

Chapter 10

Living Miners' Claims: Entitlement Under 20 C.F.R. Part 727

I. Applicability of 20 C.F.R. Part 727, generally¹

The regulations at 20 C.F.R. Part 727 are applicable in claims where (1) the miner establishes ten years or more coal mine employment, and (2) the claim is filed on or after January 1, 1974, and on or before March 31, 1980. 20 C.F.R. §§ 727.1 and 718.1. Also, a miner's claim, which is filed between July 1, 1973 and December 31, 1973 (also known as a Section 415 transition claim), and which is pending or denied on or before March 1, 1978, is subject to review under 20 C.F.R. Part 727. Indeed, the regulations provide, "A claim filed under section 415 of the Act which is reviewed under this part shall for all purposes be considered as if it was filed on January 1, 1974 under Part C of Title IV of the Act." 20 C.F.R. § 727.303(a) and (b).

If, however, a miner files a claim between January 1, 1974 and March 31, 1980, inclusive of these dates, but has less than ten years of coal mine employment, the claim must be adjudicated under 20 C.F.R. § 410.490. *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991); *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988). The Supreme Court decisions are the result of a long line of conflicting decisions among the circuit courts and the Board.

In *Sebben*, the Supreme Court, after determining the invocation provisions of 20 C.F.R. § 727.203 were more restrictive than the criteria at 20 C.F.R. § 410.490, concluded miners with fewer than ten years of coal mine employment are entitled to have their claims decided under 20 C.F.R. § 410.490, rather than 20 C.F.R. Part 410.

Following *Sebben*, a number of circuits held the Part 20 C.F.R. 727 rebuttal provisions were more restrictive than the 20 C.F.R. § 410.490 rebuttal provisions. As a result, a claim denied under 20 C.F.R. Part 727 must be considered under the less restrictive rebuttal provisions of 20 C.F.R. § 410.490(c). See *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990).

¹ See Chapter 3 for a discussion of various principles of weighing medical evidence.

The Supreme Court resolved the issue in *Pauley v. Bethenergy Mines*, 111 S.Ct. 2524 (1991), holding the rebuttal provisions of 20 C.F.R. Part 727 were not more restrictive than those of 20 C.F.R. § 410.490(c). Therefore, the logical result of *Pauley* is, once a claim has been denied under 20 C.F.R. Part 727, it need not be considered under 20 C.F.R. § 410.490. As previously noted, however, if 20 C.F.R. Part 727 is inapplicable because the miner has fewer than ten years of coal mine employment, then his or her claim must be adjudicated under 20 C.F.R. § 410.490.

II. The interim presumptions

A. Generally

A central feature of the regulations at 20 C.F.R. Part 727 are interim presumptions, which provide that a miner, with at least ten years of coal mine employment, may be entitled to the following rebuttable presumptions: (1) the miner is totally disabled due to pneumoconiosis; (2) the miner was totally disabled due to pneumoconiosis at the time of death; and (3) the miner's death was due to pneumoconiosis. 20 C.F.R. § 727.203(a).

The presumptions are "invoked" if any one of the following five requirements is satisfied: (1) chest x-ray evidence establishes the existence of pneumoconiosis; (2) ventilatory studies establish the presence of a chronic respiratory or pulmonary disease; (3) blood gas studies demonstrate the presence of an impairment in the transfer of oxygen; (4) well-reasoned, well-documented medical reports support a finding of a totally disabling respiratory impairment; or (5) lay testimony as to the miner's condition in the case of a deceased miner. 20 C.F.R. § 727.203(a)(1)-(5).

Satisfying the requirements of any one of the separate medical criteria is sufficient to invoke the presumptions. *Wise v. Peabody Coal Co.*, 3 B.L.R. 1-119 (1981). As a result, any error made by the Administrative Law Judge in the evaluation of a particular type of evidence under subsections (a)(1)-(5) is considered harmless, if the presumption is properly invoked under another subsection. *Bibb v. Clinchfield Coal Co.*, 7 B.L.R. 1-134 (1984); *Berczik v. U.S. Steel Corp.*, 6 B.L.R. 1-723 (1983); *Elkins v. Beth-Elkhorn Corp.*, 2 B.L.R. 1-683 (1979).

Claimant bears the burden of satisfying, by a *preponderance of the evidence*, at least one of the five medical criteria to invoke the presumption. *Mullins Coal Co. v. Director, OWCP*, 108 S.Ct. 427 (1987). Prior to *Mullins*, several circuits, including the Third, Fourth, and Seventh Circuits, held a single qualifying item of evidence under one of the subsections at (a)(1)-(5) was sufficient to invoke the presumption. In *Mullins*, however, the Supreme Court rejected the "single qualifying item of evidence" approach, and held

Claimant must establish, by a preponderance of the evidence, one of the medical criteria to invoke the interim presumption.

B. "Pneumoconiosis" defined

Pneumoconiosis is defined at 20 C.F.R. § 727.202 as the following:

[A] chronic disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis anthro-silicosis, massive pulmonary fibrosis, progressive massive fibrosis silicosis, or silicotuberculosis arising out of coal mine employment. For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by, dust exposure in coal mine employment.

20 C.F.R. § 727.202.

For a discussion of the distinction between "clinical" and "legal" pneumoconiosis, see Chapter 11.

On rebuttal, if the party opposing entitlement seeks to demonstrate pneumoconiosis is not present, it must establish the claimant does not have a chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or significantly aggravated by, dust exposure in coal mine employment. *Biggs v. Consolidation Coal Co.*, 8 B.L.R. 1-317 (1985); *Jones v. Kaiser Steel Corp.*, 8 B.L.R. 1-339 (1985). For example, in *Butela v. U.S. Steel Corp.*, 8 B.L.R. 1-48 (1985), the Board rejected Claimant's argument that his disability would be aggravated by his return to coal mine employment, making the potential aggravation a sufficient basis for compensation. The Board stated the miner's respiratory or pulmonary impairment must be actually aggravated coal mine dust exposure to the point of total disability in order to be entitled to benefits.

C. Invocation of the rebuttable presumption of total disability due to pneumoconiosis

Pursuant to 20 C.F.R. § 727.203(a)(1), a miner who engaged in coal mine employment for at least ten years is presumed totally disabled due to pneumoconiosis if a chest x-ray, biopsy, or autopsy establishes the existence of pneumoconiosis. If the existence of pneumoconiosis is conceded, the

interim presumptions under 20 C.F.R. § 727.203(a) are invoked as a matter of law. *Simpson v. Director, OWCP*, 6 B.L.R. 1-49 (1983).

For general principles of weighing x-ray evidence, see *Chapter 3*.

1. Chest x-ray evidence

a. Generally

To invoke the interim presumptions, an x-ray interpretation must meet the quality standards at 20 C.F.R. § 410.428 of the regulations. 20 C.F.R. § 727.206(a). Although the language of 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 holds this language is inconsistent with the purposes of the 1977 Reform Act. *Sgro v. Rochester & Pittsburgh Coal Co.*, 4 B.L.R. 1-370 (1981). Rather, the Board held this section should be interpreted to mean 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.

b. The "Tobias rule" and rereading chest x-rays

Section 413(b) of the Act prohibits the Director from rereading certain positive x-rays in claims filed before January 1, 1982. 30 U.S.C. § 923(b), implemented at 20 C.F.R. § 727.206(b)(1). In *Tobias v. Republic Steel Corp.*, 2 B.L.R. 1-1277 (1981), the Board set forth the threshold requirements of Section 413(b) of the Act, which are as follows: (1) there is other evidence of a pulmonary or respiratory impairment; (2) the x-ray was taken by a radiologist or qualified technician and it is of a sufficient quality to demonstrate the presence of pneumoconiosis; (3) the physician who first interpreted the x-ray is a board-certified radiologist; and (4) no evidence exists that the claim has been fraudulently represented. *Id.* at 1-1279. If these requirements are satisfied, then the Director must accept the initial interpretation of the x-ray, and cannot have the x-ray reread. *Id.* See also *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994). Section 413(b) also applies to positive x-rays obtained by the Social Security Administration. *Coburn v. Director, OWCP*, 7 B.L.R. 1-632 (1985). See also *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994) (the rereading prohibition was applicable to evidence submitted by Claimant on modification).

