PART VIII

STATUTORY PRESUMPTIONS IN MINERS' CLAIMS

B. <u>SECTION 411(c)(3)</u>

Section 411(c)(3) of the Act, 30 U.S.C. §921(c(3), and its implementing regulations found at 20 C.F.R. §§410.418 and 718.304, provide that if a miner is suffering or suffered from complicated pneumoconiosis, then there is an *irrebuttable* presumption that s/he is totally disabled due to pneumoconiosis, that death was due to pneumoconiosis, or that, at the time of death, s/he was totally disabled due to pneumoconiosis.

Complicated pneumoconiosis may be proven by x-ray evidence only if the x-ray evidence, which must be weighed, reveals one or more large opacities (greater than one centimeter in diameter), classified as category A, B, or C. 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §§410.418(a), 718.304(a). Complicated pneumoconiosis may be established by autopsy or biopsy evidence, if such evidence establishes massive pulmonary lesions. 30 U.S.C. §921(c)(3)(B); 20 C.F.R. §§410.418(b), 718.304(b). Section 410.418(b) also states that a biopsy or autopsy will be accepted as evidence of complicated pneumoconiosis if the histological findings establish simple pneumoconiosis and progressive massive fibrosis. Section 718.304(b) does not contain this additional provision. Finally, a provision is made for diagnosis of complicated pneumoconiosis by other means, if the condition diagnosed would yield results similar to those described above if diagnosed by x-ray, autopsy or biopsy. 30 U.S.C. §921(c)(3)(C); 20 C.F.R. §§410.418(c), 718.304(c). The Board has construed this standard strictly in several cases. *See* ***Lohr v. Rochester & Pittsburgh Coal Co.***, 6 BLR 1-1264 (1984); ***Clites v. Jones & Laughlin Steel Corp.***, 2 BLR 1-1019 (1980); ***Gaudiano v. United States Steel Corp.***, 1 BLR 1-949 (1978).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify the claimant for the irrebuttable presumption found at Section 411(c)(3). Rather, the administrative law judge must examine all of the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See* ***Truitt v. North American Coal Corp.***, 2 BLR 1-199 (1979), *aff'd sub nom*. ***Director, OWCP v. North American Coal Corp.***, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). If the record contains any evidence indicating the existence of complicated pneumoconiosis, the administrative law judge must specifically address it, and, if it is rejected, must provide a legitimate explanation. ***Shultz v. Borgman Coal Co.***, 1 BLR 1-233 (1977). If there is no evidence of complicated pneumoconiosis in the record, however, no specific finding of fact is required as to the existence or non-existence of

complicated pneumoconiosis. ***Lewandowski v. Director, OWCP***, 1 BLR 1-840 (1978).

This presumption is not rebutted by the fact that the miner continues or continued to work after being diagnosed as suffering from complicated pneumoconiosis. Moreover, once a claimant is found entitled to the benefit of this presumption, he is entitled to monthly benefits without any offset for earned wages. *See* ***Kelley v. Brookside Pratt Mining Co.***, 1 BLR 1-619 (1978); ***Fisher v. Bethlehem Mines Corp.***, 1 BLR 1-591 (1978). *See also* ***Gaul v. Bethlehem Mines Corp.***, 1 BLR 1-911 (1978). For additional discussion of the Section 411(c)(3) presumption *see* Part X.E. of the Desk Book.

CASE LISTINGS

[determination of whether complicated pneumoconiosis exists is finding of fact to be made by adjudicator] ***Webb v. United States Pipe & Foundry Co.***, 1 BLR 1-226 (1977).

[Section 411(c)(3) designed to compensate miner for continuing impairment of health as well as decreased earning capacity] ***Nemec v. Lehigh Valley Anthracite, Inc.***, 1 BLR 1-504 (1978).

