

## PART IX

### REGULATORY PRESUMPTIONS

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

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

###### d. Section 727.203(a)(4)

Invocation of the interim presumption is established pursuant to Section 727.203(a)(4) when the presence of a totally disabling respiratory or pulmonary impairment is established by "[o]ther medical evidence, including the documented opinion of a physician exercising reasoned medical judgment." For a discussion of documented and reasoned medical opinions see Part IV.D.4.a., b. of the Desk Book. Other medical evidence does not include those items of clinical evidence pertinent to invocation under 20 C.F.R. §727.203(a)(1)-(3). *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984); *Horn v. Jewell Ridge Coal Corp.*, 6 BLR 1-933 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877 (1984); *Dolzanie v. Director, OWCP*, 6 BLR 1-865 (1984); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). The administrative law judge must weigh all medical reports prior to invocation of the interim presumption. *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987).

It is insufficient for the medical evidence to merely present a diagnosis of pulmonary or respiratory disease. *Buttermore v. Duquesne Light Co.*, 7 BLR 1-604 (1984); *DeFelice v. Consolidation Coal Co.*, 5 BLR 1-275 (1982); *Dees v. Peabody Coal Co.*, 5 BLR 1-117 (1982). The medical evidence must address the severity of the miner's impairment, *Krushinsky v. Director, OWCP*, 7 BLR 1-622 (1984); *Shortt v. Director, OWCP*, 7 BLR 1-318 (1984); *Brown v. Island Creek Coal Co.*, 4 BLR 1-620 (1982), and support the requirement that the miner's impairment be totally disabling. *Buttermore, supra*; *Shortt, supra*. Invocation is not established by a medical opinion that diagnoses only a mild to moderate chronic obstructive pulmonary disease as this diagnosis fails to establish a totally disabling respiratory or pulmonary impairment. *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Clay v. Director, OWCP*, 7 BLR 1-82 (1984); *Reedy v. Director, OWCP*, 3 BLR 1-163 (1981). Furthermore, a medical report that diagnoses total disability, but does not attribute it to a respiratory or pulmonary impairment, is insufficient to invoke the interim presumption under Section 727.203(a)(4). *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Fluharty v. Director, OWCP*, 5 BLR 1-357 (1982).

The physician's conclusion need not be phrased with the words "total disability,"

but the physician's opinion must elaborate on the miner's impairment in such a way as to permit the adjudication officer to infer that the miner is totally disabled. **McMath v. Director, OWCP**, 12 BLR 1-6 (1988); **Turner v. Director, OWCP**, 7 BLR 1-419 (1984); **Bueno v. Director, OWCP**, 6 BLR 1-865 (1984); **DeFelice v. Consolidation Coal Co.**, 5 BLR 1-275 (1982).

In **Eckert v. Director, OWCP**, 6 BLR 1-888 (1984) the Board held that a physician's statement that claimant has a 15-20 percent disability due to exposure to occupational dust was not sufficient to meet the subsection (a)(4) requirement of total disability. In **Budash v. Bethlehem Mines Corp.**, 9 BLR 1-48 and 13 BLR 1-46 (1986)(en banc), *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc), the Board held that a doctor's diagnosis of a "Class II Respiratory Impairment, which is 10-20% of the whole man" was relevant to the issue of whether the miner had established a totally disabling respiratory impairment. While **Budash** is a case arising under the Part 718 regulations, it reflects the current view of the Board on such reports (even with respect to cases arising under Part 727).

### CASE LISTINGS

[observations of nurse who served with miner's attending physician, not sufficient for subsection (a)(4) invocation] **Gonzales v. Director, OWCP**, 4 BLR 1-571 (1981).

[medical report stating miner retired early due to shortness of breath not sufficient for subsection (a)(4) because not objective assessment, nor does it directly attest to any disability] **Markus v. Old Ben Coal Co.**, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983).

[irrational for adjudicator to find unreasoned opinion of physician who treated miner for respiratory problem for twenty years and who based his opinion on all evidence of record] **Estep v. Director, OWCP**, 6 BLR 1-84 (1983).

