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***SUPPLEMENT TO THE 2013 EDITION OF THE
JUDGES' BENCHBOOK:
BLACK LUNG BENEFITS ACT***

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Chapter 1
Introduction to the Claims Process and Research Tools

II. The request for a formal hearing

B. An Administrative Law Judge must be properly appointed [new]

In *Miller v. Pine Branch Coal Sales, Inc.*, ___ BLR ___, BRB No. 18-0323 BLA (Oct. 22, 2018), the Benefits Review Board (“Board”) addressed the issue of Department of Labor Administrative Law Judges’ appointments. The *Miller* case was before the Board for the second time. In its initial appeal of a June 27, 2017 Decision and Order awarding benefits in this subsequent claim, Employer challenged – based on the Appointments Clause of the U.S. Constitution¹ – the Administrative Law Judge’s ability to hear and decide the case. The Director, Office of Workers’ Compensation Programs (“Director”), responded by asking the Board to vacate the award and remand the case to the Administrative Law Judge to reconsider his decision and those prior actions taken, and to ratify them if appropriate. The Board granted the Director’s request to remand, and thus it remanded the case to him to reconsider his prior actions and to then issue a decision.

On remand, the Administrative Law Judge reviewed the actions he had taken previously, ratified them, and issued a new Decision and Order on Remand awarding benefits on March 29, 2018.

Employer appealed, once again arguing that the Administrative Law Judge was without authority to hear and decide the case and that the case must therefore be remanded for reassignment to a new Administrative Law Judge. The Director agreed that, in light of *Lucia v. SEC*, 585 U.S. ___, 138 S.Ct. 2044 (2018), the case should be remanded to the Office of Administrative Law Judges for reassignment to a new, properly appointed, Administrative Law Judge.

The Board concluded that “*Lucia* dictates that when a case is remanded because the administrative law judge was not constitutionally appointed, the parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge.” Slip op. at 4. However, the Board declined to address, as premature, Employer’s contentions that the Secretary of Labor’s [December 21, 2017 ratification letters of appointment](#) are constitutionally

¹ Article II, Section 2, of the U.S. Constitution states in part:

[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: *but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.*

U.S. Const. art. II, §2 (emphasis added).

deficient or that any removal protections afforded to Administrative Law Judges are unconstitutional. *Id.*

In light of the above, the Board vacated the Decision and Order on Remand and remanded “this case to the Office of Administrative Law Judges for reassignment to a new administrative law judge . . .” *Id.* at 5.

D. Party qualified to pursue the claim

In *Dalton v. Director, OWCP and Frontier-Kemper*, 738 F.3d 779 (7th Cir. 2013), the court held the children of a deceased miner had constitutional standing to sue, as they “have a concrete, financial interest in the outcome of this case, and it is fully redressable by the court.” The court rejected Frontier’s argument that the children were “not real parties in interest,” and could not pursue the miner’s claim for benefits. Citing to 20 C.F.R. § 725.360(b), the court held the rights of the children “may be prejudiced by a decision of an adjudication officer” and, as a result, they could pursue an award of benefits:

. . . even if Mr. Dalton had received all payments to which he was entitled, save for a 20% penalty to which his estate is still entitled . . ., Frontier’s request for modification made it necessary for the Children to defend the award Mr. Dalton already had received. As of then, there was a risk that the resulting modification could result in a reversal of the existing award. (citations omitted). The Children were and are entitled to benefits as Mr. Dalton’s surviving relatives.

738 F.3d at 783; see *Baird v. Westmoreland Coal Co.*, BRB Nos. 16-0532 BLA & 16-0533 BLA, slip op. at 5-6 (July 19, 2017) (unpub.) (rejecting Employer’s argument that no justiciable controversy existed because of Claimant’s death “and the absence of any substitution” and noting that “[t]he adversity between the Trust Fund and employer is sufficient to maintain the justiciability of these appeals”).

Chapter 2
Introduction to the Medical Evidence

III. The pulmonary function (ventilatory) study

E. The use of bronchodilators

But see Gower v. Eastern Associated Coal Co., BRB No. 13-0586 BLA (July 29, 2014) (unpub.) (noting that the Administrative Law Judge acted within his discretion in crediting the claimant's pre-bronchodilator results over those obtained after the administration of a bronchodilator).

IV. The blood gas studies

In *Jackson v. Drummond Co., Inc.*, BRB No. 16-0250 BLA (Feb. 27, 2017) (unpub.), the Board addressed questions surrounding those values that must be obtained during an arterial blood gas test in order for the test to be deemed qualifying. In one of the blood gas studies at issue, the PCO₂ value was exactly 50, while the PO₂ value was 55.1. According to the table at 20 C.F.R. Part 718, Appendix C(1), a PO₂ value "equal to or less than" 60 will be deemed qualifying for a PCO₂ value ranging from 40-49. Any PO₂ value will be deemed qualifying for a PCO₂ value "Above 50." The Board rejected Employer's argument that the results of this test were not qualifying because the table simply fails to contemplate a PCO₂ value of exactly 50:

Employer is technically correct that, as written, the tables in Appendix C do not account for a PCO₂ value of exactly 50. Employer's position, however, would effectively preclude any study that produced such a value from ever being qualifying regardless of the PO₂ value produced, or from being considered at all, even as studies with PCO₂ values below and above 50 could be qualifying. It defies logic to think that the Department of Labor (DOL) would write the tables to account for any PCO₂ value from "25 or below" to "Above 50," but deliberately exclude a value of exactly 50. Employer offers no reason why the tables should be read that way, and we will not interpret the regulations to produce such an absurd result.

Slip op. at 6 (internal citation omitted). Furthermore, the Board noted that "there is evidence that when DOL introduced the current blood gas tables in Appendix C, it intended for any blood gas studies that produce PCO₂ values of 50 or above — not "Above 50" — to be automatically qualifying." *Id.* at 6-7, citing 45 Fed. Reg. 13,678, 13,711 (Feb. 29, 1980) ("The Department has thus decided to adopt a value of 50 mmHg pCO₂ in order to establish disability independent of the pO₂." (emphasis in original)). Therefore, the Board held "that a valid arterial blood gas study with a PCO₂ value of 50 and any PO₂ value is qualifying based on the tables at 20 C.F.R. Part 718, Appendix C" and affirmed the ALJ's finding that the test was qualifying.

The Board next addressed Claimant's contention that the Administrative Law Judge erred in finding a different arterial blood gas study non-qualifying. In this study, at rest,

Claimant's PCO₂ value was 49.1, while his PO₂ value was 67.7. At exercise, his PCO₂ value was 50.3, while his PO₂ value was 67.6. The Administrative Law Judge found that both tests were non-qualifying because a PO₂ value cannot surpass 60mmHg when the corresponding PACO₂ value is over 40. Agreeing with Claimant, the Board held that the results from the resting and exercising studies were qualifying:

A claimant's PCO₂ and PO₂ values must be "equal to or less than" the values on the table used to evaluate the claimant's values. Therefore, the resting blood gas study . . . is qualifying. Contrary to employer's contention, the study cannot be analyzed using the line on the table for PCO₂ values from 40 to 49, because claimant's measured PCO₂ value of 49.1 is not "equal to or less than" 49. Thus, the study must be analyzed using the next line, for PCO₂ values "Above 50" — which, as we held in considering [the earlier] blood gas study, effectively means "50 and above." As the table indicates, any PO₂ value would be qualifying, including the 67.7 produced here.

Slip op. at 8 (internal citations omitted). Accordingly, the Board concluded that the Administrative Law Judge erred in finding this blood gas study to be non-qualifying.

In light of the above error and other errors committed by the Administrative Law Judge in her consideration of the blood gas study evidence, the Board vacated her finding that the new blood gas study evidence failed to support a finding of total disability. On remand, the Board directed the Administrative Law Judge to, at the outset, reconsider the new blood gas study evidence to determine whether it supports a finding of total disability.

Chapter 3

General Principles of Weighing Medical Evidence

Citation update for this chapter:

Mullins Coal Co. of Virginia v. Director, OWCP, 483 U.S. 135, 138 (1987), *reh'g. denied*, 484 U.S. 1047 (1988).

II. Rules of general application

B. The "later evidence" rule

3. Ventilatory studies

[to be included after the *Coleman* citation]; *Miller v. National Mines Corp.*, BRB No. 15-0474 BLA, slip op. at 9 (Aug. 15, 2016) (unpub.) (noting that, "although a later negative x-ray cannot be credited over an earlier positive x-ray based on recency, . . . a later non-qualifying pulmonary function study and an earlier qualifying pulmonary function study may accurately represent the miner's respiratory condition at the time each study was taken"); *but see Spence v. Excel Mining, LLC*, BRB No. 15-0371 BLA, slip op. at 5 (Apr. 27, 2016) (unpub.) (concluding that the Administrative Law Judge "misapplied the later evidence rule" when she credited the three most recent pulmonary function studies, which produced higher values than the three earlier studies, because "a disharmony exists among the . . . studies that cannot be resolved by the later evidence rule").

5. Medical opinions

Lance Coal Corp./Golden Oak Mining Co, Inc. v. Caudill, 636 Fed. Appx. 355 (6th Cir. Mar. 22, 2016) (unpub.) (rejecting Employer's argument that an Administrative Law Judge must afford less weight to a medical opinion that fails to account for later-developed evidence or, alternatively, at least explain why the opinion is not entitled to be given diminished weight).

C. Numerical superiority

1. Chest x-rays

b. Mechanical application, held improper

Fourth Circuit

In *Sea "B" Mining Co. v. Addison*, 831 F.3d 244 (4th Cir. 2016), the Fourth Circuit addressed Employer's challenge to the Administrative Law Judge's weighing of the x-ray readings of record, specifically the readings of an x-ray dated May 20, 2011. A B reader and a dually-qualified physician interpreted the x-ray as being positive for pneumoconiosis, and a dually-qualified physician read the x-ray as negative for the disease. The Administrative Law Judge determined that the x-ray was positive for pneumoconiosis. On appeal, the court concluded that it was unable to "decipher from the ALJ's sparse explanation how, or if, he weighed the x-ray readings in light of the readers' qualifications." According to the court, "[w]ithout a more specific record of the ALJ's rationale for reaching his decision as to the May

20 x-ray, we are unable to adequately perform our judicial review function to assure that the ALJ's decision is based on a 'reasoned explanation.'" Therefore, the court directed the Administrative Law Judge on remand to "provide an explanation for his decision concerning the May 20 x-ray by explaining how he weighed the evidence 'in light of the readers' qualifications' and whether his conclusion was based on a numerical headcount of experts."

Sixth Circuit

But see Sunny Ridge Mining Co. v. Keathley, 773 F.3d 734 (6th Cir. 2014) (noting that *Woodward* was "not a *per se* ban on using differences in the quantity of evidence to reach conclusions").

Benefits Review Board

In *Parks v. Pinnacle Mining Co.*, BRB No. 14-0131 BLA (Nov. 24, 2014) (unpub.), the Board addressed a pro se appeal of an Administrative Law Judge's decision denying benefits. The Board agreed with the Director that the Administrative Law Judge "erred in 'doing a head count of the x-ray readers' and by failing to perform a qualitative analysis of the x-ray evidence, prior to finding that Claimant does not have complicated pneumoconiosis." The Board noted that, while the doctors agreed that Claimant's x-rays showed large masses in his lungs, the doctors disagreed as to whether these masses were large opacities of complicated pneumoconiosis. For example, the Board pointed out that Dr. Wheeler identified multiple large masses in Claimant's lungs, which the doctor stated were "compatible with conglomerate granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis]." Furthermore, Dr. Hippensteel noted "some type of granulomatous inflammation," and Dr. Scott identified "histoplasmosis, mycobacterium avium complex, tuberculosis, and sarcoidosis, as possible alternative diagnoses for claimant's radiological findings." Finally, while Dr. Forehand diagnosed complicated pneumoconiosis, he "recommended a CT scan to rule out cancer, infection, and granulomatous disease."

