PART VII

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

B. EXISTENCE OF PNEUMOCONIOSIS

DIGESTS

The Third Circuit agreed with the Director and held that Section 718.202 requires that all types of relevant evidence of record must be weighed together in determining whether claimant has met his burden of establishing pneumoconiosis. The court cited to 30 U.S.C. §923(b)["in determining the validity of claims under this part, all relevant evidence shall be considered"], as well as ***Kertesz v. Crescent Hills Coal Co.***, 788 F.2d 158, 163, 9 BLR 2-1, 2-6 (3d Cir. 1986)[the ALJ should review all medical evidence presented in determining the presence of pneumoconiosis]. 1997 U.S. App. Lexis 12806, at 7, 8. The Court concluded that the Board erred in affirming the ALJ's finding of pneumoconiosis under Section 718.202(a)(1) thereafter noting that employer's arguments regarding subsections (a)(2) and (a)(3) need not be reached as Section 718.202(a) provided "alternative methods" of establishing pneumoconiosis. The Court went on to review the ALJ's finding of pneumoconiosis as based on substantial evidence and thereby affirming the board's decision on other grounds. ***Penn Allegheny Coal Co. v. Williams***, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Based on the statutory language at 30 U.S.C. §923(b), the Fourth Circuit held that all relevant evidence is to be considered together rather than merely within discrete subsections of 20 C.F.R. §718.202(a)(1)-(4) in determining whether claimant has met his burden of establishing the existence of pneumoconiosis by a preponderance of all of the evidence. While noting that legal pneumoconiosis is a much broader category of diseases than medical pneumoconiosis, and that evidence which does not establish medical pneumoconiosis should not necessarily be treated as evidence weighing against a finding of legal pneumoconiosis, the court rejected the Director's position, that evidence of medical pneumoconiosis should not be weighed with evidence of legal pneumoconiosis, as not being a reasonable interpretation of the Act or the regulation. ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, No. 98-2051 (4th Cir. May 2, 2000).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(a)(2), which expands the definition of pneumoconiosis to include both chronic restrictive or obstructive pulmonary disease arising out of coal mine employment, is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 862, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***,

160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), stating that pneumoconiosis is recognized as a latent and progressive disease, is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 863, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), setting forth the definition of pneumoconiosis, should be narrowly construed to state that pneumoconiosis *can* be a progressive and latent disease, not that it is always, or typically, a latent or progressive disease. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 869, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The amendments to 20 C.F.R. §718.201, defining "clinical" and "legal" pneumoconiosis and recognizing pneumoconiosis as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure, did not alter a claimant's burden of proving the existence of 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 holdings in ***Nat'l Mining Ass'n v. U.S. Dep't of Labor***, 292 F.3d 849 (D.C. Cir. 2002) do not require, however, that a claimant separately prove that the disease suffered is one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that it actually progressed. ***Workman v. Eastern Associated Coal Corp.***, 23 BLR 1-22 (2004) (Motion for Recon.)(*en banc*); ***Parsons v. Wolf Creek Collieries***, 23 BLR 1-29 (2004)(Motion for Recon.) (*en banc*)(McGranery, J., concurring and dissenting).

While pneumoconiosis is not latent and progressive in the majority of cases, the potential for these characteristics is inherent in every case, thus a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of coal mine employment, or who proves that the pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a progressive nature. ***Workman v. Eastern Associated Coal Corp.***, BRB No. 02-0727 BLA, 23 BLR 1-22 (2004)(Motion for Recon.) (*en banc*); ***Parsons v. Wolf Creek Collieries***, 23 BLR 1-29 (2004)(Motion for Recon.)(*en banc*)(McGranery, J., concurring and dissenting).

The Tenth Circuit held that, under the plain language of the revised regulation at 20 C.F.R. §718.201(a)(2), proving that one suffers from a "chronic obstructive pulmonary disease" does not establish legal pneumoconiosis unless one is able to show that the condition arose out of coal mine employment. Thus, a claimant establishes the

existence of legal pneumoconiosis only if he is able to prove, without the benefit of the rebuttable presumption at 20 C.F.R. §718.203, that his chronic pulmonary disease or respiratory or pulmonary impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. ***Andersen v. Director, OWCP***, F.3d , BLR (10th Cir. 2006).

