

Chapter 3

General Principles of Weighing Medical Evidence

I. An introduction

Absent operation of a presumption, the award of benefits in a black lung claim is dependent on a claimant's ability to establish each element of the claim by a preponderance of the medical evidence. The primary elements of entitlement in a miner's claim are whether: (1) the miner suffers from pneumoconiosis; (2) his or her pneumoconiosis arises out of coal mine employment; (3) the miner suffers from a totally disabling respiratory impairment; and (4) the totally disabling respiratory impairment is caused by pneumoconiosis. A survivor, on the other hand, must demonstrate that the miner's death was due to coal workers' pneumoconiosis.

As many black lung claims are a battle of the medical experts, proper application of sound principles of weighing medical evidence is critical to arriving at a well-reasoned decision that is supported by the record. Each case must be reviewed independently, and considerable thought must be given to application of these principles. They should never be applied mechanically.

This chapter is divided into sections to cover the main types of medical evidence received in a black lung claim with citations to regulatory and/or case law to assist in weighing such evidence.

The admission of medical evidence under the amended regulations at 20 C.F.R. § 725.414 is addressed in Chapter 4.

A. Burdens, generally

The claimant carries the general burden of establishing entitlement, and the initial burden of going forward with the evidence. *Young v. Barnes & Tucker Co.*, 11 B.L.R. 1-117 (1988); *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983).

**B. Claims adjudicated under
20 C.F.R. Part 727 or 20 C.F.R. § 410.490**

If a claim falls under 20 C.F.R. Part 727 or 20 C.F.R. § 410.490, and a claimant establishes invocation of an interim presumption by a preponderance of the evidence, then the burden shifts to the party opposing entitlement to establish rebuttal by a preponderance of the evidence. *Gilson v. Price River Coal Co.*, 6 B.L.R. 1-96 (1983) (if party opposing entitlement fails to carry its burden of proof, claimant prevails). For claims adjudicated under these provisions, see Chapters 8, 9, and 10.

C. Claims adjudicated under 20 C.F.R. Part 718

Under 20 C.F.R. Part 718, a claimant must demonstrate each element of entitlement by a preponderance of the evidence. *Lattimer v. Peabody Coal Co.*, 8 B.L.R. 1-509 (1986) (addressing Part 727); *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986)(en banc) (addressing Part 718); *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986)(en banc) (addressing Part 718). For claims adjudicated under 20 C.F.R. Part 718, see Chapter 11.

II. Rules of general application

A. The "true doubt" rule

1. For claims filed on or before January 19, 2001

The "true doubt" rule was a judicial creation intended to give the benefit of the doubt to claimants in those black lung cases where the evidence was in "equipoise." For example, a claim file contains two x-ray interpretations of the same study, one positive and one negative and the qualifications of the physicians interpreting the study are identical, *i.e.* both readers are Board-certified radiologists and B-readers. For several years, an Administrative Law Judge reviewing this evidence would find that it was in equipoise, apply the "true doubt" rule, and find in a claimant's favor that the evidence supported the existence of pneumoconiosis.

The United States Supreme Court, in *Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251 (1994), *aff'g. sub. nom., Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3rd Cir. 1993), dispensed with the "true doubt" rule stating it violated Section 556(d) of the Administrative Procedure Act by improperly placing the burden of persuasion on the party opposing entitlement. Consequently, under any of the regulatory schemes, a claimant

must establish the requisite elements of his or her claim by a preponderance of the evidence.

As a result of the Court's holding in *Greenwich*, any claim pending on appeal, wherein this rule was applied, was remanded for re-evaluation of the evidence. On remand, some Administrative Law Judges concluded, because the "true doubt" rule was utilized in the prior decision, then the evidence is necessarily deficient and a claimant could not prevail on remand. However, in *Cole v. East Kentucky Collieries*, 20 B.L.R. 1-50 (1996), the Board concluded otherwise and stated:

[A] finding of evidentiary equipoise under the discredited true doubt principle does not automatically require a finding of insufficient evidence under a preponderance of the evidence standard. Rather, the administrative law judge as fact-finder must determine whether, under this standard, claimant has met his burden of proof pursuant to Section 7(c) of the Administrative Procedure Act.

Consequently, the Administrative Law Judge must re-weigh the evidence *de novo* if a claim is remanded for improper application of the "true doubt" rule.

2. For claims filed after January 19, 2001

There is no provision under the amended regulations codifying the "true doubt" rule. In its comments to the amended regulations rules, the Department states the following:

The Department has not adopted a 'true doubt' rule in these regulations. The 'true doubt' rule was an evidentiary weighing principle under which an issue was resolved in favor of the claimant if the probative evidence for and against the claimant was in equipoise. The Department believes that evaluation of conflicting medical evidence requires careful consideration of a wide variety of disparate factors affecting the credibility of that evidence. The presence of these factors makes it unlikely that a fact-finder will be able to conclude that conflicting evidence is truly in equipoise. See preamble to § 718.3.

65 Fed. Reg. 79,924 (Dec. 20, 2000).¹

¹ See also 64 Fed. Reg. 54,969 (Oct. 8, 1999) and 62 Fed. Reg. 3,341 (Jan. 22, 1997) (regulatory history to support decision not to promulgate the "true doubt" rule).

B. The "later evidence" rule

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from older evidence. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). This rule should not be mechanically applied, however, in situations where the evidence would tend to demonstrate an "improvement" in the miner's condition since the Board and courts agree that pneumoconiosis is progressive and irreversible. Indeed, the nature of pneumoconiosis as a disease process is codified at 20 C.F.R. § 718.201 as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c).

1. The appellate tribunals

The following are cases involving application of the "later evidence rule" by the Benefits Review Board and circuit courts of appeals:

- Benefits Review Board

In *Bailey v. U.S. Steel Mining Co.*, 21 B.L.R. 1-152 (1999)(en banc on recon.), the Board held it was improper to apply the "later evidence" rule where "all the interpretations of the most recent x-rays are negative and the second most recent x-ray taken on June 11, 1991 had conflicting interpretations." The Board concluded, on remand, the Administrative Law Judge must analyze the evidence without reference to "its chronological relationship," but should consider the radiological qualifications of the physicians.

In *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.), it was proper for the Administrative Law Judge to give greater weight to the more recent evidence of record as the Sixth Circuit, in which jurisdiction the case arose, has held that pneumoconiosis is a "progressive and degenerative disease." The Board also cited to *Mullins Coal Co. of Virginia v. Director, OWCP*, 483 U.S. 135 (1987), *reh'g. denied*, 484 U.S. 1047 (1988), wherein the Supreme Court stated pneumoconiosis is a "serious and progressive pulmonary condition" and *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993).

- Fourth Circuit

The Fourth Circuit *upheld* use of the "later evidence" rule in the following cases: *Thorn v. Itmann Coal Co.*, 3 F.3d 713 (4th Cir. 1993) (while "recency" by itself is an arbitrary benchmark for weighing evidence, "[t]here may be new or additional evidence developed that discredits an earlier opinion); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000) (in a case involving complicated pneumoconiosis, the "later is better rule" was not mechanically applied; rather, it was properly used where the later x-rays were not inconsistent with earlier studies given the progressiveness and irreversibility of pneumoconiosis); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4th Cir. 1998) (case arising under Part 727; "later evidence is more likely to show the miner's current condition").

Moreover, the court accepted use of the rule where later evidence yielded non-qualifying blood gas study results over earlier qualifying studies. In *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court reviewed the blood gas study evidence and found, "[o]ut of a total of nine tests, the five initial tests produced qualifying results, and the four later tests did not." The court noted, in previous decisions, the "later is better" approach has been rejected where later x-rays were negative and earlier studies were interpreted positively. However, the court found, in this case, "the parties conceded at oral argument that because pneumoconiosis is a progressive disease, later nonqualifying blood gas studies are inconsistent with coal workers' pneumoconiosis . . ."

However, the Fourth Circuit rejected use of the "later evidence" rule in *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992):

The 'later evidence is better' rationale began as a reasonable way to discount old non-qualifying test results or physical examinations in favor of subsequent results that reveal a deterioration of the miner's condition. In recent years the BRB has applied the concept wholesale, in situations like this one, where it cannot have any logical force.

Specifically, the court rejected application of the rule where the miner has pneumoconiosis, yet "the evidence, taken at face value, shows that the miner has improved" The court concluded, "Either the earlier or the later result *must* be wrong, and it is just as likely that the later evidence is faulty as the earlier. The reliability of irreconcilable items of evidence must therefore be evaluated without reference to their chronological relationship." (emphasis in original).

- Sixth Circuit

Citing to the Fourth Circuit's decision in *Adkins* as well as to its own decision in *Conn v. White Deer Coal Co.*, 862 F.2d 591 (6th Cir. 1988), the Sixth Circuit, in *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), rejected wholesale application of the "later evidence" rule where the recent x-ray evidence was negative for the existence of pneumoconiosis, but prior evidence was positive for the disease. The court noted, because "pneumoconiosis is a progressive and degenerative disease", the Administrative Law Judge is required to specifically resolve the "disharmony in the x-ray evidence." On the other hand, where newer evidence demonstrates a worsening of the miner's condition consistent with the presence of pneumoconiosis, the "later evidence" rule may be applied. See also *Stewart v. Wampler Brothers Coal Co.*, 22 B.L.R. 1-80 (2000) (en banc) (a case arising in the Sixth Circuit; rejection of "later evidence" rule proper where earlier x-ray evidence was positive and later x-ray evidence was negative); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163 (6th Cir. 1997) ("[r]ecent evidence is particularly important in black lung cases, where because of the progressive nature of pneumoconiosis, more recent evidence is often accorded more weight").

- Seventh Circuit

In *Old Ben Coal Co. v. Scott*, 144 F.3d 1045 (7th Cir. 1998), it was proper for the Administrative Law Judge to accord greater weight to the more recent x-ray studies submitted by the survivor with her timely petition for modification. Employer argued the Administrative Law Judge erred in crediting the more recent x-ray studies of record based on the "mythology" that pneumoconiosis is a progressive disease. In rejecting

Employer's position, the court stated the following:

We have held . . . that the etiology of this disease is a question of legislative fact, . . . so that the Department of Labor's view may be upset only by medical evidence of the kind that would invalidate a regulation. Old Ben has not adduced evidence on this issue, so we accept the administrative approach. (citations omitted). Mine operators must put up or shut up on this issue.

2. Chest x-rays

a. Date of study relevant

In weighing x-ray interpretations using the "later evidence" rule, it is the date of the study, and not the date of the interpretation, which is relevant. *Wheatley v. Peabody Coal Co.*, 6 B.L.R. 1-1214 (1984). Generally, it is proper to accord greater weight to the most recent x-ray study of record. *Clark, supra*; *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983).

b. Length of time between studies, qualifications of readers relevant

Even if the most recent x-ray evidence is positive, the Administrative Law Judge is not required to accord it greater weight. Rather, the length of time between the x-ray studies and the qualifications of the interpreting physicians are factors to be considered. *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Pruitt v. Director, OWCP*, 7 B.L.R. 1-544 (1984); *Gleza v. Ohio Mining Co.*, 2 B.L.R. 1-436 (1979). The Board indicated a seven month time period between x-ray studies is sufficient to apply the "later evidence" rule, but five and one-half months is too short a time period. *Tokarcik, supra*; *Stanley v. Director, OWCP*, 7 B.L.R. 1-386 (1984). However, in *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985), it was proper for the Administrative Law Judge not to apply the "later evidence" rule where eight months separated the dates of the x-ray studies.

3. Ventilatory studies

More weight may be accorded to the results of a recent ventilatory study over the results of an earlier study. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993).

In *Andruscavage v. Director, OWCP*, Case No. 93-3291 (3rd Cir. Feb. 1, 1994) (unpub.), the Administrative Law Judge properly accepted four qualifying studies "as having been conducted in accordance with the quality standards," but found these earlier tests "were not the most reliable indicators of the claimant's respiratory condition." In so holding, the Administrative Law Judge noted the most recent test of record yielded non-qualifying values, and he found:

Unexpectedly, here the most recent of the five studies in question resulted in substantially higher values than the others. However, pulmonary function testing is effort-dependent and spurious low volumes can result, but spurious high volumes are not possible. Based on above, I find the higher results achieved by the claimant in the (latest) testing is the best indicator of the claimant's respiratory or pulmonary condition.

The court determined that the Administrative Law Judge acted within his discretion as the trier-of-fact in rendering the foregoing findings.

4. Blood gas studies

More weight may be accorded to the results of a recent blood gas study over a study that was conducted earlier. *Schretroma v. Director, OWCP*, 18 B.L.R. 1-17 (1993).

5. Medical opinions

A medical report containing the most recent physical examination of the miner may be properly accorded greater weight on grounds that it contains a more accurate evaluation of the miner's current condition. *Gillespie v. Badger Coal Co.*, 7 B.L.R. 1-839 (1985). See also *Bates v. Director, OWCP*, 7 B.L.R. 1-113 (1984) (more recent report of record entitled to more weight than reports dated eight years earlier); *Kendrick v. Kentland-Elkhorn Coal Co.*, 5 B.L.R. 1-730 (1983).

C. Numerical superiority

The issue of numerical superiority most often arises with regard to the x-ray evidence, although it is also relevant to other types of medical evidence in a claim. Even in the aftermath of the evidentiary limitations at 20 C.F.R. § 725.414 of the amended regulations, a party may submit multiple studies or re-readings of the same study to counter evidence from the opposing party.

1. Chest x-rays

a. Generally

An Administrative Law Judge is not required to defer to the numerical superiority of x-ray evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990). See also *Tokaricik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1984) (the Administrative Law Judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease). Importantly, the Administrative Law Judge always must consider the qualifications of the physicians in weighing medical evidence.

b. Mechanical application, held improper

- Fourth Circuit

In *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992), the court exhibited disfavor in "counting heads" and, in *Copley v. Arch of West Virginia, Inc.*, Case No. 93-1940 (4th Cir. June 21, 1994)(unpub.), the court held:

[E]ven if a simple 'head counting' approach were acceptable, the ALJ allowed the readings of one x-ray, by virtue of their numerical superiority, to control the question of whether the x-ray evidence established pneumoconiosis. That methodology encourages multiple readings in a quest for numbers and makes x-rays with fewer readings immaterial. It is, therefore, improper. The conflicting interpretations of one x-ray should be evaluated to determine whether the individual x-ray is negative or positive. Conflicts between x-rays should then be weighed in context to determine whether there is pneumoconiosis.

- Sixth Circuit

The Sixth Circuit rejected application of the rule in *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), and stated, "Administrative fact finders simply cannot consider the quantity of evidence alone, without reference to a difference in

the qualifications of the readers or without an examination of the party affiliation of the experts."

- Seventh Circuit

In *Sahara Coal Co. v. Fitts*, 39 F.3d 781 (7th Cir. 1994), the court remanded the claim for further consideration and concluded, "To base a decision on which side produced more witnesses, and to include in the count of witnesses one whose opinion rested on a premise that was later discredited, is not a rational method of decision-making."

And, in a claim arising under 20 C.F.R. Part 727, *Zeigler Coal Co. v. Director, OWCP*, 23 F.3d 1235, *reh'g. en banc denied* (7th Cir. 1994), the court noted the record contained a 1980 chest x-ray that was read as negative by two B-readers. There were no positive interpretations of the study. A study conducted in 1981 produced three negative B-reader interpretations and two positive B-reader interpretations. On balance, the court concluded, "While our opinions have been critical of decisions based entirely on 'head counts' of experts, . . . we also have held that 'a single positively interpreted x-ray does not trump any number of negative readings.'"

The court emphasized "the age of the readings, the qualifications of the experts, the persuasiveness of their reports and any other relevant evidence" should be considered by the fact-finder in weighing x-ray evidence. In this claim, the court determined, because of the "paucity" of the evidence, the Administrative Law Judge's award of benefits was reversed and the claim was remanded for the miner to "pursue further testing, *i.e.*, ventilatory studies, blood gas studies and other diagnostic and pulmonary testing, so that he might be given an opportunity to establish the required standard of proof (substantial evidence) of his alleged pneumoconiosis. See 20 C.F.R. § 727.203(a)."

2. Blood gas studies

Schetroma v. Director, OWCP, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies).

3. Medical opinions

It is improper to accord greater weight to certain medical opinions of record based solely on numerical superiority.

In *Gunderson v. U.S. Dep't. of Labor*, 601 F.3d 1013 (10th Cir. 2010)(J. O'Brien, dissenting), the panel majority concluded, where "equally qualified experts give conflicting testimony" regarding the presence of legal coal workers' pneumoconiosis under 20 C.F.R. § 718.202(a)(4), the Administrative Law Judge cannot "avoid the scientific controversy by declaring a tie." The court explained:

This is a task that is routinely assigned to judges and to juries and that may be accomplished by careful consideration of many factors, including 'the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments and the sophistication and bases of their diagnosis.

Moreover, the court noted, with regard "to disputes concerning the existence and causes of pneumoconiosis, an ALJ has the benefit of a substantial inquiry by the Department of Labor." The court noted the Administrative Law Judge may rely on regulations, which provide that pneumoconiosis is progressive, irreversible, and may be latent, in assessing scientific testimony. As a result, the court remanded the claim for re-evaluation of conflicting medical opinions under § 718.202(a)(4).

Similarly, in *Stalcup v. Peabody Coal Co.*, 477 F.3d 482 (7th Cir. 2007), the court vacated the Administrative Law Judge's denial of benefits on grounds that it was not sufficiently reasoned. In particular, the Administrative Law Judge concluded the qualifications and expertise of the physicians offering opinions were equal and held:

Drs. Castle, Tuteur and Dahhan found no pneumoconiosis, while Drs. Cohen and Koenig found the existence of the disease. Because these opinions are entitled to equal weight, I now find that [the miner] has not established the existence of pneumoconiosis.

The court noted black lung claims "often turn on science and involve conflicting medical opinions" such that a "scientific dispute must be resolved on scientific grounds." In this vein, the court held, "when an ALJ is faced with conflicting evidence from medical experts, he cannot avoid the scientific

controversy by basing his decision on which side has more medical opinions in its favor." The court stated, "This unreasoned approach, which amounts to nothing more than a 'mechanical nose count of witnesses,' . . . would promote a quantity-over-quality approach to expert retention, requiring parties to engage in a race to hire experts to insure victory."

D. Quality standards

1. For medical evidence developed on or before January 19, 2001

a. Quality standards under Part 718

The quality standards under Part 718 are not mandatory and "an otherwise reliable and probative study must not be rejected simply for failing to satisfy a noncritical quality standard." *Orek v. Director, OWCP*, 10 B.L.R. 1-51, 1-54 (1987) (20 C.F.R. § 718.105; blood gas studies); *Gorman v. Hawk Contracting, Inc.*, 9 B.L.R. 1-76, 1-78 (1986) (20 C.F.R. § 718.103; pulmonary function studies); *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48 (1986) (20 C.F.R. § 718.104; medical reports).

On the other hand, in the Third Circuit, the quality standards under Part 718 are mandatory, but the Administrative Law Judge may consider evidence that is in "substantial compliance" with the standards. *Director, OWCP v. Siwiec*, 894 F.2d 635 (3rd Cir. 1990); *Mangifest v. Director, OWCP*, 826 F.2d 1318 (3rd Cir. 1987). In particular, the court stated as follows in *Mangifest*:

We do not construe the regulations to require the exclusion from an ALJ's consideration of non-complying medical reports. Instead, we hold that a medical judgment contained in a non-complying report may constitute substantial evidence of total disability if, as required by Part 718.204(c), it is 'reasoned' and 'based on medically acceptable clinical and laboratory diagnostic techniques.'

Id. at 1327.

b. Quality standards under 20 C.F.R. Parts 410 and 727

The quality standards under Parts 410 and 727 are mandatory. *Anderson v. Youghioghney & Ohio Coal Co.*, 7 B.L.R. 1-152 (1984).

c. Applicability of Part 718 standards to Part 727 claims

The 20 C.F.R. Part 718 quality standards do not apply to cases adjudicated under 20 C.F.R. Part 727, even where evidence is submitted after the effective date of the 20 C.F.R. Part 718 regulations. *Pezzetti v. Director, OWCP*, 8 B.L.R. 1-464 (1986).

Although 20 C.F.R. § 727.206(a) indicates the quality standards set forth at 20 C.F.R. § 718.103 apply to evidence submitted subsequent to March 31, 1980, the Board held this language is inconsistent with the purposes of the 1977 Reform Act, and concluded the provisions at 20 C.F.R. § 410.428 applied. *Sgro v. Rochester & Pittsburgh Coal Co.*, 4 B.L.R. 1-370 (1981). In so holding, the Board determined 20 C.F.R. § 727.206(a) should be interpreted to mean that the applicable quality standards, regardless of the date on which the evidence is submitted, are "those in effect at the time Part 727 became effective, *i.e.*, those provided by Part 410." *Id.* at 1-375.

However, in the Sixth and Tenth Circuits, the 20 C.F.R. Part 718 quality standards do apply to 20 C.F.R. Part 727. *Plutt v. Benefits Review Board*, 804 F.2d 597 (10th Cir. 1986); *Prater v. Hite Preparation Co.*, 829 F.2d 1363 (6th Cir. 1987). In the Sixth Circuit, however, where a pulmonary function study is at issue, the 20 C.F.R. Part 718 standards apply only to a study that is performed after March 31, 1980. *Wiley v. Consolidated Coal Co.*, 915 F.2d 1076 (6th Cir. 1990).

Additionally, in an unpublished decision, the Third Circuit held the 20 C.F.R. Part 718 quality standards apply to 20 C.F.R. Part 727. *Patton v. Director, OWCP*, Case No. 88-3296 (3rd Cir. 1988)(unpub.). As previously noted, the Third Circuit holds, satisfying the quality standards at 20 C.F.R. Part 718 requires the medical evidence be in "substantial compliance" with the mandatory standards. *Director, OWCP v. Siwec*, 894 F.2d 635 (3rd Cir. 1990).

2. For medical evidence developed after January 19, 2001

a. Quality standards, generally

The amended regulations require "substantial compliance" with the quality standards for all evidence developed after the effective date of the amendments, which is January 19, 2001. Twenty C.F.R. § 718.101(b)

requires "substantial compliance" with the quality standards only for evidence developed after the effective date, and reads as follows:

The standards for the administration of clinical tests and examinations contained in this subpart shall apply to all evidence developed by any party after January 19, 2001 in connection with a claim governed by this part These standards shall also apply to claims governed by part 727 , but only for clinical tests or examinations conducted after January 19, 2001. Any clinical test or examination subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. Unless otherwise provided, any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered.