In agreeing with the Director, the Board also noted that, while the Administrative Law Judge "specifically observed that 'claimant[']s designated treatment records . . . indicate that he does not have tuberculosis, histoplasmosis, or sarcoidosis,' she did not address the credibility of the x-ray evidence in light of this relevant evidence." Furthermore, the Board pointed out that Dr. Forehand provided remarks, and Dr. Hippensteel provided testimony, "concerning negative test results for tuberculosis and histoplasmosis."

Accordingly, the Board vacated the denial of benefits and remanded the matter for further consideration.

III. Chest x-ray evidence

B. Format of the x-ray report

2. Use of the official ILO form, generally

In *Coastal Coal-WV, LLC v. Director [Miller]*, 624 Fed. Appx. 824 (4th Cir. Oct. 5, 2015) (unpub.), concerning the merits of Employer's appeal, the court agreed with Employer that the Administrative Law Judge erred in failing to consider the comments its doctors provided

on their x-ray interpretations concerning the existence of complicated pneumoconiosis. The court concluded “that the ALJ erred by failing to consider the physicians’ comments, as those comments have direct bearing on whether the mass appearing on the x-ray is in fact the manifestation of a chronic dust disease or is the result of some other disease process.” Because the Administrative Law Judge primarily relied on the interpretations of these physicians in finding that the irrebuttable presumption of complicated pneumoconiosis was applicable, without also considering the attendant comments and how those comments might affect the credibility of the doctors’ readings, the court concluded “that substantial evidence does not support the award of benefits.”

In light of the above, the court vacated the award of benefits and remanded the matter to the Administrative Law Judge “for reconsideration of the x-ray evidence of complicated pneumoconiosis.” The court noted that, “[i]f the ALJ again finds that the x-ray evidence establishes the existence of complicated pneumoconiosis, he should then weigh all of the evidence to determine whether Employer provided affirmative evidence showing that the opacity does not exist or was caused by another disease process.”

IV. Pulmonary function (ventilatory) studies

A. Resolving height discrepancies

In *Floyd v. E. Assoc. Coal Co.*, BRB No. 14-0365 (June 18, 2015) (unpub.), the Board rejected an Administrative Law Judge’s decision to use the shortest measured height of the miner when assessing whether the pulmonary function studies of record were qualifying. In citing to *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983) ([i]f there are substantial differences in the recorded heights among all the studies, the administrative law judge must make a factual finding to determine claimant’s actual height.”), the Board concluded that the Administrative Law Judge’s rationale for using the shortest measured height was insufficiently explained, flawed, and unsound. Therefore, the Board vacated this finding. The Board further noted that “a general rule that categorically relies on the shortest height measurement will automatically disadvantage a miner.”

D. Miners over 71 years of age

However, in *Owens v. Harman Mining Corp.*, BRB No. 14-0292 BLA (Mar. 24, 2015) (unpub.), Board noted that it had held in *Meade* “that the party opposing entitlement may offer medical evidence to prove that pulmonary function studies that yield qualifying values for age 71 are actually normal or otherwise do not represent a totally disabling pulmonary impairment.” In *Owens*, Employer had submitted this type of evidence, as two of its doctors had extrapolated qualifying values for several of the pulmonary function studies using the Knudson equations, and opined that these studies did not reveal a totally disabling pulmonary impairment. The Board agreed with Employer that the Administrative Law Judge erred in rejecting Employer’s evidence as an improper attempt to extrapolate qualifying values. Instead, the Board concluded that, while it “has recognized that it is improper for an administrative law judge to, *sua sponte*, select and apply a mathematical formula to extrapolate values for a miner over 71 years old, the Board has recognized that an administrative law judge may properly consider evidence ‘*like the Knudson equations*’ in determining whether pulmonary function studies that yield qualifying values for a 71 year old miner are actually indicative of total disability.”

VI. Medical reports**B. Undocumented and unreasoned opinion, little or no probative value****9. Legal pneumoconiosis, smoking versus coal dust exposure must be explained**

In *Arch on the Green, Inc. v. Groves*, 761 F.3d 594 (6th Cir. 2014), the Administrative Law Judge found that legal pneumoconiosis was established partly by Dr. Rasmussen's opinion that coal dust inhalation "is more than a *de minimis* factor in Claimant's condition." Specifically, Dr. Rasmussen asserted that "[i]t seems quite intuitive that most of [Claimant's] impairment is secondary to cigarette smoking and that coal mine dust contributes to a minor degree." The Board upheld the Administrative Law Judge's finding, explaining that the applicable standard is satisfied if Claimant's coal mine employment contributed "at least in part" to his pneumoconiosis.

The Sixth Circuit held that the Board and the Administrative Law Judge applied the correct standard for concluding that Claimant's COPD arose out of his coal mine employment. The court explained that a claimant is not required to establish what portion of his disease arises out of his coal mine employment and what portion is unrelated to such employment; instead, it is enough that coal mine dust exposure contributed to the disease at least in part. In this case, the court held that substantial evidence supported the Administrative Law Judge's finding that Claimant established the existence of legal pneumoconiosis:

While Dr. Rasmussen said that smoking was the more important cause, "[i]t is sufficient that ... exposure to coal mine employment contributed 'at least in part' to [a claimant's] pneumoconiosis." *Cornett*, 227 F.3d at 576. Dr. Rasmussen's opinion clearly stated that [Claimant's] coal mine employment contributed to [his] disease.

Therefore, the court found that the Administrative Law Judge did not err in finding that Claimant established that he suffered from legal pneumoconiosis.

In *West Virginia CWP Fund v. Mullins*, 623 Fed. Appx. 59 (4th Cir. Sept. 10, 2015) (unpub.), the Administrative Law Judge, in a decision on remand from the Board, awarded benefits based on a finding that Claimant established total disability due to legal pneumoconiosis. The Board subsequently affirmed the award.

On appeal, the Fourth Circuit reversed, concluding that the Administrative Law Judge's decision awarding benefits was not supported by substantial evidence. Specifically, the court concluded "that substantial evidence does not support the ALJ's decision to accord full probative weight to Dr. Gaziano's opinion," which the Administrative Law Judge relied upon in finding that Claimant had legal pneumoconiosis and was totally disabled due to the disease. In support of its conclusion, the court noted the following:

Dr. Gaziano's diagnosis of legal pneumoconiosis was based entirely on [Claimant's] history of coal dust exposure. Dr. Gaziano offered no objective medical evidence to support the conclusion that [Claimant's] [COPD] arose out

of his coal mine employment or was aggravated by coal dust exposure, and Dr. Gaziano confirmed at deposition that [Claimant's] symptoms were not specific to any respiratory disease. Dr. Gaziano also admitted that it was possible that [Claimant's] COPD could have been caused entirely by cigarette smoking, without any aggravation by coal dust. Thus, Dr. Gaziano essentially presented only the possibility that [Claimant's] COPD was caused by coal dust exposure, which we have deemed insufficient to support an award of benefits.

The court further noted that "Dr. Gaziano's reliance on an overestimate of the length of [Claimant's] coal mining career by five years" was problematic, as (1) the Administrative Law Judge failed to explain how this discrepancy did not make a difference in this case, and (2) "[t]his discrepancy [did] not bolster the ALJ's decision to accord full probative weight to Dr. Gaziano's opinion, especially when the sole basis for Dr. Gaziano's diagnosis of legal pneumoconiosis was [Claimant's] exposure to coal dust."

The court concluded that Dr. Gaziano's opinion "is simply insufficient to satisfy [Claimant's] burden of demonstrating his entitlement to benefits." Finding no remaining evidence supporting entitlement, the court reversed the award of benefits.

C. Physicians' qualifications

4. Conviction or lapse of licensure, effect of

See *Adkins v. Kentland Elkhorn Coal Co.*, 87 F.3d 1315 (6th Cir. 1996) (table) (unpub.), wherein the court affirmed the Administrative Law Judge's determination that a medical expert's "credibility is at or below zero level":

The ALJ's credibility determination was based on evidence which showed that on January 16, 1986, the State Board of Medical Licensure of the Commonwealth of Kentucky issued an Order of Temporary Restriction against the medical license of Dr. Ameji. The temporary restriction against Dr. Ameji's medical license was based on a complaint against Dr. Ameji which alleged: (1) that he demonstrated gross ignorance, gross incompetence, gross negligence and/or malpractice regarding patients on August 15, 1985, August 25, 1985, and August 26, 1985; and (2) that he prescribed and dispensed Schedule III and Schedule IV controlled substances to eight patients with the intent or knowledge that they were to be used for non-therapeutic purposes.

The court further noted:

Claimant asserts that the ALJ should not have relied on this evidence to discredit Dr. Ameji's opinion because all of the events upon which the temporary restriction of his license were based occurred after he examined claimant and issued his report on claimant's condition. However, as the ALJ stated in his decision and order, Dr. Ameji's "actions cast grave doubt on his medical honesty and sincerity and on the trustworthiness of his medical opinions and diagnoses." J.A. 77. We agree, and conclude that the ALJ did not err in giving little or no weight to Dr. Ameji's opinion.

See also *Hatton v. Westmoreland Coal Co.*, BRB No. 13-0219 BLA (Feb. 20, 2014) (unpub.) (if the Administrative Law Judge “admits the evidence regarding Dr. Dennis’s surrender of his medical license, she must determine whether it alters the weight to which Dr. Dennis’s opinion is entitled”; “it is unclear to the Board whether the administrative law judge would still credit Dr. Dennis’s opinion, based on her observation that the . . . misconduct took place after Dr. Dennis performed the miner’s autopsy and testified in this case”).

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

6. Pneumoconiosis does not progress after exposure to dust ceases

[to be included after *Banks* case citation] *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734 (6th Cir. 2014) (Dr. Broudy, in response to a question asking how he ruled out coal mine dust as a cause of the miner’s impairment, stated that, “for one thing, the bronchitis associated with coal dust exposure usually ceases with cessation of exposure”; the court concluded that the Administrative Law Judge reasonably found “that Dr. Broudy’s medical opinion about legal pneumoconiosis was based on a premise inconsistent with the Act,” noting that this premise “was the sole reason Dr. Broudy gave for eliminating coal dust exposure as the cause of [the miner’s] chronic bronchitis.”).

J. The preamble to the amended regulations

1. Benefits Review Board

[to be included after *Aberry Coal* summary]; *but see Short v. Keystone Coal Mining Corp.*, BRB No. 15-0196 BLA, slip op. at 4-5 (Feb. 24, 2016) (unpub.) (agreeing with Employer that the Administrative Law Judge erred in discrediting its physicians’ opinions because, while he discredited their opinions based on a finding that they “were inconsistent with the DOL’s recognition that the medical literature supports the theory that ‘dust induced emphysema and smoke-induced emphysema occur through similar mechanisms,’” he did not reference any support for his finding that these physicians “actually based their opinions on the principle that dust-induced emphysema and smoke-induced emphysema occur through different mechanisms.”).

In *Vance v. Hobet Mining, Inc.*, BRB No. 13-0212 BLA (Feb. 28, 2014) (unpub.), the Board held the following with regard to consideration of physicians’ opinions premised on views that are inconsistent with the preamble:

A party may dispute the science credited by the Department of Labor in the preamble to the 2001 amended regulations by laying the appropriate foundation. See *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319 (4th Cir. 2013) (observing that neither of the employer’s doctors had ‘testified as to scientific innovations that archaized or invalidated the science underlying the preamble’). Otherwise, a party cannot dispute the science incorporated into the regulations. (citations omitted). In this case, the administrative law judge indicated that Dr. Zaldivar relied on medical authority that was developed after the preamble to the 2001 amended regulations (in) support of the opinion of Dr. Zaldivar, as well as the opinion of Dr. Hippensteel, that bullous emphysema

is not caused by coal dust exposure. However, as claimant asserts, the administrative law judge did not render a specific determination that the medical literature cited by Dr. Zaldivar was, in fact, developed after the preamble to the 2001 amended regulations. (citation omitted). Moreover, even if the studies cited by Drs. Zaldivar and Hippensteel were developed after the preamble to the 2001 amended regulations, the administrative law judge did not explain, as required by the APA, why the studies cited by Drs. Zaldivar and Hippensteel are more credible than the studies relied on by the Department of Labor.