- No other evidence of impairment needed

There is no requirement that other evidence of a pulmonary or respiratory impairment exists at the time the Director seeks to reread the x-ray. Rather, other evidence need only exist at the time of the hearing. *Hyle v. Director, OWCP*, 8 B.L.R. 1-512 (1986). For a discussion of what constitutes "other evidence" to establish a pulmonary or respiratory impairment, see *Coburn v. Director, OWCP*, 7 B.L.R. 1-632 (1985), and *Bobbitt v. Director, OWCP*, 8 B.L.R. 1-380 (1985).

- No prohibition on re-reading study interpreted as negative

Section 413(b) does not prohibit the re-reading of an x-ray, which was originally interpreted as negative. *Rankin v. Keystone Coal Mining Corp.*, 8 B.L.R. 1-54 (1985). Section 413(b) also does not prohibit the Director from having the x-ray reread to determine the quality of the x-ray, *i.e.*, whether it is unreadable for pneumoconiosis.

- Initial interpretation must be made by board-certified radiologist

The physician who first interprets the x-ray must be a board-certified radiologist. If the record does not establish the qualifications of the physician who first interprets the x-ray, the rule does not apply, and the Director may have the x-ray study reread. *Vance v. Eastern Associated Coal Corp.*, 8 B.L.R. 1-68 (1985); *Pulliam v. Drummond Coal Co.*, 7 B.L.R. 1-846 (1985).

- The "Tobias" rule not apply to employer

Section 413(b) does not prohibit Employer from rereading an x-ray study, which was interpreted as positive by a board-certified radiologist. *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984). However, in *Tobias*, if Section 413(b) prohibits the Director from admitting an x-ray rereading, Employer cannot introduce the same x-ray rereading. *Tobias*, 2 B.L.R. at 1-1286.

2. An autopsy or biopsy

Autopsy and biopsy evidence may be used to invoke the interim presumption under 20 C.F.R. § 727.203(a)(1). Autopsy evidence is the most reliable method of ascertaining the existence of pneumoconiosis. *Kimick v. National Mines Corp.*, 2 B.L.R. 1-221 (1979). However, a physician's report or opinion, which is based on review of a death certificate and autopsy report of another physician who conducted the

autopsy, is not considered autopsy evidence. This physician's report should be weighed under 20 C.F.R. § 727.203(a)(4), and not under 20 C.F.R. § 727.203(a)(1). *Cartwright v. Gibraltar Coal Co.*, 5 B.L.R. 1-325 (1982).

3. Pulmonary function (ventilatory) studies

Pursuant to 20 C.F.R. § 727.203(a)(2), a miner who engages in coal mine employment for at least ten years is presumed totally disabled due to pneumoconiosis arising out of that employment if ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (*i.e.* the studies are qualifying and meet the requirements for duration in 20 C.F.R. § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the table). The fact-finder should weigh all ventilatory studies prior to invocation. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981).

4. Blood gas studies

Pursuant to 20 C.F.R. § 727.203(a)(3), a miner who engages in at least ten years of coal mine employment is presumed totally disabled due to pneumoconiosis if blood gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as determined by values which are equal to or less than those specified in the applicable table. All blood gas studies must be weighed to ascertain whether invocation of the presumptions is proper. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980); *Mullins, supra*.

5. Reasoned medical opinions

a. Generally

Under 20 C.F.R. § 727.203(a)(4), a miner who engaged in coal mine employment for at least ten years is presumed totally disabled due to pneumoconiosis arising out of such employment if other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory impairment. Claimant cannot seek to combine his or her testimony of total disability with the physician's finding of pneumoconiosis to establish total disability due to pneumoconiosis. *Plutt v. Benefits Review Board*, 804 F.2d 597 (10th Cir. 1987). To the contrary, the medical evidence alone must establish the miner's total disability. *Id.* at 599.

b. All evidence weighed before invoking the presumptions

All medical evidence must be weighed prior to invoking the presumptions. However, medical reports considered under subsection (a)(4) are not weighed against evidence considered under prior subsections of 20 C.F.R. § 727.203(a). The phrase "[o]ther medical evidence" as used in this subsection means evidence other than x-ray, autopsy, biopsy, ventilatory study, and blood gas study evidence. *Thompson v. Director, OWCP*, 6 B.L.R. 1-807 (1984). However, x-rays, autopsy or biopsy data, and ventilatory and blood gas testing may be considered insofar as they relate to the credibility of the medical opinion they document. Said differently, you may assess the testing considered by physician in preparing a medical report to determine whether the report is sufficiently documented and reasoned to be probative.

c. Parsing probative and non-probative portions of a medical opinion

In *Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994), the Eleventh Circuit articulated the parameters for weighing medical reports under 20 C.F.R. Part 727. Specifically, the Administrative Law Judge "need not . . . find that a medical opinion is either wholly reliable or wholly unreliable." Rather, he or she may find a physician's opinion reliable on the issue of degree of impairment, but unreliable on the issue of causation. However, quoting from the dissent in *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 164, 167 (1987), the court noted, "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."

6. Lay evidence

Twenty C.F.R. § 727.203(a)(5) is applicable in the case of a deceased miner with ten or more years of coal mine employment where no medical evidence is available. 20 C.F.R. § 727.203(a)(5). Under this subsection, a miner is presumed totally disabled due to pneumoconiosis at the time of death, or death is presumed due to pneumoconiosis, if an affidavit of the survivor, or miner, or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or

pulmonary impairment. 20 C.F.R. § 727.203(a)(5). The provisions of 20 C.F.R. § 727.203(a)(5) are available to claims filed by miners who later died as well as to claims filed by their survivors. *DeForno v. Director, OWCP*, 14 B.L.R. 1-11 (1990).

a. Evaluation of

The evaluation of lay evidence under this section is a two-part process. First, the Administrative Law Judge must determine whether the lay evidence is sufficient, if fully credited, to establish the existence of a totally disabling respiratory or pulmonary impairment. The Administrative Law Judge may find invocation established even though the lay testimony of record is insufficient to describe the miner's usual coal mine employment. *Mikels v. Director, OWCP*, 870 F.2d 1407 (8th Cir. 1989). Second, the Administrative Law Judge must assess the credibility of the evidence, and of witness(es) for and against Claimant. *Kosack v. Director, OWCP*, 7 B.L.R. 1-248 (1984). When considering the severity of the deceased miner's respiratory impairment, the Administrative Law Judge may consider the miner's work history, and the fact s/he continued to work until death. *Pendleton v. Director, OWCP*, 822 F.2d 101 (4th Cir. 1989). For further discussion of the use of lay testimony, see Chapter 15.

b. Benefits Review Board and Sixth Circuit

Twenty C.F.R. § 727.203(a)(5) cannot be used to invoke the interim presumption if the record contains medical evidence relevant to the existence of a respiratory or pulmonary impairment. *Gattuso v. Director, OWCP*, 10 B.L.R. 1-155 (1987); *Adams v. Director, OWCP*, 8 B.L.R. 1-369 (1985). In *Koppenhaver v. Director, OWCP*, 11 B.L.R. 1-51 (1988), the Board held, where the record contains medical evidence relevant to the deceased miner's respiratory or pulmonary condition, invocation pursuant to this subsection is precluded. This decision followed the Sixth Circuit's holding in *Coleman v. Director, OWCP*, 829 F.2d 3 (6th Cir. 1987).

c. Third, Fourth, and Seventh Circuits

The Third and Seventh Circuits rejected the Board's approach, and held invocation under this subsection is available where the medical evidence is insufficient to establish total disability, or lack thereof, under subsections (a)(1) - (a)(4). *Koppenhaver v. Director, OWCP*, 864 F.2d 287 (3rd Cir. 1988); *Hillibush v. U.S. DOL*, 853 F.2d 197 (3rd Cir. 1988); *Collins v. Old Ben Coal Co.*, 861 F.2d 481 (7th Cir. 1988); *Dempsey v. Director, OWCP*, 811 F.2d 1154 (7th Cir. 1987).

In *Cook v. Director, OWCP*, 901 F.2d 33 (4th Cir. 1990), the Fourth Circuit, while it did not specifically accept the Seventh Circuit's decision in *Dempsey*, stated the Board's standard contravenes the spirit of the Act, and is not required by the literal language of the regulations.