20 C.F.R. § 718.101(b).

In its comments to the regulatory amendments, the Department noted 20 C.F.R. § 718.101(b) was added "to emphasize that the Part 718 quality standards apply to all evidence developed by any party in connection with a claim filed after March 31, 1980, and to claims governed by Part 727 if the evidence was developed after that date." 65 Fed. Reg. 79, 927 (Dec. 20, 2000).

b. Chest x-rays

The amended regulations at 20 C.F.R. § 718.102 provide, for chest x-ray studies, compliance with the quality standards is presumed in the absence of evidence to the contrary. However, the regulations further provide "no chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is conducted and reported in accordance with the requirements of (§ 718.102) and Appendix A." 20 C.F.R. § 718.102(c).

In its comments to the amended regulations, the Department states "substantial compliance" with the quality standards for chest x-rays requires compliance with the ILO classification system:

In some circumstances, the adjudicator may determine that the x-ray interpretation provides sufficient information to make a factual finding on the presence or absence of pneumoconiosis. For example, the physician may describe the film findings in terms of 'no pneumoconiosis,' rather than classifying the film as '0/-, 0/0 or 0/1.' Such a reading may be considered sufficiently

detailed to be in 'substantial compliance' notwithstanding the lack of classification. Conversely, the physician's description or reporting of x-ray film findings may indicate that (s)he read the film for reasons unrelated to diagnosing the existence of pneumoconiosis, *e.g.*, lung cancer or cardiac surgery. The adjudicator may consider that evidence not in substantial compliance because it does not reliably address the presence or absence of pneumoconiosis.

65 Fed. Reg. 79,929 (Dec. 20, 2000).

c. Pulmonary function studies

The regulations at 20 C.F.R. § 718.103 provide the following quality standards for pulmonary function studies:

(a) Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop). The instrument shall simultaneously provide records of volume versus time (spirometric tracing). The report shall provide the results of the forced expiratory volume in one second (FEV₁) and the forced vital capacity (FVC). The report shall also provide the FEV₁/FVC ratio, expressed as a percentage. If the maximum voluntary ventilation (MVV) is reported, the results of such test shall be obtained independently rather than calculated from the results of the FEV₁.

. . .

(c) Except as provided in this paragraph, no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part. In the absence of evidence to the contrary, compliance with the requirements of Appendix B shall be presumed. In the case of a decreased miner, where no pulmonary function tests are in substantial compliance with paragraphs (a) and (b) and Appendix B, non-complying tests may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner.

20 C.F.R. § 718.103. Twenty C.F.R. § 718.103(b) continues to require three

tracings for each pulmonary function study, and variability of the MVV values may be within ten percent, and be valid. 20 C.F.R. § 718.103(b). However, the amended regulations also require the flow-volume loop for the study be admitted into the record. 20 C.F.R. § 718.103(b).

d. Blood gas studies

The amended provisions at 20 C.F.R. § 718.105 contain new provisions related to blood gas studies conducted during a terminal hospitalization:

(d) If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death.

(e) In the case of a deceased miner, where no blood gas tests are in substantial compliance with paragraphs (a), (b), and (c), non-complying tests may form the basis for a finding if, in the opinion of the adjudication officer, the only available tests demonstrate technically valid results. This provision shall not excuse compliance with the requirements in paragraph (d) for any blood gas study administered during a hospitalization which ends in the miner's death.

20 C.F.R. § 718.105. In its comments, the Department states "the proposed requirement was necessary because the miner's qualifying test results during a terminal hospitalization may be related to an acute non-pulmonary condition rather than a chronic pulmonary impairment." 65 Fed. Reg. 79,935 (Dec. 20, 2000).

e. Autopsy and biopsy evidence

The provisions at 20 C.F.R. § 718.106(b) are modified to state the following:

In the case of a miner who died prior to March 31, 1980, an autopsy or biopsy report shall be considered even when the report does not substantially comply with the requirements of this section. A non-complying report concerning a miner who

died prior to March 31, 1980, shall be accorded the appropriate weight in light of all relevant evidence.

20 C.F.R. § 718.106(b). This language does not present a departure from the prior provisions at subsection (b); rather, the amended regulation is merely shortened.

f. Medical opinion evidence

The amended regulations contain specific quality standards for medical opinion evidence at 20 C.F.R. § 718.104, which were not present under the prior regulations:

(a) A report of any physical examination conducted in connection with a claim shall be prepared on a medical report form supplied by the office or in a manner containing substantially the same information. Any such report shall include the following information and test results:

- (1) The miner's medical and employment history;
- (2) All manifestations of chronic respiratory disease;
- (3) Any pertinent findings not specifically listed on the form;
- (4) If heart disease secondary to lung disease is found, all symptoms and significant findings;
- (5) The results of a chest X-ray conducted and interpreted as required by Sec. 718.102; and
- (6) The results of a pulmonary function test conducted and reported as required by Sec. 718.103. If the miner is physically unable to perform a pulmonary function test or if the test is medically contraindicated, in the absence of evidence establishing total disability pursuant to Sec. 718.304, the report must be based on either medically acceptable clinical and laboratory diagnostic techniques, such as a blood gas study.

(b) In addition to the requirements of paragraph (a), a report of physical examination may be based on any other procedures such as electrocardiogram, blood gas studies conducted and reported as required by Sec. 718.105, and other blood analyses which, in the physician's opinion, aid in his or her evaluation of the miner.

(c) In the case of a deceased miner, where no report is in substantial compliance with paragraphs (a) and (b), a report prepared by a physician who is unavailable may nevertheless form the basis for a finding if, in the opinion of the adjudication

officer, it is accompanied by sufficient indicia of reliability in light of all relevant evidence.

20 C.F.R. § 718.104.

In its comments to the amended regulation requiring that medical opinions comply with certain quality standards, the Department states the following:

With respect to the mandatory x-ray requirement, . . . X-rays are an integral part of any informed and complete pulmonary evaluation of a miner; a general requirement for inclusion of this test is therefore appropriate. The Department also notes, however, that the quality standards require only 'substantial compliance' with the various criteria, not technical compliance with every criterion in every quality standard in every case. A fact-finder may conclude the omission of an x-ray does not undermine the overall credibility of the opinion, but this determination must be made on a case-by-case basis.

65 Fed. Reg. 79932 (Dec. 20, 2000).

g. Hospitalization and treatment records

In its comments to the amended regulations, the Department noted "there was not need to add an exemption from the quality standards for hospitalization and treatment records because § 718.101 is clear that it applies quality standards only to evidence developed in connection with a claim for black lung benefits." 65 Fed. Reg. 79,927 (Dec. 20, 2000).

3. Challenging quality of evidence, burdens for

A party challenging the admission of objective medical evidence must (1) specify how the evidence fails to conform to the quality standards, and (2) how this defect or omission renders the study unreliable. *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988); *Orek v. Director, OWCP*, 10 B.L.R. 1-51 (1987). The fact-finder must render a reasoned decision with regard to consideration of the evidence in question.

E. Party affiliation

1. Allegations of bias based on adverse opinion or party affiliation

Allegations of party affiliation, standing alone, do not establish improper bias. In the seminal case of *Richardson v. Perales*, 402 U.S. 387, 404 (1971), the Supreme Court held the fact that certain physicians' reports, including consultative opinions, "were adverse to Perales' claim is not in itself bias or an indication of non-probative character."

Similarly, in *Brown v. Director, OWCP*, 7 B.L.R. 1-730 (1985), the Board held the following:

Claimant argues that Dr. Altose is biased because he consults for coal companies and the government and spends only five percent of his time seeing patients directly. The determination of a medical witness's credibility is for the trier-of-fact. (citation omitted). We cannot say, on these facts, that claimant's allegations establish that it was irrational to credit Dr. Altose's opinion.

. . .

Claimant also contends that, since the government paid Dr. Altose, his report should be given less weight. Dr. Altose was actually hired by claimant's employer, which had the right to have claimant examined by its chosen physician prior to the hearing. 20 C.F.R. § 725.414(a). Medical reports prepared for litigation are not unusual and, absent evidence to the contrary, should be considered as equally reliable as other reports. (citation omitted).

Id. at 1-732 and 1-733. See also *Urgolites v. Bethenergy Mines, Inc.*, 17 B.L.R. 1-20 (1992); *Chancey v. Consolidation Coal Co.*, 7 B.L.R. 1-240 (1984); *Peabody Coal Co. v. BRB*, 560 F.2d 797 (7th Cir. 1977).

However, the Fourth Circuit, in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946 (4th Cir. 1997), held the following with regard to establishing bias via party affiliation of experts:

To the extent that ALJs determine that a particular expert's opinion is not, in fact, independently based on the facts of a particular claim, but is instead influenced more by the identity of

his or her employer, ALJs have clear discretion to disregard such an expert's opinion as being of exceedingly low probative value.

Moreover, while the Sixth Circuit, in *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), indicated party affiliation may be considered when weighing numerous x-ray interpretations, the court did not provide any guidance on how to properly accomplish this very difficult task.

2. Department of Labor sponsored examination

The opinions of Department of Labor physicians should not automatically be accorded greater weight absent a foundation in the record that the Department's expert is independent, and the opinions offered by the parties are biased. *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991)(en banc).

F. Cumulative, repetitious, or immaterial evidence

Prior to applicability of the amended regulations at 20 C.F.R. Part 725, evidence was admissible in black lung claims without restrictions so long as the due process rights of the parties were protected, *i.e.* the parties had notice and an opportunity to be heard on the evidence presented.

In *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946 (4th Cir. 1997), Claimant argued that "the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. § 556(d), by admitting cumulative or repetitive evidence submitted by Elkay Mining." Initially, the court noted, "Because the ALJ is presumably competent to disregard that evidence which should be excluded or to discount that evidence which has lesser probative value, it makes little sense, as a practical matter, for an administrative law judge in that position to apply strict exclusionary evidentiary rules."

The court concluded, however, "the APA grants ALJ's broad discretion to exclude excessive evidence which lacks significant probative value" In this vein, the court noted, in a case involving voluminous evidence, "[t]here is a point of diminishing returns and a point at which additional evidence provides almost no value." The court then emphasized the importance of considering the "quality" of the evidence when weighing it.

The amended regulations, however, contain specific restrictions on the admission of medical evidence. See *Chapter 4* for a discussion of these amendments.

III. Chest x-ray evidence

The following principles are intended to assist the fact-finder in weighing the x-ray evidence of record.

A. Physicians' qualifications

The fact-finder always must consider physicians' qualifications when weighing medical opinions. The following categories (A, B, and C readers, board-certified and board-eligible radiologists, and "dually-qualified" physicians) provide general principles for weighing x-ray evidence based on qualifications of the physicians. A physician's qualifications *at the time the interpretation is rendered* should be considered. *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985). However, an Administrative Law Judge may utilize any reasonable method of weighing such evidence. For example, in *Sexton v. Director, OWCP*, 752 F.2d 213 (6th Cir. 1985), the court held the x-ray interpretation of an examining physician without any specialized qualifications related to interpreting chest x-rays, but whose credentials entailed several pages of achievements, was entitled to greater weight than the interpretation of a B-reader.

1. Dually qualified physicians

a. Over a board-certified radiologist

Greater weight may be accorded the x-ray interpretation of a dually-qualified (B-reader and board-certified radiologist) physician over the reading of a board-certified radiologist who is not a B-reader. *Herald v. Director, OWCP*, BRB No. 94-2354 BLA (Mar. 23, 1995)(unpub.). *See also Peranich v. Director, OWCP*, BRB No. 87-3158 BLA (Nov. 27, 1990) (unpub.) (it is proper to accord greater weight to the opinion of a dually-qualified physician over a physician who is a board-certified radiologist, but not a B-reader).

b. Over a B-reader

In *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n. 5 (1985), the Board held it "takes official notice that the qualifications of a certified radiologist are at least comparable if not superior to a physician certified as a reader pursuant to 42 C.F.R. § 37.51"

The Board and some circuit courts hold it is proper to credit the interpretation of a dually-qualified physician over the interpretation of a

B-reader. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894 (7th Cir. 2003) (complicated pneumoconiosis); *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 842-43 (7th Cir. 1997) (proper to accord greater weight to the interpretation of a dually-qualified physician over the interpretation of a B-reader, who was not board-certified in radiology); *Bethenergy Mines, Inc. v. Cunningham*, Case No. 03-1561 (4th Cir. July 20, 2004)(unpub.); *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). See also *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985) (weighing evidence under 20 C.F.R. Part 718).

2. Board-certified and board-eligible radiologists

The interpretation of a board-certified radiologist is entitled to greater weight than the interpretation of a physician who is board-eligible in radiology. 20 C.F.R. § 718.202(a)(1)(ii).

3. C-readers and B-readers

It is proper to accord greater weight to the interpretation of a C-reader over an interpretation by a B-reader. *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983).

4. B-readers and A-readers

A B-reader's interpretation is entitled to greater weight than the reading of an A-reader. *Pavesi v. Director, OWCP*, 758 F.2d 956 (3rd Cir. 1985). However, the fact-finder may not, without explanation, accord greater weight to one B-reader's interpretation over the interpretation of another B-reader as they are presumably equally qualified. *York v. Jewell Ridge Coal Corp.*, 7 B.L.R. 1-767 (1985); *Isaacs v. Bailey Mining Co.*, 7 B.L.R. 1-62, 1-63 n. 2 (1984); *Whitman v. Califano*, 617 F.2d 1055 (4th Cir. 1980).

5. Credentials unknown

It is improper to accord greater weight to the interpretation of a physician whose qualifications are unknown (*i.e.* the reader is identified only by initials). *Stanley v. Director, OWCP*, 7 B.L.R. 1-386 (1984). The party seeking to rely on an x-ray interpretation bears the burden of establishing the qualifications of the reader. *Rankin v. Keystone Coal Mining Co.*, 8 B.L.R. 1-54 (1985).

6. Taking official notice of credentials

In *Pruitt v. Amax Coal Co.*, 7 B.L.R. 1-544, 1-546 (1984), the Board held as follows with regard to taking official notice of an interpreter's credentials:

The rules of official notice in administrative proceedings are more relaxed than in common law courts. The mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. (citation omitted). Although the administrative law judge erred in failing to cite the 'B' reader list as the source of his information regarding Dr. Morgan's qualifications, and the parties should have been afforded a full opportunity to dispute his qualifications, *Casias v. Director, OWCP*, 2 B.L.R. 1-259 (1979), the error is harmless, because Dr. Morgan's name does, in fact, appear on the 'B' reader list and a contrary finding cannot be made on remand. (citations omitted). Claimant has not shown that he was substantially prejudiced by the administrative law judge's action.

See also *Simpson v. Director, OWCP*, 9 B.L.R. 1-99 (1986).

B. Format of the x-ray report

1. Use of ILO form not required

An x-ray interpretation need not be submitted on an official ILO form, but may be contained in the body of a medical report, treatment note, or hospitalization record. *Consolidation Coal Co. v. Chubb*, 741 F.2d 968 (7th Cir. 1984).² All admitted x-ray interpretations must be weighed in determining whether the miner suffers from pneumoconiosis. Moreover, the fact-finder must provide an explanation for crediting, or discrediting, certain readings. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983) (all interpretations must be weighed prior to invocation under 20 C.F.R. Part 727); *Justice v. Jewell Ridge Coal Corp.*, 3 B.L.R. 1-547 (1981) (20 C.F.R. Part 727). Failure to consider all admitted x-ray interpretations generally will result in a remand of the claim. *Isaacs v. Bailey Mining Co.*, 7 B.L.R. 1-62 (1984).

² For x-ray evidence developed after January 19, 2001, see the discussion of quality standards in this chapter.

2. Use of the official ILO form, generally

An Administrative Law Judge may treat an x-ray reading with a profusion level of 1/0 or greater as positive for pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1, 1-4 (1999) (en banc on recon.). Sometimes, a physician will add "comments" to his or her interpretation.

a. Comments reflecting bias

With regard to comments offered on the x-ray report, the Administrative Law Judge first should determine whether the interpretation reflects bias on the part of the reader. The Board affirmed the Administrative Law Judge's weighing of medical evidence in two unpublished decisions arising in the Fourth Circuit, *Reed v. Triple S Energy, Inc.*, BRB No. 09-0819 BLA (Sept. 29, 2010)(unpub.), and *Shrewsberry v. Itmann Coal Co.*, BRB Nos. 09-0864 BLA and 09-0865 BLA (Sept. 29, 2010)(unpub.). In both cases, the Administrative Law Judge properly accorded greater weight to positive x-ray interpretations of pneumoconiosis because physicians offering negative interpretations of the studies "applied criteria not included in the regulations."

In *Reed*, some experts found Category 1 pneumoconiosis, whereas other physicians did not mark a category reading, and commented that the miner suffered from "asbestosis." The Administrative Law Judge found "asbestosis" is a form of clinical pneumoconiosis and, citing to a dictionary definition that asbestosis is "a form of pneumoconiosis (silicatosi) caused by inhaling fibers of asbestos," the Board affirmed this finding. As a result, the Board held it was proper to accord less weight to certain chest x-ray interpretations on this basis.

In *Shrewsberry*, the Administrative Law Judge accorded little probative weight to a medical opinion regarding the existence of complicated pneumoconiosis where the physician testified that he preferred to rely on x-ray interpretations of radiologists who "require that any opacities found be representative of coal workers' pneumoconiosis." The Administrative Law Judge stated:

[T]he selective reliance by (the medical opinion expert) upon the interpretations by (expert radiologists) because they required that any opacities found be representative of coal workers' pneumoconiosis (as opposed to pneumoconiosis in general, as envisioned by the statutory and regulatory scheme) reflected bias and affected (the medical opinion expert's) credibility and

the amount of weight to which his opinion is entitled.

The Board noted the ILO classification form "requires the reviewing radiologist to indicate whether the patient has any parenchymal or pleural abnormalities 'consistent with pneumoconiosis,' regardless of whether pneumoconiosis is caused by coal dust exposure."

b. No bias, alternative versus additional diagnosis

If bias is not present, then the fact-finder must determine whether the comments constitute an "alternative diagnosis," or merely an "additional diagnosis."

- Alternative diagnosis

A physician diagnosing Category 1 pneumoconiosis or greater may also comment that another disease cannot be ruled out, as in *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991) (en banc) (a case involving complicated pneumoconiosis). In this situation, the physician's comment calls the diagnosis of pneumoconiosis into question. *Id.* at 1-37. Consequently, the comments should be evaluated within an Administrative Law Judge's 20 C.F.R. § 718.202(a)(1) analysis. Notably, where comments suggest an alternative diagnosis, the "internal inconsistencies" may "detract from the credibility of the x-ray interpretation under 20 C.F.R. § 718.202(a)(1)." *Cranor*, 22 B.L.R. at 1-5 (discussing *Melnick*).

- Additional diagnosis

A physician diagnosing Category 1 pneumoconiosis or greater may comment that the disease is "not CWP etiology unknown," as occurred in *Cranor*. *Id.* at 1-4. Under these circumstances, the physician's comments are directed not to the presence of pneumoconiosis, but to the etiology of the diagnosed pneumoconiosis. *Id.* at 1-5, 1-6. Accordingly, an Administrative Law Judge should consider the comments under 20 C.F.R. § 718.203 (*i.e.* when addressing the etiology of a miner's pneumoconiosis).

In *Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-246 (2006), the Board reaffirmed its decision in *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1, 1-5 (1999) (en banc), and held it was proper for

the Administrative Law Judge to conclude Dr. Halbert's classification of an x-ray as Category 1/1 was positive for the presence of pneumoconiosis under § 718.202(a)(1) of the regulations. In a narrative report accompanying the ILO classification form, Dr. Halbert indicated he "found opacities consistent with pneumoconiosis of some type (such as asbestosis) but no CWP." The Board agreed with the Director's position that the Administrative Law Judge properly considered Dr. Halbert's comments under § 718.203 as "Section 718.202(a)(1) does not require that claimant prove the cause of the clinical pneumoconiosis diagnosed by chest x-ray."

3. Treatment record and use of the ILO form

By unpublished decision in *Reed v. Markfork Coal Co.*, BRB No. 10-0170 BLA (Feb. 22, 2011)(unpub.), the Board affirmed the award of benefits on grounds that Claimant suffered from complicated coal workers' pneumoconiosis. On appeal, Employer challenged the Administrative Law Judge's designation of certain ILO x-ray interpretations, which were generated at a black lung clinic, as "treatment" records. The Board upheld the Administrative Law Judge's characterization of the ILO interpretations as "treatment" records and stated:

Because the regulations do not specifically define what evidence may constitute a treatment record, such a determination is a matter of discretion for the administrative law judge, based on his review of the facts and evidence in a particular case. (citation omitted). As an initial matter, we hold that the administrative law judge acted within his discretion in rejecting employer's general contention that the classification of an x-ray under the ILO system establishes, *per se*, that the x-ray reading is not a treatment record under 20 C.F.R. § 725.414(a)(4). The administrative law judge rationally determined that employer did not provide any evidence establishing that ILO classified x-rays are obtained, or used, solely for the purpose of litigation. (citations omitted).

Slip op. at 7.

C. Interpretation that is silent regarding pneumoconiosis

Chest x-rays classified as less than 1/0 (*i.e.* 0/0 or 0/1) do not constitute affirmative evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). However, in some instances, a physician will not specifically indicate whether the disease is present or absent. In *Marra v. Consolidation Coal Co.*, 7 B.L.R. 1-216 (1984), a case arising under 20 C.F.R. Part 727, the Board held, under some circumstances, it is proper for the Administrative Law Judge to infer that an interpretation, which does not mention the presence of pneumoconiosis, as negative.

On the other hand, in *Sacolick v. Rushton Mining Co.*, 6 B.L.R. 1-930 (1984), the Board upheld invocation under 20 C.F.R. § 727.203(a)(1) where one x-ray was interpreted as positive for the disease and the remainder of the studies, which were interpreted for purposes of diagnosing cancer, included no diagnosis of pneumoconiosis. *See also Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 BLA (June 19, 1997)(en banc)(unpub.) ("when an x-ray is not classified, and makes no mention of pneumoconiosis, the administrative law judge has discretion to infer whether or not the x-ray is negative for pneumoconiosis").

If a physician has left the "profusion" boxes blank on the official ILO form, then the fact-finder may conclude the interpretation is negative for the presence of pneumoconiosis if (1) the reader checked the "completely negative" box on the form, or (2) the physician checked the box that s/he found no parenchymal abnormalities consistent with pneumoconiosis. On the other hand, where the physician finds parenchymal abnormalities consistent with the presence of pneumoconiosis, but leaves the "profusion" boxes blank, the fact-finder may conclude the study is internally inconsistent, or does not support a finding of the presence or absence of pneumoconiosis.

For a discussion of the effect of the amended regulations on silent x-ray interpretations dated after January 19, 2001, see the discussion on quality standards in this chapter.