Slip op. at 9. As a result, the claim was remanded for further consideration of the medical opinions.

In *Tobin v. Cumberland Cyprus Resources*, BRB No. 14-0299 BLA (May 29, 2015) (unpub.), the Board addressed Claimant's appeal of an Administrative Law Judge's denial of benefits in a survivor's claim. Below, the Administrative Law Judge found that Claimant had invoked the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4), but further found that Employer had rebutted the presumption.

On appeal, the Board addressed the Administrative Law Judge's credibility findings on rebuttal, and specifically considered whether the Administrative Law Judge erred in crediting the opinions of Drs. Rosenberg and Zaldivar in finding rebuttal established. Of note, the Board agreed with the Director that the Administrative Law Judge "did not fully assess the documentation underlying Dr. Zaldivar's exclusion of coal dust exposure as a contributing cause of the miner's emphysema." The Board stated that, while the Administrative Law Judge pointed out that Dr. Zaldivar's reference to medical literature post-dating the preamble made his opinion more persuasive, the Administrative Law Judge "did not determine whether this literature actually pertained to differentiating between the effects of smoking and coal dust exposure on the lungs, or solely to the effects of smoking." In addition, in citing to the Fourth Circuit's decision in *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013), the Board reiterated that "an expert's reliance on medical science set forth in medical literature more recent than the preamble to the 2001 revised regulations is significant only if the expert testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble."² Therefore, the Board vacated the Administrative Law Judge's crediting of Dr. Zaldivar's opinion that neither coal dust exposure nor pneumoconiosis played any role in the miner's death.

² The Board noted the following in a footnote:

The Director also asserts that Dr. Zaldivar's statement, that no new literature has been published "regarding black lung or silica since the Federal Register stated that smoking and coal dust produced damage in the same fashion in the lungs," is incorrect. [citation omitted]. In support of this argument, the Director states that NIOSH published an Intelligence Bulletin in 2011 in which it reported that "new findings strengthen [the] conclusions and recommendations" set forth in the 1995 NIOSH publication that the DOL cited in the preamble to the 2001 revised regulations. Director's Letter Brief at 5 n.6, quoting *Current Outcomes, A Review of Information Published Since 1995*, NIOSH Intelligence Bulletin 64 (2011) (available at www.cdc.gov/niosh/docs/2011-172).

Slip op. at 8, n.9.

2. Third Circuit

See also *National Mines Corp. v. Director, OWCP [Davis]*, 553 Fed. Appx. 273 (3rd Cir. Feb. 11, 2014) (unpub.) (reliance on preamble in addition to consideration of the physicians' credentials, the substance of their opinions, support for their opinions, and whether the opinions were "consistent with the regulatory regime that holds that pneumoconiosis may be diagnosed 'notwithstanding a negative X-ray'" was proper).

3. Fourth Circuit

In *Island Creek Coal Co. v. Dykes*, 611 Fed. Appx. 119 (4th Cir. May 21, 2015), Employer alleged that the Administrative Law Judge erred in using the preamble to the 2001 regulations to discredit the opinion of Dr. Fino when considering whether Employer rebutted the 15-year presumption. In analyzing Dr. Fino's opinion, the Administrative Law Judge noted Dr. Fino's opinion that Claimant had only a minimal, non-disabling respiratory obstruction upon leaving the mines in 1994. The Administrative Law Judge then stated that, "[t]o the extent that Dr. Fino may be suggesting that, because Claimant was not disabled after leaving the coal mines, his present disability is unrelated to coal mine employment, his opinion is at odds with [the Department's] findings that pneumoconiosis is a progressive disease that can worsen after cessation of coal mine dust exposure." In addition, the Administrative Law Judge pointed out that the Department, in the preamble, "specifically rejected Dr. Fino's position that pneumoconiosis was not progressive." The court rejected Employer's contention of error:

The ALJ did not explicitly discredit Dr. Fino's opinion based on this conflict with the Preamble. Moreover, in the Preamble, the Department clearly rejected Dr. Fino's opinion that pneumoconiosis is not latent or progressive, and cited medical studies supporting its position. Although the Preamble does not state that pneumoconiosis is always progressive, the Department retained its regulatory provisions specifying that pneumoconiosis is latent and progressive. In his deposition, Dr. Fino explained that he believed pneumoconiosis can be progressive, but only in a small portion of miners, 'maybe 10 to 15 percent at most, but it clearly can be progressive.' [citation omitted]. The ALJ properly evaluated Dr. Fino's opinion.

611 Fed. Appx. at 122.

In *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663 (4th Cir. 2017), Claimant had worked for approximately 30 years in qualifying coal mine employment and had smoked cigarettes at a minimal rate for 39 years. Dating back to the early 1990s, and near the end of his coal mine work, Claimant had received advice from several physicians that he should not return because of his difficulty breathing.

Claimant filed the instant claim in March 2011, nearly 20 years after retiring from his work in the mines. Four physicians – Drs. Klayton, Gallai, Rosenberg, and Zaldivar – provided medical reports in the case. Dr. Klayton diagnosed Claimant as having clinical pneumoconiosis, while Dr. Gallai instead diagnosed legal, and not clinical, pneumoconiosis. Drs. Rosenberg and Zaldivar each opined that Claimant suffered from asthma and/or a smoking-related impairment, not black lung.

In awarding Claimant benefits, the Administrative Law Judge found that Claimant timely filed his claim and suffered from a totally disabling respiratory or pulmonary impairment. In light of Claimant's length of coal mine employment, the Administrative Law Judge found that Claimant invoked the 15-year rebuttable presumption, at Section 718.305, that he was totally disabled due to pneumoconiosis arising out of his coal mine employment. The Administrative Law Judge found that Employer was unable to rebut the presumption and therefore awarded benefits. The Board affirmed the award, and Employer then appealed to the Fourth Circuit.

On appeal, Employer challenged, *inter alia*, the Administrative Law Judge's decision to discount Dr. Rosenberg's opinion (1) based on the preamble to the 2001 regulatory amendments, and (2) in light of that physician's discussion of the FEV1/FVC ratio derived from pulmonary function testing. The court summarized Dr. Rosenberg's opinion in the following way:

In particular, Dr. Rosenberg cited medical articles indicating that FEV1 and FVC measurements together decline in patients suffering from black lung disease such that the corresponding FEV1/FVC ratio ordinarily remains undisturbed. By contrast, because [Claimant's] FEV1/FVC ratio decreased over time, Dr. Rosenberg posited, the medical evidence indicated that Claimant's] history of smoking was the "sole culprit" of his disabling lung disease.

876 F.3d at 671. The court agreed with the Administrative Law Judge's finding, however, that the above "hypothesis regarding FEV1/FVC ratios runs directly contrary to the agency's own conclusions in this regard." *Id.*; see 65 Fed. Reg. 79,920-01, 79,943 (Dec. 20, 2000) (noting that COPD related to coal mine dust exposure "may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC"). In addition, the court concluded that Dr. Rosenberg selectively quoted studies that predated the preamble when interpreting them, while the more recent studies he referenced failed to address black lung; therefore, the court determined that they provided little support for Employer's contention that the Administrative Law Judge had improperly discredited Dr. Rosenberg's opinion. Referencing (1) prior decisions in which it and the Sixth Circuit had rejected physicians' reliance on similar evidence to opine that claimants are not entitled to federal black lung benefits, and (2) "an ALJ's general prerogative to discount medical opinions at odds with the conclusions adopted by the agency itself, [the court concluded] that the ALJ did not err in rejecting Dr. Rosenberg's opinion regarding the FEV1/FVC ratio's ability to show particularized causation." 876 F.3d at 672, citing *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491-92 (6th Cir. 2014).

4. Sixth Circuit

In *Central Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483 (6th Cir. 2014), the Sixth Circuit affirmed the Administrative Law Judge's award of benefits pursuant to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Before the Sixth Circuit, Employer argued that the Administrative Law Judge erred in discrediting the medical opinions of Employer's doctors, including Dr. Rosenberg. Employer contended that these opinions, if credited, could have established on rebuttal that the miner's COPD was not attributable to his coal mine employment.

Notably, Dr. Rosenberg determined that the miner's COPD was not due to his coal mine employment because the COPD was "characterized by a severe reduction of his FEV1 and FEV1/FVC ratio," which Dr. Rosenberg stated is attributable to a smoking-induced, as opposed to a coal mine-induced, disease. In support of his opinion, Dr. Rosenberg discussed "at great length the effects of both cigarette smoking and coal-dust exposure on the FEV1/FVC ratio," and further explained "that both DOL and the Global Initiative for Chronic Obstructive Lung Disease overbroadly define COPD as a reduction in the FEV1/FVC ratio, whereas 'recent literature (including literature published after [DOL's] revisions to the black lung regulations) establishes the limitation of defining COPD as simply a reduction in FEV1 or FEV1% values.'" The Administrative Law Judge declined to credit Dr. Rosenberg's opinion, however, as he found the opinion to be "inconsistent with the DOL's position that 'coal mine dust exposure may cause COPD, with associated decrements in FEV1/FVC.'"

In rejecting Employer's argument, the court held that the "Administrative Law Judge was entitled to consider the DOL's position and to discredit Dr. Rosenberg's testimony because it was inconsistent with the DOL position set forth in the preamble to the applicable regulation." The court noted that Employer did not challenge the Department's position, as stated in the preamble, that coal mine dust exposure may cause COPD with a reduced FEV1/FVC ratio. If Employer were to make such an argument, the court indicated that it "would need to engage the substance of that scientific dispute," but "only after [Employer] submitted 'the type and quality of medical evidence that would invalidate' the DOL's position in that scientific dispute." The court noted that Employer had submitted no such evidence in the present case and requested that no such determination be made by the court.

In *Quarto Mining Co. v. Marcum*, 604 Fed. Appx. 477 (6th Cir. March 24, 2015), the Sixth Circuit quoted at length from its decision in *Sterling* in affirming the Administrative Law Judge's decision to discredit Dr. Rosenberg's opinion as being inconsistent with the preamble. In *Marcum*, Dr. Rosenberg offered the same reasons for concluding that the claimant did not suffer from an impairment related to coal mine dust exposure that he offered in *Sterling*. The court rejected Employer's argument that "the ALJ erred in not assessing the post-preamble studies alluded to in Dr. Rosenberg's report because the [Act] prescribes that all relevant evidence related to black lung claims be considered." Instead, the court concluded that, while *Sterling* "leaves open the possibility that a mining company could muster medical evidence that would invalidate the position taken by the Department in the preamble," the court could "find nothing to distinguish [Dr. Rosenberg's] evidence from the evidence that he relied upon, and that we rejected, in [*Sterling*]." Therefore, the court concluded that the Administrative Law Judge appropriately discounted Dr. Rosenberg's opinion as being at odds with the Department's position in the preamble "without establishing the invalidity of that position."

In *Arch on the Green, Inc. v. Groves* 761 F.3d 594 (6th Cir. 2014), the court held that the Administrative Law Judge did not err when he relied on the preamble to test whether the theories of Employer's doctors were consistent with medical literature. The court noted that there was no indication that the Administrative Law Judge treated the preamble as binding. Moreover, although the Administrative Law Judge used the phrase "regulatory intent," there is no indication that he was invoking a presumption in favor of granting benefits. Rather, "[i]n context, it seems far more likely that the Administrative Law Judge was using regulatory intent to refer to the language that the decision quoted from the preamble, which was not in error."

6. Ninth Circuit [new]

In affirming the award of benefits in *Peabody Coal Co. v. Director, OWCP* [Opp], 746 F.3d 1119 (9th Cir. 2014), a claim involving nearly 40 years of coal mine employment and over 50 years of smoking cigarettes, the court held “the ALJ simply—and not improperly—considered the regulatory preamble to evaluate conflicting expert medical opinions,” and it stated:

A preamble may be used to give an ALJ understanding of a scientific or medical issue.