III. Rebuttal of the interim presumption of total disability due to pneumoconiosis

A. Generally

1. Burden on party opposing entitlement

Once a claimant submits evidence sufficient to invoke the interim presumption, the party opposing entitlement has the burden of going forward with evidence establishing rebuttal by a preponderance of the evidence. *Laird v. Alabama By-Products Corp.*, 6 B.L.R. 1-1146 (1984); *Burt v. Director*, 7 B.L.R. 1-197 (1984); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936 (4th Cir. 1980).

2. All evidence must be considered

All relevant evidence must be considered and weighed, including any non-qualifying and/or non-conforming x-rays, test results, and opinions, regardless of the section under which the presumption was invoked, *York v. BRB*, 819 F.2d 134, 10 B.L.R. 2-99 (6th Cir. 1987) and *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424 (4th Cir. 1986) (reversed on other grounds), as well as exams and tests not conducted in compliance with the regulations. *Saginaw Mining Co. v. Ferda*, 879 F.2d 198 (6th Cir. 1989).

3. One method of rebuttal established, entitlement to benefits precluded

Establishing one method of rebuttal precludes entitlement to benefits and renders a discussion of other methods unnecessary. *Endrizzi v. Bethlehem Mines Corp.*, 8 B.L.R. 1-11 (1985).

B. Total disability; weighing the medical opinion evidence

1. Exertional requirements; claimant's burden

It is Claimant's burden to establish the physical requirements of the miner's work and, where there is no such evidence, a physician's opinion may be considered. *Cregger v. U.S. Steel Corp.*, 6 B.L.R. 1-1219 (1984).

2. Specific medical opinion of severity of impairment required

A physician's opinion must establish the severity of the miner's respiratory impairment in order to support a finding of a totally disabling respiratory condition. *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981); *Sansone v. Director, OWCP*, 3 B.L.R. 1-422 (1981). Diagnosis of a chronic respiratory or pulmonary disease resulting in a "moderate" impairment is insufficient to establish total disability. *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981).

A physician's report advising the miner to discontinue coal mine employment, and diagnosing "severe coronary and pulmonary disease," is similarly insufficient to support total disability because it fails to evaluate the extent of the miner's disability. *Wheatley v. Peabody Coal Co.*, 6 B.L.R. 1-1214 (1984). See also *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984).

3. Medical assessment versus subjective narration of limitations

a. Benefits Review Board

The Board, 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), held the fact-finder must determine whether statements made in a physician's report constitute the physician's assessment of physical limitations, which must be compared to the exertional requirements of the miner's last coal mine employment. Or, the fact-finder must determine whether such statements are merely a narrative of the miner's assertions, which 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 opinion to invoke the presumptions of total disability due to pneumoconiosis under 20 C.F.R. Part 727. The opinion set forth a medical assessment of Claimant's abilities to walk, climb, lift, and carry. The Board held, based on these exertional limits, the Administrative Law Judge properly concluded the miner's physical abilities were severely limited, and the limitations would effectively rule out all types of work.

This case is distinguishable from Board decisions, which hold a narrative of symptoms in the "Medical Assessment" section of the

Department of Labor examination form, or elsewhere, 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 the miner's respiratory or pulmonary disease prevents him from engaging in gainful activity because of "one block dyspnea" does not establish that the miner is totally disabled. *Parino v. Old Ben Coal Co.*, 6 B.L.R. 1-104 (1983).

b. Third, Fourth, and Eleventh Circuits

The Third, Fourth, and Eleventh Circuit Courts hold an Administrative Law Judge cannot conclude, without specific evidence in support thereof, that 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 of 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). For further discussion of this issue, see Chapter 3.

4. Exertional requirements versus physical limitations

An opinion need not be phrased in terms of total disability if it elaborates on the miner's impairment such that the Administrative Law Judge may infer the miner is totally disabled. *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Bueno v. Director, OWCP*, 7 B.L.R. 1-337 (1984).

Where a physician states a miner is limited to "light work," or is unable to do "heavy physical labor," the Administrative Law Judge must assess the actual requirements of the miner's usual coal mine work and compare it to the physician's opinion to determine whether the opinion establishes a totally disabling respiratory or pulmonary impairment. *Bueno v. Director, OWCP*, 7 B.L.R. 1-337 (1984); *Shepherd v. Allied Coal Inc.*, 6 B.L.R. 1-1138 (1984). For example, if a physician states a miner is restricted from "heavy exertion and other strenuous activity," and the miner's usual coal mine work involves "heavy exertion and other strenuous activity," the physician's opinion is sufficient to establish invocation of the presumptions at 20 C.F.R. Part 727 (and does not establish rebuttal). *Andrini v. Director, OWCP*, 5 B.L.R. 1-844 (1983). See also *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236 (1984); *Meeks v. Director, OWCP*, 6 B.L.R. 1-794 (1984).

5. No respiratory or pulmonary impairment supports rebuttal

It is proper to reject a physician's report under 20 C.F.R. § 727.203(b)(2) where the physician does not consider the exertional requirements of the miner's usual coal mine work. However, if a physician finds no evidence of respiratory or pulmonary impairment, it is unnecessary for the physician to address the specific character of the coal mine work. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984); *Grayson v. North American Coal Co.*, 6 B.L.R. 1-851 (1984).

C. Means of rebuttal

1. Miner is engaged in usual coal mine work or comparable and gainful work

a. Generally

The interim presumptions shall be rebutted if evidence establishes the miner is, in fact, doing his or her usual coal mine work or comparable and gainful work. 20 C.F.R. § 727.203(b)(1). In the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her coal mine work, the miner's employment in a mine shall not be used as conclusive evidence that s/he is not totally disabled. 20 C.F.R. § 727.205(a). However, no miner shall be found totally disabled if s/he is found to be doing his usual or customary coal mine work, or comparable and gainful work, and there are no changed circumstances of employment indicative of reduced ability to perform coal mine work. 20 C.F.R. § 727.205(b). Therefore, where a miner is performing his or her usual coal mine employment, and there is no evidence of changed circumstances, the interim presumptions are rebutted under 20 C.F.R. § 727.203(b)(1). *Zamora v. C.F. & I. Steel Corp.*, 7 B.L.R. 1-568 (1984).

b. "Usual coal mine work" under subsection (b)(1)

Initially, a determination must be made identifying the miner's "usual coal mine work." This is generally accomplished through review of the miner's testimony, or the testimony of others familiar with his or her coal mine work, as well as any documentary evidence of record, including medical opinions and the employment history form completed by the claimant at the time of application for benefits.

The phrase "usual coal mine work" is defined as the most recent job a miner performed regularly over a substantial period of time. *Daft v. Badger Coal Co.*, 7 B.L.R. 1-124 (1984); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 B.L.R. 1-534 (1982). The Board, in *Brown v. Cedar Coal Co.*, 8 B.L.R. 1-86 (1985), found the miner's latest work as a general inside laborer was solely for the purpose of closing down the mine, and was temporary in nature, such that the miner's "usual coal mine work" was his previous position of dispatcher. See also *Uhl v. Consolidation Coal Company*, 10 B.L.R. 1-72 (1987) (a federal mine inspector is a "miner" within the meaning of the Act, and rebuttal was established under 20 C.F.R. § 727.203(b)(1) where the miner continued to perform his usual coal mine work as an inspector).

However, the presumptions cannot be rebutted under 20 C.F.R. § 727.203(b)(1) if the miner obtains only "make work," has sporadic mining jobs, makes only marginal earnings, performs poorly due to his health or through extraordinary physical effort, or continues to work in the mines to survive during the pendency of his claim. *Meyer v. Zeigler Coal Co.*, 894 F.2d 902 (7th Cir. 1990).

c. "Comparable and gainful work" under subsection (b)(1)

The proper legal standard for comparing employment under 20 C.F.R. § 727.203(b)(1) includes a range of factors, with no single factor assuming paramount importance. *Harris v. Director, OWCP*, 3 F.3d 103 (4th Cir. 1993). To determine whether the miner is engaged in "comparable and gainful work," the Administrative Law Judge must compare the general skills and abilities required in the present job with those of the miner's former job, as well as the amount of compensation. *Ratliff v. BRB*, 816 F.2d 1121 (6th Cir. 1981); *Big Horn Coal Co. v. Director, OWCP*, 897 F.2d 1050 (10th Cir. 1990). In *Echo v. Director, OWCP*, 744 F.2d 327 (3rd Cir. 1984), the Third Circuit added, "Relevant factors in considering comparability of present employment include relative compensation, working conditions, levels of exertion, educational requirements, location of employment, and skills and abilities required" with "compensation [being] the prime criterion of comparability" *Id.* at 331.