[miner with complicated pneumoconiosis may be entitled to benefits while drawing full wages for coal mine employment] ***Gaul v. Bethlehem Mines Corp.***, 1 BLR 1-911 (1978).

[x-ray revealing opacities ranging in size up to one centimeter, legally insufficient to prove existence of complicated pneumoconiosis since Section 411(c)(3)(A) and Section 410.418(a) require finding of greater than one centimeter] ***Gaudiano v. United States Steel Corp.***, 1 BLR 1-949 (1978).

[award of benefits upheld under Section 411(c)(3) even though claimant continued usual coal mine job four years after x-ray revealed presence of complicated pneumoconiosis] ***Truitt v. North American Coal Corp.***, 2 BLR 1-199 (1979), *aff'd sub nom*. ***Director, OWCP v. North American Coal Corp.***, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

[under Section 411(c)(3), miner who establishes existence of complicated pneumoconiosis irrebuttably presumed totally disabled due to pneumoconiosis as of month complicated pneumoconiosis established, even though still working] ***Justus v. Jones & Laughlin Coal Co.***, 3 BLR 1-185 (1981).

[adjudicator's finding that claimant established existence of complicated pneumoconiosis was reversed where only one of 16 x-rays diagnosed complicated

pneumoconiosis and remaining 15 were negative] ***Hoffman v. Peabody Coal Co.***, 3 BLR 1-678 (1981).

[adjudicator's finding of no totally disabling respiratory or pulmonary impairment basis for rejection of argument that the Section 411(c)(3) presumption cannot be invoked] ***Kislak v. Rochester & Pittsburgh Coal Co.***, 3 BLR 1-103 (1981), *aff'd in part and rev'd in part sub nom*. ***Director, OWCP v. Rochester and Pittsburgh Coal Co.***, 678 F.2d 17, 4 BLR 2-74 (3d Cir. 1982).

[adjudicator's finding of no complicated pneumoconiosis affirmed based on greater weight to physician's earlier biopsy report of four centimeter nodule as a "pulmonary hamartoma" (overgrowth of mature cells and tissues), which did not mention massive lesions, over his later report of complicated pneumoconiosis; noted absence of evidence from which an equivalency determination could be made] ***Reilly v. Director, OWCP***, 7 BLR 1-139 (1984).

[adjudicator properly found Section 411(c)(3) presumption not invoked where only one report found complicated pneumoconiosis and all other x-rays found only simple pneumoconiosis, except one read negative] ***Maypray v. Island Creek Coal Co.***, 7 BLR 1-683 (1985).

[adjudicator's finding that sole x-ray reading of complicated pneumoconiosis outweighed by two rereadings termed "unreadable" and eight negative x-rays, precluding entitlement at Section 411(c)(3) affirmed] ***King v. Cannelton Industries, Inc.***, 8 BLR 1-146 (1985).

DIGESTS

The Board rejected employer's argument that the quality standards contained in Section 410.428 apply to determinations under Section 411(c)(3), stating they only apply to x-rays which diagnose simple pneumoconiosis. ***Swartz v. United States Steel Corp.***, 8 BLR 1-481 (1986).

A claimant must produce medical evidence of complicated pneumoconiosis to establish entitlement to the irrebuttable presumption found at 20 C.F.R. §718.304, which implements Section 411(c)(3) of the Act. ***Trent v. Director, OWCP***, 11 BLR 1-26 (1987).

The Board held that an x-ray interpretation indicating the absence of small or large opacities consistent with pneumoconiosis, but noting the presence of a 1.0 centimeter lesion, is legally insufficient to establish the existence of complicated pneumoconiosis under Section 718.304(a) since Section 718.304(a) requires a finding of one or more large opacities greater than one centimeter in diameter. ***Handy v. Director, OWCP***, 16

BLR 1-73 (1990).