The court concluded the preamble was consistent with the Black Lung Benefits Act and its implementing regulations. With regard to weighing the medical expert opinions, the court found:

The ALJ rationally discounted the testimony of Peabody’s medical experts, who based their opinions on the premise that coal dust exposure never, or very rarely, causes COPD. The ALJ permissibly looked to the preamble to determine that Peabody’s medical experts proffered only one of several interpretations of the evidence.

. . .

Because ‘there is considerable basic scientific data linking coal mine dust to the development of obstructive airways disease,’ the ALJ properly discounted the contrary view advanced by Peabody’s experts. 65 Fed. Reg. at 79943.

746 F.3d at 1127.

7. Tenth Circuit [new]

In *Blue Mountain Energy v. Director, OWCP* [Gunderson], 805 F.3d 1254, 25 B.L.R. 2-765 (10th Cir. Nov. 2015), the Administrative Law Judge, on second remand, awarded benefits by finding Claimant established that he was totally disabled due to legal pneumoconiosis. Of note, the Administrative Law Judge found that “the brevity of Dr. Shockey’s report [finding legal pneumoconiosis] causes it to be less probative in light of the comprehensiveness of the other medical opinions of record.” *Gunderson v. Blue Mountain Energy*, OALJ Case No. 2004-BLA-05323, slip op. at 14-15 (Mar. 18, 2013) (unpub.). Furthermore, the Administrative Law Judge found “Dr. Repsher’s opinion that Claimant’s COPD is not related to coal dust exposure based predominately, if not totally, on articles Dr. Repsher cites for the proposition that coal dust exposure is significantly less likely to cause COPD than cigarette smoking” *Id.* at 15. Therefore, the Administrative Law Judge accorded Dr. Repsher’s opinion “less weight because it does not focus on Claimant’s specific symptoms and conditions, but on statistics.” *Id.* The Administrative Law Judge also noted that Dr. Repsher failed to “address whether coal dust exposure and smoking could have been additive causes of Claimant’s lung disease, an etiology clearly adopted in the Preamble to the Regulations.” *Id.* In sum, the Administrative Law Judge found the opinions of Drs. Cohen and Parker to be most probative because both doctors “more thoroughly evaluated Claimant’s specific condition when determining that Claimant’s obstructive lung disease was caused by coal mine dust exposure.” *Id.* The Administrative Law Judge also pointed out that Dr. Parker

had, for example, “specifically linked Claimant’s symptoms to the documented effects of coal mine dust exposure and cited to literature that has been approved by the Department in the Preamble.” *Id.*

Employer moved for reconsideration, which the Administrative Law Judge denied, except in respect to the onset date for the payment of benefits, which he modified accordingly.

Employer then appealed. The Board concluded that the Administrative Law Judge had “permissibly relied on the preamble to the revised 2001 regulations as a statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment.” *Gunderson v. Blue Mountain Energy*, BRB No. 13-0412 BLA, slip op. at 6 (May 16, 2014) (unpub.). The Board further noted that “the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond.” *Id.* Of note, the Board concluded that the Administrative Law Judge “reasonably credited Dr. Parker’s diagnosis of legal pneumoconiosis because Dr. Parker linked claimant’s impairment to the documented effects of coal mine dust exposure, based on studies that were cited with approval in the preamble to the revised 2001 regulations.” *Id.* at 7. Furthermore, the Board stated that the Administrative Law Judge “rationally discounted Dr. Repsher’s opinion,” as the Administrative Law Judge found the opinion at legal pneumoconiosis insufficiently explained, “considering that the Department of Labor accepted medical literature stating that smoking and coal mine dust exposure are additive in causing COPD.” *Id.* Accordingly, the Board affirmed the award of benefits.

Employer petitioned the Tenth Circuit for review. Before the court, Employer argued that the Administrative Law Judge violated the Administrative Procedure Act (APA). Specifically, Employer first contended that the Administrative Law Judge inappropriately relied “on the preamble, thereby giving the preamble the ‘force and effect of law.’” *Gunderson*, 805 F.3d at 1259. At the outset, the court noted “the very limited extent to which the ALJ referenced the preamble,” as the Administrative Law Judge included the preamble as only one of the tools he used to evaluate the credibility of two medical reports, and referenced the preamble on only two occasions. *Id.* The court also noted that, while such use of the preamble is a matter of first impression in the Tenth Circuit, numerous other circuit courts have affirmed reliance on the preamble. The court disagreed with Employer that the Administrative Law Judge’s citation to the preamble “undeniably changed the outcome” of the case, and further noted that the Administrative Law Judge did not solely rely on the preamble in crediting the medical reports. *Id.* at 1260. The court concluded that there was “no indication in the ALJ’s final opinion that he was effecting some sort of change in the law or relying on a broadly-applicable rule premised on the preamble.” *Id.* at 1261. Instead, the Administrative Law Judge simply “used the preamble’s summary of medical and scientific literature as one of his tools in determining whether the experts’ medical analyses of [Claimant’s] condition were credible.” *Id.* The court failed to see how the Administrative Law Judge’s use of the preamble transformed “a summary of ‘the prevailing view of the medical community’ into binding law.” *Id.*

The court also rejected Employer’s argument predicated upon *Christensen v. Harris County*, 529 U.S. 576 (2000), and the fact that the preamble was not subject to notice and comment. The court distinguished *Christensen* on two grounds: (1) in contrast to the opinion letter in *Christensen*, which offered a legal interpretation of a statute, the preamble “provides

a scientific justification for amending a regulation,” and (2) the question before the court in *Christenson* was one of *Chevron* deference, while in the present case the issue was whether “the ALJ was entitled to use the preamble as one of his tools in evaluating the scientific credibility of experts.” *Id.*

In light of the above, and in rejecting Employer’s first argument on appeal, the court concluded that the preamble “seems like a reasonable and useful tool for ALJs to use in evaluating the credibility of the science underlying expert reports that address the cause of pneumoconiosis.” *Id.* Accordingly, the court held “that an ALJ may—but need not—rely on the preamble to 20 C.F.R. §718.201 for this purpose.” *Id.* at 1262. The court noted that “parties remain free to offer other scientific materials for the ALJ to consider for the same purpose, including but not limited to, materials challenging the continued validity of the science described in the preamble.” *Id.*

Second, the court addressed Employer’s argument that the preamble constitutes evidence not contained in the record and, therefore, the Administrative Law Judge was required to reopen the record to provide Employer with an opportunity to respond to findings in the preamble. The court rejected this argument, concluding that the Administrative Law Judge did not abuse his discretion in refusing to do so and noting that Employer “was well aware of the preamble’s scientific findings . . . and had ample opportunity prior to the close of this record to submit evidence or expert opinions to persuade the Administrative Law Judge that the preamble’s findings were no longer valid or were not relevant to the facts of this case.” *Id.* Furthermore, Employer’s requests to reopen the record largely “did not point to anything in the preamble that [Employer] considered no longer scientifically valid.” *Id.*

In *Energy West Mining Co. v. Blackburn*, 857 F.3d 817 (10th Cir. 2017), the Tenth Circuit addressed Employer’s appeal in a deceased miner’s claim filed on November 5, 2009.

In *Blackburn*, the first Administrative Law Judge assigned to the case denied benefits, but on appeal the Board vacated the denial and remanded the matter to provide the Administrative Law Judge with an opportunity to further explain his weighing of the medical opinion evidence. The case was reassigned on remand, and the new Administrative Law Judge awarded benefits based on the rebuttable 15-year presumption at Section 411(c)(4). Employer appealed the award, and the Board affirmed. Employer then appealed to the Tenth Circuit.

In its decision, the court denied Employer’s petition for review and affirmed the decision awarding benefits on remand. The court initially rejected Employer’s contention that the Board erred in vacating the first Administrative Law Judge’s decision. It then addressed the following six challenges Employer made to the award on remand: (1) that the second Administrative Law Judge ruled beyond the scope of the Board’s remand, (2) that his decision on remand was not supported by substantial evidence, (3) that he interjected his own medical opinions for the opinions of Employer’s physicians, (4) that he erred in relying on the preamble to the 2001 amendments to the black lung regulations, (5) that he erred in being “overly generous” when considering the opinion of the physician who believed that the miner’s disabling emphysema was caused by the miner’s coal mine work, and (6) that he applied the incorrect legal standard in determining whether Employer rebutted the 15-year presumption. The court rejected each challenge in turn and thus denied the petition for review.

K. Citation to medical literature**1. Generally**

[To be included following the *J.P. v. Peabody Coal Co.* summary] In *Buckley v. Shrewsbury Coal Co. & Valley Camp Coal Co.*, BRB No. 15-0184 BLA, slip op. at 7 (Feb. 29, 2016) (unpub.), the Board rejected Employer's argument that an Administrative Law Judge may not independently review the medical literature; instead, the Board concluded that "an administrative law judge may review the scientific studies cited by a physician, and may require that they be included in the record, to determine whether the physician's characterization of the studies is accurate." The Board, however, agreed with Employer that the Administrative Law Judge erred in relying on the absence of particular medical studies from the record in giving Employer's physicians' opinions less weight, while also finding that Claimant's physicians' opinions were supported by these same studies.

Funka v. Consolidation Coal Co., BRB No. 16-0184 BLA (Mar. 15, 2017) (unpub.), involved a miner's claim and a survivor's claim that were before the Board for the fourth time. Most recently, the Board had remanded the case for the Administrative Law Judge to determine, *inter alia*, whether the evidence established the existence of pneumoconiosis. On remand, the Administrative Law Judge found that the miner was totally disabled by pneumoconiosis arising out of his coal mine employment. The Administrative Law Judge therefore awarded benefits in the miner's claim and found Claimant automatically entitled to survivor's benefits based on this award, in accordance with Section 422(l) of the BLBA.

On appeal, Employer challenged, among other findings made by the Administrative Law Judge, the decision to discredit Dr. Tomashefski's opinion. Notably, Dr. Tomashefski cited to a "McConnochie study as support for his opinion that the miner's fibrosis could not be due to coal dust because the miner had a limited amount of pigment in his lungs." The Administrative Law Judge deemed this interpretation of the study to be "called into question by Dr. Green's explanation that the McConnochie study actually supported the conclusion that miners can have interstitial fibrosis with minimal dust particles in their lungs."³ The Board also noted the Administrative Law Judge's finding that Dr. Tomashefski failed to provide an explanation for, or cite to any medical literature that would support, his conclusion that the honeycombing present in the miner's lungs was not associated with fibrosis related to coal dust. In light of the above, the Board affirmed the Administrative Law Judge's decision to give less weight to Dr. Tomashefski's opinion.

Neal v. Union Carbide Corp., BRB Nos. 16-0317 BLA and 16-0317 BLA-A (Apr. 13, 2017) (unpub.), involved Claimant's appeal and Employer's cross-appeal of a decision denying benefits in a miner's subsequent claim. Although the Administrative Law Judge found that the miner suffered from a totally disabling respiratory or pulmonary impairment, and that Claimant thereby demonstrated a change in an applicable condition of entitlement, he further found that the miner suffered from neither clinical nor legal pneumoconiosis. Therefore, the Administrative Law Judge denied benefits.

³ The Board concluded that the Administrative Law Judge permissibly accorded Dr. Green's explanation more weight, as she found that he "was the co-author of the study and therefore has a better understanding of the study's conclusion."

On appeal, the Board agreed with Claimant and the Director “that the administrative law judge failed to consider claimant’s argument that Dr. Meyer’s rationale for excluding clinical pneumoconiosis on x-ray and CT scan testing is undermined by recent medical science.” The Board noted that Claimant had argued that a medical study, Laney and Petsonk, *Small pneumoconiotic opacities on U.S. coal workers’ surveillance chest radiographs are not predominantly in the upper lung zones*, Am. J. Indus. Med., 55: 793-98 (2012), undercut Dr. Meyer’s reasoning and “found that, among coal miners with pneumoconiosis, small opacities were found equally over all lung zones and that 37.9% of opacities were irregular, contrary to Dr. Meyer’s rationale.” *Slip op.* at 7, citing Claimant’s Post-Hearing Brief at 5. According to the Board, Dr. Sood “set forth the results of this study, along with other relevant studies, in his October 19, 2015 medical report in which he diagnosed clinical coal workers’ pneumoconiosis.” *Id.*, citing Claimant’s Exhibit 9 at 11-12, 17-19. The Board concluded that the Administrative Law Judge failed to “address the credibility issue raised below before assigning the most weight to Dr. Meyer’s x-ray and CT scan readings and medical opinion,” and he therefore “did not adequately explain the weight he accorded the relevant evidence.” The Board thus vacated the Administrative Law Judge’s clinical pneumoconiosis finding overall, and specifically his findings based on the x-ray, CT scan, and medical opinion evidence.⁴ In light of the above, the Board also vacated the Administrative Law Judge’s disability causation finding.