1. GENERALLY

Section 718.202 provides four *alternative* methods by which a claimant may establish the existence of pneumoconiosis. They are: 1) chest x-rays; 2) biopsy or autopsy; 3) the presumptions contained in Sections 718.304, 718.305 or 718.306; or 4) a physician's reasoned medical judgment, notwithstanding negative x-rays, that a claimant suffers from pneumoconiosis. *See* ***Dixon v. North Camp Coal Co.***, 8 BLR 1-344 (1985). Section 718.201 provides a definition of pneumoconiosis identical to that provided by 20 C.F.R. §727.202. *See also* ***Nance v. Benefits Review Board***, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); Part II.D. of the Desk Book. Establishing pneumoconiosis under one of the four methods obviates the need to do so under any of the other methods. *See* ***Dixon***, ***supra***. Section 718.202(b) prohibits the denial of a claim solely on the basis of a negative x-ray. *See* 20 U.S.C. §923(b). Section 718.202(c) provides that pneumoconiosis may not be found solely on the basis of a living miner's statement or testimony or, in claims filed after January 1, 1982, through affidavits of survivors of dependents in claims involving a deceased miner.

The Seventh Circuit held that employer's argument, that a negative CT scan is conclusive evidence that claimant does not have pneumoconiosis, is contrary to the most recent guidelines promulgated by the Department of Labor (DOL). The court explained that DOL has rejected the view that a CT scan, by itself, "is sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis." The court deferred to DOL's finding that a negative CT scan, standing alone, need not be given controlling weight in the evaluation of a claim under the Act because the statutory definition of "pneumoconiosis" encompasses a broader spectrum of diseases than those pathological conditions which can be detected by clinical tests such as x-ray and CT scans. ***Consolidation Coal Co. v. Director, OWCP* [*Stein*]**, 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002).

The Seventh Circuit also determined that employer's argument, that the CT scan is a more sophisticated and diagnostic test than an x-ray was flawed because, *inter alia*, it was based on the erroneous assumption that the medical community has reached a consensus about the singular, best method for diagnosing pneumoconiosis. The court indicated that DOL has determined that no single test or procedure, standing alone, is entitled to controlling weight as a matter of law. The court held, therefore, that any decision denying a claim for benefits under the Act must be based on a totality of the medical and scientific evidence contained in the record - not the results of the CT scan

alone. The court thus deferred to DOL's reasonable judgment in resolving complex, technical issues that draw upon its familiarity and expertise with the diagnosis, prevention, and remediation of black lung disease. ***Consolidation Coal Co. v. Director, OWCP* [*Stein*]**, 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002).

The Seventh Circuit further upheld the administrative law judge's conclusion that the reader of the CT scan, Dr. Bruce, lacked the necessary expertise, knowledge, and qualifications to offer a reliable opinion in the case under consideration. The court indicated that (1) nothing in the record conclusively establishes that Dr. Bruce has any experience or training with reading CT scans for the presence of legal pneumoconiosis (as opposed to other occupational diseases) or for purposes of diagnosis (as opposed to treatment), and (2) that employer failed to explain whether Dr. Bruce followed standard medical procedures when he examined claimant's CT scan, much less describe what those procedures might be. The court further found ample support for the administrative law judge's determination that claimant is totally disabled due to pneumoconiosis and thus upheld her decision to award benefits. ***Consolidation Coal Co. v. Director, OWCP* [*Stein*]**, 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002).

In this Fourth Circuit case, the majority held that a remand of the case was required because the administrative law judge did not weigh together all of the evidence regarding the existence of pneumoconiosis as required under ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The majority held that the administrative law judge must consider the weight of the x-ray evidence, which he properly determined to be negative, against the weight of the medical opinion evidence upon which he relied to find the existence of pneumoconiosis established in this case. The majority also held that the administrative law judge accorded undue weight to a treating physician's opinion by erroneously finding that "generally [a treating physician's] opinion would ordinarily be entitled to more weight." The majority determined that substantial evidence did not support the administrative law judge's finding that this physician, who had treated the miner for ten years, possessed comparable credentials to the other physicians of record. A dissenting judge would have held that although the administrative law judge erred, substantial evidence supports the administrative law judge's factual findings and decision to accord greater weight to the opinion of the miner's treating physician. ***Consolidation Coal Co. v. Held***, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002).

PART VII

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

B. EXISTENCE OF PNEUMOCONIOSIS

1. GENERALLY

a. UNDER THE 2000 REVISIONS TO THE REGULATIONS

DIGESTS

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(a)(2), which expands the definition of pneumoconiosis to include both chronic restrictive or obstructive pulmonary disease arising out of coal mine employment, is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 862, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

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