[diagnosis that claimant has "one flight dyspnea" and "one block dyspnea" insufficient to constitute finding of total disability sufficient to invoke presumption under subsection (a)(4)] **Parino v. Old Ben Coal Co.**, 6 BLR 1-104 (1983).

[hearing testimony of miner not medical evidence and insufficient to invoke subsection (a)(4)]. **Keen v. Jewell Ridge Coal Corp.**, 6 BLR 1-454 (1983); **White v. Director, OWCP**, 6 BLR 1-368 (1983).

[diagnosis of severe dyspnea on exertion after walking 150 yards or climbing less than one flight stairs tends to establish invocation at subsection (a)(4)] **Bray v. Director, OWCP**, 6 BLR 1-400 (1983).

[adjudicator may reject report that does not clearly diagnose totally disabling respiratory or pulmonary impairment] **Keen v. Jewell Ridge Coal Corp.**, 6 BLR 1-454 (1983).

[adjudicator may conclude that medical assessment of physical capabilities is respiratory evaluation when it appears in response to question concerning chronic respiratory or pulmonary disease] **Olszewski v. Youghiogheny & Ohio Coal Co.**, 6 BLR 1-521 (1983).

[medical opinion that return to coal mine work medically contraindicated insufficient to establish totally disabling pulmonary or respiratory impairment] **Coleman v. Harman Mining Corp.**, 6 BLR 1-601 (1983); **New v. Director, OWCP**, 6 BLR 1-597 (1983).

[medical opinion that claimant's activity probably limited more by cardiac than pulmonary disease reasonably found not to establish totally disabling respiratory impairment] **Minton v. Director, OWCP**, 6 BLR 1-670 (1983).

[age non-respiratory factor; may not be considered regarding if claimant can perform usual coal mine work (subsection (b)(2) case)] **Coletti v. Consolidation Coal Co.**, 6 BLR 1-698 (1983).

[adjudicator properly reviewed two opinions submitted by same doctor, finding them insufficient to invoke because they contained no explanation for significantly different conclusions] **Surma v. Rochester and Pittsburgh Coal Co.**, 6 BLR 1-799 (1984).

[adjudicator may not weigh medical reports of record against x-rays, ventilatory studies, or blood gas studies under subsection (a)(4); evidence that calls into question reliability of documentation on which reports are based is relevant] **Winters v. Director, OWCP**, 6 BLR 1-877 (1984).

[adjudicator erred invoking presumption at subsection (a)(4) based on medical opinion that claimant was disabled for arduous work without making determination of whether miner's usual coal mine work arduous] **Shepherd v. Allied Coals, Inc.**, 6 BLR 1-1138 (1984).

[if medical opinions require comparison of physical capabilities with usual coal mine work and record lacks evidence of exertional requirements, adjudicator properly found no subsection (a)(4) invocation; claimant bears burden of establishing all elements necessary for invocation] **Cregger v. United States Steel Corp.**, 6 BLR 1-1219 (1984).

[mere recitation of symptoms insufficient for subsection (a)(4); not finding of existence or degree of severity of impairment] **Heaton v. Director, OWCP**, 6 BLR 1-1222 (1984); **Pruett v. Pickands Mather Co.**, 6 BLR 1-824 (1984); **Bushilla v. North American Coal Corp.**, 6 BLR 1-365 (1983).

[medical diagnosis of carcinoma of larynx insufficient to invoke subsection (a)(4)] **Heaton v. Director, OWCP**, 6 BLR 1-1222 (1984).

[adjudicator may not reject doctor's opinion solely for lack of objective tests or based on objective tests failing to qualify; terms "qualifying and non-qualifying" have little significance outside of invocation under relevant subsection] **Fuller v. Gibraltar Coal Corp.**, 6 BLR 1-1291 (1984); see also **Blacklege v. Director, OWCP**, 6 BLR 1-1060 (1984).

[if adjudicator properly discredits only medical opinion supportive of party's burden of proof under subsection (a)(4), irrelevant how s/he treats contrary opinion] **Cregger v. United States Steel Corp.**, 6 BLR 1-1219 (1984).

A doctor's opinion that claimant's disability will undermine his efforts to do manual labor is insufficient to establish that claimant is currently totally disabled due to a respiratory or pulmonary impairment for purposes of subsection (a)(4) invocation. **Baker v. North American Coal Corp.**, 7 BLR 1-79 (1984).