D. Film quality

If the quality of the film is not noted on the x-ray report, then the study is assumed to be of acceptable quality (absent contrary proof), if the study is read. *Auxier v. Director, OWCP*, 8 B.L.R. 1-109 (1985); *Lambert v. Itmann Coal Co.*, 6 B.L.R. 1-256 (1983). *See also Consolidation Coal Co. v. Director, OWCP [Chubb]*, 741 F.2d 968 (7th Cir. 1984).

E. Digital x-rays and CT-scans considered separately from chest x-ray evidence

In *Webber v. Peabody Coal Co*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring), the Board adopted the Director's position and held digital x-ray interpretations are not considered "chest x-ray" evidence under 20 C.F.R. §§ 718.101(b), 718.102, 718.202(a)(1), and Appendix A to Part 718, as they do not satisfy the quality standards at Appendix A. Consequently, digital chest x-rays are "properly considered under 20 C.F.R. § 718.107, where the Administrative Law Judge must determine, on a case-by-case basis, pursuant to 20 C.F.R. § 718.107(b), whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement." See also *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-273 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc). Similarly, CT-scans would be considered with "other evidence" and not with the chest x-ray interpretations. See also *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991) (en banc) (CT-scans should be weighed separately from chest x-ray evidence).

As a result, "other evidence" under 20 C.F.R. § 718.107 such as CT-scans and digital x-rays should be weighed under 20 C.F.R. § 718.202(a)(4) and/or 20 C.F.R. § 718.304(c) (for cases involving complicated pneumoconiosis).

IV. Pulmonary function (ventilatory) studies

A. Resolving height discrepancies

The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). See also *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995) (the fact-finder erred in failing to resolve height discrepancies in the record particularly where the discrepancies affected whether the tests were qualifying).

It is prudent to review the file prior to the hearing to ascertain whether total disability is at issue and, if so, whether the record contains discrepancies in the recorded height of the miner. Where there is conflict in the record, testimony may be elicited at the hearing, or the parties may be required to stipulate to the miner's height. Otherwise, the fact-finder may average the heights recorded in the studies admitted as evidence. See *Protopappas, supra*.

B. Qualifying test results

An Administrative Law Judge may infer, in the absence of evidence to the contrary, the reported ventilatory results represent the best of each of the three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-1083 (1984).

All ventilatory studies of record, both pre-bronchodilator and post-bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, (1) the FEV₁ must qualify, **and** (2) the MVV or FVC values must qualify, **or** FEV₁/FVC must equal 55% or less. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984).

In addition, the results of a study cannot be "rounded off" to render it qualifying. *Bolyard v. Peabody Coal Co.*, 6 B.L.R. 1-767 (1984); *Sexton v. Peabody Coal Co.*, 7 B.L.R. 1-411, 1-412 n. 2 (1984).

C. Determination of reliability or conformity

The fact-finder must determine the reliability of a study based on its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1-154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986).

In assessing the reliability of a study, an Administrative Law Judge may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). However, the Administrative Law Judge should not invalidate a study based on the opinion of a reviewing technician. *Bolyard v. Peabody Coal Co.*, 6 B.L.R. 1-767 (1984).

On the other hand, more weight may be given to the first-hand observations of technicians who administered the studies than to physicians who reviewed the tracings. *Revnack v. Director, OWCP*, 7 B.L.R. 1-771 (1985). Indeed, if the Administrative Law Judge credits a consultant's opinion over the opinion of the physician/technician who actually observed the test, a rationale must be provided. *Brinkley v. Peabody Coal Co.*, 14 B.L.R. 1-147 (1990).

Further, a consulting physician, who merely places a checkmark in a box indicating "poor or unacceptable technique" without explanation, has not provided sufficient evidence to support his or her rejection of the study. *Gambino v. Director, OWCP*, 6 B.L.R. 1-134 (1983). *See also Chester v.*

Hi-Top Coal Co., BRB No. 00-1000 BLA (July 31, 2001) (unpub.) (the Administrative Law Judge properly accorded no weight to a physician's "failure to fully identify the evidence he relied upon in reaching his conclusions regarding the validity of (a) pulmonary function study").

For more information on pulmonary function studies conducted on or after January 19, 2001, see the discussion regarding quality standards in this chapter.

1. Conformity issues

a. "Poor" cooperation or comprehension

Little or no weight may be accorded a ventilatory study where the miner exhibited "poor" cooperation or comprehension. This is because the study is non-conforming, *i.e.* the study does not "conform" to the quality standards set forth in the regulations. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981).

b. "Fair" cooperation or comprehension

If "fair" effort is noted on the study, the study may be conforming and accorded weight. *Laird v. Freeman United Coal Co.*, 6 B.L.R. 1-883 (1984); *Verdi v. Price River Coal Co.*, 6 B.L.R. 1-1067 (1984); *Whitaker v. Director, OWCP*, 6 B.L.R. 1-983 (1984). However, the Board found a study was non-conforming where "fair" effort was noted, and the administering physician stated that the miner was "coughing" during the test. *Clay v. Director, OWCP*, 7 B.L.R. 1-82 (1984).

c. Non-conforming, non-qualifying study may be probative

In *Crapp v. U.S. Steel Corp.*, 6 B.L.R. 1-476 (1983), a non-conforming pulmonary function study may be entitled to probative value where the results exceed the table values, *i.e.*, the test is non-qualifying. In particular, the Board noted that the non-qualifying study was not accompanied by statements of the miner's cooperation and comprehension, thus rendering it non-conforming. However, the Board held:

[T]he lack of these statements does not lessen the reliability of the study. Despite any deficiency in cooperation and

comprehension, the demonstrated ventilatory capacity was still above the table values. Had the claimant understood or cooperated more fully, the test results could only have been higher.

. . .

It should be noted, however, that the only non-conforming pulmonary function tests that may be considered on invocation are those with non-qualifying results and that are non-conforming only due to a lack of statements of cooperation and/or comprehension.

Id. at 1-479 (emphasis in original).

2. Requirement of three tracings and flow-volume loop

Because tracings are used to determine the reliability of a ventilatory study, a study that is not accompanied by three tracings may be less probative. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then the Administrative Law Judge may presume the study conforms, unless the party challenging conformance submits a medical opinion in support of this challenge. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984).

For studies conducted after January 19, 2001, the flow-volume loop must also be admitted into the record. 20 C.F.R. § 718.103(b).

3. Testing conducted during hospitalization

In *Jeffries v. Director, OWCP*, 6 B.L.R. 1-1013 (1984), the Board held as follows regarding probative value of ventilatory studies conducted during the miner's hospitalization for a heart attack:

The Director contends that, because the studies were performed during claimant's hospitalization for a heart attack, they are unreliable and cannot support invocation. Although this argument is very appealing, we decline to accept it in this case. While the studies may have been affected by claimant's heart attack, and may, therefore, actually be unreliable, without qualified medical testimony to that effect, neither the Board nor

the administrative law judge has the requisite medical expertise to make that judgment. The Director has produced no such evidence.

Id. at 1-1014.

D. Miners over 71 years of age

In *K.J.M. v. Clinchfield Coal Co.*, 24 B.L.R. 1-40 (2008), the Board adopted the Director's position and held, for miners over 71 years of age, the table values of Appendix B for a 71-year-old miner should be used to determine whether the study is qualifying. The Board reasoned, "In the absence of a revision to Appendix B to account for older miners, we are persuaded that the Director has presented a reasonable method for resolving the problem of the table values ending at age 71." However, the Board also held the opposing party must be allowed to submit evidence to challenge whether the test establishes total disability under the circumstances.

Thus, while the Board remanded the claim and instructed the Administrative Law Judge to utilize the values for a 71-year-old miner at Appendix B to determine whether the 75-year-old Claimant's study was qualifying, the Board also instructed that the Administrative Law Judge "reopen the record to allow employer to submit evidence . . . indicating that the ventilatory function tests that yield qualifying values for age 71 are actually normal or otherwise do not demonstrate a totally disabling respiratory impairment."

In this case, Employer proposed on appeal that the "Knudson formula" be used for this miner's testing. According to Employer, the formula provides that the predicted normal FEV₁ is $0.1321 \times \text{height (in inches)} - 0.0270 \times \text{age (in years)} - 4.203$." The threshold FEV₁ is then calculated by multiplying the predicted normal value by 0.60. The Board noted the tables at Appendix B were derived using a formula contained in the published study by R.J. Knudson and others entitled, "The Maximal Expiratory Flow-volume Curve: Normal Standards, Variability, and Effects of Age," 113 Am. Rev. Resp. Dis. 587-660 (May 1976).

Thus, the Board directed, on remand, the record be reopened by the Administrative Law Judge to address this evidence from Employer. The Board specified that Employer's evidence "should be considered by the Administrative Law Judge when he or she is making her initial determination as to whether the pulmonary function study supports a finding of total disability at Section 718.204(b)(2)(i)." Moreover, although this claim was

not governed by the *amended regulations* at 20 C.F.R. § 725.414, even if the amendments applied, the Board noted Employer's proffered evidence would be admissible under the "rebuttal" provisions of the regulatory amendments at 20 C.F.R. § 725.414(a)(2)(ii) and (a)(3)(ii).

Subsequent decisions of the Board continue to support use of the table values for a 71 year old miner in cases where the claimant is over 71 years of age. In *Styka v. Jeddo-Highland Coal Co.*, 25 B.L.R. 1-61 (2012), the Board affirmed the Administrative Law Judge's use of pulmonary function study table values of a 71-year-old miner for a miner who was tested at the ages of 76 and 77 years. See *Meade v. Clinchfield Coal Co.*, 24 B.L.R. 1-40 (2008). Employer argued this was error, and the Administrative Law Judge "should have extrapolated the table values to reflect claimant's age." The Board disagreed:

[A]s employer submitted no evidence to show that this test, which produced qualifying values for age 71, was actually normal or otherwise did not demonstrate a totally disabling pulmonary impairment, we affirm the administrative law judge's finding

By unpublished decision in *Wilson v. Peabody Coal Co.*, BRB No. 09-0770 BLA (Aug. 11, 2010)(unpub.), a case arising in the Sixth Circuit, the Board cited to *Meade v. Clinchfield Coal Co.*, 24 B.L.R. 1-40 (2008), and held, "Given claimant's advanced age (over 71 years old), the administrative law judge permissibly utilized the qualifying values for a 71 year old miner."

V. Blood gas studies

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise, and an Administrative Law Judge must provide a rationale for according greater probative value to the results of one study over the results of another study. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981).

A. Cannot "round-up" or "round-down" values

Blood gas tables at Appendix C of Part 718 do not permit "rounding up" or "rounding down" of PCO₂ or PO₂ values to determine whether the test is qualifying; rather, each value must be "equal to or less than" the applicable table value. *Tucker v. Director, OWCP*, 10 B.L.R. 1-35 (1987).

B. Determination of reliability or conformity

The following list contains a few of the principles which may be utilized in assigning probative value to the blood gas studies of record:

1. Validation by medical opinion

a. Factors to consider, generally

In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated). Similarly, in *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1045 (10th Cir. 1990) and *Twin Pines Coal Co. v. U.S. DOL*, 854 F.2d 1212 (10th Cir. 1988), the Administrative Law Judge must consider a physician's report addressing the reliability and probative value of testing, where the physician attributes qualifying results to non-respiratory factors such as age, altitude, or obesity.

a. Technical validation of study, value of

Technical validation of a study, without explanation, does not automatically entitle the study to greater weight. In *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court reviewed the blood gas study of evidence and found, "Out of a total of nine tests, the five initial tests produced qualifying results, and the four later tests did not." The court concluded it was error for the Administrative Law Judge to credit an earlier qualifying study solely on the grounds that it was "validated" by a Department of Labor physician. Specifically, the court stated the physician "merely checked a box verifying that the test was technically acceptable" and "provided no reasons for his opinion," such that "his validation lent little additional persuasive authority to (the earlier study)." In addition, the court concluded the Administrative Law Judge "failed to consider . . . testimony that obesity could affect the blood gas studies, causing the studies to be more likely to qualify; nor did the ALJ address the potential effect of (Claimant's) heart disease and intervening coronary artery surgery on the tests."

2. Test conducted during hospitalization

a. For testing conducted on or before January 19, 2001

In *Jeffries v. Director, OWCP*, 6 B.L.R. 1-1013 (1984), the Board held as follows regarding probative value of blood gas studies conducted during the miner's hospitalization for a heart attack:

The Director contends that, because the studies were performed during claimant's hospitalization for a heart attack, they are unreliable and cannot support invocation. Although this argument is very appealing, we decline to accept it in this case. While the studies may have been affected by claimant's heart attack, and may, therefore, actually be unreliable, without qualified medical testimony to that effect, neither the Board nor the administrative law judge has the requisite medical expertise to make that judgment. The Director has produced no such evidence.

Id. at 1-1014. *But see Hess v. Director, OWCP*, 21 B.L.R. 1-141 (1998) (it was proper for the Administrative Law Judge to question the reliability of a blood gas study where a physician stated it was taken while Claimant was in the hospital, and "may not be representative of [claimant's] true lung function").

b. For testing conducted after January 19, 2001

At 20 C.F.R. § 718.105(d), the amended regulations provide the following with regard to blood gas studies conducted during a miner's terminal hospitalization:

If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death.

20 C.F.R. § 718.105(d).

VI. Medical reports

There are several basic principles of weighing evidence, which are relevant to medical reports and opinions. This subsection of Chapter 3 sets forth a variety of techniques for weighing medical opinions.

A. Well-documented, well-reasoned opinion defined

A "documented" opinion sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). As one example, a treating physician's opinion based on a positive x-ray interpretation, physical examination, and the miner's symptoms was deemed sufficiently documented. *Adamson v. Director, OWCP*, 7 B.L.R. 1-229 (1984).

A "reasoned" opinion is one in which the Administrative Law Judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields, supra*. Whether a medical report is sufficiently documented and reasoned is for the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

B. Undocumented and unreasoned opinion, little or no probative value

1. Generally

An unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). See also *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986) (an internally inconsistent and inadequately reasoned report may be entitled to little probative value).

2. Separation of probative, non-probative components of report

In *Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994), the Eleventh Circuit held an Administrative Law Judge "need not . . . find that a medical opinion is either wholly reliable or wholly unreliable"; rather, the opinion may be divided into the relevant issues of entitlement to determine whether it is reasoned and documented with regard to any particular issue. However, in applying this holding to cases arising under 20 C.F.R. Part 727, the court held, "when the weight of evidence in one of the medical evidence categories invokes the presumption, then the same evidence cannot be considered during rebuttal to challenge the existence of the fact proved, but it may be considered if relevant to rebut one of the presumed elements of a valid claim for benefits."

Similarly, in *Cumberland River Coal Co. v. Director, OWCP [Banks]*, 690 F.3d 477 (6th Cir. 2012), the circuit court affirmed the Administrative Law Judge's award of benefits based on a finding that the miner was totally disabled due to legal coal workers' pneumoconiosis. Noting a 38-pack-year cigarette smoking history and a 17-year coal mine employment history, the Administrative Law Judge weighed conflicting medical opinions to conclude that smoking and coal dust exposure contributed to development of the miner's disabling emphysema and chronic bronchitis.

The Administrative Law Judge found clinical pneumoconiosis was not established by x-ray evidence under 20 C.F.R. § 718.202(a)(1) and, as a result, he accorded less weight to components of opinions prepared by Drs. Forehand and Rasmussen wherein they diagnosed clinical pneumoconiosis based on x-ray data underlying their reports. The court affirmed this determination as well as the Administrative Law Judge's holding that the diagnoses of legal pneumoconiosis by Drs. Forehand and Rasmussen were entitled to "full probative weight":

[Employer] asserts that ALJ Merck's explanation for crediting the diagnosis of legal pneumoconiosis while simultaneously discrediting the diagnoses of clinical pneumoconiosis 'is not supported by the record.' This argument is unavailing because the definition of legal pneumoconiosis is significantly broader than that of clinical pneumoconiosis. (citation omitted). Dr. Forehand diagnoses both pneumoconiosis and chronic bronchitis. Dr. Rasmussen found that Banks suffered from respiratory impairments that he attributed, in part, to coal dust exposure. The ALJ adequately explained his reliance on the

diagnosis, finding that each doctor 'based his diagnosis on objective medical evidence, considered [Banks'] employment history and his smoking history, and explained the basis for his opinion.' Rather than showing that he erred in finding these reports to be well-reasoned and well-documented, ALJ Merck's rejection of the diagnosis of clinical pneumoconiosis demonstrates his careful examination of the record.

Id. at 486-487.

See also *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc) (separation of admissible and inadmissible portions of physician's opinion under the amended regulations); *Martin v. Ligon Preparation Co.*, 400 F.3d 302 (6th Cir. 2005) (physician's finding of clinical pneumoconiosis not probative, but finding of legal pneumoconiosis supported by the record and probative).

3. Unsupported medical conclusion

An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1291 (1984). See also *Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982); *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.) (proper to give less weight to the report of Dr. Fino because his opinion was based on a CT-scan that was not in the record, and he did not have the benefit of reviewing the two most recent qualifying pulmonary function studies).

4. Basis for opinion unclear

A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies Coal Co.*, 6 B.L.R. 1-1182 (1984).

For example, in *Mingo Logan Coal Co. v. Director, OWCP [Owens]*, 724 F.3d 550 (4th Cir. 2013), the court found the Administrative Law Judge properly found the opinions of Employer's experts insufficiently reasoned, stating:

(The Administrative Law Judge) found (the experts) both 'dismissed in a cursory [fashion] the medical literature that

associated coal dust exposure with interstitial fibrosis;' that they both 'maintained that idiopathic interstitial fibrosis exists in the general population, but neither adequately addressed the fact that [Owens] is not a member of the general population' based on his extensive coal-dust exposure; and that they '[b]oth acknowledged that the diagnosis of idiopathic interstitial fibrosis depended on ruling out all suspected factor[s], but neither doctor gave an adequate explanation for why coal dust inhalation could not have caused at least some of [Owens'] impairment.'

The court upheld the Administrative Law Judge's conclusion that the experts did not adequately explain why the miner's "interstitial fibrosis—which they identified as the cause of his total disability—did not constitute legal pneumoconiosis."

5. Opinion based on generalities

A medical opinion based on generalities, rather than specifically focusing on the miner's condition, may be accorded less weight. *Knizer v. Bethlehem Mines Corp.*, 8 B.L.R. 1-5 (1985).

An example where a circuit court found that a physician's opinion was less probative because it was based on generalities is found in *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723 (7th Cir. 2008). Here, the court affirmed the Administrative Law Judge's award of benefits based on a finding that the miner suffered from totally disabling chronic obstructive pulmonary disease stemming from 13 years of coal mine employment. The court noted:

What complicates this case is that (the miner) was also a smoker. He started smoking cigarettes at age 18 or 19, averaging one to one-half pack per day at varying times. He quit at age 54, after about 35 years of smoking.

The record further revealed that, by 2005, the miner was totally dependent on supplemental oxygen and "was taking three nebulizer treatments a day."

While noting the regulations recognize the existence of "legal" pneumoconiosis, the court emphasized the miner carried the burden of demonstrating "that his COPD was caused, at least in part, by his work in the mines, and not simply his smoking habit." In this vein, the court cited to medical opinions in the record supporting a finding that coal dust contributed

to the miner's COPD, but it also noted the following:

. . . Dr. Tuteur examined (the miner) . . . ; he diagnosed severe COPD solely due to smoking. He concluded that coal dust exposure did not cause or contribute to (the miner's disease), noting that miners with no smoking history rarely have COPD, while smokers have a one in five chance of developing a severe obstruction. Dr. Renn reviewed the medical records and issued a report in 2004 where he diagnosed COPD due solely to smoking.

The Administrative Law Judge accorded little weight to the opinions of Drs. Tuteur and Renn in this claim, and the court agreed:

First, the essence of (Dr. Tuteur's) opinion was a three sentence comment that presented a personal view that (the miner's) condition had to be caused by smoking because miners rarely have clinically significant obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust. However, the Department of Labor reviewed the medical literature on this issue and found that there is consensus among scientists and researchers that coal dust-induced COPD is clinically significant. This medical authority indicates that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners. 65 Fed. Reg. 79,938. Second, Dr. Tuteur did not rely on information particular to (the miner) to conclude that smoking was the only cause of his obstruction. Third, he did not cite a single article in the medical literature to support his propositions.

The court then rejected Employer's argument that Dr. Tuteur merely states that development of coal dust induced COPD is "rare" in miners:

. . . the Department of Labor report does not indicate that this causality is merely rare. And even if the causation is rare, Dr. Tuteur does not explain why (the miner) could not be one of these 'rare' cases. This flaw is endemic to the entire opinion, because Dr. Tuteur did not appear to analyze any data or observations specific to (the miner).

On the other hand, the court approved of the Administrative Law Judge's crediting of Dr. Cohen's report, which supported the miner's entitlement to benefits:

First, it was based on objective data and a substantial body of

peer-reviewed medical literature that confirms the causal link between coal dust and COPD. Second, he reviewed studies that were even more recent than the aforementioned Department of Labor study. Third, he linked these studies with (the miner's) symptoms, physical examination findings, pulmonary function studies, and arterial blood gas studies. Finally, he explained that (the miner's) pulmonary function studies showed 'minimal reversibility after administration of bronchodilator' and that he had an 'abnormal diffusion capacity,' all of which is consistent with a respiratory condition related to coal dust exposure.

6. Reliance on unreliable study, subjective complaints

A flawed report may be discredited. *Goss v. Eastern Assoc. Coal Corp.*, 7 B.L.R. 1-400 (1984). As an example, an Administrative Law Judge properly discredited a physician's opinion as undocumented where it was based only on the claimant's work history, subjective complaints, and an unreliable blood gas study. *Mahan v. Kerr-McGee*, 7 B.L.R. 1-159 (1984).

7. Inaccurate coal mine employment or smoking history

It is proper for an Administrative Law Judge to discredit a medical opinion based on an inaccurate coal mine employment history, or an inaccurate smoking history. *Worhach v. Director, OWCP*, 17 B.L.R. 1-105 (1993)(per curiam) (physicians reported an eight year coal mine employment history, but the Administrative Law Judge only found four years of such employment); *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993) (physician's opinion less probative where based on inaccurate smoking history).

8. Inadequate reasoning

a. Reliance on negative x-ray alone

In *Cannelton Industries, Inc. v. Director, OWCP [Frye]*, 93 Fed. Appx. 551 (4th Cir. Apr. 5, 2004) (unpub.), the Administrative Law Judge properly accorded less weight to the opinion of Dr. Forehand, who found the miner was totally disabled due to smoking-induced bronchitis, but failed to explain "how he eliminated (the miner's) nearly thirty years of exposure to coal mine dust as a possible cause" of the bronchitis. In affirming the Administrative Law Judge, the court noted, "Dr. Forehand erred by assuming that the negative x-rays (underlying his opinion) necessarily ruled out that

(the miner's) bronchitis was caused by coal mine dust . . ."