The Board holds, while physical exertion is a factor to consider, identical physical exertion is not required. *Parks v. Director, OWCP*, 9 B.L.R. 1-82 (1986); *Chabala v. Director, OWCP*, 7 B.L.R. 1-6 (1984); *Caton v. Amax Coal Co.*, 6 B.L.R. 1-571 (1983). However, the Board upheld an Administrative Law Judge's finding of no comparability where the miner's current job was higher paying, and involved sedentary activity and some

supervisory skills, but no technical skills. *Carter v. Beth-Elkhorn Corp.*, 7 B.L.R. 1-15 (1984).

2. Miner is *able* to perform usual coal mine work or comparable and gainful work

a. Standard for subsection (b)(2) rebuttal

The interim presumptions shall be rebutted if, in light of all relevant evidence, the miner is *able* to do his or her usual coal mine work or comparable and gainful work. This is so even if the miner is not presently employed. 20 C.F.R. § 727.203(b)(2).

The factors applicable to a determination of the miner's usual coal mine work are the same under this section as those set forth above regarding 20 C.F.R. § 727.203(b)(1).

- Benefits Review Board

The Board interpreted this section to allow two methods of rebuttal for demonstrating the miner is *able* to do his or her usual coal mine work: (1) the absence of a respiratory or pulmonary impairment; or, (2) the miner's impairment is not totally disabling. *Bibb v. Clinchfield Coal Co.*, 7 B.L.R. 1-134 (1984); *Coleman v. Kentland-Elkhorn Coal Co.*, 5 B.L.R. 1-260 (1983); *Sykes v. Itmann Coal Co.*, 2 B.L.R. 1-1089 (1980).

The Third, Fourth, Sixth, and Eleventh Circuit Courts of Appeals rejected the Board's interpretation of 20 C.F.R. § 727.203(b)(2) rebuttal to state, if the miner is totally disabled *for any reason*, then subsection (b)(2) rebuttal is precluded. The Seventh Circuit, on the other hand, concludes (b)(2) rebuttal may be established if the disabling impairment is wholly unrelated to black lung disease. The following is a summary of circuit court decisions addressing rebuttal under 20 C.F.R. § 727.203(b)(2):

- Third Circuit

In *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158 (3rd Cir. 1986), the court stated, "Because it is undisputed that Kertesz is totally disabled and unable to do his usual coal mine work or comparable and gainful work, we believe the BRB erred in invoking § 727.203(b)(2). The court further held, "We believe to the contrary, that evidence showing the presumed disease does not exist goes to rebuttal under § 727.203(b)(4) . . . , and evidence showing some other disease caused the disability goes to rebuttal under

§ 727.203(b)(3)." *Id.* at 162, fn. 5. Therefore, for a party to establish rebuttal under (b)(2), the party also must demonstrate the miner is not disabled for *any* reason. *See also Oravitz v. Director, OWCP*, 843 F.2d 738 (3rd Cir. 1988).

- Fourth Circuit

In *Sykes v. Director, OWCP*, 812 F.2d 890 (4th Cir. 1987), the court stated, "For an employer to rebut the interim presumption under 20 C.F.R. § 727.203(b)(2), consideration should be given to the health requirements for work comparable to that performed by the claimant. *Id.* at 893. *See also Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994) (Employer must demonstrate "the claimant is able, from a whole-man standpoint, of doing his usual coal mine or comparable gainful work"); *Adkins v. Director, OWCP*, 824 F.2d 287 (4th Cir. 1987).

In *Harman Mining Co. v. Layne*, 21 B.L.R. 2-507, Case No. 97-1385 (4th Cir. 1998) (unpub.), the Administrative Law Judge properly refused to reopen the record on remand where Employer was on notice of the standard for establishing (b)(2) rebuttal, *i.e.*, it must demonstrate that the miner was not disabled for any reason, from the plain language of the regulation, which requires that Employer establish "the individual is able to do his usual coal mine work or comparable and gainful work." According to the court, Board decisions to the contrary were inconsistent with the language of the regulation, and the fact that Employer "chose to restrict its evidence to the lesser standard . . . does not allow it to avoid the fact that it was on notice of the higher standard."

- Sixth and Eleventh Circuits

Subsection (b)(2) rebuttal is precluded where the miner is disabled for *any* reason. *Martin v. Alabama By-Products Corp.*, 864 F.2d 1555 (11th Cir. 1989); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622 (6th Cir. 1988); *York v. BRB*, 819 F.2d 134 (6th Cir. 1987); *Wright v. Island Creek Coal Co.*, 824 F.2d 505 (6th Cir. 1987); *Patton v. National Mines Corp.*, 825 F.2d 1035 (6th Cir. 1987). However, the Sixth Circuit holds a physician's finding of no disabling respiratory impairment is equivalent to a finding that the miner can perform his usual coal mine employment, where there is no evidence of any other impairment in the record. *Neace v. Director, OWCP*, 867 F.2d 264 (6th Cir. 1989).

- Seventh Circuit

The Seventh Circuit went in a different direction with regard to subsection (b)(2) rebuttal. In *Freeman United Coal Mining Co. v. Foster*,

30 F.3d 834 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995), a panel held rebuttal under 20 C.F.R. § 727.203(b)(2) may be accomplished if the totally disabling impairment is wholly unrelated to black lung disease. In so holding, the panel found the miner's totally disabling back injury was sufficient to establish (b)(2) rebuttal. The court reasoned the rebuttal provisions at 20 C.F.R. § 727.203(b) should be read "as a whole" to "identify and compensate 'total disability due to pneumoconiosis.'" See also *Peabody Coal Co. v. Director, OWCP [Goodloe]*, 116 F.3d 207 (7th Cir. 1997); *Old Ben Coal Co. v. Director, OWCP*, 62 F.3d 1003, 1008 (7th Cir. 1995).

b. "Usual coal mine work" under subsection (b)(2)

The circuit courts of appeals and Board hold the inquiry into whether the miner can do his usual coal mine work is solely a question of physical capability. Thus, vocational evidence is irrelevant, and the presumption of disability must be rebutted by medical evidence alone. The vocational standards, as discussed more fully below, are relevant only to the inquiry of whether the miner can perform *comparable and gainful* work. *Adams v. Peabody Coal Co.*, 816 F.2d 1116 (6th Cir. 1987); *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985); *Taft v. Alabama By-Products Corp.*, 733 F.2d 1518 (11th Cir. 1984); *Addison v. Jewell Ridge Coal Corp.*, 7 B.L.R. 1-438 (1984); *Busetto v. Kaiser Steel Corp.*, 7 B.L.R. 1-422 (1984); *Byrne v. Allied Chemical Corp.*, 6 B.L.R. 1-734 (1984); *Director, OWCP, v. Beatrice Pocahontas Co.*, 698 F.2d 680 (4th Cir. 1983). Therefore, evidence regarding a claimant's educational background, work experience, or age is not relevant to establishing the claimant's ability to do his or her usual coal mine work; rather, such evidence is relevant to showing that s/he can do comparable and gainful work. *Byrne v. Allied Chemical Corp.*, 6 B.L.R. 1-734 (1984); *Allen v. Alabama By-Products Corp.*, 6 B.L.R. 1-1094 (1984); *Coletti v. Consolidation Coal Co.*, 6 B.L.R. 1-698 (1983).

The following constitute a few of the principles of reviewing evidence to determine whether subsection (b)(2) rebuttal is established:

- Clinical tests and medical reports

It is error for the fact-finder to weigh the results of clinical tests against a physician's opinion; to do so would allow the Administrative Law Judge to substitute his or her opinion for that of a physician. Accordingly, clinical tests may not be weighed against a physician's report under 20 C.F.R. § 727.203(b)(2). *Carpeta v. Mathies Mining Co.*, 7 B.L.R. 1-145 (1984).

