary specialist to interpret results of blood gas studies] **Shortt v. Director, OWCP**, 7 BLR 1-318 (1984).

[ventilatory study accompanied by statement that miner's understanding was good sufficient to conform to quality standards] **Bowman v. Director, OWCP**, 7 BLR 1-718 (1985).

[reviewing doctor's opinion that ventilatory study unreliable because based on less than optimal effort must be considered by adjudicator] **Revnack v. Director, OWCP**, 7 BLR 1-771 (1985).

[consulting physicians' opinions regarding reliability of ventilatory studies may constitute substantial evidence for their rejection; adjudicator must provide rationale for preferring the opinion of consulting physician over that of administering doctor] **Siegel v. Director, OWCP**, 8 BLR 1-156 (1985).

DIGESTS

Where the record contains competent medical testimony that a miner's qualifying objective test score may have been affected by a health condition not related to (and therefore not indicative of) the type of disease or impairment which the objective tests were designed to detect, such evidence must be discussed prior to invocation of the interim presumption. **Casella v. Kaiser Steel Corp.**, 9 BLR 1-131 (1986).

Section 727.206(a) precludes invocation based on pulmonary function study evidence if tracings are omitted. **Casella v. Kaiser Steel Corp.**, 9 BLR 1-131 (1986); **Smith v. National Mines Corp.**, 7 BLR 1-803 (1985); **Clay v. Director, OWCP**, 7 BLR 1-82 (1984).

Interpretation of objective data is a medical determination for which an administrative law judge cannot substitute his own opinion. **Casella v. Kaiser Steel Corp.**, 9 BLR 1-131 (1986).

The Board's interpretation of the blood gas tables found in Appendix C of Part 718 does not permit the "rounding up" nor "rounding down" of pCO₂ or Po₂ values, but rather, follows the express regulatory requirement that the reported test value be "equal to or less than" the specified table value. **Tucker v. Director, OWCP**, 10 BLR 1-35 (1987).

The standards set forth in Section 718.105 for blood gas studies are not mandatory and should be considered and used as guidelines. An otherwise reliable and probative study must not be rejected simply for failing to satisfy a non-critical quality standard. **Orek v. Director, OWCP**, 10 BLR 1-51 (1987)(Levin, J., concurring).

While the administrative law judge may consider the quality standards found in Section 718.103, the standards are not mandatory and pulmonary function studies cannot be precluded from consideration by the administrative law judge under Section 718.204(c)(1) simply because the evidence fails to comply with those standards. **DeFore v. Alabama By-Products Corp.**, 12 BLR 1-27 (1988); **Gorman v. Hawk Contracting, Inc.**, 9 BLR 1-76 (1986).

Quality standards listed in Section 718.103 are not exclusive. **Bowlin v. Director, OWCP**, 825 F.2d 410 (6th Cir. 1987)(Table).

Pulmonary function studies are relevant only to the issue of total disability and not the existence of pneumoconiosis. **Trent v. Director, OWCP**, 11 BLR 1-26 (1987).

The administrative law judge may discredit a pulmonary function study on the strength of two consultants' opinions attesting to claimant's poor effort. Cf. **Trent v. Director, OWCP**, 11 BLR 1-26 (1987); **Minton v. Director, OWCP**, 6 BLR 1-670 (1983); **Yeager v. Bethlehem Mines Corp.**, 6 BLR 1-307 (1983); **Gambino v. Director, OWCP**, 6 BLR 1-134; see **Hunt v. Califano**, 445 F. Supp. 624 (D. Md. 1977); **Baker v. Secretary of Health, Education and Welfare**, 383 F. Supp. 1095 (W.D. Va. 1974).

The administrative law judge may not reevaluate the numerical test results of a pulmonary function study because it would entail impermissible substitution of the administrative law judge's own medical expertise. Moreover 20 C.F.R. §410.430 explicitly requires the MVV value to be observed, not calculated. **Castle v. Eastern**

Associated Coal Co., 12 BLR 1-105 (1988).

In the Third Circuit, the quality standards at Section 718.102-107 are mandatory and where the objective tests do *not* strictly conform to the applicable standard, the administrative law judge may, nevertheless, consider the objective test if the test is found to be in substantial compliance with the quality standard. **Director, OWCP v. Siwiec**, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); **Director, OWCP v. Mangifest**, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987).

Objective studies which do not meet the quality standards under the Part 718 regulations must be challenged below and such challenges will not be considered for the first time on appeal to the Board. See **Owens v. Jewell Smokeless Coal Corp.**, 14 BLR 1-47 (1990); **Orek v. Director, OWCP**, 10 BLR 1-51 (1987)(Levin, J., concurring).