Q. Weighing “Other evidence” under 20 C.F.R. § 718.107

2. Digital x-rays, not weighed under 20 C.F.R. § 718.202(a)(1) or 20 C.F.R. § 718.304(a)⁵

On April 17, 2014, the Labor Department published revised regulations at 79 Fed. Reg. 21606 (Apr. 17, 2014). These amendments address quality standards for, and consideration of, digital x-ray interpretations in black lung claims. The effective date of the amendments is May 19, 2014.

Prior to issuance of the amendments, the regulations did not contain quality standards for digital x-rays. As a result, digital x-rays were weighed as “Other evidence” (along with CT-scans) under 20 C.F.R. § 718.107. In determining whether pneumoconiosis was present or absent, only analog x-ray interpretations were weighed under 20 C.F.R. §§ 718.202(a)(1) and 718.304(a); digital x-ray interpretations were weighed under 20 C.F.R. §§ 718.202(a)(4) and 718.304(c). And, as part of its “affirmative” case, each party was limited to one interpretation of each study, scan, or procedure offered under 20 C.F.R. § 718.107. *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006) (en banc) (J. Boggs, concurring), *aff’d.*, 23 B.L.R. 1-261 (2007) (en banc on recon.).

Because the April 17, 2014, amendments provide quality standards for digital x-ray interpretations, this type of evidence can no longer be designated and weighed as “Other

⁴ The Board explicitly instructed the Administrative Law Judge to “address claimant’s argument that the medical study cited by Dr. Sood undermines Dr. Meyer’s rationale for finding no clinical pneumoconiosis on the miner’s x-rays and CT scans.”

⁵ This is the heading as it appears in the October 2013 *Benchbook*. In light of the 2014 regulatory amendments, the heading is amended to read, “Digital x-rays, weighed under 20 C.F.R. § 718.202(a)(1) or 20 C.F.R. § 718.304(a).”

evidence” under 20 C.F.R. §§ 718.107, 718.202(a)(4), 718.304(c). Rather, under the amended regulations, a party may elect to proffer digital x-ray interpretations to fill one or both of its affirmative x-ray slots. A party will no longer be permitted to proffer a digital x-ray interpretation under the slot provided for “Other evidence.”

In *Green v. Coal River Mining, LLC*, 25 B.L.R. 3-205 (2014), the Administrative Law Judge found that the Department’s revised regulations on digital x-rays and quality standards apply only to claims filed on or after May 19, 2014. In finding that the retroactivity event is the date that the claim was filed, the Administrative Law Judge rejected the Director’s position that the date of the x-ray reading should control. Finally, as the revised quality standards prohibit converted x-rays, and in light of the Department’s concerns about the accuracy of scanned, digitized images obtained from analog x-rays, the Administrative Law Judge concluded that converted digital x-rays offered in claims filed before May 19, 2014, face a very high bar for demonstrating “medical acceptability” under Section 718.107. Revised 20 C.F.R. § 718 Appendix A (d)(16)-(17); 79 Fed. Reg. 21,607-08 (April 17, 2014).

The Board offered the following explanation concerning the recent digital x-ray regulations in a footnote in an unpublished decision:

Effective May 19, 2014, the Department of Labor revised the regulations governing the admission and weighing of chest x-rays to include digital x-ray readings. *In claims, such as this one, that are filed before May 19, 2014, the revised regulations apply to digital x-ray readings performed on or after May 19, 2014.* See Black Lung Benefits Act Bulletin Nos. 14-08, 14-11.

Parks v. U.S. Steel Mining Co., LLC, BRB No. 15-0524 BLA, slip op. at 7, n.8 (Sept. 28, 2016) (unpub.) (emphasis added). Because the x-ray at issue was read by each of the physicians after May 19, 2014, the Board concluded that the x-ray should have been considered on the issue of complicated pneumoconiosis at Section 718.304(a), not Section 718.304(c).

Chapter 4
Limitations on Admission of Evidence and the “Good Cause”
Standard in Black Lung Claims

I. Limitation of documentary medical evidence

B. Evidence rulings must be made prior to issuance of decision on the merits

In *Boyd v. Island Creek Coal Co.*, ___ BLR ___, BRB No. 16-0524 BLA (July 28, 2017), the Board concluded that the Administrative Law Judge erred in, *inter alia*, not resolving the admissibility of an untimely submitted supplement report prepared by a DOL-sponsored examining physician prior to issuing her decision. Her failure to do so prevented Employer from having the opportunity to respond to the supplemental report and “from being able to properly address the evidence and the administrative law judge’s evidentiary ruling in its post-hearing brief, since it neither knew that the evidence was admitted nor the grounds on which it was admitted.” Slip op. at 6; see *L.P. [Preston] v. Amherst Coal Co.*, 24 BLR 1-57 (2008) (en banc).

C. An original claim or a claim filed pursuant to 20 C.F.R. § 725.309

2. In support of responsible operator’s or Trust Fund’s position

In *McClanahan v. Brem Coal Co., LLC*, 25 B.L.R. 1-165 (2016), the Board addressed an appeal of an Administrative Law Judge’s order directing Claimant to attend a third physical examination at Employer’s request. In denying the Director’s motion for reconsideration, the Administrative Law Judge found that the third examination would serve “the best interests of justice.”

Claimant and the Director filed interlocutory appeals with the Board, contending that the Administrative Law Judge erred in granting the motion to compel. At the time of the Administrative Law Judge’s order on the motion to compel, Section 725.414 stated that “[t]he responsible operator . . . shall be entitled to obtain and submit, in support of its affirmative case, no more than . . . two medical reports.” 20 C.F.R. § 725.414(a)(3)(i) (2015). Furthermore, only upon the showing of good cause is medical evidence exceeding the evidentiary limitations to be admitted. See 20 C.F.R. § 725.456(b)(1). The Board agreed with the Director that the plain language of the regulation limits Employer to obtaining only two pulmonary evaluations and thereby rejected Employer’s contention that the regulation simply limited the evidence to be submitted. The Board also referenced, for additional support, the preamble to the 2001 regulations, which states the following concerning the evidentiary limitations: “The Department recognizes that . . . testing may be difficult for some claimants. In the absence of good cause, the [new rule] limit[s] the maximum total number of tests to five in the vast majority of cases involving a designated operator”⁶ 65 Fed. Reg. 79,920, 79,992 (Dec. 20, 2000). Upon recognizing the deference owed to the Director’s

⁶ The Board noted that these five examinations are the complete pulmonary evaluation offered at the Department’s expense, two examinations attributed to a claimant, and two examinations attributed to an employer.

interpretation of the regulations, the Board held “that Section 725.414 limits an employer (in the absence of a showing of good cause) to obtaining two pulmonary evaluations.”

In the instant case, the Board noted that Employer already had obtained two pulmonary evaluations of Claimant. Furthermore, the Board concluded that Employer’s basis for alleging that it had established good cause for obtaining a third evaluation – “because all of the evidence is approximately three years old and a third medical evaluation is needed ‘in order to obtain the most accurate evidence and to properly evaluate the merits of the claim’” – was legally insufficient. The Board construed Employer’s assertion of good cause to be based simply upon relevance, an assertion which cannot establish good cause to exceed the limitations at Section 725.414. Accordingly, the Board reversed the Administrative Law Judge’s orders compelling Claimant to attend a third Employer-sponsored pulmonary evaluation.

In *McCormick v. National Coal Corp.*, BRB No. 16-0083 BLA (Nov. 28, 2016) (unpub.), the Board addressed an Administrative Law Judge’s Orders directing Claimant to submit to an employer-requested CT scan. The Board concluded that the Administrative Law Judge applied the incorrect standard in addressing Employer’s request to obtain the CT scan, as he considered whether Claimant could demonstrate that the CT scan request was unreasonable, as opposed to whether Employer could establish good cause to compel Claimant to submit to the CT scan. Furthermore, the Board determined that the evidence Employer proffered in the instant case was insufficient for it to establish good cause. The Board noted that Employer failed to demonstrate why a CT scan was needed, as opposed to the typical methods for diagnosing pneumoconiosis as prescribed by law. Characterizing the physician’s affidavit that Employer submitted in support of its CT scan request as simply a blanket, unsupported statement, the Board concluded that such a statement fails to “establish the particularized showing required to establish good cause to exceed the evidentiary limitations.” The Board held that to require the “claimant to undergo a CT scan based on employer’s general statement that it is medically necessary, without more, would . . . eviscerate the evidentiary limitations.”

In light of the above, the Board reversed the Administrative Law Judge’s Orders.

In *North v. Harlan Cumberland Coal Co., LLC*, BRB No. 16-0200 BLA (Feb. 2, 2017) (Hall, J., concurring and dissenting) (unpub.), which involved a miner’s subsequent claim, a majority of the Board addressed Employer’s contention that the Administrative Law Judge erred in rejecting its request to compel Claimant to submit to post-bronchodilator pulmonary function testing. At both examinations with Employer-provided physicians, Claimant had refused to submit to post-bronchodilator testing, and on each occasion the physician related that Claimant was refusing based on the advice of his attorney. Following Claimant’s refusals to submit to such testing, Employer filed a motion to deny the claim by reason of abandonment or, in the alternative, to compel Claimant to submit to the requested testing. The Administrative Law Judge denied Employer’s motion, stating that it had “not demonstrated that Claimant has unreasonably refused to submit to any testing it has requested” and that “the pertinent regulations do not require Claimant to undergo post-bronchodilator pulmonary function testing.” The Administrative Law Judge subsequently declined to alter her conclusion at the hearing and later rejected Employer’s renewed, post-hearing objections in her Decision and Order awarding benefits.

On appeal, Employer argued that the Administrative Law Judge abused her discretion in denying its motion because the regulations do not require such post-bronchodilator testing. Employer also posited that simply because the regulations do not require such testing does not mean that they could not be performed if a physician were to conclude that they would be useful in reaching a diagnosis. A majority of the Board concluded that it was unable to discern whether the Administrative Law Judge had abused her discretion in denying Employer's motion; therefore, it vacated her denial and remanded the case to her to further consider Employer's request and to more fully explain her findings:

In her November 1, 2013 order and her December 29, 2015 decision, the administrative law judge only stated basis for denying employer's motion is that post-bronchodilator testing is not required by the regulations. However, as employer asserts, the administrative law judge failed to address its argument that the fact that post-bronchodilator testing is not required by the regulations does not, itself, mean that they may not be performed, or its contention that its due process rights were violated because claimant's refusal to submit to post-bronchodilator pulmonary function testing denied employer evidence that was relevant to its defense of the claim.

Slip op. at 6.

In a concurring and dissenting opinion, Judge Hall noted her disagreement with "the majority's decision to vacate the administrative law judge's denial of employer's motion to compel claimant to undergo post-bronchodilator pulmonary function testing." Judge Hall wrote that she "would hold that, on the facts presented in this case, employer has not met its burden to show that the administrative law judge abused her discretion in denying employer's motion to require claimant to undergo post-bronchodilator pulmonary function testing." In support, Judge Hall noted the following: (1) the post-bronchodilator portion of the pulmonary function test is not required under the regulations, (2) the Department has acknowledged that the use of a bronchodilator does not sufficiently assess the extent of a miner's disability, (3) the Sixth Circuit "has recognized the limited value of a miner's response to bronchodilators as a method for excluding coal mine dust exposure as a cause of his impairment," and (4) Claimant had attended all Employer-related appointments.