- Conforming studies

Pulmonary function studies need not be conforming to be relevant to 20 C.F.R. § 727.203(b)(2) rebuttal. *Hardy v. Director, OWCP*, 7 B.L.R. 1-722 (1985); *Levitz v. Rochester and Pittsburgh Coal Co.*, 4 B.L.R. 1-497 (1982).

- Exertional requirements versus physical limitations

As under 20 C.F.R. § 727.203(a)(4), many physicians' opinions are not phrased in terms of "total disability." Under these circumstances, the Administrative Law Judge must determine the requirements of the miner's usual coal mine work, and then compare the physical requirements of that work against the physical limitations noted by the physicians. *Daft v. Badger Coal Co.*, 7 B.L.R. 1-124 (1984); *Bibb v. Clinchfield Coal Co.*, 7 B.L.R. 1-134 (1984).

- Non-qualifying ventilatory and blood gas studies

Non-qualifying pulmonary function studies and blood gas testing, standing alone, are insufficient to establish subsection (b)(2) rebuttal. *Whicker v. U.S. Department of Labor* 733 F.2d 346 (4th Cir. 1984); *Patellas v. Director, OWCP*, 7 B.L.R. 1-661 (1985); *Addison v. Jewell Ridge Coal Corp.*, 7 B.L.R. 1-438 (1984); *Sykes v. Itmann Coal Co.*, 2 B.L.R. 1-1089 (1980). According to the Board, the "current legal standard permits a finding of rebuttal based on non-qualifying studies when accompanied by a physician's opinion based in part on the studies." *Wagner v. Badger Coal Co.*, 9 B.L.R. 1-69 (1986); *Kincaid v. Consolidation Coal Co.*, 8 B.L.R. 1-256 (1985). Indeed, because the interpretation of pulmonary function studies is medical in nature, it is not error for an Administrative Law Judge to rely on a medical opinion of no disability for rebuttal, when it is based in part on a qualifying study, providing the physician sets forth adequate rationale for his or her conclusions. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 B.L.R. 1-730 (1983).

- Percentage of disability

With regard to invocation under 20 C.F.R. § 727.203(a)(4), a physician's opinion that a miner suffers from a 20 to 30% disability does not establish total disability and, therefore, is not sufficient to invoke the interim presumption. The opinion also does not establish the miner could perform his or her usual coal mine work, and cannot support rebuttal under 20 C.F.R. § 727.203(b)(2). *Conley v. Roberts and Schaefer Co.*, 7 B.L.R. 1-309 (1984).

**c. "Comparable and gainful work"
under subsection (b)(2)**

- Generally

If evidence is insufficient to demonstrate a miner can do his or her usual coal mine work, then the party opposing entitlement may seek to rebut the presumptions by demonstrating that the miner is able to perform "comparable and gainful work." Under this component of subsection (b)(2) rebuttal, the opposing party must prove the miner is able to perform comparable and gainful work in light of his or her vocational and physical capacity. Moreover, the work must be available in the immediate area of his or her residence. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985); *Shamrock Coal Co. v. Lee*, 751 F.2d 187 (6th Cir. 1985); *Harris v. Director, OWCP*, 3 F.3d 103 (4th Cir. 1993) (range of factors to be considered including compensation and physical exertion; court found miner's job as a federal mine inspector was comparable and gainful to his former job as an electrician); *Central Appalachian Coal Co. v. Fletcher*, 697 F.2d 1086 (4th Cir. 1982); *Busetto v. Kaiser Steel Corp.*, 7 B.L.R. 1-422 (1984); *Hvizdzak v. North American Coal Corp.*, 7 B.L.R. 1-469 (1984).

- Factors considered

In determining whether a miner can do comparable and gainful work, various factors such as the miner's age, education, work experience, and skill level are considered along with the compensation and exertional requirements of the allegedly "comparable" work. *Big Horn Coal Co. v. Office of Workers' Compensation Programs*, 897 F.2d 1052, 1056 (10th Cir. 1990); *Neace v. Director, OWCP*, 867 F.2d 264 (6th Cir. 1989); *Pate v. Director, OWCP*, 834 F.2d 675, 677 (7th Cir. 1987); *Echo v. Director, OWCP*, 744 F.2d 237 (3rd Cir. 1984) (a lower paying job is not comparable employment); *Allen v. Alabama By-Products Corp.*, 6 B.L.R. 1-1094 (1984); *Coletti v. Consolidation Coal Co.*, 6 B.L.R. 1-1698 (1983). With regard to compensation, the Board held the Third Circuit's emphasis on compensation in *Echo* should be applied in the converse situation; namely, "where a miner's current employment is more remunerative than his previous coal mine employment." *Romanoski v. Director, OWCP*, 8 B.L.R. 1-407, 1-409 (1985).

- Reasonable opportunity to be hired

The Fourth and Sixth Circuits hold there is no requirement that the party opposing entitlement show the miner has a "reasonable opportunity to be hired." *Shamrock Coal Co. v. Lee*, 751 F.2d 187 (6th Cir. 1985); *Central Appalachian Coal Co. v. Fletcher*, 697 F.2d 1086 (4th Cir. 1982). However,

the Board reached a contrary conclusion in *Temple v. Big Horn Coal Co.*, 7 B.L.R. 1-573 (1984).

3. Total disability did not arise in whole or in part out of coal mine employment

The interim presumptions shall be rebutted if evidence establishes the miner's total disability respiratory impairment did not arise in whole, or in part, out of coal mine employment. 20 C.F.R. § 727.203(b)(3). Whether a miner is totally disabled due to pneumoconiosis is primarily a medical determination. *Harlow v. Imperial Colliery Coal Co.*, 5 B.L.R. 1-896 (1983). However, lay evidence, corroborated by some medical evidence, may support such a determination. *Rickard v. C & K Coal Co.*, 7 B.L.R. 1-372 (1984); *Wilson v. U.S. Steel Corp.*, 6 B.L.R. 1-1055 (1984).

However, a physician's opinion, which is equivocal regarding the etiology of the miner's respiratory impairment, is insufficient to support subsection (b)(3) rebuttal. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000) (a physician who concluded simple pneumoconiosis "probably" would not disrupt a miner's pulmonary function did not support (b)(3) rebuttal).

a. Evolution of the "rule out" standard

The Board originally held the "in whole or in part" language of subsection (b)(3) was not consistent with the Act since it would permit a claimant to receive benefits where the miner was not totally disabled due solely to coal workers' pneumoconiosis. *Wilson v. U.S. Steel Corp.*, 6 B.L.R. 1-1055 (1984); *Jones v. The New River Company*, 3 B.L.R. 1-199 (1981). However, the Board's decision in *Jones* was overruled by several circuits, which embraced the "rule out" standard, *i.e.* the party opposing entitlement must submit medical evidence sufficient to support a finding that pneumoconiosis in no way (not even in a marginally significant manner) contributed to the miner's total disability. See *Carozza v. U.S. Steel Corp.*, 727 F.2d 74 (3rd Cir. 1984); *Bernardo v. Director, OWCP*, 790 F.2d 351 (3rd Cir. 1986); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984); *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511 (11th Cir. 1984).

b. Standards for establishing subsection (b)(3) rebuttal

The Board and several circuit courts adopted the "rule out" standard for demonstrating subsection (b)(3) rebuttal. Only the Sixth, Seventh, and Eighth Circuits employ the "contributing cause" standard for demonstrating rebuttal under this subsection.

- Benefits Review Board

Borgenson v. Kaiser Steel Corp., 12 B.L.R. 1-169 (1989) (*en banc*) (the employer must "rule out" the causal nexus between the miner's disability and coal mine employment).

- Third Circuit

Plesh v. Director, OWCP, 71 F.3d 103 (3rd Cir. 1995) (an equivocal physician's opinion is insufficient to sustain this burden); *Kline v. Director, OWCP*, 877 F.2d 1175 (3rd Cir. 1989).

