

## PART IX

### REGULATORY PRESUMPTIONS

#### A. 20 C.F.R. §727.203 INTERIM PRESUMPTION

##### 1. INVOCATION OF THE INTERIM PRESUMPTION GENERALLY

###### c. Section 727.203(a)(3)

Section 727.203(a)(3) allows for invocation of the interim presumption based on blood gas studies demonstrating an impairment in the transfer of oxygen from the lung alveoli to the blood. The miner is entitled to the presumption if the arterial carbon dioxide level is lower than the stated table value that is paired with the arterial oxygen level. The Board has taken official notice of the fact that the table values for PO<sub>2</sub> and PCO<sub>2</sub>, correctly reported in the Federal Register, are transposed in the 1984 Code of Federal Regulations. ***Krushinsky v. Director, OWCP***, 7 BLR 1-622 (1984).

Before invoking the interim presumption pursuant to subsection (a)(3), the administrative law judge must weigh all blood gas studies of record. ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP***, 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987). The Board has held that either at rest or exercise blood gas values may invoke the presumption, but that the administrative law judge must explain why he has chosen one test over another. ***Vigil v. Director, OWCP***, 8 BLR 1-99 (1985); ***Robertson v. Alabama By-Products Corp.***, 7 BLR 1-793 (1985); ***Honaker v. Habco Coal Co.***, 6 BLR 1-408 (1983); ***Sturnick v. Consolidation Coal Co.***, 2 BLR 1-972 (1980).

#### CASE LISTINGS

[claimant's testimony supports treating physician's opinion that blood gas test contraindicated and ventilatory test affected by claimant's pulmonary impairment; adjudicator properly denied motion to dismiss under Sections 725.456(e) and 725.408] ***Bertez v. Consolidation Coal Co.***, 6 BLR 1-820 (1984).

[non-qualifying blood gas values cannot support (a)(3) invocation] ***Horn v. Jewell Ridge Coal Corp.***, 6 BLR 1-933 (1984).

[adjudicator may give little weight to single qualifying blood gas test where post-exercise values not qualifying and other tests all non-qualifying] ***Coen v. Director, OWCP***, 7 BLR 1-30 (1984).

[blood gas test may be judged unreliable by doctor who found study "confusing" because of great discrepancy between at rest/exercise results] **Mahan v. Kerr-McGee Coal Corp.**, 7 BLR 1-159 (1984).

[no requirement that adjudicator credit later blood gas study simply because it is most recent evidence] **Conley v. Roberts and Schaefer Co.**, 7 BLR 1-309 (1984).

[pathologist not *per se* less competent than internist or pulmonary specialist to interpret results of blood gas tests; specific blood gas values must be considered; if reported values exceed table values, even by fractional amount, presumption not invoked] **Shortt v. Director, OWCP**, 7 BLR 1-318 (1984).

[effect of altitude on blood gas study may not be considered on invocation under subsection (a)(3)] **Keen v. Jewell Ridge Coal Corp.**, 6 BLR 1-454 (1983); **McNalley v. Columbia Mining Co.**, 6 BLR 1-167 (1983); **Martino v. United States Fuel Co.**, 6 BLR 1-33 (1983); accord **Temple v. Big Horn Coal Co.**, 7 BLR 1-573 (1984).

[failure of doctor to report post-exercise blood gas value does not prevent pre-exercise qualifying value from supporting invocation] **Robertson v. Alabama By-Products Corp.**, 7 BLR 1-793 (1984).

[non-respiratory factor could affect results of blood gas studies, rendering it unreliable; need medical evidence to establish unreliability] **Robertson v. Alabama By-Products Corp.**, 7 BLR 1-793 (1984)(heart surgery); **Vivian v. Director, OWCP**, 7 BLR 1-360 (1984)(leukemia and chronic anemia); **Jefferies v. Director, OWCP**, 6 BLR 1-1013 (1984); **Cardwell v. Circle B Coal**, 6 BLR 1-788 (1984)(intoxication).

[adjudicator's failure to discuss non-qualifying exercise values of blood gas study requires remand] **Frazio v. Consolidation Coal Co.**, 8 BLR 1-223 (1985); **Vigil v. Director, OWCP**, 8 BLR 1-99 (1985).

## DIGESTS

Under subsection (a)(3), claimant need not prove that his impairment is caused by pneumoconiosis. Accordingly, it is error as a matter of law to evaluate the cause of a claimant's respiratory impairment, as shown by four qualifying blood gas studies attributed to obesity, when considering invocation under this subsection. **Endrizzi v. Bethlehem Mines Corp.**, 4 BLR 1-252 (1981) overruled to the extent it is inconsistent with the holding in **Casella v. Kaiser Steel Corp.**, 9 BLR 1-131 (1986).

The Tenth Circuit held that the cause of the miner's impairment was not relevant under subsection (a)(3). **Swasey v. Director, OWCP**, No. 85-1473 (10th Cir. Mar. 6,

1986)(unpub.).

Part B and Part C claims are not dissimilar and Part B cases may be applicable to Part C claims regarding invocation. **Prater v. Hite Preparation Co.**, 829 F.2d 1363, 10 BLR 2-297 (6th Cir. 1987).

In the Tenth Circuit an administrative law judge should consider, prior to invocation, all evidence relevant to the reliability and probative value of objective tests as indicators of chronic respiratory or pulmonary disease. Therefore, the administrative law judge should evaluate, prior to invocation under Section 727.203(a)(3), a doctor's report attributing results of numerically qualifying blood gas studies to non-respiratory factors such as age, altitude or obesity. **Temple v. Big Horn Coal Co.**, 14 BLR 1-142 (1990); see **Mullins Coal Co., Inc. of Virginia v. Director, OWCP**, 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987) as interpreted by the Tenth Circuit in **Twin Pines Coal Co. v. United States Department of Labor**, 854 F.2d 1212 (10th Cir. 1988) and **Big Horn Coal Co. v. Director, OWCP [Alley]**, 897 F.2d 1045 (10th Cir. 1990).

The criteria found at 20 C.F.R. Part 718, Appendix C are not applicable to claims considered pursuant to 20 C.F.R. Part 727. **Knuckles v. Director, OWCP**, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); **Temple v. Big Horn Coal Co.**, 7 BLR 1-573 (1984).

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