F. "Other evidence" under 20 C.F.R. § 718.107

On April 17, 2014, the Labor Department published revised regulations at 79 Fed. Reg. 21606 (Apr. 17, 2014). These amendments address quality standards for, and consideration of, digital x-ray interpretations in black lung claims. The effective date of the amendments is May 19, 2014.

Prior to issuance of the amendments, the regulations did not contain quality standards for digital x-rays. As a result, digital x-rays were weighed as "Other evidence" (along with CT-scans) under 20 C.F.R. § 718.107. In determining whether pneumoconiosis was present or absent, only analog x-ray interpretations were weighed under 20 C.F.R. §§ 718.202(a)(1) and 718.304(a); digital x-ray interpretations were weighed under 20 C.F.R. §§ 718.202(a)(4) and 718.304(c). And, as part of its "affirmative" case, each party was limited to one interpretation of each study, scan, or procedure offered under

20 C.F.R. § 718.107. *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006) (en banc) (J. Boggs, concurring), *aff'd.*, 23 B.L.R. 1-261 (2007) (en banc on recon.).

Because the April 17, 2014, amendments provide quality standards for digital x-ray interpretations, this type of evidence can no longer be designated and weighed as "Other evidence" under 20 C.F.R. §§ 718.107, 718.202(a)(4), 718.304(c). Rather, under the amended regulations, a party may elect to proffer digital x-ray interpretations to fill one or both of its affirmative x-ray slots. A party will no longer be permitted to proffer a digital x-ray interpretation under the slot provided for "Other evidence."

2. Limitations on admission of

a. Limited to one case-in-chief report for each scan, study, or procedure

[to be included before *Harris* citation] *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) (concluding that the Administrative Law Judge erred in considering only one of the three CT scans Employer submitted for consideration, as Employer "was entitled to submit, and the ALJ was required to consider, one reading of each CT scan under 20 C.F.R. §718.107").

I. "Good Cause" standard for admitting evidence over limitations

1. The regulatory amendments

d. Applying "good cause" under 20 C.F.R. § 725.456(b)(1), an overview

[to be inserted at FN 30]; *McClanahan v. Brem Coal Co., LLC*, 25 B.L.R. 1-165 (2016) (in holding "that Section 725.414 limits an employer (in the absence of a showing of good cause) to obtaining two pulmonary evaluations," construing Employer's assertion of good cause to be based simply upon relevance and therefore legally insufficient).

Chapter 5

What is the Applicable Law?

III. Department of Labor jurisdiction

On April 27, 2018, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (Apr. 27, 2018), in which it dismissed Arch Coal's complaint. This case concerned Arch Coal's challenge to Bulletin 16-01, which contains Department of Labor guidance sent to OWCP's Division of Coal Mine Workers' Compensation ("DCMWC") staff. This Bulletin provides guidance to DCMWC staff when "adjudicating claims in which the miner's last coal-mine employment of at least one year was with one of the 50 subsidiary companies that have been affected by the Patriot Coal Corporation bankruptcy." Bulletin 16-01 at 1. Specific to Arch Coal, the Bulletin instructs DCMWC staff to send notices of claim to that company in particular circumstances, even though Arch Coal had sold the Black Lung Benefits Act ("BLBA" or "Act") liabilities of certain subsidiaries to Magnum Coal Co., which in turn was later acquired by Patriot Coal. As part of this federal court litigation, Arch Coal sought to enjoin the Department's administrative proceedings.

In March of 2017, the U.S. District Court for the District of Columbia granted the Department's motion to dismiss for lack of subject matter jurisdiction. The District Court concluded "that Arch Coal's challenges to [Bulletin 16-01] are within the scope of [the review structure laid out by the BLBA] because they are ultimately about whether Arch Coal is liable for certain miners' compensation claims—which is the core issue that the agency adjudicates (i.e., who is the responsible operator?) through orders under this review structure." *Arch Coal, Inc. v. Hugler*, 242 F. Supp. 3d 13, 19 (D.D.C. 2017).

Arch Coal appealed this decision to the Court of Appeals. In its decision, the D.C. Circuit first addressed the question of federal court jurisdiction. It initially noted that the BLBA, by its terms, made clear Congress's intent to limit operators to contesting "their liability for benefits payments exclusively through the statutory review scheme." 888 F.3d at 499. The Court of Appeals also concluded that, "[i]n all relevant respects, the BLBA resembles other statutory schemes held to preclude district court jurisdiction." *Id.* For example, operators may challenge proposed decisions and orders before an Administrative Law Judge and seek further review before the Board. "Only after the Board has issued a final order may an adversely affected party obtain judicial review, and that review is available only in a U.S. court of appeals." *Id.* Moreover, the court stressed that in only two limited circumstances not relevant to the present claim does the BLBA expressly authorize district court jurisdiction. See 33 U.S.C. §§ 921(d), 934(b)(4)(A). Accordingly, "operators seeking to contest their liability for black lung benefits claims must exhaust the administrative remedies provided in the statute before seeking review in a U.S. court of appeals." *Id.* at 500.

The Court of Appeals further held that the claims raised by Arch Coal are of the very type that Congress intended to fall within this review scheme. It therefore rejected Arch Coal's contention that *National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (per curiam), dictated that the company's claims could be heard in federal court because Bulletin 16-01 represented a substantive rule impermissibly issued retroactively and without notice-and-comment. The Court of Appeals noted that it had pointed out in *Nat'l Mining* "that in a case of the sort that Arch seeks to pursue here, 'there [is] no reason to

believe that [the operator's] legal position, if correct, could not be fully remedied through review in the Court of Appeals.'" *Id.*, quoting *Nat'l Mining*, 292 F.3d at 858. A formal regulation, not a bulletin, was challenged in *Nat'l Mining*, and the court underscored that Bulletin 16-01 neither imposes liability upon Arch Coal nor adjudicates any claim on the merits. The court thus characterized the federal lawsuit as "an attempt by Arch to jump the gun and make an end run around the BLBA's statutory scheme." *Id.* at 501. It also called attention to the concession by Arch Coal's attorney at oral argument that the operator will have the opportunity to raise objections to the Bulletin and any other Department actions during the administrative process; in fact, the D.C. Circuit pointed out that the company had in fact already done so in at least one case. The court also determined that any argument regarding the lack of meaningful judicial review because of inadequate discovery was premature; it further detailed numerous statutory and regulatory discovery safeguards, as well as the possibility of appellate review. *Id.* at 502.

Second, the Court of Appeals rejected Arch Coal's argument that Bulletin 16-01's guidance amounts to a final agency action not otherwise subject to review during the administrative process. In so doing, the Court of Appeals agreed with the Department, which contended that Arch Coal is able to raise its claims throughout the administrative process, these claims will be considered when raised, and Arch Coal has failed to challenge a final agency action in accordance with 5 U.S.C. §704.

Chapter 6
Definition of Coal Miner and Length of Coal Mine Employment

II. Coal miner defined under 20 C.F.R. Parts 718 and 727

B. The three-prong test

2. Merger of “status” and “function” prongs in some circuits

c. Sixth and Seventh Circuits

Salyers v. KenWest Terminals LLC, BRB No. 16-0557 BLA, slip op. at 3-5 (July 18, 2017) (unpub.) (affirming the Administrative Law Judge’s finding that Claimant’s work “at a coal loading dock on a river,” which Claimant testified “involved crushing, sizing, and mixing raw coal before loading it onto a barge for shipment,” constituted the work of a miner under the Act).

4. Function of the miner

f. Mine inspector

Furthermore, in *Navistar, Inc. v. Forester*, 767 F.3d 638 (6th Cir. 2014), the Sixth Circuit vacated an Administrative Law Judge’s award of benefits, holding that Claimant’s employment as a federal mine inspector with the Department’s Mine Safety and Health Administration could not be counted as qualifying coal mine employment for purposes of the fifteen-year rebuttable presumption. The court remanded the case to the Administrative Law Judge to determine whether Claimant was entitled to an award of benefits based on his five years of coal mine employment as a miner with a private coal mine company.

The Administrative Law Judge had found that Claimant’s five years of private coal mine employment, combined with his sixteen years of employment as a federal mine inspector, rendered him eligible for the rebuttable presumption of total disability due to pneumoconiosis. The Administrative Law Judge relied on the Board’s holding in *Moore v. Duquesne Light Co.*, 4 B.L.R. 1-40 (1981), *aff’d*, 681 F.2d 805 (3rd Cir. 1982), in which the Board concluded that federal mine inspectors are “miners” for purposes of the Act. According to the Board in *Moore*, a federal mine inspector’s work satisfies the “situs” test, as the inspector spends a significant portion of each workday in underground coal mines. Furthermore, a federal mine inspector’s work satisfies the “function” test, because the inspector’s duties are an integral function of the operation of the coal mines; safety inspections are statutorily required, and mines cannot operate unless health and safety standards are met.

While it was undisputed that Claimant’s work as a federal mine inspector satisfies the “situs” test, the Sixth Circuit agreed with the Director that a federal mine inspector’s work does not satisfy the “function” test; therefore, the court concluded that such inspectors fall outside the scope of the statutory definition of a miner. In so holding, the Sixth Circuit noted:

A federal coal mine inspector does not work ‘in the extraction or preparation of coal,’ or ‘in coal mine construction or transportation,’ as those terms are commonly defined. Nor is a federal mine inspector involved in ‘maintenance’

tasks at the mine site. Rather, a federal mine inspector's duties are purely regulatory. Although the 'function' test also encompasses 'workers performing duties incidental to the extraction or preparation of coal,' those 'incidental duties must be an 'integral' or 'necessary' part of the coal mining process.'

The Sixth Circuit distinguished the present case from cases in which private coal mine inspectors had been found to be "miners" under the Act. In those cases concerning private coal mine inspectors, the claimants performed other tasks related to the maintenance and daily operation of the mines, in addition to their inspection duties. For example, one claimant was directly involved in the repair and replacement of pipes and pumps, while another was responsible for checking and refilling fire extinguishers and weighing coal cars. In contrast to these claimants, the Sixth Circuit explained:

A federal mine inspector serves a purely regulatory function. He is not involved in the day-to-day overall operation of any particular mine; rather, he inspects each mine several times each year, issuing citations if he finds violations of federal mine health and safety standards. Merely because the federal mine inspector is charged with ensuring compliance with those standards, the violation of which may delay or halt the mining process, these incidental regulatory duties are not an 'integral or necessary part of the coal mining process.' (citation omitted). They therefore fail to satisfy the "function" test.

For these reasons, the Sixth Circuit gave "considerable deference" to the Director's position in concluding that federal mine inspectors are not "miners" for purposes of determining eligibility for federal black lung benefits.

The Board generally followed the Sixth Circuit's *Forester* decision in *Spatafore v. Consolidation Coal Co.*, 25 B.L.R. 1-179 (2016), a case arising out of the Fourth Circuit. In *Spatafore*, the Board first addressed Employer's argument that the Administrative Law Judge erred in finding Claimant worked for at least 15 years in qualifying coal mine employment. Below, the Administrative Law Judge credited Claimant with 17.8 years of coal mine employment, 7 years of which were as an underground miner for Employer and 10.8 years of which were as a West Virginia state mine safety trainer. The Director and Employer alleged that Claimant should not be considered a "miner" for this later coal mine employment and, therefore, the Administrative Law Judge erred in crediting Claimant for this time. As the Board noted, the definition of a "miner" encompasses a situs requirement ("that the claimant worked in or around a coal mine or coal preparation facility") and a function requirement ("that the claimant worked in the extraction or preparation of coal"). The Board stated that the parties did not dispute that Claimant's work as a state mine safety trainer satisfied the situs requirement; instead, the issue was "whether that work also satisfies the function requirement."