- Fourth Circuit

Lane Hollow Coal Co. v. Director, OWCP [Lockhart], 137 F.3d 799 (4th Cir. 1998) ("[t]here is a critical difference between evidence of no impairment, which can, if credited, rebut the interim presumption, and no evidence of impairment, which cannot"); *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994); *The Youghioghney & Ohio Coal Co. v. Angus*, 996 F.2d 130 (6th Cir. 1993), *cert. den.* No. 93-390 (Jan. 10, 1994), (an employer cannot accomplish (b)(3) rebuttal by demonstrating the miner suffers from a second disability, which is independent of his pneumoconiosis); *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999); *Cox v. Shannon-Pocahontas Mining Co.*, 6 F.3d 190 (4th Cir. 1993) (a physician's statement that the miner's total disability did not contribute to his cardiac disease or diabetes was insufficient to "rule out" the causal nexus between the miner's total disability and his coal mine employment); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123 (4th Cir. 1984).

In *Harman Mining Co. v. Layne*, 21 B.L.R. 2-507, Case No. 97-1385 (4th Cir. 1998) (unpub.), it was not an abuse of discretion for the Administrative Law Judge to refuse to reopen the record on remand for additional evidence under 20 C.F.R. § 727.203(b)(2) and (b)(3) 25 years after filing of the claim. Employer argued the court's decision in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984), which was issued after

the record closed in *Layne*, changed the legal standard for subsection (b)(3) rebuttal such that Employer was entitled to present new evidence on the issue. The Fourth Circuit held, to the contrary, *Massey* did not represent a change in the law; rather, it "simply reaffirmed existing law" that Employer must present evidence sufficient to "rule-out" any causal nexus between the miner's coal mine employment and total disability. In so holding, the court cited to its decisions in *Hampton v. Dept. of Labor*, 678 F.2d 506 (4th Cir. 1982) (per curiam) and *Rose v. Clinchfield Coal Co.*, 614 F.2d 936 (4th Cir. 1980), which were issued prior to the time the record closed in *Layne*.

By unpublished decision in *Brooks v. Clinchfield Coal Co.*, BRB No. 97-1225 BLA (June 2, 1988)(unpub.), a case arising in the Fourth Circuit, the Board stated the following with regard to establishing subsection (b)(3) rebuttal:

[T]he [Fourth Circuit] made it clear that in order to establish subsection (b)(3) rebuttal based on a medical opinion diagnosing no pulmonary impairment, the physician must state his opinion with clarity, rule out any impairment entirely, and accept the existence of pneumoconiosis, if the adjudicator finds the disease present.

The Board held, where one physician found a moderate pulmonary impairment and two other physicians (upon whose opinions the Administrative Law Judge relied to find subsection (b)(3) rebuttal) failed to diagnose the presence of pneumoconiosis, then the medical opinion evidence was insufficient to find rebuttal. The Board cited to *Lambert v. Itmann Coal Co.*, 70 F.3d 112 (4th Cir. 1995), and stated, "[I]f a physician's opinion that the miner did not have pneumoconiosis does not serve as the basis for his or her opinion regarding the cause of the miner's impairment, it may support rebuttal under subsection (b)(3)."

- Sixth Circuit

Island Creek Coal Co. v. Holdman, 202 F.3d 873 (6th Cir. 2000) (a physician, who concluded simple pneumoconiosis "probably" would not disrupt a miner's pulmonary function, was too equivocal and insufficient to demonstrate rebuttal under 20 C.F.R. § 727.203(b)(3)); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198 (6th Cir. 1989). See also *Edmiston v. F&R Coal Co.*, 14 B.L.R. 1-65 (1990) (in the Sixth Circuit, "it is employer's burden to rule out pneumoconiosis as a contributing factor to the miner's total disability"); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179 (6th Cir. 1989).

- Seventh Circuit

In two post-*Pauley* decisions, the Seventh Circuit reaffirmed its earlier holding in *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987); *to wit*, rebuttal under 20 C.F.R. § 727.203(b)(3) requires that the party opposing entitlement establish the miner's pneumoconiosis was not a contributing cause of his or her total disability.

In *Peabody Coal Co. v. Director, OWCP [Vigna]*, 22 F.3d 1388 (7th Cir. 1994), the Seventh Circuit held, to establish rebuttal under 20 C.F.R. § 727.203(b)(3), Employer must demonstrate by a preponderance of the evidence that black lung disease was not a contributing cause of the miner's disability. The phrase "contributing cause" is interpreted to mean whether the cause is "necessary, but not sufficient, to bring about the miner's disability." Thus, where the "evidence dictates that (the miner's) total disability was caused by the stroke which he sustained in 1971," then s/he is not entitled to benefits under the Act. See also *Freeman United Coal Mining Co. v. Director, OWCP*, 20 F.3d 289 (7th Cir. 1994) (rebuttal under (b)(3) was not established where the physician stated that the miner's pneumoconiosis did not contribute "significantly" to his total disability; the court held such an opinion does not "exclude the possibility that the disease contributed in some, presumably lesser, degree").

In *R&H Steel Buildings, Inc. v. Director, OWCP*, 146 F.3d 514 (7th Cir. 1998), the court addressed the standard for 20 C.F.R. § 727.203(b)(3) rebuttal to state, "[N]o matter how it's viewed, rebuttal under this section is an uphill battle." The court observed, "The company is confronted with a person presumed to be disabled because of pneumoconiosis-which is a chronic dust disease of the lungs arising from coal mine employment-and it must show that the disability did not arise, even in part, from coal mine employment." According to the court, x-ray evidence is insufficient as a matter of law to establish rebuttal under (b)(3), and it cited to "[o]ne study (which) has shown that 25 percent of people with pneumoconiosis had negative x-rays." The court then affirmed the Administrative Law Judge's finding of no rebuttal on grounds that the physicians' opinions offered by Employer were equivocal and conclusory.

In *Gulley v. Director, OWCP*, 397 F.3d 535 (7th Cir. 2005), black lung benefits were precluded where the miner was totally disabled due to blindness. The court noted, under 20 C.F.R. § 727.203(b)(3), a miner "cannot recover benefits if he was totally disabled by an unrelated, non-pulmonary condition notwithstanding his probable pneumoconiosis." The Seventh Circuit did state, however, if the amended regulatory provisions at 20 C.F.R. § 718.204(a) had been applicable, then the miner's blindness

would not have precluded an award of black lung benefits.

- Eighth Circuit

Consolidation Coal Co. v. Smith, 837 F.2d 321 (8th Cir. 1988) (“contributing cause” standard applied).

- Ninth Circuit

Palmer Coking Coal Co. v. Director, OWCP, 720 F.2d 1054 (9th Cir. 1983)(rule out standard applied).

- Tenth Circuit

Rosebud Coal Sales Co. v. Weigand, 831 F.2d 926 (10th Cir. 1987) (rule out standard applied).

- Eleventh Circuit

Thomas v. United States Steel Corp., 843 F.2d 503 (11th Cir. 1988) (rule out standard applied).

c. Specific principles of weighing evidence under 20 C.F.R. § 727.203(b)(3)

The following list constitutes various case summaries containing principles of weighing medical evidence, which are specific to subsection (b)(3) rebuttal:

- Checking a box

Merely checking the box marked “no” on the Department of Labor form, in response to whether the diagnosed condition is related to coal mine employment, is sufficient to establish that the impairment suffered by the miner is not related to coal dust exposure. *Cryster v. Christopher Coal Co.*, 6 B.L.R. 1-518 (1983); *Bray v. Director, OWCP*, 6 B.L.R. 1-400 (1983); *Simpson v. Director, OWCP*, 6 B.L.R. 1-49 (1983).

- Equivocal opinion

Where the medical evidence is equivocal, rebuttal is not established under 20 C.F.R. § 727.203(b)(3). *DeKnuydt v. Zeigler Coal Co.*, 7 B.L.R. 1-78 (1984). Thus, if a physician states a miner's respiratory symptoms “could” have been caused by his smoking history, aortic stenosis, or high

blood pressure, then the opinion does not have the requisite degree of medical certainty to support rebuttal. *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236 (1984). See also *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000) (a physician who concluded simple pneumoconiosis "probably" would not disrupt a miner's pulmonary function did not demonstrate (b)(3) rebuttal); *R&H Steel Buildings, Inc. v. Director, OWCP*, 146 F.3d 514 (7th Cir. 1998); *Carpeta v. Mathies Coal Co.*, 7 B.L.R. 1-145 (1984).