[medical opinion of "shortness of breath" or "C.O.P.D. typical of black lung" cannot provide substantial evidence for subsection (a)(4) invocation] **Clay v. Director, OWCP**, 7 BLR 1-82 (1984).

[adjudicator may rely on medical report finding total disability based in part on non-qualifying and non-conforming ventilatory studies] **Rickey v. Director, OWCP**, 7 BLR 1-106 (1984)(Ramsey, C.J., concurring).

[x-ray reread as negative no reason to reject opinion re: respiratory capability] **Sabett v. Director, OWCP**, 7 BLR 1-299 (1984)(Ramsey, C.J., dissenting on other gr'ds); **Coen v. Director, OWCP**, 7 BLR 1-30 (1984); **Fuller v. Gibraltar Coal Co.**, 6 BLR 1-1291 (1984); **Warman v. Pittsburgh and Midway Coal Mining Co.**, 4 BLR 1-601 (1981).

[error to discredit medical report finding total disability because based in part on non-qualifying ventilatory study and does not contain blood gas studies or by weighing it against x-rays or other objective studies of record] **Sabett v. Director, OWCP**, 7 BLR 1-299 (1984)(Ramsey, C.J., dissenting on other grounds).

[adjudicator's failure to weigh diagnosis that miner's bronchitis precludes him from "hard physical work" against miner's duties requires remand at subsection (a)(4)] **Bueno v. Director, OWCP**, 7 BLR 1-337 (1984).

[miner's continued post-coal mine employment as janitor may establish no total disability; properly considered on rebuttal, not under subsection (a)(4) where decision based on other *medical* evidence] **Bueno v. Director, OWCP**, 7 BLR 1-337 (1984).

[Eleventh Circuit held physicians need not phrase medical diagnoses in terms of "total disability" to invoke under subsection (a)(4); medical limitations of "one-block walking" and "one flight climbing" can support inference of total disability. **Black Diamond Coal Mining Co. v. Benefits Review Board [Raines]**, 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985).

[medical opinion that miner moderately to severely impaired in any type of physical exertion whatsoever due to respiratory disorders supports subsection (a)(4) invocation] **Newcomb v. Director, OWCP**, 7 BLR 1-680 (1985).

[positive x-ray outweighed by negative x-rays not alone reason to deny subsection (a)(4) invocation; presence of contrary objective test results, however, is relevant to overall probative value of medical report] **York v. Jewell Ridge Coal Corp.**, 7 BLR 1-766 (1985); **Baker v. North American Coal Corp.**, 7 BLR 1-79 (1984); **Winters v. Director, OWCP**, 6 BLR 1-877 (1984); **Arnoni v. Director, OWCP**, 6 BLR 1-423 (1983).

[fact that medical report partially based on x-ray reread negative and ventilatory study wherein full effort was not exerted does not *per se* render opinion insufficient under subsection (a)(4)] **Pulliam v. Drummond Coal Co.**, 7 BLR 1-846 (1985).

[medical diagnosis of pneumoconiosis and chronic obstructive lung disease does not establish existence of totally disabling chronic respiratory condition because report does not indicate degree of disability] **Hutchens v. Director, OWCP**, 8 BLR 1-16 (1985).

## DIGESTS

Lay testimony regarding the extent of disability is not the type of lay evidence which may be considered under subsection (a)(4). Lay evidence as to the miner's work duties, however, is clearly relevant. **Plutt v. Benefits Review Board**, 804 F.2d 597, 9 BLR 2-168 (10th Cir. 1986); **Prater v. Director, OWCP**, 8 BLR 1-461 (1986); **Sabett v. Director, OWCP**, 7 BLR 1-299 (1984)(Ramsey, C.J., dissenting on other grounds); **New v. Director, OWCP**, 6 BLR 1-597 (1984); **Wilkin v. North American Coal Corp.**, 5 BLR 1-289 (1982).