See also *A&E Coal Co. v. Director, OWCP [Adams]*, 694 F.3d 798 (6th Cir. 2012); *Cumberland River Coal Co. v. Director, OWCP [Banks]*, 690 F.3d 477 (6th Cir. 2012) (Dr. Jarboe maintained the miner did not suffer from coal dust induced emphysema because there was not enough coal dust retention shown on the chest x-rays; the Administrative Law Judge properly concluded that the regulations provide legal pneumoconiosis may exist even in the absence of clinical pneumoconiosis, *i.e.* negative x-rays and CT scans).

b. Reversibility on pulmonary function testing with residual disability

In *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. May 11, 2004) (unpub.), the court upheld the Administrative Law Judge's finding that reversibility of pulmonary function values after use of a bronchodilator did not preclude the presence of disabling coal workers' pneumoconiosis. In particular, the court noted the following:

All the experts agree that pneumoconiosis is a fixed condition and therefore any lung impairment caused by coal dust would not be susceptible to bronchodilator therapy. In this case, although Swiger's condition improved when given a bronchodilator, the fact that he experienced a disabling residual impairment suggested that a combination of factors was causing his pulmonary condition. As a trier of fact, the ALJ 'must evaluate the evidence, weigh it, and draw his own conclusions.' (citation omitted). Therefore, the ALJ could rightfully conclude that the presence of the residual fully disabling impairment suggested that coal mine dust was a contributing cause of Swiger's condition. (citation omitted).

Slip op. at 8.

See also *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350 (6th Cir. 2007) (the court upheld the Administrative Law Judge's decision to accord less weight to a physician who "had not adequately explained why Barrett's responsiveness to treatment with bronchodilators necessarily eliminated a finding of legal pneumoconiosis, and had not adequately explained 'why he believe[d] that coal dust exposure did not exacerbate [Barrett's] . . . smoking-related impairments").

See also *Cumberland River Coal Co. v. Director, OWCP [Banks]*, 690 F.3d 477 (6th Cir. 2012) (Dr. Dahhan cited to the miner's treatment with bronchodilator agents, which was suggestive that the miner suffered from a reversible condition, as support for his finding of no legal pneumoconiosis; the court agreed with the Administrative Law Judge that bronchodilator treatments constitute an insufficient basis to conclude legal pneumoconiosis is not present).

9. Legal pneumoconiosis, smoking versus coal dust exposure must be explained

In *Westmoreland Coal Co. v. Amick*, 289 Fed. Appx. 638 (4th Cir. Aug. 18, 2008) (unpub.), the court upheld the Administrative Law Judge's award of benefits based on finding the miner was totally disabled due to coal dust-induced and smoking-induced chronic obstructive pulmonary disease. Under the facts of the case, the miner had a 33-year coal mine employment history as well as a history of smoking one pack of cigarettes per day from 1941 until 1988. A dispute arose among the medical experts regarding whether the miner's chronic obstructive pulmonary disease stemmed solely from his smoking history, or whether it was due both to smoking and coal dust exposure. In affirming an Administrative Law Judge's weighing of medical opinions, the court concluded it was proper for the Administrative Law Judge to accord greater weight to physicians who recognized, and discussed, the latent and progressive nature of pneumoconiosis.

The court also held it was proper to accord less weight to physicians who did not take into account both cigarette smoking and coal mine dust exposure as potential causes of the miner's chronic obstructive pulmonary disease. Specifically, the Administrative Law Judge found Employer's experts failed to explain "why no part of (the miner's) disability was due to thirty-three of coal dust exposure." The court held this did not improperly shift the burden to Employer as Claimant's medical experts "supported their conclusions that (the miner's) disability impairment was due, at least in part, to thirty-three years of coal mine dust exposure."

Likewise, in *Island Creek Coal Co. v. Henline*, Case No. 07-1850 (4th Cir. July 9, 2008) (unpub.), the court affirmed the Administrative Law Judge's weighing of medical evidence pertaining to the issue of disability causation and stated:

. . . the ALJ reasonably determined that none of Island Creek's doctors satisfactorily explained why (Claimant's) total disability was not due to a coal-dust induced disease In employing this analysis, the ALJ did not improperly 'shift[] the burden of

proof from the claimant to the employer,' as Island Creek claims he did. (citation omitted). Rather, he merely concluded their analysis was incomplete, and therefore that their opinions were not well-reasoned.

Slip op. at 2.

See also *C.B. v. Bowman Coal Co.*, BRB No. 07-0320 BLA (July 23, 2008) (unpub.) (the Board upheld the Administrative Law Judge's decision to accord the opinion of Employer's expert little weight on grounds that the expert "did not explain his conclusion that claimant's pulmonary condition is entirely attributable to smoking").

10. Medical opinion cannot be based on chest x-ray alone

A medical opinion submitted for consideration under 20 C.F.R. § 718.204(a)(4) is entitled to little weight if the diagnosis regarding the presence or absence of pneumoconiosis is based on a chest x-ray alone. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the circuit court held, if a physician bases his or her finding of coal workers' pneumoconiosis only on the miner's history of coal dust exposure and a positive chest x-ray, then the opinion "should not count as a reasoned medical judgment under § 718.202(a)(4)." However, the court found the opinions of Drs. Veazy and Baker were not, as characterized by the Administrative Law Judge, based only on the miner's exposure to coal dust. Rather, in addition to consideration of coal mine employment and chest x-rays, the physicians "considered their examinations of Cornett, his history in the mines, his history as a smoker and pulmonary functions studies."

Similarly, in a claim involving complicated pneumoconiosis, *S.P.W. v. Peabody Coal Co.*, BRB No. 07-0278 BLA (Dec. 27, 2007)(unpub.), the Board held the irrebuttable presumption at 20 C.F.R. § 718.304 cannot be invoked under subsection (c) using medical opinions based solely on chest x-ray interpretations. Specifically, the Board noted 20 C.F.R. § 718.304(c) permits invocation of the presumption "*by means other than*" interpretations of chest x-rays at 20 C.F.R. § 718.304(a) of the regulations. Therefore, while medical opinions may be considered under 20 C.F.R. § 718.304(c) to invoke the irrebuttable presumption, such opinions cannot be based solely on x-ray interpretations.

C. Physicians' qualifications

The qualifications of physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

1. Treating physician

Proper consideration of treating physicians' opinions has been, and continues to be, a point of contention. On the one hand, treating physicians may have the benefit of observing the miner over time, and may be more familiar with his or her condition. On the other hand, episodic treatment, or an opinion by the treating physician that is not well-reasoned or well-documented, does not compel the fact-finder to accord greater weight to the opinion solely because of the status of the authoring physician.

The amended regulations at 20 C.F.R. § 718.104(d) set forth specific considerations when weighing treating physicians' opinions against other medical opinions of record. Although these provisions do not apply to opinions submitted in claims filed on or before January 19, 2001, there is a body of case law developed prior to the amendments, which sets forth many of the same considerations.

a. For medical opinions developed on or before January 19, 2001

More weight may be accorded to the reasoned and documented conclusions of a treating physician as s/he is more likely to be familiar with the miner's condition than a physician who examines the miner once or episodically. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989). However, in *Collins v. J & L Steel (LTV Steel)*, 21 B.L.R. 1-182 (1999), it was error for the Administrative Law Judge to give greater weight to a treating physician's opinion without addressing its "flaws," *i.e.*, whether the doctor's failure to discuss the miner's lung cancer and heavy smoking history rendered his report less probative.

- Status as "treating physician" not controlling

An Administrative Law Judge "is not required to accord greater weight to the opinion of a physician based solely on his status as claimant's treating physician. Rather, this is one factor which may be taken into consideration" *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). *See also Consolidation*

Coal Co. v. Director, OWCP [Held], 314 F.3d 184 (4th Cir. 2002).

In *Eastover Mining Co. v. Williams*, 338 F.3d 501 (6th Cir. 2003), a case filed prior to promulgation of the amended regulations at 20 C.F.R. § 718.104(d), the court held the opinion of a treating physician is not automatically entitled to greater weight simply because of the physician's status and, as a result, the court retreated from its holding in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993) that a treating physician's opinion should be accorded controlling weight. The court cited with approval the amended regulatory provisions at 20 C.F.R. § 718.204(d), stating, "A simple principle is evident: in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade." In *Williams*, the court found, while the treating physician had an "almost-certainly benevolent intent" towards the miner's family, the fact that he did not diagnose pneumoconiosis during 14 years of treatment, but only after the miner allegedly died from it, rendered the physician's conclusion "dubious."

The Seventh Circuit holds a physician may not be entitled to greater weight solely because of his or her status as the miner's "treating" physician. In *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001), the circuit court found it was "irrational" to accord greater weight to the opinion of a treating physician, who may not be a specialist. The court stated:

Treating physicians often succumb to the temptation to accommodate their patients (and their survivors) at the expense of third parties such as insurers, which implies attaching a discount rather than a preference to their views.

- Report must be well-reasoned, well-documented

Other factors to be considered in weighing a treating physician's report include whether the report is well-reasoned and well-documented. *McClendon v. Drummond Coal Co.*, 12 B.L.R. 2-108 (11th Cir. 1988) (a well-reasoned, well-documented treating physician's report may be given greater weight); *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992) (a treating physician's report that is not well-reasoned or well-documented should not be given greater weight); *Amax*

Coal Co. v. Beasley, 957 F.2d 324 (7th Cir. 1992). Similarly, in *Lango v. Director, OWCP*, 104 F.3d 573 (3rd Cir. 1997), the court held a treating physician's opinion may be accorded greater weight than the opinions of other physicians of record, but "the ALJ may permissibly require the treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to the miner's death."

- Length of time of treatment is relevant

The length of time during which the physician treated the miner is relevant to the weight given the physician's opinion. *Revnack v. Director, OWCP*, 7 B.L.R. 1-771 (1985). It is logical that a physician who recently began "treating" the miner will not necessarily have a more thorough understanding of the miner's condition than other examining physicians of record. *Gomola v. Manor Mining & Contracting Corp.*, 2 B.L.R. 1-130, 1-135 (1979) (the length of time a particular physician treats a claimant is a valid factor to be considered in the weighing process). See also *Peabody Coal Co. v. Odom*, 342 F.3d 486 (6th Cir. 2003) (treating physician for 16 years with "extensive" treatment notes and reasoned opinions); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511 (6th Cir. 2002) (the Administrative Law Judge properly accorded greater weight to the opinion of the miner's treating physician, who examined the miner on numerous occasions from 1981 through 1989, as opposed to the opinions of employer's physicians who never examined the miner or who only examined the miner once in 1981); *Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002).

The Fourth Circuit noted the importance of conducting multiple examinations over time in *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992), stating "a comparison of medical reports and tests over a long period of time may conceivably provide a physician with a better perspective than the pioneer physician." In *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994), the court further held, although the miner's treating physician was "not as highly qualified as the other physicians whose opinions appear in this record, his status as the treating physician entitles his opinion to great, though not necessarily dispositive, weight."

- Treating physician's qualifications relevant

In *Peabody Coal Co. v. Odom*, 342 F.3d 486 (6th Cir. 2003), a treating physician's opinion that the miner suffered from coal workers' pneumoconiosis was entitled to "additional weight" because: (1) the treating physician was a "highly qualified" board-certified pulmonary specialist; (2) he treated the miner for 16 years and wrote "probative and persuasive medical reports"; and (3) he had "extensive" treatment notes from 1980 through 1996. The Administrative Law Judge properly considered the other medical reports of record, but determined the treating physician's report was well-documented and well-reasoned.

**b. For medical reports generated after
January 19, 2001**

At 20 C.F.R. § 718.104(d), the amended regulations set forth specific considerations in weighing a treating physician's opinion:

(d) Treating physician. In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

(1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

(2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition;

(4) Extent of treatment. The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition;

(5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

In its comments to the amended regulations, the Department states the following:

The Department emphasizes that the 'treating physician' rule guides the adjudicator in determining whether the physician's doctor-patient relationship warrants special consideration of the doctor's conclusions. The rule does not require the adjudicator to defer to those conclusions regardless of the other evidence in the record. The adjudicator must have the latitude to determine which, among the conflicting opinions, presents the most comprehensive and credible assessment of the miner's pulmonary health. For the same reasons, the Department does not consider subsection (d) to be an evidentiary presumption which shifts the burden of production or persuasion to the party opposing entitlement upon the submission of an opinion from the miner's treating physician. Accordingly, the Department declines to eliminate the requirement in subsection (d)(5) that a treating physician's opinion must be considered in light of all relevant

evidence in the record.

65 Fed. Reg. 79,334 (Dec. 20, 2000).

In the preamble, the Department also notes that the new treating physician regulation does not apply retroactively:

None of these changes, however, apply retroactively. Section 718.101(b) provides that the 'standards for the administration of clinical tests and examinations' will govern all evidence developed in connection with benefits claims after the effective date of the final rule. Section 718.104 contains the quality standards for any '[r]eport of physical examinations,' including reports prepared by the miner's treating physician. Physicians' medical reports are expressly included in the terms of § 718.101(b). Consequently, the changes to § 718.104 apply only to evidence developed after the effective date of the final rule. With respect to treating physicians' opinions developed and submitted before the effective date of the final rule, the judicial precedent summarized in the Department's initial notice of proposed rule-making continues to apply. See 62 Fed. Reg. 3342 (Jan. 22, 1997). These decisions recognize that special weight may be afforded the opinion of a miner's treating physician based on the physician's opportunity to observe the miner over a period of time.

65 Fed. Reg. 79,334 (Dec. 20, 2000).

- Treating physician's opinion probative

For example, in *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004), the Administrative Law Judge improperly accorded less weight to the treating physician's conclusion that coal workers' pneumoconiosis was present. The court reasoned as follows:

The ALJ stated that he did not credit Dr. Karlavage's opinion as that of a treating physician because Dr. Karlavage had only seen Soubik three times over six months. That was, of course, three more times and six months more than Dr. Spagnolo saw him. So easily minimizing a treating physician's opinion in favor of a physician who has never laid eyes on the patient is not only indefensible on this record, it

suggests an inappropriate predisposition to deny benefits. It is well-established in this circuit that treating physicians' opinions are assumed to be more valuable than those of non-treating physicians. *Mancia v. Director, OWCP*, 130 F.3d 579, 590-91 (3rd Cir. 1997). The ALJ nevertheless ignored Dr. Karlavage's clinical expertise; an expertise derived from many years of diagnosing and treating coal miners' pulmonary problems. The ALJ did so without making any effort to explain why Dr. Spagnolo's board certification in pulmonary medicine was a more compelling credential than Dr. Karlavage's many years of 'hands on' clinical training.

- Treating physician not probative

In *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628 (6th Cir. 2009), the Administrative Law Judge's denial of benefits was affirmed. The Administrative Law Judge discredited a diagnosis of coal workers' pneumoconiosis by Dr. Brown, who was Claimant's treating physician. Here, Claimant maintained that Dr. Brown's opinion was entitled to greater weight by virtue of his status as a treating physician. The court rejected this argument and stated, "A medical opinion is not entitled to any additional weight simply because it was rendered by the claimant's treating physician"; rather, "the weight to be accorded a treating physician's opinion is based on its power to persuade." The Administrative Law Judge concluded Dr. Brown's opinion was entitled to little weight because it was "poorly" reasoned and documented stemming, in part, from Dr. Brown's reliance on an erroneous coal mine employment history, *i.e.* Dr. Brown relied on 18 years of coal mine employment and the Administrative Law Judge found only 11 years of such employment.

Similarly, in *Maynard v. Eastern Coal Co.*, Case No. 08-3909 (6th Cir. May 26, 2009)(unpub.), the court upheld a denial of benefits based on Claimant's failure to demonstrate the presence of complicated coal workers' pneumoconiosis, or that he was totally disabled due to simple coal workers' pneumoconiosis. With regard to weighing treating physicians' opinions, the court held, "Treating physicians are not entitled to automatic deference in black lung cases but may be given greater deference if their extended relationship with the patient

makes their opinions more persuasive in the context of a given case." In affirming the Administrative Law Judge's decision to discount the treating physicians' opinions, the court stated:

Judge Levin noted that Dr. Nadorra, who diagnosed (Claimant) with complicated CWP in 2000, offered no basis for that diagnosis, presented no specialty credentials, and may have relied on an inaccurate smoking history. These are valid reasons for discounting Dr. Nadorra's opinion. Judge Levin's only explanation for discounting Dr. Younes's opinion was his reliance on an inaccurate smoking history. Although a history of smoking apparently has no direct relation to the diagnosis of CWP, a mistake as to such a basic historical fact by a physician treating a pulmonary ailment may cast doubt on the level of Dr. Younes's familiarity with (Claimant) and may be cause to undermine the reliability of his diagnosis.

Slip op. at 11.

- Treating physician's qualifications relevant

In *Parsons v. Wolf Creek Collieries*, 23 B.L.R. 1-29 (2004) (en banc on recon.), the Administrative Law Judge improperly accorded less weight to the opinion of Dr. Tuteur solely because of his status as a consulting physician and "mechanically" accorded greater weight to the opinion of Claimant's treating physician. The Board noted, "While a treating physician's opinion may be entitled to special consideration, there is neither a requirement nor a presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians."

2. Examining physicians

In *Jericol Mining, Inc. v. Director, OWCP [Napier]*, 301 F.3d 703 (6th Cir. 2002), the court held the factors set forth at 20 C.F.R. § 718.104(d)(5) "are appropriate considerations in determining the weight to be given an examining physician's views." The court concluded that the Administrative Law Judge did not provide sufficient reasoning to accord greater weight to the opinion of Dr. Baker, who examined the miner four times over a four year period of time, as opposed to the opinion of Dr. Dahhan, who examined the miner twice over the same time period. The

court noted the "problem with the ALJ's analysis is that he did not specifically consider whether the four annual examinations by Dr. Baker were materially different from the two examinations that Dr. Dahhan performed during the same time frame." The court reasoned claimants could "'stack the deck' by frequently visiting a physician who provided a favorable diagnosis, and then arguing that the opinion of that examining physician should automatically be accorded greater weight." See also *Sewell Coal Co. v. O'Dell*, Case No. 00-2253 (4th Cir. July 26, 2001) (unpub.) (citing to *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440 (4th Cir. 1997) (opinions of examining physicians, "although not necessarily dispositive, deserve special consideration").

3. Non-examining or consultative physician

In earlier case law, the Board held an Administrative Law Judge may accord less weight to a consulting or non-examining physician's opinion on grounds that s/he does not have first-hand knowledge of the miner's condition. *Bogan v. Consolidation Coal Co.*, 6 B.L.R. 1-1000 (1984). See also *Cole v. East Kentucky Collieries*, 20 B.L.R. 1-51 (1996) (the Administrative Law Judge acted within his discretion in according less weight to the opinions of the non-examining physicians; he gave their opinions less weight, but did not completely discredit them). However, with regard to rebuttal under 20 C.F.R. Part 727, the opinion of such a physician is relevant. *Szafraniec v. Director, OWCP*, 7 B.L.R. 1-397 (1984).

In subsequent years, the case law evolved. Presently, a non-examining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician, or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984); *Easthom v. Consolidation Coal Co.*, 7 B.L.R. 1-582 (1984). Indeed, in *Collins v. J & L Steel (LTV Steel)*, 21 B.L.R. 1-182 (1999), the Board cited the Fourth Circuit's decision in *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438 (4th Cir. 1997), and held it was error for the Administrative Law Judge to discredit a physician's opinion solely because he was a "non-examining physician." Also, in *Chester v. Hi-Top Coal Co.*, BRB No. 00-1000 BLA (July 31, 2001) (unpub.), the Board cited to *Millburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998), and held an Administrative Law Judge may not discredit a medical opinion solely because the physician did not examine the miner. But see *Consolidation Coal Co. v. Director, OWCP [Wasson]*, Case No. 98-1533 (4th Cir., Nov. 13, 2001)(unpub.) (a consulting physician's opinion was entitled to less weight because it was not well-reasoned or well-documented).

4. Conviction or lapse of licensure, effect of

Historically, in black lung litigation, Administrative Law Judges occasionally have been confronted with licensing and/or conviction issues surrounding a particular medical expert, and the resulting question of how much, if any, probative value to accord the expert's opinion in a claim. The spectrum of these issues ranges from a lapse in licensure for unstated reasons to fraud convictions stemming from conduct in the Black Lung Program.

a. Lapse in licensure standing alone; opinion may be probative

Starting with the lapse in licensure, in *Stone v. Zeigler Coal Co.*, 2007 WL 7629292, BRB No. 06-0491 BLA (Apr. 27, 2007)(unpub.), Employer urged "appropriate scrutiny" of a pathology report by Dr. Jones due to the lapse in his licensure for unknown reasons. In footnote 3 of its decision, the Board stated:

We reject employer's argument that Dr. Jones's opinion is inherently unreliable and entitled to little, if any, weight, based on employer's submission of evidence to the administrative law judge which showed that the physician's license was subsequently revoked or suspended in some states.

...

The administrative law judge was required to base his decision on the record evidence before him, and he permissibly concluded that the materials attached to employer's brief had no bearing on the weight to which Dr. Jones's report was entitled, as they did not establish that any problems existed with the physician's licensure at the time he rendered his opinion in this case, nor did they reveal the reasons for the alleged lapses in licensure.

Slip op. at 6. See also *Gump v. Consolidation Coal Co.*, 2003 WL 26099313, BRB No. 02-0305 BLA (Feb. 27, 2003)(unpub.) (the Board rejected Employer's argument that Dr. Kristofic's medical opinion should be accorded no probative weight because "his medical license, at one time, had been suspended").

b. Conviction for activities related to Black Lung Program

- Opinion accorded no weight

Next, there is a series of cases involving consideration of tax evasion convictions of certain medical experts appearing in black lung claims. For example, in *Whitt v. Kennedy Coal Co.*, 2002 WL 34706896, BRB No. 01-0958 BLA (Sept. 24, 2002)(unpub.), the Board noted Claimant's argument as follows:

. . . although Dr. Berry was convicted of not reporting income, part of which was derived from federal black lung examinations, there was never any allegation that Dr. Berry had modified or misconstrued his medical findings for personal gain in any black lung case. Thus, claimant contends that Dr. Berry's conviction for income tax evasion is distinguishable from a criminal case in which a physician was specifically convicted of defrauding the federal black lung program by falsifying medical records and submitting false claims.

Slip op. at 3. The Administrative Law Judge, however, accorded Dr. Berry's reports no weight:

. . . the administrative law judge found that because 'filing false income tax returns involves both dishonesty and false statement' and 'Dr. Berry was engaged in these activities at the time he prepared his . . . report,' 'Dr. Berry [was] not a credible individual, and . . . his report has no probative value.