- Etiology of total disability only

The relevant inquiry under 20 C.F.R. § 727.203(b)(3) is the cause of the miner's total disability, not the cause of the miner's pneumoconiosis. Said differently, "the administrative law judge's findings with regard to the cause of claimant's pneumoconiosis have no relevance at subsection (b)(3) rebuttal." *Lucas v. Director, OWCP*, 11 B.L.R. 1-61, 63 (1988). See also *Adkins v. Director, OWCP*, 6 B.L.R. 1-1318 (1984).

- Hostile-to-the-Act

The report of a physician, whose basic opinions are contrary to the Act, may not be used as rebuttal evidence under 20 C.F.R. § 727.203(b)(3). One example is a physician who concludes the miner's total disability can never be due to pneumoconiosis. *Dillow v. Duquesne Light Co.*, 6 B.L.R. 1-813 (1984).

- The "later evidence" rule

The "later evidence" rule applies to rebuttal under 20 C.F.R. § 727.203(b)(3). In *Cosalter v. Mathies Coal Co.*, 6 B.L.R. 1-1182 (1984), it was proper for an Administrative Law Judge to accord lesser weight to a physician's opinion (that the claimant's chronic bronchitis and hypertension were unrelated to coal mine employment) where the physician's report predated other medical reports by several years. See also *Coomes v. Island Creek Coal Co.*, 6 B.L.R. 1-1176 (1984); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 B.L.R. 1-730 (1983).

- Non-examining physician

The Fourth Circuit holds, as a matter of law, rebuttal is not accomplished under subsection (b)(3) based on a non-examining physician attributing the miner's total disability to a source not discussed by the examining physicians. See *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123 (4th Cir. 1984) (non-examining physician's conclusion that the miner's emphysema was related to his smoking history was outweighed by

examining physicians' opinions, which did not discuss the impact of the miner's smoking history and attributed his lung condition to coal dust exposure); *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 (4th Cir. 1994) (subsection (b)(3) rebuttal not accomplished where only non-examining physicians attributed miner's total disability to alcoholism). See also *Johnson v. Old Ben Coal Co.*, 19 B.L.R. 1-103 (1995) (applying *Malcomb* to a case arising in the Fourth Circuit).

The Board, however, holds a non-examining physician may be accorded weight under subsection (b)(3) even if s/he attributes the miner's respiratory impairment to an ailment not discussed by examining physicians. *Cochran v. Consolidation Coal Co.*, 12 B.L.R. 1-136 (1989); *Presley v. Sunshine, Inc.*, 8 B.L.R. 1-410 (1985).

- Non-qualifying studies

In *Bates v. Creek Coal Co.*, 18 B.L.R. 1-1 (1993), the Board held, "[N]on-qualifying objective studies of record are not determinative of causation, and are on their own, insufficient to establish rebuttal at Section 727.203(b)(3)."

- Silent opinion

Reports of physicians, which are silent as to the cause of a miner's total disability, do not support rebuttal under 20 C.F.R. § 727.203(b)(3). *Bates v. Creek Coal Co.*, 18 B.L.R. 1-1 (1993); *Tinch v. Director, OWCP*, 6 B.L.R. 1-1284 (1984); *Allen v. Brown Badgett, Inc.*, 6 B.L.R. 1-567 (1983).

d. A finding of "no impairment"

While the language of the rebuttal provisions at 20 C.F.R. § 727.203(b)(3) are focused on the etiology of a miner's total disability, controversy has arisen regarding whether a finding of "no impairment" is sufficient to establish rebuttal under this subsection.

The following cases set forth the viewpoints of the Board and various circuit courts of appeal that have addressed this issue:

- Benefits Review Board

In *Pollice v. Marcum*, 11 B.L.R. 1-23 (1987), a finding of no pulmonary or respiratory impairment was sufficient to establish subsection (b)(3) rebuttal.

- Third Circuit

In *Cort v. Director, OWCP*, 996 F.2d 1549 (3rd Cir. 1993), a physician's finding of "no respiratory or other impairment" was insufficient to establish (b)(3) rebuttal. In so holding, the court reasoned the extent of any disability is addressed under 20 C.F.R. § 727.203(b)(1) and (b)(2), whereas 20 C.F.R. § 727.203(b)(3) addresses only the etiology of the miner's disability. As a result, the Third Circuit concluded total disability must be assumed under (b)(3) of the regulations and, in support of this, the court cited its prior decisions in *Oravitz v. Director, OWCP*, 843 F.2d 736, 740 n.3 (3rd Cir. 1988) (subsection (b)(3) assumes "total disability and limits rebuttal to those instances where disability was caused by some other disease"); *Bernardo v. Director, OWCP*, 790 F.2d 351, 353 (3rd Cir. 1986); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162 n.5 (3rd Cir. 1986).

- Fourth Circuit

In *Thorn v. Itmann Coal Co.*, 3 F.3d 713 (4th Cir. 1993), the reports of two physicians that the miner suffered from "no respiratory impairment," were insufficient to establish subsection (b)(3) rebuttal. The court noted, "These opinions are not helpful because a claimant need not prove that pneumoconiosis is a self-sufficient cause of disability." The Fourth Circuit declined, however, to decide whether a broader finding of "no impairment" was sufficient to demonstrate (b)(3) rebuttal as the record in *Thorn* did not require the resolution of this issue.

In *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994), the court held, where invocation occurs under subsection (a)(1), opinions addressing only the existence of a pulmonary impairment are insufficient to establish subsection (b)(3) rebuttal "if the physician rendering the opinion has premised it on an erroneous finding that the claimant does not suffer from pneumoconiosis." The court concluded "such opinions are not worthy of much, if any, weight." The *Grigg* court further held invocation under subsection (a)(4) precludes subsection (b)(3) rebuttal based solely upon finding no respiratory or pulmonary impairment "because (a)(4) invocation presupposes that the greater weight of the evidence shows a totally disabling respiratory or pulmonary impairment." To then "credit an opinion on rebuttal denying *any* impairment would be irreconcilable with the finding at the presumption invocation phase." The court declined to rule on whether the same holding applies where invocation occurs under subsection (a)(2) or (a)(3) of the regulations. *But see Dehue Coal Co. v. Ballard*, 65 F.3d 1189 (4th Cir. 1995) (a physician must clearly state the miner does not suffer from clinical or legal pneumoconiosis).

In *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4th Cir. 1998), under 20 C.F.R. § 727.203(b)(3), the party opposing entitlement must "rule out" the causal nexus between a miner's total disability and coal mine employment. The court concluded, "In cases in which the combined effects of several diseases disable the miner, the employer obviously cannot meet its burden of proof by focusing solely on the disabling potential of the miner's pneumoconiosis." Rather, an employer must prove the miner's "primary condition, whether it be emphysema or some other pulmonary disease, was not aggravated to the point of total disability by prolonged exposure to coal dust." The court observed, "Disputing the clinical accuracy of the law is not rebuttal," and it is error for a physician to conclude the miner has no pulmonary impairment related to his coal mine employment "because simple pneumoconiosis does not generally cause any pulmonary impairment." The court determined this position is contrary to the regulations. In the end, the court held subsection (b)(3) rebuttal is accomplished either by demonstrating (1) the miner has no respiratory or pulmonary impairment of any kind, or (2) the miner's impairment is attributable "solely to sources other than coal mine employment." The court concluded, "There is a critical difference between evidence of no impairment, which can, if credited, rebut the interim presumption, and no evidence of impairment, which cannot." (emphasis in original).

- Sixth Circuit

In *Warman v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257 (6th Cir. 1988), a finding of "no functional disability arising out of coal mine employment" was insufficient to establish subsection (b)(3) rebuttal.

4. The miner does not suffer from pneumoconiosis

The interim presumptions shall be rebutted if the evidence establishes that the miner does not have pneumoconiosis. 20 C.F.R. § 727.203(b)(4). The regulatory definition of pneumoconiosis found at 20 C.F.R. § 727.202 must be considered under 20 C.F.R. § 727.203(b)(4) rebuttal; therefore, the party opposing entitlement must establish the absence of any respiratory or pulmonary impairment arising out of coal mine employment, including chronic pulmonary disease resulting from respiratory or pulmonary impairment significantly related to or significantly aggravated by dust exposure in coal mine employment. *Biggs v. Consolidation Coal Co.*, 8 B.L.R. 1-317 (1985); *Shonborn v. Director, OWCP*, 8 B.L.R. 1-434 (1986); *Wiggins v. Director, OWCP*, 7 B.L.R. 1-442 (1984); *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984). See also *Pavesi v. Director, OWCP*, 758 F.2d 956 (3rd Cir. 1985).