Medical reports which do not term claimant totally disabled; do not address the severity of claimants's impairment, nor discuss the extent of physical limitations are insufficient for subsection (a)(4) invocation. Thus a physician's statement that the miner exhibited the classic symptoms of coal miner's pneumoconiosis is not sufficient for subsection (a)(4) invocation. **Wenanski v. Director, OWCP**, 8 BLR 1-487 (1986); **Turner v.**

**Director, OWCP**, 7 BLR 1-419 (1984); **Horn v. Jewell Ridge Coal Corp.**, 6 BLR 1-933 (1984).

The Eighth Circuit overturned the Board and held that the administrative law judge erred in discrediting a medical report that found the miner disabled from a respiratory or pulmonary impairment. The administrative law judge discredited the report because he found that all x-rays were negative and all the objective evidence was non-qualifying. The Court held that the report, which was unimpeached and based on the miner's work history, employment history, and symptoms, constituted a documented and well-reasoned report. **Ware v. Director, OWCP**, 814 F.2d 514, 10 BLR 2-1 (8th Cir. 1987).

Although the application of the quality standards is not a mandatory requirement under subsection (a)(4), an administrative law judge may, in his discretion, use these standards as indicia of the reliability of a pulmonary function study. If the administrative law judge finds the study unreliable, he may properly question the credibility of a medical opinion based on that study. **McMath v. Director, OWCP**, 12 BLR 1-6 (1988); **Casey v. Director, OWCP**, 7 BLR 1-337 (1984); **Wike v. Bethlehem Mines Corp.**, 7 BLR 1-593 (1984).

Administrative law judge may not discredit doctor's report under subsection (a)(4) because administrative law judge does not credit x-ray upon which the doctor partially relied. **McMath v. Director, OWCP**, 12 BLR 1-6 (1988). **Coen v. Director, OWCP**, 7 BLR 1-30 (1984).

It is within the administrative law judge's discretion to find a pulmonary function study's values disparately low in comparison with later studies and discredit study on that basis. The administrative law judge may also question the validity of a medical report at subsection (a)(4) based on such a discredited study. **McMath v. Director, OWCP**, 12 BLR 1-6 (1988); **Baker v. North American Coal Corp.**, 7 BLR 1-79 (1984).

A respiratory or pulmonary impairment adequate to establish invocation under (a)(4) is not limited to impairments caused by pneumoconiosis. **McMath v. Director, OWCP**, 12 BLR 1-6 (1988); **Dolzanie v. Director, OWCP**, 6 BLR 1-865 (1984).

Administrative law judge may refuse to base an inference of total disability on a listing of physical limitations which he finds is merely a report of claimant's medical history. **McMath v. Director, OWCP**, 12 BLR 1-6 (1988); **Parsons v. Director, OWCP**, 6 BLR 1-272 (1983).

In the absence of an explicit medical finding of total disability, a medical opinion constitutes substantial evidence for subsection (a)(4) invocation if the physician concludes that a claimant is unable to perform the duties required by his coal mine work, or the physician provides an assessment of a claimant's physical limitations from which the administrative law judge can draw such conclusion. **McMath v. Director,**

**OWCP**, 12 BLR 1-6 (1988); **Turner v. Director, OWCP**, 7 BLR 1-419 (1984); **DeFelice v. Consolidation Coal Co.**, 5 BLR 1-275 (1982).

Where the record includes both a medical opinion that contains a listing of claimant's physical limitations without any opinion as to disability as well as evidence of the exertional requirements of claimant's usual coal mine employment, the administrative law judge must compare the two in order to determine if the medical opinion supports invocation pursuant to subsection (a)(4). **McMath v. Director, OWCP**, 12 BLR 1-6 (1988); **Rankin v. Keystone Coal Mining Corp.**, 8 BLR 1-54 (1985); **Stanley v. Eastern Associated Coal Corp.**, 6 BLR 1-1157 (1984).

The Eleventh Circuit reversed an administrative law judge's discrediting of a medical opinion as unreasoned based on the administrative law judge's finding that the doctor failed to specify whether the listed physical limitations were his own or merely the miner's recitation of his symptoms. The Court held that the administrative law judge must identify the basis for a finding that the listed limitations are the patients rather than the doctor's conclusions. **Jordan v. Benefits Review Board**, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989).

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