The Board, citing **Director, OWCP v. Mangifest**, 826 F.2d 1318, 10 BLR 2-220 (3rd Cir. 1987), held that the quality standards found at Section 718.104 are mandatory (although not rigid), and that while an administrative law judge may accept a medical judgment in a report that does not comply with Section 718.104, the administrative law judge must determine the reliability of that judgment with reference to the documentation requirements of Section 718.104. **Budash v. Bethlehem Mines Corp.**, 16 BLR 1-27 (1991).

Where the administrative law judge applied Part 718 Appendix B, paragraph (2)(ii)(G) himself and deemed two qualifying pulmonary function studies invalid, the Board held that the interpretation of the medical data is a matter for the medical experts, noted that the administrative law judge's conclusion was not supported by medical evidence of record, vacated the administrative law judge's Section 718.204(c)(1) finding and remanded the case for reconsideration of the pulmonary function study evidence. The Board noted in a footnote, however, that invalidation reports concerning excessive variability between the FEV₁ curves (and therefore supportive of the administrative law judge's conclusion) had been excluded from the evidence of record by the administrative law judge. **Schetroma v. Director, OWCP**, 18 BLR 1-19 (1993).

The Sixth Circuit held that the administrative law judge's explanations for crediting the opinions of Drs. Broudy and Fino and discounting the contrary opinion of Dr. Rasmussen, to find the medical opinions insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), were not supported by substantial evidence. The administrative law judge credited the opinions of Drs. Broudy and Fino over the contrary opinion of Dr. Rasmussen because he found that Dr. Rasmussen relied on an incomplete medical record in that he diagnosed only clinical pneumoconiosis by x-ray, whereas Drs. Broudy and Fino relied on comprehensive documentation in reaching their conclusions that claimant did not have pneumoconiosis. The administrative law judge also found that Dr. Fino had excellent professional qualifications. The Sixth Circuit held that the administrative law judge did not

adequately explain his finding that Dr. Rasmussen's report did not support a finding of legal pneumoconiosis, where the record showed that Dr. Rasmussen relied on the results of his exercise blood gas study and diffusing capacity test to determine that claimant was suffering from a pulmonary disability. The Sixth Circuit also held that the Board's explanation that Dr. Rasmussen diagnosed clinical but not legal pneumoconiosis, was inaccurate as a matter of law because (1) Dr. Rasmussen's consideration of evidence, other than the x-ray, including a physical exam, diffusing capacity test, arterial blood gas studies, and claimant's personal and occupational histories, would have been sufficient alone to support a finding of legal pneumoconiosis; and because (2) even if Dr. Rasmussen diagnosed only clinical pneumoconiosis, as the Board concluded, such a diagnosis was necessarily legal pneumoconiosis where legal pneumoconiosis includes clinical pneumoconiosis. ***Martin v. Ligon Preparation Co.***, 23 BLR 2-261 (6th Cir. 2005).

The Sixth Circuit held that the administrative law judge did not adequately explain his reasons for crediting the opinions of Drs. Broudy and Fino. The Sixth Circuit found "no rational explanation" for the administrative law judge's determination that Dr. Broudy's opinion was more credible than Dr. Rasmussen's opinion regarding the existence of pneumoconiosis, especially after the administrative law judge found that Dr. Broudy's report contained little rationale or explanation and that Dr. Rasmussen's report was well-reasoned. The Sixth Circuit noted, moreover, that what explanation Dr. Broudy did provide for his opinion that claimant did not have pneumoconiosis, directly supported Dr. Rasmussen's finding of pneumoconiosis based on the blood gas study results. With regard to Dr. Fino, the Sixth Circuit held that Dr. Fino's credentials were not necessarily superior to those of Dr. Rasmussen, where Dr. Fino was Board-certified in Internal Medicine and Pulmonary Disease and Dr. Rasmussen was Board-certified in Internal Medicine only but had extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis. The Sixth Circuit also determined that the record refuted the administrative law judge's finding that Dr. Fino reviewed Dr. Rasmussen's exercise blood gas study and diffusing capacity test results and had determined that they were not indicative of pneumoconiosis. The Sixth Circuit thus vacated the Board's decision affirming the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and the denial of benefits, and remanded the case to the administrative law judge for further consideration. ***Martin v. Ligon Preparation Co.***, 23 BLR 2-261 (6th Cir. 2005).

Pulmonary function studies performed on a miner who is older than 71 – the maximum age for which qualifying values are reported in Appendix B to Part 718 – must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. However, the party opposing entitlement may submit medical evidence that the qualifying values for a 71 year old are not indicative of total disability in an older miner. The administrative law judge must consider this evidence when making an initial determination as to whether the pulmonary function study evidence supports a finding of total disability. ***K.J.M. v. Clinchfield Coal Co.***, BLR (June 30, 2008).

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