The Sixth Circuit holds, where the miner's disability arguably is not significantly related to coal dust, subsection (b)(4) is the applicable rebuttal provision since, under the definition of pneumoconiosis under 20 C.F.R. § 727.202, the respiratory or pulmonary impairment must be significantly related to or aggravated by coal dust exposure in coal mine employment. *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179 (6th Cir. 1989).

a. Rebuttal under subsection (b)(4) precluded if invoked under subsection (a)(1)

Rebuttal under 20 C.F.R. § 727.203(b)(4) is precluded where the Administrative Law Judge finds invocation of the interim presumption established under 20 C.F.R. § 727.203(a)(1). *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002); *Curry v. Beatrice Pocahontas Coal Co.*, 18 B.L.R. 1-59 (1994)(*en banc*) (J. Brown and McGranery concurring and dissenting); *Bates v. Creek Coal Co.*, 18 B.L.R. 1-1 (1993); *Buckley v. Director, OWCP*, 11 B.L.R. 1-37 (1988) (*citing Mullins Coal Company of Virginia v. Director, OWCP*, 108 S. Ct. 427 (1987)); *Dockins v. McWane Coal Co.*, 9 B.L.R. 1-57 (1986).

b. Specific principles of weighing evidence under subsection (b)(4)

The following constitutes specific principles of weighing medical evidence under subsection (b)(4):

- Blood gas studies

In *Morgan v. Bethlehem Steel Corp.*, 7 B.L.R. 1-226 (1984), the Board held, while blood gas studies are relevant primarily to the determination of the existence or extent of impairment, this evidence "also may bear upon the existence of pneumoconiosis insofar as test results indicate the absence of any disease process, and by implication, the absence of any disease arising out of coal mine employment."

- Hostile-to-the-Act

A medical opinion, which is premised on views that are contrary to the Act, is not probative. For example, a view that coal miners never develop severe respiratory impairments is contrary to the Act. However, the opinion

may be relevant concerning the existence or nonexistence of pneumoconiosis. *Rapavi v. The Youghiogheny and Ohio Coal Co.*, 7 B.L.R. 1-435 (1984); *Morgan v. Bethlehem Steel Corp.*, 7 B.L.R. 1-226 (1984).

- Non-conforming x-ray interpretations

There is no requirement that x-ray interpretations be classified according to the quality standards of 20 C.F.R. § 410.428(a) to be considered under 20 C.F.R. § 727.203(b)(4). Moreover, x-rays interpreted as "negative," "no evidence of pneumoconiosis," or "normal chest" are relevant evidence considered under this subsection. An Administrative Law Judge has discretion to infer an x-ray is negative where the physician fails to mention pneumoconiosis, *Wiggins, supra*, although s/he is not required to draw such a conclusion.

- Lung condition unrelated to coal dust exposure

If a physician determines the miner suffers from emphysema arising from smoking as opposed to pneumoconiosis, this opinion is relevant to 20 C.F.R. § 727.203(b)(4) rebuttal. *Blaize v. Old Ben Coal Co.*, 3 B.L.R. 1-719 (1981). However, where a physician provides a diagnosis of emphysema related to coal mine employment or coal dust exposure, the opinion does not support rebuttal under 20 C.F.R. § 727.203(b)(4). *Heavilin v. Consolidation Coal Co.*, 6 B.L.R. 1-1209 (1984).

And, in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984), the Fourth Circuit held, as a matter of law, a non-examining physician's opinion (that the miner's emphysema was due to his history of cigarette smoking) is insufficient to rebut the interim presumption at 20 C.F.R. § 727.203(a), where no examining physician mentioned smoking as a possible cause of the miner's condition. Notably, the Board holds to the contrary with regard to a non-examining physician's opinion in *Cochran v. Consolidation Coal Co.*, 12 B.L.R. 1-136 (1989) and *Presley v. Sunshine, Inc.*, 8 B.L.R. 1-410 (1985).

- Negative x-ray evidence

The interim presumption may not be rebutted under 20 C.F.R. § 727.203(b)(4) based solely on negative x-rays. *Edwards v. Central Coal Co.*, 7 B.L.R. 1-712 (1985); *Conley v. Roberts and Shaefer Co.*, 7 B.L.R. 1-309 (1984); *Olszewski v. The Youghiogheny and Ohio Coal Co.*, 6 B.L.R. 1-521 (1983). However, x-ray evidence is always relevant, and it must be considered. *Michael v. James Spur Coal Co.*, 11 B.L.R. 1-78 (1988); *Hall v. Consolidation Coal Co.*, 6 B.L.R. 1-1306 (1984); *Edwards, supra*.

Similarly, a physician's opinion of no pneumoconiosis based solely on a negative chest x-ray is insufficient to support rebuttal under 20 C.F.R. § 727.203(b)(4). *Shonborn v. Director, OWCP*, 8 B.L.R. 1-434 (1986); *Weaver v. Reliable Coal Corp.*, 7 B.L.R. 1-486 (1984). However, a physician's opinion can be used to rebut the interim presumption, where it is based on negative chest x-rays in addition to other factors. *Foster v. National Mines Corp.*, 6 B.L.R. 1-1255 (1984); *Murphy v. Consolidation Coal Co.*, 3 B.L.R. 1-575 (1981); *Edwards, supra*.

- Silent opinion

Where a physician diagnoses chronic lung disease, but does not attribute it to a source, the opinion cannot constitute substantial evidence on rebuttal. *Pattelos v. Director, OWCP*, 7 B.L.R. 1-661 (1985); *Seese v. Keystone Coal Mining Co.*, 6 B.L.R. 1-149 (1983).

- Ventilatory studies

Pulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis. *Burke v. Director, OWCP*, 3 B.L.R. 1-410 (1981). Moreover, the fact that a physician conducted studies, which produced non-qualifying results, is not a sufficient reason to discredit the opinion under 20 C.F.R. § 727.203(b)(4).

IV. Applicability of 20 C.F.R. Parts 410 and 718 and § 410.490

Twenty C.F.R. § 727.203(d) provides, where eligibility is not established under 20 C.F.R. Part 727, eligibility may be established under 20 C.F.R. Part 718. The Board holds this provision, as written, is inconsistent with Section 402(f)(2) of the Act. As a result, the Board requires that claims denied under 20 C.F.R. Part 727 be reviewed under 20 C.F.R. Part 410. *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 B.L.R. 1-627 (1981).

However, the Third, Sixth, Seventh, Eighth and Eleventh Circuits hold that, if a claimant cannot establish entitlement under 20 C.F.R. Part 727 and the claim is adjudicated after March 31, 1980, then the regulations at 20 C.F.R. Part 718 (not 20 C.F.R. Part 410) are applicable. *Terry v. Director, OWCP*, 956 F.2d 251 (11th Cir. 1992); *Oliver v. Director, OWCP*, 888 F.2d 1239 (8th Cir. 1989); *Knuckles v. Director, OWCP*, 869 F.2d 996 (6th Cir. 1989); *Caprini v. Director, OWCP*, 824 F.2d 283 (3rd Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987). See also *Ezell v. Illinois Central Gulf Railroad*, BRB No. 88-0760 BLA (Mar. 30, 1993)(unpub.) (for a claim denied under 20 C.F.R. Part 727, then apply 20 C.F.R. Part 410 or 718, depending upon circuit court jurisdiction, but do not apply both).

Rebuttal under 20 C.F.R. § 727.203(b)(2) precludes entitlement under 20 C.F.R. Parts 410 and 718. *Wheaton v. North American Coal Corp.*, 8 B.L.R. 1-21 (1985) (consideration under 20 C.F.R. Part 410 precluded); *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989) (consideration under 20 C.F.R. Part 718 precluded).

Moreover, rebuttal under 20 C.F.R. § 727.203(b)(3) or (b)(4) precludes entitlement under 20 C.F.R. Part 410. *Pastva v. The Youghioghny and Ohio Coal Co.*, 7 B.L.R. 1-829 (1985) (rebuttal at subsection (b)(3) addressed); *Lefler v. Freeman United Coal Co.*, 6 B.L.R. 1-579 (1983) (rebuttal at subsection (b)(4) addressed).