

PART VII

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

B. EXISTENCE OF PNEUMOCONIOSIS

3. SECTION 718.202(a)(2): BIOPSY OR AUTOPSY EVIDENCE

Autopsy or biopsy evidence may be used as the basis for a finding of the existence of pneumoconiosis if conducted and reported in compliance with Section 718.106, 20 C.F.R. §718.106. An autopsy finding of anthracotic pigmentation, by itself, shall not be sufficient to establish pneumoconiosis alone. Finally, an autopsy report shall be accepted unless evidence of record indicates that it is inaccurate or has been fraudulently represented.

An autopsy report shall include detailed gross macroscopic and microscopic descriptions of the lungs or slides of lung tissue. If surgery has been to extract samples, all details of this operation must be included in the report. 20 C.F.R. §718.106(a). All autopsy or biopsy reports must comply with the requirements of Section 718.106 unless the miner died prior to March 31, 1980, and in those cases, the administrative law judge must determine weight and probative value on a case by case basis. See generally *Dagnan v. Blue Diamond Coal Mining Co.*, 994 F.2d 1536, 18 BLR 2-203 (11th Cir. 1993).

While negative biopsy results are not conclusive of the non-existence of pneumoconiosis, positive biopsy results constitute evidence of the presence of pneumoconiosis.

CASE LISTINGS

DIGESTS

In an *en banc* decision, the majority held that the administrative law judge properly determined that the biopsy findings, which include diagnoses of “subpleural fibrosis with anthracosis” and “perivascular anthracosis,” with associated disease process, fall within the regulatory definition of “pneumoconiosis” provided at 20 C.F.R. §718.201, notwithstanding the fact that there is no medical evidence linking these diagnoses to claimant’s coal mine employment. The majority thereby adopted the Director’s position

that the etiology of claimant's conditions 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. The majority also held that the administrative law judge's determination that the biopsy findings support a finding of the existence of pneumoconiosis, is consistent with the decision of the United States Court of Appeals for the Fourth Circuit in **Clinchfield Coal Co. v. Fuller**, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). **Hapney v. Peabody Coal Co.**, 22 BLR 1-104 (2001)(*en banc*)(SMITH and DOLDER, Administrative Appeals Judges, dissenting in part and concurring in part).

Judges Smith and Dolder, for the minority, agreed with employer's contention that the administrative law judge committed reversible error in determining that the biopsy findings establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2). In the absence of any medical evidence affirmatively linking the biopsy findings with claimant's coal mine employment, the diagnoses of "anthracosis" cannot constitute "pneumoconiosis" within the meaning of the Act and implementing regulations. 30 U.S.C. §902(b); 20 C.F.R. §§718.201, 718.202(a), (a)(1) and (b). The minority thus indicated that the Director's interpretation of the regulations, namely that the etiology of claimant's conditions 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, is not reasonable in this instance and does not merit the deference accorded it by the majority. The minority disagreed with the majority's conclusion that the administrative law judge's finding, that the diagnoses of "anthracosis" made on biopsy support a finding of the existence of pneumoconiosis, is supported by the Fourth Circuit's decision in **Fuller**, as the court did not reach the issue *sub judice*. **Hapney v. Peabody Coal Co.**, 22 BLR 1-104 (2001) (*en banc*) (SMITH and DOLDER, Administrative Appeals Judges, dissenting in part and concurring in part).

The Board held that a report by a pathologist who has reviewed the autopsy tissue slides, but has not provided a detailed gross macroscopic description of the lungs or visualized portion of a lung, as set forth at 20 C.F.R. §718.106(a), is nonetheless in substantial compliance with the Section 718.106(a) quality standards, and, therefore, can constitute a report of an autopsy. **Keener v. Peerless Eagle Coal Co.**, 23 BLR 1-229 (2007)(*en banc*).

The Board extended its reasoning in **Keener v. Peerless Eagle Coal Co.**, 23 BLR 1-229, 1-241 (2007) (*en banc*) to biopsy evidence and held that a biopsy slide review can be in substantial compliance with 20 C.F.R. §718.106 even if it does not include a gross macroscopic description of the tissue samples. **J.V.S. v. Arch of West Virginia/Apogee Coal Co.**, BLR (2008).

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