In addressing this issue, the Board noted the various descriptions of Claimant's work as a state mine safety trainer contained in the record. In response to Employer's interrogatories, Claimant described his job duties as follows: "Trained mine rescue teams and did safety training for miners underground[.]" A completed Department employment history form described Claimant as "a safety instructor[,]" which required him to train mine rescue teams." Claimant indicated that he trained these teams "to build stoppages, shovel[,]" and do various mining duties while using the breathing apparatus" He also led escape

studies “to try out the effects of the self[-]rescuer.” These trainings were conducted inside and outside the mine, and Claimant indicated he was exposed to “significant amounts” of coal dust and smoke. At the hearing, Claimant testified that during trainings “[w]e’d go underground and work problems” and conduct drills. He and the team he was training would “go up on a section [underground] and talk safety to the guys, watch them mine coal,” and “tell them where to stand, where not to stand.” Although Claimant stated that he worked 3 days a week underground, for about 5 to 6 hours a day, he did not do work that was related to the production of coal.

The Board concluded that, while “claimant performed important work as a mine safety trainer, claimant’s job duties were not integral or necessary to the extraction or preparation of coal.” Therefore, the Board further “conclude[d] that claimant was not working as a miner, as defined by the [Black Lung Benefits] Act [(“Act”)] and its implementing regulations, when he worked for the State of West Virginia as a mine safety trainer.” In light of this holding and the Sixth Circuit’s holding in *Forester*, that a federal miner inspector is not considered to be a miner, the Board stated the following: “logic compels us to conclude that, as a general rule, government employees, whether federal or state workers, are not miners for purposes of the Act and the regulations.” The Board reiterated that, “with the exception of coal mine construction and transportation workers, the Act and its function requirement limit the definition of ‘miner’ to those individuals who perform work integral or necessary to the extraction or preparation of coal.”⁷

In support of its distinguishing between employees of private entities and government agencies, the Board referenced the Sixth Circuit’s decision in *Forester* and 20 C.F.R. § 725.491, which clarifies that “[n]either the United States, nor any State, nor any instrumentality or agency of the United States or any State, shall be considered an operator.” 20 C.F.R. § 725.491(f); see *Forester*, 767 F.3d at 646 (noting that, when Congress moved enforcement of federal mine safety regulations to the Department, it “intended to separate inspection duties from any nexus to production”). Although the Board emphasized that the instant decision “does not preclude private employees who perform safety-related tasks for operators from being considered miners under the Act,” the Board found “it difficult to envision how government employees’ work related to regulation could be integral or necessary to coal production.”

Pursuant to the above, the Board held “that individuals who work at coal mines on behalf of federal or state agencies not charged with the function of extracting, preparing, or transporting coal, or performing coal mine construction, do not perform work integral or necessary to the extraction or preparation of coal, and therefore do not work as ‘miners’ under the Act.” The Board noted that it follows that such work “is not ‘coal mine employment,’ ‘coal mine work,’ or ‘employment in a mine or mines’ under the Act and regulations.” This

⁷ The Board recognized its departure, with this holding, from its holding in *Moore v. Duquesne Light Co.*, 4 BLR 1-40 (1981), *aff’d*, 681 F.2d 805 (3rd Cir. 1982), that a federal mine inspector is a miner for purposes of the Act. The Board indicated that it was compelled to depart from the reasoning in *Moore* in light of government employees’ regulatory function and decisions from the Fourth and Sixth Circuits. See *Forester*, 767 F.3d at 645-47 (holding that a federal mine inspector does not satisfy the Act’s definition of a miner for failure to meet the function requirement); *McGraw v. OWCP*, 908 F.2d 967 (Table), 1990 WL 101412 at *1 (4th Cir. July 10, 1990) (concluding that “[f]ederal mine inspectors do not meet [the] definition [of a miner] for the purposes of establishing eligibility for black lung benefits”).

conclusion then, impacts not just who is a miner, but also, *inter alia*, the calculation of length of coal mine employment for purposes of the rebuttal presumption.

j. Security guard

Citation update: On appeal, in *The Wackenhut Corp. v. Hansen*, 560 Fed. Appx. 747, 2014 WL 1227552 (10th Cir. Mar. 26, 2014) (unpub.), the court affirmed the Administrative Law Judge's finding that Mr. Hansen's duties while working as a security guard qualified him as a "miner." The court held, to be a miner, the "claimant's function must involve extraction or preparation of coal":

But consistent with the statute's remedial purpose, courts have applied a broad definition to the term 'miner,' including within its meaning workers who perform duties incidental to the extraction or preparation of coal, so long as their work is 'an integral or necessary part of the coal mining process.'

The court held, "Duties necessary to the procurement of coal or keeping the mine operational satisfy the function test, but duties merely convenient or helpful to the operation of a mine do not." Based on a review of Mr. Hansen's duties, which included patrolling mine sites and inspecting coal-conveyor tubes for fire hazards as well as inspecting water pumps to ensure they were operating properly and inspecting mine equipment, the court concluded he was a "miner." See *McCall v. Holbrook Mining Co., Inc.*, BRB No. 17-0033 BLA (Oct. 30, 2017) (unpub.) (affirming the Administrative Law Judge's finding that Claimant had worked as a "miner" when he was a night watchman for Employer from 1993 to 2000).

5. Situs of the work performed

[to be included at the end of the penultimate paragraph] See *Pennington v. Director, OWCP*, Case No. 2012-BLA-05015 (Oct. 19 2015) (unpub.) (finding that the road construction sites Claimant worked at as a driller satisfied the situs prong and, therefore, that these sites met the definition of a coal mine under the BLBA).

III. Length of coal mine employment

C. For claims filed after January 19, 2001

1. The regulatory requirements

In *Crum v. Champion Coal Co., Inc.*, BRB No. 13-0207 BLA (Feb. 27, 2014) (unpub.), the Board affirmed the Administrative Law Judge's determination that the miner worked for 16.21 years in underground coal mine employment.

Initially, for the years 1971 to 1977, the Administrative Law Judge credited Claimant with six years of coal mine employment, after identifying the number of quarters in each of these years in which Claimant's SSA earnings statement indicated that he earned at least \$50.00 from coal mine employment.

The Administrative Law Judge then used a different method for calculating the length of Claimant's coal mine employment for the years 1978 through 1980, 1982, 1983, 1988,

and 1990 through 1997, as the evidence was insufficient to establish the beginning and end dates of Claimant's employment with a variety of coal mine companies. For these years, the Administrative Law Judge compared Claimant's total yearly earnings with Exhibit 609, the Department's "Wage Base History" table.⁸ The Administrative Law Judge credited Claimant with one year of coal mine employment if his yearly earnings met or exceeded the yearly wage for the relevant year; otherwise, the Administrative Law Judge credited the claimant with a portion of the year by dividing Claimant's earnings by the wage base. Using these calculations, the Administrative Law Judge credited Claimant with 5.29 years of coal mine employment for these years.

Finally, the Administrative Law Judge determined that, for the years 1981, 1984, 1985, 1986, and 1987, Claimant was continuously employed by an employer for a full calendar year. In order to determine whether Claimant worked for 125 days during each of these calendar years, the Administrative Law Judge considered whether Claimant's earnings for each year met or exceeded the average earning figure set out in Exhibit 610, entitled "Average Earnings of Employees in Coal Mining." The Administrative Law Judge credited Claimant with one year of coal mine employment for those years in which Claimant's earnings met or exceeded the industry average earnings, and credited Claimant with a partial year, calculated by dividing Claimant's earnings by the industry average, for those years in which Claimant's earnings were less than the industry average. Based on the above, the Administrative Law Judge credited Claimant with 4.92 years of coal mine employment for the above calendar years.

On appeal, the Board held:

Contrary to employer's argument, the administrative law judge was not required to apply the same method of calculation for years in which the beginning and ending dates of employment cannot be determined, and for those years in which claimant's employment spanned a full calendar year with one employer, consistent with the regulatory definition of a "year" and its calculation. As the administrative law judge employed reasonable methods of computation and sufficiently explained their use, see *Tackett*, 6 B.L.R. at 1-841, and substantial evidence supports his findings, we affirm his determination of 16.21 years of underground coal mine employment

Slip op. at 8.

In *Barnes v. Cowin & Co., Inc.*, BRB No. 14-0367 BLA (Aug. 25, 2015) (unpub.), the Board again addressed the issue of calculation of length of coal mine employment. In this decision, the Board affirmed the Administrative Law Judge's finding, on remand, that Claimant established 15.13 years of qualifying coal mine employment. Of note was the Administrative Law Judge's decision to credit Claimant with .63 of a year with Graciano Corp. (in 1983 and 1984) and .05 of a year with Gunther-Nash, Inc. (in 1985). In arriving at these figures, the Administrative Law Judge concluded "that the use of the [BLS] data would not result in an accurate accounting of the Claimant's coal mine employment for the years 1983-1986." However, the Administrative Law Judge, in looking to the 125-day table at Exhibit 610, did

⁸ In light of *Osborne v. Eagle Coal Co., Inc.*, 25 B.L.R. 1-195 (2016), an Administrative Law Judge's reliance on Exhibit 609 to determine the length of a claimant's coal mine employment is no longer considered to be a reasonable method of calculation.

note that "Claimant's total income for 1984 through 1986 was above the average wage listed by the [BLS], and that his total income for 1983 was only slightly below the average wage." The Administrative Law Judge assumed that the miner's wage rate would be the same, regardless of the multiple employers Claimant worked for during those years, and decided "to calculate his coal mine employment by crediting him with a partial year, based on the proportion of his coal mine employment income (for Graciano or Gunther-Nash) to his total income for the relevant year." The Administrative Law Judge then arrived at the .63 of a year with Graciano and .05 of a year with Gunther-Nash. In her June 20, 2014 D&O on Remand, the Administrative Law Judge adopted these findings.

Before the Board, Employer alleged, *inter alia*, that the Administrative Law Judge "did not properly analyze claimant's SSA earnings records to calculate the length of claimant's coal mine employment with Graciano and Gunther-Nash." *Barnes*, slip op. at 10. Specifically, Employer contended that it was irrational for the Administrative Law Judge "to assume that, during the years 1983 to 1986, claimant was paid at the same rate and was fully employed each year by the multiple listed coal mine construction employers, when calculating the portion of each year that claimant worked for Graciano or Gunther-Nash." *Id.*

The Board disagreed, noting that, as Claimant's "yearly earnings totals suggest fairly consistent employment, the administrative law judge reasonably calculated claimant's length of coal mine employment with Graciano and Gunther-Nash in the years 1983 to 1985 by dividing the reported earnings with those employers by the total earnings for each year." *Id.* at 10. The Board therefore affirmed the Administrative Law Judge's decision to credit Claimant with .68 of a year of qualifying coal mine employment with Graciano and Gunther-Nash.

2. Use of Exhibit 609 of the Coal Mine Black Lung Benefits Act Procedure Manual (titled "Wage Base History") not a reasonable method for computing length of coal mine employment [amended]

[strike the entirety of this subsection except for the following]

The regulatory provisions at 20 C.F.R. § 725.101(a)(32) refer to a table developed by the Bureau of Labor Statistics. The Department uses two tables, which are identified as Exhibits 609 and 610 of the Coal Mine Black Lung Benefits Procedure Manual. Exhibit 609, titled "Wage Base History," is updated periodically and contains the cap on yearly earnings on which both employees and employers must pay Social Security tax.

In *Osborne v. Eagle Coal Co., Inc.*, 25 B.L.R. 1-195 (2016), the Board addressed the use of Exhibit 609, which the Board described as containing the Social Security Administration's wage base table that "sets forth the maximum amount of yearly earnings on which employers and employees in all occupations are required to pay Social Security tax." The Board noted its agreement with the allegation, raised by Claimant and the Director, that the Administrative Law Judge's "reliance on Exhibit 609 to determine the length of claimant's coal mine employment in 1982 and 1985 does not provide the basis for a reasonable method of computation." For those two years, the Administrative Law Judge had divided the miner's yearly earnings by the yearly figure contained in the Social Security Administration's wage base table listed at Exhibit 609. The Board held "that reliance on Exhibit 609 to determine

the length of a miner's coal mine employment when the formula at 20 C.F.R. §725.101(a)(32)(iii) is applied is not appropriate because it contains a wage base that is not specific to the coal mine industry." Because the Administrative Law Judge applied Exhibit 609 and Section 725.101(a)(32)(iii) in calculating Claimant's length of coal mine employment for the years 1982 and 1985, the Board vacated these findings and the finding that Claimant did not invoke the 15-year rebuttable presumption. The Board therefore remanded the case to the Administrative Law Judge in order to recalculate the length of Claimant's coal mine employment for these two years.