Slip op. at 4. The Board upheld the Administrative Law Judge's determination on grounds that it "was rational."

Similarly, in *Boyd v. Clinchfield Coal Co.*, 46 F.3d 1122 (4th Cir. Jan. 12, 1995)(unpub.)(table), the Administrative Law Judge, acting *sua sponte*, issued an order requiring Claimant "to show cause why Dr. Modi's opinions should not be 'discredited' because Dr. Modi had admitting to defrauding the Black Lung Program." The court noted:

. . . Dr. Modi pled guilty to a charge of tax evasion based on illegal income derived from submitting to the Labor Department phony claims for oxygen equipment which he prescribed for black lung beneficiaries who did not need such treatment. The ALJ took judicial notice of the conviction. In response to the

show cause order, Boyd noted that Dr. Modi had been relicensed in Virginia and was again practicing medicine.

Slip op. at 1. In weighing the expert medical evidence, the Administrative Law Judge accorded “no weight” to Dr. Modi’s opinion, and the court affirmed his decision. The court held it was “well within” the Administrative Law Judge’s discretion to take official notice of Dr. Modi’s conviction pursuant to 29 C.F.R. § 18.201³ as the judgment of another court.

Moreover, the court stated:

In considering this *adjudicative* fact, however, the ALJ did not need to reopen the record.

. . .

We also conclude that the ALJ did not abuse his discretion in giving no weight to Dr. Modi’s opinion based on Dr. Modi’s prior

³ The regulation at 29 C.F.R. § 18.201 is titled, “Official notice of adjudicative facts,” and it provides the following:

(a) *Scope of the rule.* This rule governs only official notice of adjudicative facts.

(b) *Kinds of facts.* An officially noticed fact must be one not subject to reasonable dispute in that it is either:

- (1) Generally known within the local area,
- (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or
- (3) Derived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency’s specialized field of knowledge.

(c) *When discretionary.* A judge may take official notice, whether requested or not.

(d) *When mandatory.* A judge shall take official notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard.* A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after official notice has been taken.

(f) *Time of taking notice.* Official notice may be taken at any stage of the proceeding.

(g) *Effect of official notice.* An officially noticed fact is accepted as conclusive.

29 C.F.R. § 18.201. It should be noted, pursuant to 29 C.F.R. §18.1101, the provisions at 29 C.F.R. § 18.201 do not apply to black lung proceedings. However, the Board has approved of taking official notice of certain facts in black lung claims, provided the parties have notice and an opportunity to be heard. See *e.g.*, *Pruitt v. Amax Coal Co.*, 7 B.L.R. 1-544, 1-546 (1984) (taking official notice of a physician’s radiological qualifications).

acts of fraud against the Black Lung Program.

Slip op. at 2. See also *Adams v. Canada Coal Co.*, Case No. 91-3706 (6th Cir. July 13, 1992)(unpub.) (the Administrative Law Judge “was obviously justified” in not crediting the testimony of Dr. Modi because of his fraud conviction).

- May accord weight to opinion of other expert not convicted of fraud, dishonesty, or false statements

On the other hand, an Administrative Law Judge may rely on a medical expert who does not have a history of dishonesty, fraud, or false statements. In the medical treatment dispute case of *Four L Coal Co. v. Director, OWCP [Lester]*, 157 Fed.Appx. 551, 2005 WL 2673654 (4th Cir. Oct. 20, 2005)(unpub.), the court noted:

In rendering his decision, the ALJ found that the criminal convictions of Drs. Baxter, Berry, and Modi did not necessarily render fraudulent the treatment they provided. The ALJ reasoned that . . . Dr. Sargent had diagnosed Lester as suffering from a pulmonary impairment of undetermined etiology and that his opinion lent credence to the diagnoses and treatment provided by the three other physicians.

Slip op. at 3. The court then affirmed the Administrative Law Judge’s decision, but did not elaborate further on the weighing of opinions by Drs. Baxter, Berry, and Modi.

Likewise, in an earlier opinion, *Middle Creek Coal Co. v. Director, OWCP [Blankenship]*, 91 F.3d 132 (4th Cir. July 11, 1996)(unpub.)(table), the court stated:

Middle Creek raises the issue that some of Blankenship’s doctors have been in trouble with the law. The ALJ recognized this as to Dr. Modi and stated that he credited Dr. Modi’s opinion only insofar as it was supportive of other medical opinions in the record. While we believe that an ALJ should give a doctor convicted of filing false claims or giving false information in connection with black lung cases little or no credibility at all, there were other doctors here who were not accused of anything on which the ALJ could and did rely.

Slip op. at 3. See also *Matney v. Lynn Coal Co.*, 995 F.2d 1063 (4th Cir. 1993).

D. Equivocal or vague conclusions

1. Generally

An opinion may be given little weight if it is equivocal or vague. *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995) (treating physician's opinion entitled to little weight where he concluded the miner "probably" had black lung disease); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988) (an equivocal opinion regarding etiology may be given less weight); *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236 (1984) (equivocal regarding disability); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002) (under 20 C.F.R. Part 727, the physician's opinion was too equivocal because he found the miner suffered from a "significant limitation" that "appeared more cardiac than pulmonary").

In *Westmoreland Coal Co. v. Director, OWCP [Cochran]*, 718 F.3d 319 (4th Cir. 2013) (Chief Judge Traxler, dissenting), the panel majority discussed the distinction between an equivocal and non-equivocal medical opinion. Although the court agreed with the Administrative Law Judge that the miner did not suffer from clinical pneumoconiosis, it was determined the miner demonstrated total disability due to legal pneumoconiosis through the medical opinion of Dr. Rasmussen. Westmoreland argued Dr. Rasmussen's opinion was insufficient to support a finding of legal pneumoconiosis. As noted by the court:

Westmoreland compares Dr. Rasmussen's testimony here to his testimony in another black lung case, *United States Steel Mining Co., Inc. v. Director, Office of Workers' Compensation Programs*, 187 F.3d 384 (4th Cir. 1999) ("Jarrell"), . . .

In *Jarrell*, the ALJ had awarded survivor benefits to a claimant 'relying solely' on Dr. Rasmussen's testimony that '[i]t is possible that [the coal miner's] death could have occurred as a consequence of his pneumonia superimposed upon his chronic lung disease, including his occupational pneumoconiosis and occupationally related emphysema' and '[i]t can be stated that [the coal miner's] occupational pneumoconiosis was a contributing factor to his death.'

Whereas the *Jarrell* court reversed the award of benefits on grounds that "the mere possibility of causation was insufficient to support finding a nexus between a claimant's pneumoconiosis and his death," the *Cochran* court concluded the tenor of Dr. Rasmussen's report differed, and it was

sufficient to support an award:

Here, by contrast, Dr. Rasmussen did not testify that coal mine dust or cigarette smoke could be the cause of Cochran's respiratory impairment. Nor did he testify that he did not know or could not tell whether coal mine dust contributed to Cochran's respiratory impairment. Rather, Dr. Rasmussen testified that both coal mine dust and cigarette smoke were causes, affirmatively asserting 'Mr. Cochran's coal mine dust exposure must be considered a significant contributing factor to . . . what should be described as overlap syndrome . . . and that he does have at least legal pneumoconiosis, *i.e.* COPD/emphysema caused in significant part by coal mine dust exposure.'

Id.

2. Inadvisability of return to coal mine employment

Inadvisability of returning to coal mine employment because of pneumoconiosis does not constitute a finding of total disability. *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-20, 1-30 (2008) (should avoid further exposure to coal dust does not constitute a finding of total disability); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988); *Bentley v. Director, OWCP*, 7 B.L.R. 1-612 (1984); *Brusetto v. Kaiser Steel Corp.*, 7 B.L.R. 1-422 (1984).

3. Unable to assess impairment

In *Kentland Elkhorn Coal Corp. v. Director, OWCP [Hall]*, 287 F.3d 555 (6th Cir. 2002), the physician stated he could not measure the level of the miner's impairment, and concluded that the miner could perform his last coal mining job. The court found the report vague and equivocal, and the court concluded it was proper for the Administrative Law Judge to accord it less weight.

4. Should work in "dust-free environment" too vague

In *White v. New White Coal Co.*, 23 B.L.R. 1-1 (2004), a physician's assessment that the miner should "work in a dust-free environment" is too vague to establish a totally disabling respiratory impairment.

5. Use of the AMA Guides

- Finding "Class II" impairment, too vague

In *Jeffrey v. Mingo Logan Coal Co.*, BRB Nos. 05-0107 BLA and 05-0107 BLA-A (Sept. 22, 2005) (unpub.), Dr. Baker examined Claimant, and concluded that he suffered from a "Class II impairment" under the *Guides to the Evaluation of Permanent Impairment* and had "a second impairment, based on Section 5.8, Page 106, Chapter Five, *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent." As a result, Dr. Baker stated, "This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations."

In view of the foregoing, the Board determined the Administrative Law Judge properly rejected the opinion:

Because Dr. Baker did not explain the severity of such a diagnosis or address whether such an impairment would prevent claimant from performing his usual coal mine employment, his diagnosis of a Class II impairment is insufficient to support a finding of total disability. (citation omitted). Moreover, since a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, . . . the administrative law judge permissibly found that this portion of Dr. Baker's opinion is insufficient to support a finding of total disability.

In addition, the Board stated:

[I]n view of our holding that the administrative law judge properly found Dr. Baker's opinion insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred by not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.

- Use of the AMA Guidelines, proper

By unpublished decision in *Consolidation Coal Co. v. Director, OWCP [Wasson]*, Case No. 98-1533 (4th Cir., Nov. 13, 2001) (unpub.), the court upheld the Administrative Law Judge's use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* to conclude a miner's "single breath diffusing capacity (DLCO) study was abnormal." A conflict arose in the interpretation of the test:

Dr. Rasmussen questioned the lower predicted value used by Dr. Bercher's laboratory in the 1991 test, stating that he believed that the claimant's diffusing capacity on that test would be abnormal if a higher predicted value was used. Thus, a controversy arose as to whether the claimant's actual performance on the 1991 test was within normal or abnormal range, i.e., whether the lower predicted value was in fact the appropriate or correct value against which to measure the claimant's test result.

The Administrative Law Judge properly notified the parties that the AMA guidelines would be used to determine the proper predicted value for the test. Employer objected to the use of the AMA guidelines because "inter-laboratory differences" would render the AMA guidelines unreliable. The court disagreed, however, and held the AMA guidelines already take such differences into account. Consequently, the court concluded "the employer had adequate notice yet offered no specific evidence to show that the use of the AMA guide was unfair or inaccurate when applied to the case at hand."

6. Presumption at 20 C.F.R. § 718.203, effect of

In *Crockett Collieries, Inc. v. Director, OWCP [Barrett]*, 478 F.3d 350 (6th Cir. 2007) (J. Rogers, concurring), the Administrative Law Judge's award of black lung benefits was affirmed. In the case, both Drs. Baker and Dahhan concluded the miner suffered from a respiratory impairment. They disagreed, however, on whether the impairment "could all be due to cigarette smoking or could be due to a combination of cigarette smoking and coal dust exposure." Dr. Baker concluded coal dust exposure "probably contributes to some extent in an undefinable portion" to the miner's

pulmonary impairment. After invoking the rebuttable presumption that the miner's legal pneumoconiosis arose out of coal dust exposure at 20 C.F.R. § 718.203(b), the court held Dr. Baker's opinion was sufficient to support a finding that the miner suffered from the disease, and it was not too equivocal. The court further noted:

In rejecting Dr. Dahhan's opinion, the ALJ found that Dahhan had not adequately explained why Barrett's responsiveness to treatment with bronchodilators necessarily eliminated a finding of legal pneumoconiosis, and had not adequately explained 'why he believes that coal dust exposure did not exacerbate (the miner's) allegedly smoking-related impairments.'

The court agreed with the Administrative Law Judge's analysis and affirmed the award of benefits.

Note, however, that the Board and certain other circuit courts apply the 10-year presumption at 20 C.F.R. § 718.203 only to findings of *clinical* pneumoconiosis, not *legal* pneumoconiosis. See Chapter 11 for further discussion of these cases.

E. Physician's opinion based on premises contrary to administrative law judge's findings

It is proper for the Administrative Law Judge to accord less weight to a physician's opinion based on premises, which are contrary to the Administrative Law Judge's findings. Some examples are as follows:

1. Benefits Review Board

In *Abshire v. D&L Coal Co.*, 22 B.L.R. 1-202 (2002)(en banc), although Dr. Broudy based his opinion regarding the etiology of the miner's total disability on a finding that the miner did not suffer from coal workers' pneumoconiosis, it was error for the Administrative Law Judge to accord the opinion less probative value where Dr. Broudy also "opined that even if claimant suffered from coal workers' pneumoconiosis, his opinion with respect to claimant's pulmonary difficulties would not change." See also *Osborne v. Clinchfield Coal Co.*, BRB No. 96-1523 BLA (Apr. 30, 1998) (*en banc on recon.*)(unpub.) (it is proper to accord less weight to physicians' opinions, which found pneumoconiosis did not contribute to the miner's disability, on grounds that the physicians did not diagnose pneumoconiosis contrary to the Administrative Law Judge's findings on the record as a whole).

In *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002)(en banc), the Administrative Law Judge "did not reconcile (Dr. Baker's) diagnosis of pneumoconiosis, based upon the positive x-ray and the miner's significant duration of coal dust exposure, with the fact that Dr. Baker's positive interpretation was reread as negative by a physician with superior qualifications." Consequently, the Board directed the Administrative Law Judge to "address whether this rereading impacts the physician's opinion and his diagnosis of pneumoconiosis."

See also *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.) (it was proper for the Administrative Law Judge to discredit the opinions of Drs. Crisalli and Zaldivar with regard to disability causation where these physicians concluded the miner did not suffer from either legal or clinical pneumoconiosis contrary to the Administrative Law Judge's findings).

2. Third Circuit

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004),⁴ a physician's failure to diagnose the presence of coal workers' pneumoconiosis had an adverse effect on his or her ability to assess whether a miner's death was due to the disease. The Administrative Law Judge found the evidence established the presence of pneumoconiosis. Dr. Spagnolo concluded the disease was not present and, even if the miner suffered from pneumoconiosis, it would not have hastened his death. The court rejected the opinion:

Common sense suggests that it is usually exceedingly difficult for a doctor to properly assess the contribution, if any, of pneumoconiosis to a miner's death if he/she does not believe it was present. The ALJ did not explain why Dr. Spagnolo's opinion was entitled to such controlling weight despite Dr. Spagnolo's conclusion that Soubik did not have the disease that both parties agreed was present.

3. Fourth Circuit

In *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002), the Administrative Law Judge erroneously accorded greater weight to the opinions of Drs. Castle and Dahhan, who found the miner's disability was not caused by coal workers' pneumoconiosis, because the physicians concluded

⁴ While the case was pending on appeal, the court noted that the widow died and the executor of her estate, John Soubik, was substituted as the appellant.

that the miner did not suffer from the disease contrary to the Administrative Law Judge's findings. Citing to *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995) and *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994), the court stated the following:

[A]n ALJ who has found (or has assumed *arguendo*) that a claimant suffers from pneumoconiosis and has total respiratory disability may not credit a medical opinion that the former did not cause the latter unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the questions of disability causation does not rest upon her disagreement with the ALJ's finding as to either or both of the predicates in the causal chain.

The fact that Drs. Dahhan and Castle stated that their opinions would not change even if the miner suffered from pneumoconiosis did not alter the court's position that the opinions could carry little weight pursuant to its holding in *Toler*:

Both Dr. Dahhan and Dr. Castle opined that Scott did not have legal or medical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal dust exposure. Thus, their opinions are in direct contradiction to the ALJ's finding that Scott suffers from pneumoconiosis arising out of his coal mine employment, bringing our requirements in *Toler* into play. Under *Toler*, the ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at most.

Indeed, the court found the opinions of Drs. Dahhan and Castle could not outweigh a contrary "poorly documented" opinion linking the miner's disability to his pneumoconiosis, because the contrary opinion was based on a finding of coal workers' pneumoconiosis consistent with the Administrative Law Judge's findings. See also *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995) (the court carefully circumscribed the *Toler* holding to require the fact-finder to distinguish between clinical and legal pneumoconiosis).

4. Seventh Circuit

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), the Administrative Law Judge properly discounted Dr. Tuteur's opinion that pneumoconiosis did not contribute to the miner's total disability because the opinion was based on a finding that the miner did not suffer

from the disease, contrary to the Administrative Law Judge's findings which were supported by substantial evidence.

F. Silent opinion

A physician's report, which is silent as to a particular issue, is not probative of that issue. However, under some circumstances, the report should not be discredited if the physician has provided documented and reasoned opinions relevant to the resolution of other entitlement issues in the claim. See *Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994) (an Administrative Law Judge "need not . . . find that a medical opinion is either wholly reliable or wholly unreliable"; rather, the opinion may be divided into the relevant issues of entitlement to determine whether it is reasoned and documented with regard to any particular issue).

G. Inconsistent reports

A report may be given little weight where it is internally inconsistent and inadequately reasoned. *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986).

For example, in *J.L.S. v. Eastern Associated Coal Co.*, BRB No. 08-0146 BLA (Oct. 24, 2008) (unpub.), the Administrative Law Judge properly concluded the evidence of record did not demonstrate the presence of a totally disabling respiratory impairment. Notably, little probative value was accorded to Dr. Rasmussen's finding of total disability on grounds that the physician failed to adequately explain his finding in light of the non-qualifying blood gas testing underlying his report. On the other hand, the Board upheld the Administrative Law Judge's conclusion that Dr. Zaldivar's finding of no total disability was reasoned and documented because "integrates all aspects of the medical and work requirement evidence," including the non-qualifying ventilatory and blood gas testing of record.

Further, it is proper to accord little probative value to a physician's opinion, which is inconsistent with his or her earlier report or testimony. *Hopton v. U.S. Steel Corp.*, 7 B.L.R. 1-12 (1984) (a failure to explain inconsistencies between two reports, which were eight months apart, rendered the physician's conclusions of little probative value); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 B.L.R. 1-799 (1984) (physician's report discredited where he found total disability in an earlier report and then, without explanation, found no total disability in a report issued five years later). See also *Brazzale v. Director, OWCP*, 803 F.2d 934 (8th Cir. 1986) (a physician's opinion may be found unreasoned given inconsistencies in the physician's testimony and other conflicting opinions of record).

H. Better supported by objective medical data

Although a report cannot be discredited simply because a physician did not consider all medical data of record, it is proper to accord greater weight to an opinion that is better supported by the objective medical data of record, *i.e.*, x-ray, blood gas, and ventilatory studies. *Minnich v. Pagnotti Enterprises, Inc.*, 9 B.L.R. 1-89, 1-90 n. 1 (1986); *Wetzel v. Director, OWCP*, 8 B.L.R. 1-139 (1985).

I. A physician's views regarding the nature of pneumoconiosis are important

In determining whether an opinion is sufficiently reasoned, the Administrative Law Judge also may consider the views held by the physician regarding the nature of pneumoconiosis, *i.e.* the disease is irreversible, progressive, and may be latent. Here, the Administrative Law Judge seeks to determine whether the physician relies on views that are consistent with (1) the plain language of the regulations, (2) the Department's position in the preamble to the amended regulations, and/or (3) the medical literature cited by the physician.

For example, in *Westmoreland Coal Co. v. Amick*, 289 Fed. Appx. 638 (4th Cir. Aug. 18, 2008) (unpub.), the court upheld the Administrative Law Judge's award of benefits based on a finding that the miner was totally disabled due to coal dust-induced and smoking-induced chronic obstructive pulmonary disease. Under the facts of the case, the miner had a 33-year coal mine employment history as well as a history of smoking one pack of cigarettes per day from 1941 until 1988. A dispute arose among the medical experts regarding whether the miner's chronic obstructive pulmonary disease stemmed solely from his smoking history, or whether it was due both to smoking and coal dust exposure. In affirming the Administrative Law Judge's weighing of the medical opinions, the court concluded it was proper for the Administrative Law Judge to accord greater weight to physicians who recognized and discussed the latent and progressive nature of pneumoconiosis.

The court held, while the regulations do not require that a physician discuss the latent and progressive nature of pneumoconiosis:

. . . considering that both the black lung regulations as well as numerous, long-standing decisions of the courts of appeals recognize the progressivity of pneumoconiosis, the ALJ was not precluded from considering as more persuasive the opinions of

those doctors who took that characteristic of pneumoconiosis into account. This is especially true in this case, given that the worsening of (the miner's) symptoms did not occur until eight years after he retired from his coal mining employment.

In resolving conflicting medical literature cited by the medical experts, the Administrative Law Judge properly noted "the Department of Labor already reviewed the medical and scientific literature before promulgating its revised regulations." As a result, the court concluded:

The ALJ's decision to credit Drs. Cohen and Koenig for their thorough discussion of the medical literature was therefore valid, in that it was, as the ALJ and BRB made clear, more consistent with the Department of Labor's findings that pneumoconiosis is latent and progressive and that an obstructive impairment may be 'legal pneumoconiosis.'

In line with this reasoning, the court held the Administrative Law Judge properly discredited the opinions of two of Employer's physicians, who concluded that the miner's impairment could not have been caused by coal dust exposure because the miner stopped working in 1983, and his condition began to deteriorate in 1991.

Also, in *Westmoreland Coal Co. v. Director, OWCP [Cochran]*, 718 F.3d 319 (4th Cir. 2013) (Chief Judge Traxler, dissenting), the majority of a three-member panel upheld the Administrative Law Judge's award of benefits. With regard to the Administrative Law Judge's assessment of opinions by Employer's medical experts, Drs. Zaldivar and Hippensteel, *Westmoreland* argued the Administrative Law Judge improperly utilized, and incorrectly characterized, the preamble to accord less weight to their opinions:

Westmoreland argues that the ALJ misinterpreted the Preamble to mean that smoke-induced and coal mine dust-induced respiratory impairments always are indistinguishable. According to *Westmoreland*, Dr. Zaldivar and Dr. Hippensteel relied on advancements in science and medicine since the implementation of the Preamble that purportedly facilitate the differentiation of coal mine dust-induced and smoke-induced emphysema, which the ALJ supposedly ignored because of how he interpreted the Preamble. In so arguing, *Westmoreland* overstates the ALJ's reliance on the Preamble.

Instead, the ALJ did not state that he would not consider Dr. Zaldivar's and Dr. Hippensteel's opinions, nor did he suggest

that he was obligated to accept the scientific studies in the Preamble over any other evidence. Rather, the ALJ explained that he chose to give Dr. Rasmussen's opinion more weight in part because it aligned with the scientific findings in the Preamble. And neither Dr. Zaldivar nor Dr. Hippensteel testified as to the scientific innovations that archaized or invalidated the science underlying the Preamble. In fact, only Dr. Zaldivar cited literature that post-dates the Preamble—none of which appears to even discuss the effects of coal mine dust exposure on the lungs.