The administrative law judge properly found invocation of the irrebuttable presumption established pursuant to Section 718.304(b) where the autopsy prosector diagnosed complicated pneumoconiosis and described the lungs as revealing "both macular and nodular pneumoconiosis. These lesions are large firm and black. They vary in size up to 1.0 cm. in diameter...." ***Gruller v. Bethenergy Mines, Inc.***, 16 BLR 1-3 (1991).

Based on the express language of the Act as set forth at 30 U.S.C. §923(b) and ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP***, 484 U.S. 135, 11 BLR 2-1 (1987), the Board held that Section 718.304(a)-(c) does not provide alternative means of establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis, but rather requires the administrative law judge to first evaluate the evidence in each category, and then weigh together the categories at Section 718.304(a), (b) and (c) prior to invocation. ***Melnick v. Consolidation Coal Co.***, 16 BLR 1-31 (1991)(en banc).

Although the regulations provide no guidance for the evaluation of CT or CAT scans, Section 718.304(c) provides for new methods of diagnosis, and allows the consideration of any acceptable medical means of diagnosis. *See* 20 C.F.R. §718.304(c). Therefore, when initially weighing the evidence in each category pursuant to Section 718.204, CT scans are not to be considered x-rays but must be evaluated pursuant to subsection (c) together with any evidence or testimony which bears on the reliability and utility of CT scans and any other evidence not applicable to subsections (a) and (b). ***Melnick v. Consolidation Coal Co.***, 16 BLR 1-31 (1991)(en banc).

The Board affirmed the administrative law judge's finding of invocation of the irrebuttable presumption of total disability and death due to pneumoconiosis under 20 C.F.R. §718.304. The Board held that substantial evidence, namely the opinion of Dr. Green as corroborated by the opinion of Dr. Koenig, supports the administrative law judge's finding that the 1.5 centimeter lesion observed on autopsy, which he determined to be the more probative evidence, would have produced an opacity of equivalent size if viewed on x-ray. The Board further held that this equivalency finding by the administrative law judge is not compromised by his additional findings at 20 C.F.R. §718.304(a) and (b). The Board held that the administrative law judge's weighing of the evidence is consistent with the statement of the United States Court of Appeals for the Fourth Circuit in ***Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*]**, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000) that "[e]vidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict." *See* ***Scarbro***, 220 F.3d 250, 256, 22 BLR 2-93, 2-101, and is also consistent with the Fourth Circuit's mandate in ***Double B Mining, Inc. v. Blankenship***, 177 F.3d 240 (4th Cir. 1999) that the administrative law judge is bound to perform equivalency determinations to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption.

See ***Blankenship***, 177 F.3d 240, 243. The Board thus affirmed the administrative law judge's award of benefits in the instant case. ***Braenovich v. Cannelton Industries, Inc./Cypress Amax***, 22 BLR 1-236 (2003)(Gabauer, J., concurring).

In a case where the United States Court of Appeals for the Fourth Circuit acknowledged that all relevant evidence supported a finding that claimant had radiographic opacities greater than three centimeters, the court rejected employer's assertion that the administrative law judge improperly shifted the burden of proof, holding that the administrative law judge's approach in weighing the evidence was consistent with ***Eastern Assoc. Coal Corp. v. Director, OWCP*** **[*Scarbro*]**, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), insofar as she "simply stated that the clear evidence of large opacities would support the presumption unless the record contained 'affirmative evidence' showing either that the opacities did not exist or that they were due to something else, such as a disease other than pneumoconiosis." In affirming the award of benefits, the court also held that the administrative law judge permissibly rejected, as speculative and equivocal, the opinions of employer's experts, who opined that large opacities identified were unrelated to coal dust exposure and likely due to other conditions, such as tuberculosis, histoplasmosis, granulomatous disease, or sarcoidosis, as they failed to point to evidence that claimant was suffering from any of the alternative diseases and explain the bases for their respective diagnoses. ***Westmoreland Coal Co. v. Cox***, 602 F.3d 276, BLR (4th Cir. 2010).

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