The court also noted the Administrative Law Judge provided additional rationale for according less weight to the opinions of Drs. Zaldivar and Hippensteel, such as their focus on whether the miner suffered from *clinical* pneumoconiosis without sufficiently addressing the presence or absence of *legal* pneumoconiosis.

The Administrative Law Judge may discredit the opinion of a physician whose medical assumptions are contrary to, or in conflict with, the spirit and purposes of the Act. *Wetherill v. Green Construction Co.*, 5 B.L.R. 1-248, 1-252 (1982). Caution must be used in determining whether an opinion is "hostile-to-the-Act," particularly if the physician couches the opinion in language that does not rule out the possibility of alternatives. For example, a physician who states that simple pneumoconiosis cannot be totally disabling has expressed an opinion that is "hostile-to-the-Act." On the other hand, a physician who states it is "highly unusual" or "unlikely" that simple pneumoconiosis can be totally disabling has not expressed an opinion that is "hostile-to-the-Act." This is because his or her opinion does not foreclose the possibility that the disease can be totally disabling. Some cases involving these concepts are:

1. Coal mine employment preserves lung function

In *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 902 (7th Cir. 2005), it was proper to accord less weight to a medical opinion "influenced by the physician's 'subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions.'" In particular, the court held Dr. Shelby's view that coal mine employment had "preserved" the miner's lung function, and had a "positive effect" on his health, was contrary to the provisions at 20 C.F.R. § 718.201(c) that pneumoconiosis can be latent and progressive.

2. Simple pneumoconiosis cannot be totally disabling

Searls v. Southern Ohio Coal Co., 11 B.L.R. 1-161 (1988); *Butela v. U.S. Steel Corp.*, 8 B.L.R. 1-48 (1985). See also *Thorn v. Itmann Coal Co.*, 3 F.3d 713 (4th Cir. 1995) (the physician stated "simple pneumoconiosis" does not cause total disability "as a rule" was hostile-to-the-Act); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106 (3rd Cir. 1989); *Adams v. Peabody Coal Co.*, 816 F.2d 1116 (6th Cir. 1987); *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987); *Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426 (10th Cir. 1984).

However, in *Chester v. Hi-Top Coal Co.*, BRB No. 00-1000 BLA (July 31, 2001) (unpub.), it was error for the Administrative Law Judge to discredit a physician's opinion as "hostile-to-the-Act" where the physician stated it "would be highly unusual for simple coal workers' pneumoconiosis of major category 1 to cause a measurable ventilatory impairment." In so holding, the Board noted the physician "did not foreclose all possibility that simple pneumoconiosis can be totally disabling."

3. No pneumoconiosis based solely on negative x-ray

A physician stating s/he would not diagnose pneumoconiosis in the absence of a positive x-ray interpretation is hostile-to-the-Act. *Black Diamond Coal Co. v. BRB [Raines]*, 758 F.2d 1532 (11th Cir. 1985). See also *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992 (7th Cir. 2005) (Administrative Law Judge's finding of legal coal workers' pneumoconiosis based on medical opinion evidence upheld despite preponderantly negative chest x-rays of record).

In *Harman Mining Co. v. Director, OWCP (Looney)*, 678 F.3d 305 (4th Cir. 2012), the Administrative Law Judge's denial of Employer's petition for modification, and the award of benefits in the miner's claim based on her finding of totally disabling legal pneumoconiosis, were affirmed. Notably, the miner demonstrated 17 years of coal mine employment, and a history of smoking cigarettes "for several decades." The Administrative Law Judge properly determined Dr. Sargent's opinion ("pneumoconiosis cannot cause disability in the absence of a positive x-ray") was contrary to the plain language of the regulations at 20 C.F.R. § 718.202(b) ("No claim for benefits shall be denied solely on the basis of a negative chest x-ray").

Dr. Fino's opinion was less probative for similar reasons, and the court stated:

Because the x-ray, CT-scan, and pathological evidence "showed clinically insignificant coal dust retention . . . , Dr. Fino concluded that coal mine dust was not a clinically significant factor in [the miner's] obstruction." The court held that the Administrative Law Judge properly accorded less weight to Dr. Fino's opinion on grounds that it was premised on views contrary to the plain language of the regulations (distinguishing between clinical and legal pneumoconiosis at 20 C.F.R. § 718.201(a)(1)-(2)) and providing that "[n]o claim for benefits shall be denied solely on the basis of a negative chest x-ray" at 20 C.F.R. § 718.202(b)). Moreover, the court held it was proper to find Dr. Fino's opinion was premised on a view contrary to the preamble that "coal dust can induce obstructive pulmonary disease independent of clinically significant pneumoconiosis" at 65 Fed. Reg. 79938-79940 (Dec. 20, 2000).

A similar holding was issued by the Third Circuit in *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248 (3rd Cir. 2011), *aff'g. Obush v. Helen Mining Co.*, 24 B.L.R. 1-117 (2009). Here, the court found it proper to accord less weight to the opinion of Dr. Renn, who concluded the miner did not suffer from legal pneumoconiosis, in part, because there was no x-ray evidence of the disease. The Administrative Law Judge found Dr. Renn's opinion was inconsistent with the plain language of the regulations at § 718.202(a)(4), which allows for a finding of pneumoconiosis "notwithstanding a negative X-ray," and it was inconsistent with the Department's position in the preamble. The court noted, "The ALJ's reference to the preamble to the regulations, 65 Fed. Reg. 79941 (Dec. 20, 2000), unquestionably supports the reasonableness of his decision to assign less weight to Dr. Renn's opinion."

In the underlying *Obush* decision, the Board concluded the Administrative Law Judge "permissibly evaluated (the physician's) opinion in conjunction with the Department's discussion of prevailing medical science in the preamble to the revised regulations." Notably, the Board stated, "The preamble sets forth how the Department of Labor has chosen to resolve questions of scientific fact." Thus, it concluded, "A determination of whether a medical opinion is supported by accepted scientific evidence, as determined by the Department of Labor, is a valid criterion in deciding whether to credit the opinion." In this case, the Administrative Law Judge "correctly noted that the Department of Labor, in the preamble to the revised regulations, recognizes that coal mine dust exposure can be

associated with significant deficits in lung function in the absence of clinical pneumoconiosis.”

See also *A&E Coal Co. v. Director, OWCP [Adams]*, 694 F.3d 39 (6th Cir. Sept. 11, 2012); *Cumberland River Coal Co. v. Director, OWCP [Banks]*, 690 F.3d 477 (6th Cir. 2012) (Dr. Jarboe maintained the miner did not suffer from coal dust-induced emphysema because there was not enough coal dust retention shown on the chest x-rays; the Administrative Law Judge properly concluded the regulations provide legal pneumoconiosis may exist even in the absence of clinical pneumoconiosis, *i.e.* negative x-rays and CT scans).

4. Pneumoconiosis does not cause, or seldom causes, obstructive impairments

a. Generally “hostile-to-the-Act”

A physician who states coal dust exposure “never” causes an obstructive lung disease is “hostile-to-the-Act.” *Harman Mining Co. v. Director, OWCP (Looney)*, 678 F.3d 305 (4th Cir. 2012) (Dr. Fino’s opinion is less probative because it is premised on a view that legal pneumoconiosis “cannot” cause obstructive lung disease; “[c]ourts have long recognized what the 2000 regulations codified—that legal pneumoconiosis includes obstructive lung disease); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995) (“Chronic obstructive lung disease . . . is encompassed within the definition of pneumoconiosis for purposes of entitlement to Black Lung benefits”; medical experts “failed to give legitimate reasons for ruling out dust exposure in coal mine employment as a cause or aggravation of that disease”). *But see Stiltner v. Island Creek Coal Co.*, 86 F.3d 337 (4th Cir. 1996) (pre-amendment decision).

The amended regulations at 20 C.F.R. § 718.201 define pneumoconiosis as including, but not limited to, “any chronic restrictive or obstructive pulmonary disease.” 20 C.F.R. § 718.201(a)(2). And, the courts have upheld the amended regulations on this point. In an early circuit court opinion applying the amended regulations, *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the Seventh Circuit affirmed the Administrative Law Judge’s determination that Dr. Fino’s opinion (“there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes obstructive lung disease”) was entitled to little weight. As noted by the court:

During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions are not in accord with the prevailing view of the

medical community or the substantial weight of the medical and scientific literature."

See also *Blakley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995) (pre-amendment claim involving obstruction).

b. Not "hostile-to-the-Act," but may be less probative

In some claims, medical experts may not assert that coal dust induced lung disease can *never* produce an obstruction; rather, they assert it is "rare" for it to do so. The Administrative Law Judge may accord less weight to such an opinion because it is based on "generalities" as opposed to the specific medical data in a particular claim.

For example, in *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723 (7th Cir. 2008), the court affirmed the Administrative Law Judge's award of benefits based on a finding that the miner suffered from totally disabling chronic obstructive pulmonary disease stemming from 13 years of coal mine employment. The court noted:

What complicates this case is that (the miner) was also a smoker. He started smoking cigarettes at age 18 or 19, averaging one to one-half pack per day at varying times. He quit at age 54, after about 35 years of smoking.

The record further revealed, by 2005, the miner was totally dependent on supplemental oxygen, and "was taking three nebulizer treatments a day."

While noting that the regulations recognize the existence of "legal" pneumoconiosis, the court emphasized the miner carried the burden of demonstrating "that his COPD was caused, at least in part, by his work in the mines, and not simply his smoking habit." In this vein, the court cited to medical opinions in the record supporting a finding that coal dust contributed to the miner's COPD, but it also noted the following:

. . . Dr. Tuteur examined (the miner) . . . ; he diagnosed severe COPD solely due to smoking. He concluded that coal dust exposure did not cause or contribute to (the miner's disease), noting that miners with no smoking history rarely have COPD, while smokers have a one in five chance of developing a severe obstruction. Dr. Renn reviewed the medical records and issued a report in 2004 where he diagnosed COPD due solely to smoking.

The Administrative Law Judge accorded little weight to the opinions of Drs. Tuteur and Renn, and the court agreed:

First, the essence of (Dr. Tuteur's) opinion was a three sentence comment that presented a personal view that (the miner's) condition had to be caused by smoking because miners rarely have clinically significant obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust. However, the Department of Labor reviewed the medical literature on this issue and found that there is consensus among scientists and researchers that coal dust-induced COPD is clinically significant. This medical authority indicates that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners. 65 Fed. Reg. 79,938. Second, Dr. Tuteur did not rely on information particular to (the miner) to conclude that smoking was the only cause of his obstruction. Third, he did not cite a single article in the medical literature to support his propositions.

The court then rejected Employer's argument that Dr. Tuteur merely states the development of coal dust induced COPD is rare in miners:

. . . the Department of Labor report does not indicate that this causality is merely rare. And even if the causation is rare, Dr. Tuteur does not explain why (the miner) could not be one of these 'rare' cases. This flaw is endemic to the entire opinion, because Dr. Tuteur did not appear to analyze any data or observations specific to (the miner).

On the other hand, the court approved of the Administrative Law Judge's crediting of Dr. Cohen's report, which supported the miner's entitlement to benefits:

First, it was based on objective data and a substantial body of peer-reviewed medical literature that confirms the causal link between coal dust and COPD. Second, he reviewed studies that were even more recent than the aforementioned Department of Labor study. Third, he linked these studies with (the miner's) symptoms, physical examination findings, pulmonary function studies, and arterial blood gas studies. Finally, he explained that (the miner's) pulmonary function studies showed 'minimal reversibility after administration of bronchodilator' and that he had an 'abnormal diffusion capacity,' all of which is consistent

with a respiratory condition related to coal dust exposure.

The Seventh Circuit issued a similar holding in *RAG American Coal Co. v. Director, OWCP [Buchanan]*, 576 F.3d 418 (7th Cir. 2009). Here, the Administrative Law Judge awarded benefits in the miner's second claim under 20 C.F.R. § 725.309 based on a finding of total disability due to legal coal workers' pneumoconiosis, *i.e.* obstructive lung disease, emphysema, and chronic bronchitis stemming, in part, from the miner's coal dust exposure. The court affirmed the Administrative Law Judge's disagreement with the premises of Drs. Fino, Tuteur, and Renn. The court noted these physicians:

. . . relied on medical studies and literature which indicated that pneumoconiosis seldom arose in an obstructive disease and that in miners who were long-term smokers, any obstructive disease resulted from only tobacco smoke, not coal dust exposure. The ALJ found that this view had been rejected by this court as contrary to the prevailing view of the medical community and substantial weight of the medical and scientific literature . . .

As a result, the court affirmed the award of benefits in the miner's second claim based on the Administrative Law Judge's finding that the miner's respiratory condition had significantly worsened since denial of the first claim, and he was now totally disabled due to coal workers' pneumoconiosis.

5. Pneumoconiosis "not expected" to cause pulmonary impairment

In *Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1997), a physician's opinion was not "hostile-to-the-Act," where the physician concluded that simple pneumoconiosis would "not be expected" to cause a pulmonary impairment. In so holding, the court concluded the physician's opinion was based upon the specific facts of the case unlike the opinion at issue in *Thorn v. Itmann Coal Co.*, 3 F.3d 713 (4th Cir. 1995), where the doctor stated "simple pneumoconiosis" does not cause total disability "as a rule."

6. Pneumoconiosis does not progress after exposure to dust ceases

In *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628 (6th Cir. 2009), the Administrative Law Judge's weighing of the medical evidence was affirmed. With regard to reports by Employer's experts, Drs. Westerfield and Broudy, the Administrative Law Judge found the reports were

inadequately reasoned. In particular, it was determined Dr. Westerfield's opinion was based on views that were hostile-to-the-Act, where he concluded the miner's respiratory impairment did not arise from coal dust exposure because the impairment "arose after (Claimant) stopped working as a coal miner." The court agreed with the Administrative Law Judge that this premise is "clearly contrary to the regulations recognizing that pneumoconiosis is 'a latent and progressive disease which may first become detectable only after the cessation of coal dust exposure.'"

Similarly, in *Westmoreland Coal Co. v. Amick*, 289 Fed. Appx. 638 (4th Cir. Aug. 18, 2008) (unpub.), the Administrative Law Judge properly awarded benefits based on a finding that the miner was totally disabled due to coal dust-induced and smoking-induced chronic obstructive pulmonary disease. Under the facts of the case, the miner had a 33-year coal mine employment history as well as a history of smoking one pack of cigarettes per day from 1941 until 1988. A dispute arose among the medical experts regarding whether the miner's chronic obstructive pulmonary disease stemmed solely from his smoking history, or whether it was due both to smoking and coal dust exposures.

In resolving conflicting medical literature cited by the medical experts, the Administrative Law Judge properly noted "the Department of Labor already reviewed the medical and scientific literature before promulgating its revised regulations." As a result, the Administrative Law Judge properly discredited the opinions of two of Employer's physicians who concluded the miner's impairment could not have been caused by coal dust exposure because the miner stopped working in 1983, and his condition began to deteriorate in 1991.

See also Cumberland River Coal Co. v. Director, OWCP [Banks], 690 F.3d 477 (6th Cir. 2012) (Dr. Jarboe cited the length of time that Claimant had stopped working in the mines as a factor against diagnosing coal dust-induced lung disease; the court agreed with the Administrative Law Judge that this constituted an "impermissible factor" to consider because the regulations provide coal dust-induced lung disease "may first become detectable only after the cessation of coal mine dust exposure" under 20 C.F.R. § 718.201(c)).

In *Blake v. Elm Grove Coal Co.*, BRB Nos. 04-0186 BLA and 04-0186 BLA-S (Dec. 28, 2004) (unpub.), *aff'd in part sub. nom.*, *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278 (4th Cir. 2007), the Administrative Law Judge may "discredit a medical opinion which is premised upon a view inconsistent with the regulations." In particular, the physician opined "only clinical pneumoconiosis is progressive," which the Board concluded was

"inconsistent with 20 C.F.R. § 718.201(c)." As a result, the medical opinion was not well-reasoned based on the following comments to the amended regulations:

[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period. Because the legal definition of pneumoconiosis includes impairments that arise from coal mine employment, regardless of whether a miner shows X-ray evidence of pneumoconiosis, this evidence of deterioration of lung function among miners, including miners who did not smoke, is significant. 65 Fed. Reg. 79971 (Dec. 20, 2000).

Slip op. at 9.

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the Administrative Law Judge properly discredited a physician's report, which "referenced parts of the medical literature that deny that coal dust exposure can ever cause pneumoconiosis" and where the physician stressed the absence of chest x-ray evidence of the disease and erroneously relied on "the absence of pulmonary problems at the time of (the miner's) retirement from coal mining." The court held this was contrary to the regulations that pneumoconiosis may be latent and progressive. *See also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001).

7. Pneumoconiosis expected to cause "restriction"

In *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628 (6th Cir. 2009), the Administrative Law Judge's weighing of the medical evidence was affirmed. With regard to reports by Employer's experts, the court noted both Drs. Westerfield and Broudy "indicated their belief that pneumoconiosis generally causes a *restrictive* lung pattern, whereas (Claimant) exhibited chronic *obstructive* lung disease." (emphasis in original). The court concluded this was contrary to the regulations, which define pneumoconiosis to include "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." Consequently, the court held it was proper for the Administrative Law Judge to discredit the opinions of Drs. Westerfield and Broudy. Nonetheless, based on other evidence in the record, the court concluded "there was substantial evidence to support the ALJ's decision to deny (the miner's) claim for benefits because (the miner) failed to establish that he had pneumoconiosis."

See also *Cumberland River Coal Co. v. Director, OWCP [Banks]*, 690 F.3d 477 (6th Cir. 2012) (Dr. Jarboe cited to lack of restriction on the miner's testing to conclude coal dust-induced lung disease was not present; the court agreed with the Administrative Law Judge that, under the regulations, legal pneumoconiosis may constitute an obstructive impairment, without any restrictive component).

8. Average loss of FEV₁, not probative

In *Harman Mining Co. v. Director, OWCP (Looney)*, 678 F.3d 305 (4th Cir. 2012), the Administrative Law Judge properly accorded less weight to the subsequent opinion of Dr. Fino that smoking was the sole cause of the miner's lung disease because "Dr. Fino relied heavily on general statistics rather than particularized facts about" the miner. Dr. Fino relied on the "average loss of FEV₁ . . . in coal miners," and his view that the "amount of obstruction caused by coal dust inhalation is directly related to the amount of coal mine dust inhaled and retained within the lung tissue." See also *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001).

9. Use of the FEV₁/FVC ratio

By unpublished decision in *Taylor v. Manalapan Mining Co.*, BRB No. 10-0403 BLA (Mar. 11, 2011)(unpub.), the Board declined to affirm the Administrative Law Judge's weighing of certain medical opinion evidence because he did not consider whether such evidence was inconsistent with the Department's position as set forth in the preamble to the amended regulations. Specifically, the Administrative Law Judge accorded greater weight to the medical opinion of Dr. Rosenberg because "he persuasively links the objective medical data to the medical literature to show that Claimant's reduction in FEV₁/FVC ratio is more consistent with a smoking-induced impairment than with a coal-dust-induced impairment."

On appeal, the Director, OWCP argued that Dr. Rosenberg's opinion appeared to be inconsistent with statements in the regulatory preamble "indicating that a reduction in the FEV₁/FVC ratio is a marker for obstructive lung disease including that cause[d] by coal mine employment" at 65 Fed. Reg. 79943 (Dec. 20, 2000). The Board agreed and stated:

The administrative law judge's role encompasses a determination of whether medical opinions are supported by the medical literature they cite, and whether they are consistent with the DOL's comments to the regulations. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 227 F.3d 829, 22 BLR 2-230

(6th Cir. 2002). Significantly, the administrative law judge found that Dr. Rosenberg's medical opinion was supported by the 'medical literature' he referenced in his report. Therefore, while we are mindful that an administrative law judge may validly credit a medical opinion despite its flaws, . . . his role as fact-finder requires him to recognize and evaluate the strengths and weaknesses of a medical opinion in order to rationally assess credibility and assign probative weight. (citation omitted). Because the regulations recognize that coal dust can cause clinically significant obstructive lung disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV₁/FVC ratio, we conclude that the administrative law judge must reconsider Dr. Rosenberg's opinion. See *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 999, 23 BLR 2-302, 2-318 (7th Cir. 2005) (administrative law judge may discount a medical opinion that is influenced by the physician's 'subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions').

Slip op. at 7-8. See also *Miller v. McCoy Caney Coal Co.*, 2013 WL 1400890, BRB No. 12-0391 BLA (Mar. 28, 2013)(unpub.) (the Administrative Law Judge properly accorded less weight to the opinion of an expert who stated the miner's "severely reduced diffusing capacity," and FEV₁/FVC ratio, precludes a finding of coal-dust-related lung disease).

J. The preamble to the amended regulations

The Board and circuit courts of appeals have upheld use of the preamble in weighing medical opinion evidence.

1. Benefits Review Board

In *W.C. v. Aberry Coal Co.*, BRB No. 07-0974 BLA (Sept. 8, 2008) (unpub.), the Board affirmed an Administrative Law Judge's use of the preamble to the December 20, 2000 regulatory amendments in weighing the medical opinion evidence of record. Notably, in a footnote, the Board stated the following:

Employer . . . objects to the administrative law judge's citation to 65 Fed. Reg. 79937-79945, asserting that, in quoting from comment (f) to 65 Fed. Reg. 79938, she omitted comments (d) and (k) respecting claimant's affirmative burden of proof. Decision and Order at 20-21. However, employer does not assert

that the administrative law judge either misquoted or misinterpreted any specific regulation or comment. Rather, the administrative law judge related the Department of Labor's position that '[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis [t]he risk is additive with smoking,' and that medical literature 'supports the theory that dust-related emphysema and smoke-induced emphysema occur through similar mechanisms.' See Decision and Order at 20-21, citing 65 Fed. Reg. 79940, 79943 (Dec. 21, 2000). She further remarked that 'medical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is not clinically significant, are, therefore, contrary to the premises underlying the regulations.' (citation omitted). In discussing the regulatory framework of the Act in the context of evaluating the conflicting medical evidence of record, the administrative law judge's remarks were entirely proper.

Slip op. at 7, n. 8.

2. Third Circuit

In *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248 (3rd Cir. 2011), *aff'g. Obush v. Helen Mining Co.*, 24 B.L.R. 1-117 (2009), the circuit court affirmed the Administrative Law Judge's weighing of the medical opinion evidence. Notably, the court found it proper to accord less weight to the opinion of Dr. Renn, who concluded the miner did not suffer from legal pneumoconiosis, in part, because there was no x-ray evidence of the disease. The Administrative Law Judge found Dr. Renn's opinion was inconsistent with the plain language of the regulations at 20 C.F.R. § 718.202(a)(4), which allows for a finding of pneumoconiosis "notwithstanding a negative X-ray," and it was inconsistent with the Department's position in the preamble. The court noted, "The ALJ's reference to the preamble to the regulations, 65 Fed. Reg. 79941 (Dec. 20, 2000), unquestionably supports the reasonableness of his decision to assign less weight to Dr. Renn's opinion."

In the underlying *Obush* decision, the Board concluded the Administrative Law Judge "permissibly evaluated (the physician's) opinion in conjunction with the Department's discussion of prevailing medical science in the preamble to the revised regulations." Notably, the Board stated, "The preamble sets forth how the Department of Labor has chosen to resolve questions of scientific fact." Thus, it concluded, "A determination of whether

a medical opinion is supported by accepted scientific evidence, as determined by the Department of Labor, is a valid criterion in deciding whether to credit the opinion.” In this case, the Administrative Law Judge “correctly noted that the Department of Labor, in the preamble to the revised regulations, recognizes that coal mine dust exposure can be associated with significant deficits in lung function in the absence of clinical pneumoconiosis.”

3. Fourth Circuit

In *Harman Mining Co. v. Director, OWCP (Looney)*, 678 F.3d 305 (4th Cir. 2012), Employer challenged the Administrative Law Judge’s use of the preamble in weighing the various medical opinions, and the court stated the following:

Primarily, Harman objects to the ALJ’s and the Board’s invocation of the preamble in the 2000 regulations, spilling much ink in its briefs on why this reference violates the APA.

...

Harman contends that the ALJ violated the APA by finding Dr. Fino’s opinion to be less credible because his views conflicted with the Department’s position set forth in the preamble that legal pneumoconiosis in the form of obstructive pulmonary disease, can exist independently of clinical pneumoconiosis. We can find no support for this argument. Although the ALJ did not need to look to the preamble in assessing the credibility of Dr. Fino’s views, we conclude that the ALJ was entitled to do so and the Board did not err in affirming her opinion.

We note that the only other circuits to address the question have upheld the ALJ’s invocation of the same preamble. See *Helen Mining Co. v. Dir., O.W.C.P.*, 650 F.3d 248 (3d Cir. 2011) (noting that ‘the ALJ gave less weight’ to the opinions of an employer’s expert because it was ‘inconsistent with 20 C.F.R. § 718.202(a)(1-4) and with the preamble to the regulations’); *Consolidation Coal Co. v. Dir., O.W.C.P.*, 521 F.3d 723, 726 (7th Cir. 2008) (describing as ‘sensible’ the ALJ’s decision to give little weight to the opinion of employer’s expert because, in part, it conflicted with the preamble’s statements on the clinical significance of coal dust induced COPD).

Id. at 314-315.

The court dismissed Employer's arguments that use of the preamble in black lung adjudications violates the APA noting:

The ALJ cited the preamble not to imbue it with the force of law or to transform it into a legislative rule, but simply as a source of explanation as to the Department's rationale in amending the regulations. *Cf. Wy. Outdoor Council v. U.S. Forest Srvc.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ('Although the preamble does not control the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent'). Because the ALJ found Dr. Fino's views conflicted with that rationale, it was well within her discretion to find his opinion less persuasive. So too the Board did not err in concluding that the ALJ 'permissibly referenced the preamble in making her credibility determination about Dr. Fino's opinion.'

In so concluding, the court found the preamble constitutes a "public law document" such that, contrary to Employer's assertion, it does not need to be "made part of the administrative record" in order for a fact-finder to rely on it.

Finally, the court rejected Employer's argument that the Administrative Law Judge did not sufficiently explain her rationale for awarding benefits. The court noted "even Harman recognizes that the APA does not impose a 'duty of long-windedness' on the ALJ." To that end, the court stated the Administrative Law Judge "conscientiously (and repeatedly) weighed the expert opinions and resolved the conflicts in favor of Looney." The court further stated, "Even if we might have weighed the evidence at issue differently than the ALJ, on review, we defer to her evaluation of the appropriate weight to accord these conflicting medical opinions."

In *Westmoreland Coal Co. v. Amick*, 289 Fed. Appx. 638 (4th Cir. Aug. 18, 2008) (unpub.), in resolving conflicting medical literature cited by the medical experts, the Administrative Law Judge properly noted "the Department of Labor already reviewed the medical and scientific literature before promulgating its revised regulations." As a result, the court concluded:

The ALJ's decision to credit Drs. Cohen and Koenig for their thorough discussion of the medical literature was therefore valid, in that it was, as the ALJ and BRB made clear, more consistent with the Department of Labor's findings that pneumoconiosis is latent and progressive and that an obstructive impairment may be 'legal pneumoconiosis.'

4. Sixth Circuit

By unpublished decision in *Little David Coal Co. v. Director, OWCP [Collins]*, Case No. 11-3574 (6th Cir. July 23, 2012) (unpub.), the court upheld the Administrative Law Judge's use of the preamble in weighing conflicting medical opinions. To that end, the court noted:

It was the ALJ's duty to consider the conflicting evidence and assign it weight as he saw fit based on the record as a whole. That record included the DOL regulations, which, in turn, include the preamble. Thus, it was permissible for the ALJ to turn to the preamble for guidance when determining the relative weight to assign two conflicting medical opinions. Although not binding authority, the preamble, much like the 'rulings, interpretations and opinions' of an agency, 'constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' (citation omitted). The preamble is an instructive resource that explains the DOL's evaluation of conflicting medical and scientific literature on the same complex issues with which the ALJ in this case was confronted. In the fact of conflicting opinions from two credible sources, it was reasonable for the ALJ to give greater weight to the testimony of the medical expert whose opinion was supported by the prevailing view of the medical and scientific community as reflected in the regulatory preamble.

Slip op. at 7. The court further stated:

If Little David had proof, as it now claims, that the medical and scientific support for this premise (coal mine dust exposure can cause legal pneumoconiosis) is faulty, it had every incentive and opportunity to present such proof . . .

. . .

Whatever Little David's reason, strategic or otherwise, for not presenting such proof, we decline to characterize that decision as error on the part of the ALJ. We find that the ALJ's alleged 'failure to give notice' that it would consider the preamble in

weighing the evidence did not result in a denial of due process.

Slip op. at 6.

Similarly, in *A&E Coal Co. v. Director, OWCP [Adams]*, 694 F.3d 798 (6th Cir. 2012), the court affirmed the Administrative Law Judge's award of benefits based on a finding of total disability due to legal coal workers' pneumoconiosis. For a miner with 17 years of coal mine employment and a 25 pack year smoking history, the court held it is within the discretion of the Administrative Law Judge to consider the preamble to the regulations in weighing expert medical opinions:

[T]he preamble merely explains why the regulations were amended. It does not expand their reach. Although the ALJ was not required to look at the preamble to assess the doctors' credibility, we agree with the Fourth Circuit that the ALJ was entitled to do so and the Board did not err in affirming [his] opinion.

The court noted, "In the preamble to the amended regulations, the Department explained the medical and scientific premises for the changes" to the regulations. And, contrary to Employer's argument, the court held public documents, such as the regulations and preamble, do not need to be made part of the formal record in order for the ALJ to rely on them. The court stated the Administrative Procedures Act "imposes on the ALJ a duty to accurately and specifically to reference the evidence supporting his decision." In the end, the court affirmed the Administrative Law Judge's decision to accord Dr. Jarboe's opinion less weight on grounds that he cited to a lack of x-ray changes to conclude that legal pneumoconiosis was not present, and his view that the miner's respiratory condition was "too severe" to be caused by coal dust exposure.

5. Seventh Circuit

In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court concluded that the Administrative Law Judge properly gave less weight to the opinions of Dr. Fino ("there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant lung disease") because:

During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions 'are not in accord with the prevailing view of the medical community or the substantial weight of the medical and

scientific literature.'

K. Citation to medical literature

1. Generally

At times, a medical expert may cite to medical literature in support of his or her opinions. The Administrative Law Judge should review the medical literature in assessing the probative value of the expert opinions offered. For example, in *R.D.O. v. Peabody Coal Co.*, BRB No. 08-0402 BLA (Feb. 24, 2009)(unpub.), one of the issues addressed by the Board was proper consideration of medical literature. The Board stated:

With respect to the conflict among the medical opinions regarding the medical literature cited by Dr. James, the administrative law judge is permitted to review the medical literature admitted into the record for the purposes of determining whether Dr. James has accurately characterized the literature and whether the criticisms that employer's experts have raised have merit. (citation omitted). As the administrative law judge indicated, however, he cannot interpret the clinical data set forth in the medical literature.

Slip op. at 5-6. In a footnote, the Board stated, because the Administrative Law Judge's findings were vacated under 20 C.F.R. § 718.202(a)(4), the Board "need not reach claimant's argument that the administrative law judge was required to consider the extent to which the views of the medical literature conform to the position adopted by the Department of Labor when promulgating the revised definition of pneumoconiosis set forth in 20 C.F.R. § 718.201(a)."

As another example, in *J.P. v. Peabody Coal Co.*, BRB No. 08-0256 BLA (Dec. 23, 2008) (unpub.), the Board upheld the Administrative Law Judge's award of benefits based, in part, on an opinion by Dr. Cohen that was supported by "medical and scientific studies confirming a link between occupational exposure to coal dust and obstructive lung disease and emphysema." In this vein, the Board noted the Administrative Law Judge "explained how Dr. Cohen integrated the medical and scientific studies with claimant's medical record to conclude that coal dust exposure contributed to his obstructive lung disease." The Administrative Law Judge further noted that Dr. Cohen's diagnosis was supported by Claimant's objective test results, *i.e.* pulmonary function testing revealing severe obstructive lung disease and blood gas testing revealing abnormal gas exchange, and the premises for his diagnosis was consistent with the position of the

Department of Labor. Dr. Cohen attributed the miner's COPD to coal dust exposure based partly on the "fact that claimant's lung function continued to decline significantly after he stopped smoking."

On the other hand, the Board held the Administrative Law Judge properly accorded less weight to the opinions of Drs. Tuteur and Repsher because the premises of these physicians' opinions were contrary to prevailing medical opinion, and statistical data relied upon by Dr. Tuteur had "no basis in the medical literature" according to Dr. Cohen. The Board found the Administrative Law Judge "properly found that Dr. Tuteur's opinion, like that of Dr. Repsher, was based on views about the relationship between chronic obstructive pulmonary disease and coal dust exposure which 'are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.'"

The Fourth Circuit also recognized the importance of considering medical literature cited in a claim. By unpublished decision in *Bethenergy Mines, Inc. v. Director, OWCP [Rowan]*, Case No. 01-2148 (4th Cir. Sept. 4, 2002) (unpub.), it was proper for the Administrative Law Judge to accord greater weight to Dr. Rasmussen's opinion that the miner's centrilobular emphysema was caused, or aggravated, by coal dust exposure:

The ALJ explained that he found Dr. Rasmussen's testimony most persuasive because Dr. Rasmussen offered extensive research to support his opinion. Dr. Rasmussen cited seven articles from medical journals and six epidemiologic studies to support his position. No other doctor offered such extensive research.

In his opinion, ALJ Burke offered concrete reasons for discounting the opinions of other doctors who were critical of Dr. Rasmussen. He noted that Dr. Renn's testimony lacked the 'definitiveness to outweigh the better reasoned and better supported report of Dr. Rasmussen.' Dr. Kleinerman's disagreement with the medical experts Dr. Rasmussen cited, were 'in the most general of terms.' Dr. Kleinerman did not 'critique any particular study or any specific data behind a study.'

Furthermore, the ALJ found that Dr. Fino's criticisms of studies cited by Dr. Rasmussen are 'insufficient to dismiss the studies that support Dr. Rasmussen's opinion,' because while Dr. Fino disputed the 'underlying data' of studies offered by Dr. Rasmussen, he did not specify which studies of Dr. Ruckley

had evidentiary problems. Further, the ALJ stated that 'Dr. Fino doesn't contend that Dr. Rasmussen is incorrect in his interpretation of a study . . . supporting the relationship between coal dust exposure and centrilobular emphysema.' While Dr. Fino discussed a more recent study that purported to support his position, he did not 'identify the study by title or author.'

Slip op. at 8.

2. The Surgeon General's report

In *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1996), the court rejected Employer's reliance on the Surgeon General's report that coal workers' pneumoconiosis does not progress in the absence of continued exposure. While the Third Circuit noted the report states that "[s]imple (coal workers' pneumoconiosis) does not progress in the absence of further exposure," it concluded the report "addressed only the progressive nature of clinical pneumoconiosis." (emphasis in original). In this vein, the court stated the legal definition of pneumoconiosis is broader, and includes chronic pulmonary diseases such as chronic bronchitis. With regard to chronic bronchitis, the court found, "Significantly, the Surgeon General's Report discusses chronic bronchitis caused by coal dust exposure but at no point suggests that industrial chronic bronchitis cannot progress in the absence of continuing dust exposure." *See also Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997) (the Seventh Circuit accepted the Benefits Review Board's rejection of the Surgeon General's report as supportive of the proposition that coal workers' pneumoconiosis does not progress in the absence of continued exposure).

3. Checklist for consideration of medical literature

Central to adjudicating a claim for federal black lung benefits is determining whether the medical evidence demonstrates total disability (or death) due to coal workers' pneumoconiosis. One significant area of conflict among medical experts in these claims involves the diagnosis of "legal" coal workers' pneumoconiosis. More specifically, the issue of whether a miner's chronic obstructive pulmonary disease, emphysema, or other chronic lung disease is due to coal dust exposure, smoking, cardiac disease, or some combination of these and other factors is a common point of contention.

Increasingly, medical experts cite to medical literature, studies, or publications in their reports and testimony. Some Administrative Law Judges delve into this cited literature in the process of weighing the medical opinion evidence, whereas other Administrative Law Judges have declined to engage in such analysis.

While each claim must be decided within the four corners of its record, the Sixth Circuit's observation regarding an expert's reference to literature in a black lung claim in *Mountain Clay, Inc. v. Collins*, 256 Fed. Appx. 757 (6th Cir. 2007) (unpub.) merits attention:

. . . the doctors' analyses of the evidence were predicated on the studies they cited, these studies formed the prism through which the doctor's saw and understood the evidence.

Id. at 760.

Medical literature cited by an expert must be (1) relevant, and (2) reliable. The following are some criteria that an Administrative Law Judge may consider when assessing the value of medical literature:

✓ Quantity of literature is not dispositive. In *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102 (1998) (en banc), the Board stated:

We . . . reject employer's argument that Dr. Renn's opinion was entitled to greater weight because he cited to 22 articles in support of his conclusions, whereas Dr. Arnett was supplied with medical literature by claimant's counsel and did not perform his own in-depth literature search. The method of obtaining medical literature in support of a physician's opinion and the quantity of such literature does not necessarily impact upon the validity of a physician's conclusions.

Id. at 1-108, n. 7.

✓ Literature cited by experts from both sides must be treated consistently by the Administrative Law Judge. In *Westmoreland Coal Co. v. Russell*, 217 F.3d 843 (4th Cir. 2000) (unpub.), the court held, where the Administrative Law Judge relied on Dr. Rasmussen's citation to medical literature as a basis for crediting his opinion, then the judge "should, consistent with his

obligation to consider all relevant evidence, also consider employer's evidence tending to undercut the positions taken in the literature on which Dr. Rasmussen relied." Likewise, in *B.C. v. Little David Coal Co.*, 2008 WL 5101191, BRB No. 07-0696 BLA (Nov. 26, 2008), the Administrative Law Judge improperly assessed medical literature cited by opposing experts:

The administrative law judge's analysis . . . makes an impermissible assumption that Dr. Rasmussen's opinion is correct, and does not require Dr. Rasmussen to explain why he disagrees with Dr. Hippensteel's opinion. We find that the administrative law judge erred in finding Dr. Hippensteel's opinion to be unexplained in light of the medical literature cited by Dr. Rasmussen without first addressing whether Dr. Rasmussen adequately explained how the medical literature supported his opinion.

Slip op. at 5-6.

✓ Literature may be less probative if it is inconsistent with the Act and implementing regulations. In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the court noted the amended regulations were promulgated "using full notice-and-comment procedures" such that mine operators carry a "heavy burden" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to demonstrate that "the agency was not entitled to use its delegated authority to resolve the scientific question" at issue (in this case, the fact that pneumoconiosis may be latent and is progressive). As a result, Claimant was "fully entitled to rely on the rule without the need to prop it up by introducing yet more independent scientific evidence tending to show that (the rule) is scientifically valid." See also *Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278 (4th Cir. 2007) (the amended regulations are entitled to *Chevron* deference); *Nat'l. Mining Ass'n. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *Zeigler Coal Co. v. Director, OWCP [Griskell]*, 490 F.3d 609 (7th Cir. 2007) ("a claimant is not required to prove that he suffers from the specific varieties of pneumoconiosis the medical literature has found to be progressive and latent").

✓ Consideration of the preamble to the amended regulations is acceptable when considering the views upon which a medical expert's opinion is based. However, the Administrative Law Judge must base his or her decision on the particular facts of the claim, and the preamble cannot be used in isolation to establish (or defeat) entitlement. In *Harlan v. Peabody Coal Co.*, 2012 WL 893985, BRB No. 11-0417 BLA (Feb. 15, 2012)(unpub.), the Board held that "it was within the administrative law judge's discretion to consult the preamble as an authoritative statement of medical principles offered by DOL, and to consider the preamble to the revised regulations in assessing the credibility of certain medical experts' opinions in this case." Specifically, in *Martin v. Eastern Assoc. Coal Corp.*, 2011 WL 5508710, BRB No. 11-0184 BLA (Oct. 27, 2011)(unpub.), the Board held that it was proper for the Administrative Law Judge to accord less weight to the opinions of Drs. Crisalli and Zaldivar because these experts "relied on the absence of x-ray evidence of clinical pneumoconiosis to exclude coal dust exposure as a cause of claimant's COPD" and "this view is contrary to the scientific literature upon which DOL relied in amending the definition of legal pneumoconiosis." In this vein, the Board rejected Employer's argument that using the preamble in "measuring the credibility of a medical opinion" violates the Administrative Procedure Act.

It is improper for Administrative Law Judge to merely state, without discussion, that a physician's opinion is premised on views, which are consistent (or inconsistent) with those of the Department in the amended regulations or preamble. For example, in *M.F. Brenda Coal, Inc.*, 2008 WL 4824178, BRB No. 08-0153 BLA (Oct. 30, 2008) (unpub.), the Administrative Law Judge accorded less weight to the opinion of Dr. Repsher on grounds that medical studies cited by him were contrary to those relied upon by the Department in support of its amended regulations. The Board held this was error because the "administrative law judge did not explain how the studies relied upon by Dr. Repsher conflict with the studies cited by DOL, nor did he explain how Dr. Repsher's opinion conflicts with DOL's view that coal dust exposure may cause obstructive lung disease."

On the other hand, if the Administrative Law Judge adequately explains in his/her decision how medical literature cited by an expert is consistent (or inconsistent) with the

implementing regulations or the Department's position in the preamble, then the decision will be upheld. In *C.C. v. Westmoreland Coal Co.*, 2008 WL 2897055, BRB No. 07-0359 BLA (May 29, 2008) (unpub.), the Board rejected Employer's arguments that the Administrative Law Judge erred in "crediting Dr. Rasmussen's opinion as well-supported by the medical literature without resolving the conflicting opinions of Drs. Fino and Renn as to the import of that medical literature." The Board held:

Contrary to employer's arguments, the administrative law judge recognized that, in contrast to employer's experts, Dr. Rasmussen's opinion, and the medical literature upon which he relied were consistent with the medical literature cited by the Department of Labor when it adopted the revised regulations.

Slip op. at 7.

✓ The preamble to the amended regulations is based on the Department's consideration of literature dated prior to January 6, 2000, which is the date the comment period for the amended regulations closed. Therefore, the Administrative Law Judge may consider whether cited medical literature is dated before, or after, January 6, 2000 in assessing its probative value. In *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723 (7th Cir. 2008), the court affirmed the Administrative Law Judge's award of benefits for coal dust induced COPD in a miner with 13 years of coal mine employment and a 35 pack year smoking history. Notably, the court approved of the administrative law judge's crediting of Dr. Cohen's report, which supported the miner's entitlement to benefits:

First, it was based on objective data and a substantial body of peer-reviewed medical literature that confirms the causal link between coal dust and COPD. Second, he reviewed studies that were even more recent than the aforementioned Department of Labor study. Third, he linked these studies with (the miner's) symptoms, physical examination findings, pulmonary function studies, and arterial blood gas studies. Finally, he explained that (the miner's) pulmonary function studies showed 'minimal

reversibility after administration of bronchodilator' and that he had an 'abnormal diffusion capacity,' all of which is consistent with a respiratory condition related to coal dust exposure.

Id. at 726-27 (emphasis added). On the other hand, if a physician cites to more recent literature, it should be properly identified and admitted as evidence in the claim. *Bethenergy Mines, Inc. v. Director, OWCP [Rowan]*, 50 Fed. Appx. 578 (4th Cir. 2002) (unpub.) (“[w]hile Dr. Fino discussed a more recent study that purported to support his position, he did not ‘identify the study by title or author’”).

✓ If a physician relies on a particular piece of medical literature, but the medical literature has not been admitted as evidence, then the Administrative Law Judge will be unable to review the literature to determine whether the expert accurately characterized the literature. For example, in *L.R.P. v. Eastern Associated Coal Corp.*, 2008 WL 4592150, BRB No. 07-1012 BLA (Sept. 22, 2008) (unpub.), the judge noted that literature cited by Drs. Rasmussen, Zaldivar, and Crisalli was not of record such that he “permissibly considered the qualifications of the physicians, and their experience with regard to pneumoconiosis, in resolving the credibility to be accorded the scientific explanations they provided.”

With regard to an expert’s representation of the contents of medical literature, the judge must review relevant portions of the cited literature to ensure that the expert’s representation is accurate. For example, in *Consolidation Coal Co. v. Latusek*, 187 F.3d 628, 1999 WL 592051 (4th Cir. Aug. 6, 1999) (unpub.), the court rejected a judge’s decision to credit conclusions drawn by Drs. Rose and Jennings that a miner’s interstitial pulmonary fibrosis (IPF) was related to coal dust exposure. Although the court stated that the physicians’ impressive qualifications were important factors to consider in weighing the medical opinions, the underlying medical literature cited by Drs. Rose and Jennings provided “weak support” for their medical conclusions. The court noted that there was “no evidence in the record regarding the reputation of the authors of two of the three articles” relied upon by Drs. Rose and Jennings. Moreover, citing to the Supreme Court’s opinion in *Daubert*, the court stated that the fact that the cited articles were published “and subjected to some amount of peer review (did) not indicate that they were necessarily

reliable.” To the contrary, the court reiterated that “publication” is only one factor to consider in assessing the probative value of medical literature.

✓ The reliability of the cited literature should be considered (*i.e.* Is the literature peer-reviewed and published?) See *Bethenergy Mines, Inc. v. Director, OWCP [Rowan]*, 50 Fed. Appx. 578 (4th Cir. 2002) (unpub.); *Westmoreland Coal Co. v. Amick*, 2008 WL 3850836, Case No. 06-2172 (4th Cir. Aug. 18, 2008) (unpub.).

✓ Medical experts cannot rely solely on medical literature in rendering their opinions; rather, the experts must consider the specific data generated in a particular claim. In *Bolen v. Director, OWCP*, 151 F.3d 1028 (4th Cir. June 5, 1998) (unpub.), the court found that the judge properly discredited Dr. Rasmussen’s opinion that the miner suffered from “legal” pneumoconiosis on grounds that the report “was generic, citing only to articles discussing the potential connections between coal dust exposure and various respiratory problems, but not explaining how *Bolen’s* specific symptoms or test results supported the conclusion that coal dust exposure contributed to his specific respiratory ailments” (*italics in original*). See also *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723 (7th Cir. 2008); *J.P. v. Peabody Coal Co.*, 2008 WL 2907390, BRB No. 09-0256 BLA (Dec. 23, 2008) (unpub.); *C.S. v. Consolidation Coal Co.*, 2008 WL 2907234, BRB No. 07-0559 BLA (Mar. 27, 2008) (unpub.); *W.C. v. Aberry Coal Co.*, 2008 WL 4592140, BRB No. 07-0974 BLA (Sept. 8, 2008) (unpub.)

L. Reliance on non-qualifying or non-conforming testing

1. Generally

It is error to discredit a physician's finding regarding disability solely because of his or her reliance on non-qualifying testing *where the physician also relied on other factors such as a physical examination, work and medical histories, and symptoms of the miner.* *Baize v. Director, OWCP*, 6 B.L.R. 1-730 (1984); *Wike v. Bethlehem Mines Corp.*, 7 B.L.R. 1-593 (1984); *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Sabett v. Director, OWCP*, 7 B.L.R. 1-299 (1984).

2. Benefits Review Board

In *Arnoni v. Director, OWCP*, 6 B.L.R. 1-423 (1983), an Administrative Law Judge properly discredited a physician's opinion, which was based on an x-ray study later interpreted as negative for existence of the disease by a B-reader as well as a ventilatory study that was later found to be nonconforming. However, in *Winters v. Director, OWCP*, 6 B.L.R. 1-877 (1984), it was improper to discredit a physician's opinion merely because the underlying x-ray and pulmonary function studies were outweighed by other studies of record. See also *Fitch v. Director, OWCP*, 9 B.L.R. 1-45, 1-47 n. 2 (1986) (physician's report may not be discredited as undocumented and unreasoned only on grounds that it was based on an x-ray interpretation, which was outweighed by the other interpretations of record).

In *Church v. Eastern Assoc. Coal Corp.*, 21 B.L.R. 1-51 (1997), *rev'g in part and aff'g in part on recon.*, 20 B.L.R. 1-8 (1996), the Administrative Law Judge properly analyzed the medical evidence under 20 C.F.R. § 718.202(a)(4) in crediting physicians' opinions that were better supported by the objective testing. However, the Board cautioned "an administrative law judge may not discredit an opinion solely on the ground that it is based, in part, upon an x-ray reading which is at odds with the administrative law judge's finding with respect to the x-ray evidence of record." In so holding, the Board noted the physician also based his finding on observations gathered during the time he physically examined the miner.

3. Fourth Circuit

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the Administrative Law Judge concluded the miner did not establish pneumoconiosis through chest x-ray evidence under 20 C.F.R. § 718.202(a)(1), but he did find pneumoconiosis established via medical opinion evidence at 20 C.F.R. § 718.202(a)(4). The Fourth Circuit held the Administrative Law Judge erred in crediting a physician's finding of pneumoconiosis that was based *solely* on the positive interpretation of an x-ray study, where the Administrative Law Judge found the x-ray evidence of record did not establish pneumoconiosis. On the other hand, the Administrative Law Judge properly credited another physician's report, which was based upon the miner's medical history, a physical examination, and a pulmonary function test.

4. Sixth Circuit

In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the court held it "is clearly an inappropriate reason to reject a physician's opinion" based on non-qualifying pulmonary function study values "as the regulations explicitly provide (that) a doctor can make a reasoned medical judgment that a miner is totally disabled even 'where pulmonary function tests and/or blood-gas studies are medically contraindicated.' 20 C.F.R. § 718.204(c)(4)." See also the pre-amendments case of *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th Cir. 1997) ("[a]lthough DeVecchio and Garson relied on pulmonary tests exhibiting levels of impairment below that required to establish total disability under section 718.204(c)(1), these tests did demonstrate some impairment and can form a basis, along with other evidence, for a reasoned medical decision establishing total disability under Section 718.204(c)(1)").

In *Clonch v. Southern Ohio Coal Co.*, 2006 WL 3409880, Case No. 05-3133 (6th Cir. Nov. 27, 2006) (unpub.), a physician's opinion that the miner suffered from a moderately severe respiratory impairment under 20 C.F.R. § 718.204(b)(2)(iv) could not be discredited because the pulmonary function study underlying the opinion yielded non-qualifying results. The court reasoned the purpose of subsection (b)(2)(iv) (addressing medical opinions) is "clear," and is designed "to provide a more flexible approach than is otherwise allowed under paragraphs (b)(2)(i)-(iii)" (addressing blood gas and pulmonary function studies).

5. Seventh Circuit

In *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994), it was improper for the Administrative Law Judge to discredit a physician's finding of total disability where the miner's ventilatory and blood gas studies produced non-qualifying results, but the physician also relied on the miner's medical history and "significant physical symptoms and limitations."

M. Extensive medical data versus limited data

Greater weight may be accorded an opinion supported by more extensive documentation over an opinion supported by limited medical data. *Sabett v. Director, OWCP*, 7 B.L.R. 1-299 (1984). See also *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004) (proper to accord greater weight to a physician who "integrated all of the objective evidence").

1. Extensive data considered, report probative

In *Church v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-8 (1996), *aff'd in relevant part on recon.*, 21 B.L.R. 1-51 (1997), the Administrative Law Judge correctly assigned greater weight to a treating physician's opinion whose diagnosis was based on "extensive medical information gathered over a period of many years." As a result, the Board rejected Employer's argument that an Administrative Law Judge is compelled to discredit a physician's opinion that the miner suffered from pneumoconiosis where the physician based his findings, in part, upon x-ray evidence, which the Administrative Law Judge ultimately concluded did not support a finding of the disease. In so holding, the Board noted the physician also based his finding upon observations gathered during the time he physically examined Claimant.

2. Incomplete data considered, report less probative

An opinion may be given less weight where the physician did not have a complete picture of the miner's condition. *Stark v. Director, OWCP*, 9 B.L.R. 1-36 (1986). *See also Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.) (it is proper to give less weight to a physician's report based on a CT-scan not of record, where the physician did not have the benefit of reviewing the two most recent qualifying pulmonary function studies).

N. Physical limitations contained in medical report

In *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(en banc) and *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988), it is for the fact-finder to determine whether statements made in a physician's report constitute his or her assessment of physical limitations, which must be compared to the exertional requirements of the miner's last coal mine employment, or whether such statements are merely a narrative of the miner's assertions and are insufficient to demonstrate total disability. *See also Parsons v. Director, OWCP*, 6 B.L.R. 1-273, 1-276 and 1-277 (1983).

In *DeFelice v. Consolidation Coal Co.*, 5 B.L.R. 1-275 (1982), the Administrative Law Judge relied on a physician's discussion, which set forth a medical assessment of the claimant's limited abilities to walk, climb, lift, and carry. The Board held, on the basis of these exertional limits, it was proper for an Administrative Law Judge to conclude Claimant's physical

abilities were severely limited, and would effectively rule out all types of work. This case is distinguishable from Board decisions holding that a narrative of symptoms in the "Medical Assessment" section of the Department of Labor examination form is not the equivalent of a diagnosis of total disability. *Heaton v. Director, OWCP*, 6 B.L.R. 1-2222 (1984); *Parsons v. Director, OWCP*, 6 B.L.R. 1-212 (1983). Similarly, a physician's opinion that a miner's respiratory or pulmonary disease prevents him from engaging in gainful activity because of one block dyspnea does not establish total disability. *Parino v. Old Ben Coal Co.*, 6 B.L.R. 1-104 (1983).

The Third, Fourth, and Eleventh Circuit Courts hold an Administrative Law Judge cannot conclude, without specific evidence in support thereof, the notations in a physician's report of limitations as to walking, climbing, carrying, and lifting, constitute a mere recitation of a miner's subjective complaints as opposed to an assessment by the physician. *Scott v. Mason Coal Co.*, 60 F.3d 1138 (4th Cir. 1995); *Kowalchick v. Director, OWCP*, 893 F.2d 615, 623 (3rd Cir. 1990); *Jordan v. Benefits Review Bd.*, 876 F.2d 1455, 1460 (11th Cir. 1989).

O. Death certificates

A death certificate, in and of itself, is an unreliable report of the miner's condition, and it is error for an Administrative Law Judge to accept conclusions contained in a death certificate where the record provides no indication that the individual signing the death certificate (1) possessed any relevant qualifications, or (2) personal knowledge of the miner upon which to assess the cause of death. *Smith v. Camco Mining, Inc.*, 13 B.L.R. 1-17 (1989); *Addison v. Director, OWCP*, 11 B.L.R. 1-68 (1988). However, a physician's opinion expressed on a death certificate in addition to his testimony may be sufficient to establish the cause of the miner's death. *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113 (1988).

Similarly, in *Lango v. Director, OWCP*, 104 F.3d 573 (3d Cir. 1997), the Third Circuit adopted the Eighth Circuit's holding in *Risher v. Office of Workers' Compensation Programs*, 940 F.2d 327, 331 (8th Cir. 1991), stating "the mere fact that a death certificate refers to pneumoconiosis cannot be viewed as a reasoned medical finding, particularly if no autopsy has been performed." See also *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186 (4th Cir. 2000) (a death certificate stating pneumoconiosis contributed to the miner's death, without some further explanation, is insufficient); *Hill v. Peabody Coal Co.*, Case No. 03-3321 (6th Cir. Apr. 7, 2004) (unpub.) (a physician's conclusory statement on a death certificate, without further elaboration, is insufficient to meet Claimant's burden as to the cause of death).

P. Determinations by other agencies

A general disability determination by the Social Security Administration is not binding on the Department of Labor with regard to a claim filed under Part C; rather, the determination may be used as some evidence of disability, or rejected as irrelevant at the discretion of the fact-finder. The only exception to this rule is a final determination where the miner is found totally disabled under Section 223 of the Social Security Act, 42 U.S.C. § 423, as the result of coal workers' pneumoconiosis. 20 C.F.R. § 410.470; *Tackett v. Director, OWCP*, 7 B.L.R. 1-703 (1985); *Reightnouer v. Director, OWCP*, 2 B.L.R. 1-334 (1979).

Likewise, a state or other agency determination may be relevant, but is not binding on the Administrative Law Judge. *Schegan v. Waste Management & Processors, Inc.*, 18 B.L.R. 1-41 (1994); *Miles v. Central Appalachian Coal Co.*, 7 B.L.R. 1-744 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 B.L.R. 1-1157 (1984) (opinion by the West Virginia Occupational Pneumoconiosis Board of a "15% pulmonary functional impairment" is relevant to disability, but not binding).

Q. Weighing "other evidence" under 20 C.F.R. § 718.107

1. CT-scans

a. Should not be weighed under 20 C.F.R. § 718.202(a)(1) or 20 C.F.R. § 718.304(a)

CT-scan evidence should be weighed separately from the analog chest x-rays. *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991)(en banc).

CT-scan evidence is weighed with hospitalization and treatment records, "other evidence" as defined at 20 C.F.R. § 718.107, and medical opinion reports under 20 C.F.R. § 718.202(a)(4) or, in cases involving complicated pneumoconiosis, under 20 C.F.R. § 718.304(c). *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring).

b. Not *per se* more probative than chest x-ray evidence

In *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885 (7th Cir. 2002), the Seventh Circuit upheld the Administrative Law Judge's

award of benefits. In reaching this determination, the court rejected Employer's argument that, "[d]espite the fact that two qualified B-readers (including a board certified radiologist) determined that Stein's x-rays were positive, . . . Dr. Bruce's negative reading of Stein's CT scan (is) conclusive because it ostensibly is the most 'sophisticated and sensitive diagnostic test' available." Citing to comments underlying the amended regulations, the court noted the Department rejected the view that a CT-scan, by itself, "is sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis." 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000).

The Administrative Law Judge reasonably accorded less weight to the negative CT-scan interpretation by a physician without any radiological qualifications as compared to the positive chest x-ray interpretations by physicians who are B-readers, and one physician who is also a board-certified radiologist.

**2. Digital x-rays, not be weighed under
20 C.F.R. § 718.202(a)(1) or
20 C.F.R. § 718.304(a)**

In *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-273 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc), the Board affirmed its prior decision, and reiterated certain holdings. First, the Board held interpretations of digital x-rays must be considered under 20 C.F.R. § 718.107, and "an administrative law judge must consider whether the readings of the digital x-ray that a party seeks to admit are 'medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits' pursuant to Section 718.107(b)." The Board declined to modify this holding despite Claimant's argument that "the digital x-ray was recorded on film." The Board also rejected Employer's argument that "digital film technology is not in dispute" such that a fact-finder need not be required to determine its reliability on a case-by-case basis. The Board found Employer's argument unpersuasive:

. . . in light of the fact that the National Institute of Occupational Safety and Health has not approved the use of digital x-rays to diagnose pneumoconiosis, as quality standards applicable to this technology have not yet been developed by the International Labor Organization.

The Board reiterated these holdings in *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring). Here, the Board adopted the Director's position, and held digital x-ray interpretations are not

considered "chest x-ray" evidence under 20 C.F.R. §§ 718.101(b), 718.102, 718.202(a)(1), and Appendix A to Part 718 as they do not satisfy the quality standards at Appendix A. As a result, the Board held digital chest x-rays are "properly considered under 20 C.F.R. § 718.107, where the administrative law judge must determine, on a case-by-case basis, pursuant to 20 C.F.R. § 718.107(b), whether the proponent of the digital x-ray evidence has established that it is "medically acceptable and relevant to entitlement."

Therefore, digital x-rays are weighed with hospitalization and treatment records and medical opinion reports under 20 C.F.R. § 718.202(a)(4) or, in cases involving complicated pneumoconiosis, the digital x-rays are weighed under 20 C.F.R. § 718.304(c). It is incumbent on the parties to notify the Administrative Law Judge if a particular study is digital, as opposed to analog.

At the time of revision of this chapter of the *Benchmark*, new quality standards for conducting and interpreting digital x-rays were issued. Specifically, on September 13, 2012, the U.S. Department of Health and Human Services (HHS) issued a final rule amending 42 C.F.R. Part 37 titled, "Specifications for Medical Examinations of Underground Coal Miners." As noted by HHS in its summary:

The revised standards modify the requirements to permit the use of film-based radiography systems and add a parallel set of standards permitting use of digital radiography systems.

Currently, interpretations of analog chest x-rays are weighed under 20 C.F.R. §§ 718.202(a)(1) and 718.304(a), whereas digital x-ray interpretations are weighed as "other evidence" under 20 C.F.R. §§ 718.107, 718.202(a)(4), and 718.304(c). *Webber v. Peabody Coal Co*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring).

As the HHS correctly notes, the impact of its rulemaking is that "[t]he U.S. Department of Labor (DOL) will likely amend its Black Lung Benefits Act (BLBA) program regulations to correspond to this final rule." However, until the black lung regulations are amended, Administrative Law Judges may wish to consider continuing to weigh digital x-rays in accordance with the Board's guidance in *Webber* and *Harris*.

VII. Autopsy reports

Autopsy evidence generally is the most reliable evidence of the existence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985) (the Administrative Law Judge's deference to autopsy evidence over

x-ray evidence was reasonable because "autopsy evidence is the most reliable evidence of the existence of pneumoconiosis"). See also *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001); *Energy West Mining Co. v. Director, OWCP [Jones]*, Case No. 03-9575 (10th Cir. July 9, 2004) (unpub.) (harmless error not to weigh lifetime medical opinions as decision was based on more probative autopsy evidence). However, with regard to diagnosing complicated pneumoconiosis under 20 C.F.R. § 718.304, the Fourth Circuit has held that chest x-ray evidence is the most probative. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000). For further discussion of diagnosing simple or complicated pneumoconiosis using autopsy evidence, see Chapter 11.

As with weighing medical opinion evidence, the fact-finder should consider the qualifications of the physicians when weighing the autopsy evidence of record. For example, in *Livermore v. Amax Coal Co.*, 297 F.3d 668 (7th Cir. 2002), the Seventh Circuit upheld the Administrative Law Judge's finding that coal workers' pneumoconiosis did not hasten the miner's death based on autopsy evidence because "the ALJ reviewed all the opinions, qualifications of the experts, and resolved the conflicting reports in a thorough and logical manner."

A. Principles of weighing autopsy evidence

1. Performing the autopsy versus review of the slides

a. Greater weight to prosector's report, held proper

For many years, the Board held greater weight may be accorded the opinion of a physician who performs the autopsy (the prosector) over a pathologist who reviews the autopsy slides. *Similia v. Bethlehem Mines Corp.*, 7 B.L.R.1-535 (1984); *Cantrell v. U.S. Steel Corp.*, 6 B.L.R. 1-1003 (1984); *Gruller v. Bethenergy Mines, Inc.*, 16 B.L.R. 1-3 (1991) (a case involving complicated pneumoconiosis). Indeed, the Board held the prosector's report must be accorded significant probative value regarding the existence and degree of pneumoconiosis because s/he sees the entire respiratory system as well as other body systems. *Fetterman v. Director, OWCP*, 7 B.L.R. 1-688, 1-691 (1985).

Some circuit courts agreed with the Board's position. See *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871 (10th Cir. 1996) (it was proper for the Administrative Law Judge to accord greater weight to the opinion of an autopsy prosector over the opinions of reviewing pathologists); *U.S. Steel Corp. v. Oravetz*, 686 F.2d 197 (3rd Cir. 1982).

b. Greater weight to prosecutor's report, held improper

In recent years, however, some circuit courts reassessed this position. Now, they conclude that it is error to accord greater weight to a prosecutor's opinion over the opinions of a reviewing pathologist simply because the prosecutor examined the whole body at the time of death. Some examples are:

- Fourth Circuit

It is error to credit a prosecutor's opinion over those opinions of reviewing pathologists solely on the basis that the prosecutor examined the miner's whole body at the time of death. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186 (4th Cir. 2000). In so holding, the court cited to a decision by the Seventh Circuit in *Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 362-63 (7th Cir. 1992) ("[n]othing in the record suggests that access to the body enhances the accuracy of diagnoses based on autopsy evidence"; it was error to credit the prosecutor's report over the reports of reviewing physicians solely because the prosecutor had access to the whole body).

- Seventh Circuit

It is error to accord more weight to a prosecutor's opinion over the opinion of a reviewing pathologist. In *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001), the Administrative Law Judge accorded greater weight to the opinion of an autopsy prosecutor, who found anthracotic pigment with reactive fibrosis, and diagnosed the presence of pneumoconiosis, over the contrary opinions of reviewing pathologists. While the Seventh Circuit held autopsy evidence was the most probative evidence of the presence of pneumoconiosis, it disagreed with the Administrative Law Judge's weighing of such evidence and stated the following:

A scientific dispute must be resolved on scientific grounds, rather than by declaring whoever examines the cadaver dictates the outcome. (citation omitted). If there were a medical reason to believe that visual scrutiny of gross attributes is more reliable than microscopic examination of tissue

samples as a way to diagnose pneumoconiosis, then relying on the conclusions of the prosector would be sensible. But neither the ALJ nor the BRB made such a finding. The mine operator contends-and on this record we have no reason to doubt-that examining tissue samples under a microscope and testing them for silica, is the best way to diagnose black lung disease. What we have, therefore, is a conflict among physicians based on their analysis of tissue samples. Bockelman's visual examination of the whole lung played little or no role.

The court stated, "Bad science is bad science, even if offered by the first expert to express a view," and it is incumbent on the

Administrative Law Judge to use his or her expertise to evaluate technical evidence.

2. Opinion of autopsy prosector versus review of findings

It is reasonable to assign greater weight to the opinion of the physician who performs the autopsy over the opinions of others who review his or her findings without reviewing the slides. *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985); *Fetterman v. Director, OWCP*, 7 B.L.R. 1-688 (1985).

B. Quality standards

The quality standards for autopsy evidence at 20 C.F.R. § 718.106(a) require that the prosector's report contain a description of macroscopic (gross) findings as well as microscopic findings. Moreover, an autopsy report should be in compliance with the quality standards, unless there is good cause to believe that the autopsy report is not accurate or that the condition of the miner is being fraudulently represented. *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 B.L.R. 1-103, 1-108 (1979). See 20 C.F.R. § 718.106.

In *Consolidation Coal Co. v. Director, OWCP [Kramer]*, 305 F.3d 203 (3rd Cir. 2002),⁵ the court upheld the Administrative Law Judge's award of

⁵ As noted by the court, the parties stipulated in briefs before the Administrative Law Judge that the miner was last employed in the coal mines in West Virginia, which falls within the jurisdiction of the Fourth Circuit. However, Employer appealed in the Third Circuit based on Claimant's previous coal mine employment in Pennsylvania. The Third Circuit considered the appeal on the merits, but cited to Fourth Circuit, as well as its own, case law.

benefits based on a preponderance of the autopsy evidence. Employer maintained the Administrative Law Judge improperly considered an autopsy report, which did not contain a microscopic description of the lungs in violation of the quality standards at 20 C.F.R. § 718.106(a). Citing to the Board's decision in *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113, 1-114 and 1-115 (1988), the court concluded, "Although the regulations require that the report include a microscopic description of the lungs, they contain no express requirements in the form or nature thereof." The court observed the autopsy report "stated that the microscopic findings were 'consistent with', *i.e.*, confirmed, the gross autopsy findings, and incorporated by reference the detailed findings contained elsewhere in the report." As a result, the court concluded the autopsy report was in compliance with 20 C.F.R. § 718.106 of the regulations.

For a discussion of the definitions of "report of autopsy" and "rebuttal" of report of autopsy under the amended regulations at 20 C.F.R. Part 718, see Chapter 4.