Additionally, the Board emphasized that a coal mine employment finding will be upheld if it is based on substantial evidence and a reasonable method of computation. Furthermore, the Board specifically "decline[d] to instruct the administrative law judge to use a method treating 125 days as the divisor for the purpose of calculating a fractional portion of a year." Agreeing with the Director, the Board pointed out that "direct evidence of claimant's actual coal mine work history exists in the form of the paystubs reflecting his coal mine employment earnings in 1982 and 1985 that can provide the basis for computing the fractional years of that employment." The Board concluded that the preference for use of such "direct evidence" is in accord with Section 725.101(a)(32)(ii), which provides that "[t]he dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony."

3. Bureau of Labor Statistics table: Exhibit 610 [new]

In *Sanders v. T C Bell Mining, Inc.*, BRB No. 15-0151, slip op. at 4-5 BLA (Jan. 13, 2016) (unpub.), the Administrative Law Judge stated that Claimant could not "recount the specific beginning and ending timeframes of his employment with various companies, and often could only recall a general year date of employment." Furthermore, the Administrative Law Judge found the evidence was "unclear as to when claimant's employment started and ended with each company," and that there were "many periods in which claimant worked for less than one year with a specific employer." The Administrative Law Judge therefore accorded great weight to Claimant's SSA earnings statement and W-2 forms. In utilizing these income records to calculate the length of Claimant's coal mine employment, the Administrative Law Judge used the following method, as summarized by the Board:

The administrative law judge noted that, "where the evidence is 'insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year,' it is permissible to use the formula provided by [20 C.F.R.] §725.101(a)(32)(iii)." Decision and Order at 9; see 20 C.F.R. §725.101(a)(32)(iii). The administrative law judge listed claimant's employers from 1979 through 1995, totaled claimant's yearly income, and then divided the yearly income by the coal mine industry's yearly average for 125 days set forth in Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, to credit claimant with 8.06 years in underground coal mine employment.

Slip op. at 5 (footnote indicating that Exhibit 610 also contains a daily earnings average by year omitted).

After reviewing Section 725.101(a)(32), the Board noted, without elaboration, that the Administrative Law Judge “used the average *annual* earnings by year for miners who spent an actual 125 days at a mine site, rather than the *daily* average earnings by year, to credit claimant with 365 days of employment if his income exceeded the industry standard for just 125 days of work.” *Id.* (emphasis in original), citing *Croucher v. Director, OWCP*, 20 B.L.R. 1-67, 1-72-3 (1996) (en banc) (McGranery, J., concurring and dissenting). The Board included the following explanatory parenthetical for the *Croucher* decision: “a mere showing of 125 working days does not establish one year of coal mine employment.” Despite the above, the Board affirmed the ALJ’s finding that Claimant was unable to invoke the 15-year presumption “because the evidence of record is insufficient to establish the requisite fifteen years of qualifying coal mine employment”

In *Cottrell v. Deby Coal Co., Inc.*, BRB No. 17-0592 BLA (Sept. 28, 2018) (unpub.), the Board addressed an appeal of a denial of benefits in a miner’s claim. The Administrative Law Judge found that Claimant failed to establish that the miner (1) worked for at least 15 years in qualifying coal mine employment, or (2) suffered from a totally disabling respiratory or pulmonary impairment prior to his death. Accordingly, she concluded Claimant failed to both invoke the 15-year rebuttable presumption and establish a necessary element of entitlement. She accordingly denied benefits.

In the appeal, which was filed by the unrepresented Claimant, the Board first addressed the Administrative Law Judge’s finding that Claimant failed to establish that the miner worked for at least 15 years in qualifying coal mine employment. Below, the Administrative Law Judge determined that the miner’s income-based records, in the form of Social Security statements, represented the most reliable employment evidence. For employment post-1977, and because the beginning and ending dates of the miner’s coal mine employment were unclear, the Administrative Law Judge applied the following formula: dividing the miner’s income for each year by the daily earnings rate for miners as listed in Exhibit 610. See 20 C.F.R. §725.101(a)(32)(iii).⁹ For each year, the Administrative Law Judge then divided the result by 250, as she found nothing in the record to contradict her using “a standard five[-]day work week with two weeks of vacation to calculate a 250 day work year” Decision and Order at 6. She thus “credited the miner with portions of the years worked” using this method. Decision and Order at 6. Applying this method of calculation, as well as another method for pre-1978 employment, the Administrative Law Judge concluded that the miner worked for 8.83 years in coal mine employment. The Board concluded that the finding that Claimant established less than 15 years of coal mine employment was supported by substantial evidence. It therefore affirmed her finding that Claimant failed to invoke the 15-year rebuttable presumption of total disability due to pneumoconiosis.

⁹ The regulation specifically states that when, *inter alia*, “the evidence is insufficient to establish the beginning and ending dates of the miner’s coal mine employment,” an adjudicator “may divide the miner’s yearly income from work as a miner by the coal mine industry’s average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).” 20 C.F.R. §725.101(a)(32)(iii). The regulation does not further specify what figure should be compared to this result, which represents an estimated number of working days, in order to determine whether the miner worked for a full year within that calendar year.

Chapter 7

Designation of Responsible Operator

IV. Identifying the proper operator; burden of production/persuasion

A. Director's burden to investigate and assess liability

2. For claims filed after January 19, 2001

By unpublished decision in *Ramey v. Robert Coal Co.*, BRB No. 13-0070 BLA (Nov. 25, 2013) (unpub.), the Board held that Robert Coal, which was not Claimant's most recent coal mine employer, should not have been named as the operator responsible for the payment of benefits as the District Director did not submit a 20 C.F.R. § 725.495 statement for the most recent coal mine employer. As a result, the Black Lung Disability Trust Fund would be liable. In so holding, the Board explained:

Section 725.495 (2013) addresses the burden of proof of the parties with regard to the criteria for determining the responsible operator, and specifically provides that the Director bears the burden of proving that the responsible operator initially found liable for the payment of benefits is a potentially liable operator that most recently employed the miner. (citation omitted). The regulation also provides that in any case in which the designated operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record shall also contain a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or authorization to self-insure. In the absence of such a statement, 'it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim.' (citation omitted).

Slip op. at 4-5.

C. Re-litigation of issue in a subsequent claim

In *Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309 (6th Cir. 2014), re-litigation of designation of the responsible operator in a subsequent claim was at issue. As noted by the court:

The claimant originally brought suit in 1992 and an administrative law judge determined that he was not medically qualified for benefits. In the same decision, the administrative law judge indicated that Arkansas Coals was not the 'responsible operator' required to pay benefits. Approximately seventeen years later, the claimant filed a second claim alleging a change in his medical condition and requesting relief. After finding that his medical condition had worsened and that the claimant was now disabled, an administrative law judge awarded benefits and determined that Arkansas Coals was the responsible operator.

Slip op. at 2. The court held designation of the responsible operator issue could be re-litigated in the second claim because (1) the miner was entitled to bring the claim under 20 C.F.R. § 725.309(d)(4), and (2) designation of the responsible operator was not a “necessary” finding in the originally-denied claim. The court concluded that the Director’s failure to participate at the hearing in the first claim, or to appeal the decision in that claim, did not preclude its participation in the second claim with regard to re-litigation of the responsible operator issue.

V. Requirements for responsible operator designation

A. Powers of supervision and control

6. Successor liability

b. For claims filed after January 19, 2001

In *Frontier-Kemper Constructors, Inc. v. Director, OWCP [Smith]*, 876 F.3d 683, (2017), Frontier-Kemper, the employer and designated responsible operator, conceded Claimant’s entitlement to benefits but challenged its liability.

Below, the Administrative Law Judge found that Frontier-Kemper was a successor operator, in accordance with the BLBA and the implementing regulations. See 30 U.S.C. §932(i)(1); 20 C.F.R. §§725.492, 725.493(b)(1). In support of this finding, the Administrative Law Judge relied upon the fact that Frontier Constructors and Kemper Construction formed a partnership in the 1970s (“the Partnership”) and that the Partnership was reorganized into Frontier-Kemper in 1982. The Administrative Law Judge found that Claimant had engaged in coal mine employment for the Partnership for 3 weeks in 1973 and 8 months in 1974, and for Frontier-Kemper for 3 months and two weeks in 2005. Combining these periods of work, the Administrative Law Judge thus found that Frontier-Kemper had employed Claimant for at least a year and was therefore the operator responsible for the payment of benefits. See 20 C.F.R. §725.494(c) (requiring that, in order for a responsible operator to be a potentially liable operator, the miner must have been “employed by the operator, or any person with respect to which the operator may be considered a successor operator, for a *cumulative period* of not less than one year (§725.101(a)(32))”) (emphasis added). The Board affirmed the Administrative Law Judge’s finding of one year of cumulative coal mine employment with Frontier-Kemper, as well as his award of benefits.

Before the Fourth Circuit, Frontier-Kemper initially challenged the Administrative Law Judge’s application of a revised, 1977 definition of “operator” to the Partnership when he combined Claimant’s coal mine work with that entity and Frontier-Kemper. Of note, before 1977, the Federal Mine Safety and Health Act defined an “operator” as “any owner, lessee, or other person who operates, controls, or supervises a coal mine.” 30 U.S.C. §802(d) (1976). In 1977, this definition was amended to include “any independent contractor performing services or construction at such time.” 30 U.S.C. §802(d). Frontier-Kemper argued that, because the Partnership was not considered an “operator” during the time that Claimant was employed by that entity, application of the revised “operator” definition in determining that Claimant worked for Frontier-Kemper for at least a year created an impermissible, retroactive effect.

The court disagreed. In beginning its inquiry to determine whether the statute's application was impermissibly retroactive, the court first noted that Congress has not spoken clearly on "the statute's proper reach" concerning the 1977 definition of "operator." 876 F.3d at 688, quoting *Matherly v. Andrews*, 817 F.3d 115, 119 (4th Cir. 2016). The court concluded, however, that applying the revised definition in this case does not retroactively impair rights that Frontier-Kemper possessed when it acted, increase liability for past conduct, or impose new duties regarding already completed transactions. See *id.* at 688-89; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Specifically, the court emphasized that "affirming Frontier-Kemper's liability does not 'attach[] new legal consequences to events completed before [the statute's] enactment' in a way that offends 'familiar considerations of fair notice, reasonable reliance, and settled expectations' because the conduct giving rise to Frontier-Kemper's liability occurred when it employed [the claimant] in 2005." *Id.* at 688-89, quoting *Landgraf*, 511 U.S. at 270. Moreover, the court noted that the law does not function retroactively in a case like the present one: when "past facts antedating a statutory change are relevant, but not determinative, to establish liability in a case filed long after the statutory change has taken effect" 876 F.3d at 689. The court underscored that liability in the present case "attaches only because Frontier-Kemper chose to acquire the Partnership (four years after Congress expanded the BLBA to make the Partnership liable for black lung benefits), and because it chose to hire [Claimant] again in 2005." *Id.* Therefore, Frontier-Kemper had a sufficient "opportunity to modify its conduct in accordance with Congress's expansion of liability to coal mine construction companies" *Id.* The Fourth Circuit thus concluded that "there is no retroactive effect in applying the expanded definition of 'operator' to the Partnership for the purpose of combining [Claimant's] employment there with his later work at Frontier-Kemper." *Id.* 689-90.

Finally, the court affirmed the Administrative Law Judge's finding that Claimant worked for the Partnership and Frontier-Kemper cumulatively for at least one year and that Frontier-Kemper is accordingly liable for the payment of benefits.

G. Ability to pay

2. For claims filed after January 19, 2001

a. Generally

In *Mays v. Bell County Coal Corp.*, BRB No. 15-0023 BLA (Oct. 29, 2015) (unpub.), the Board addressed, *inter alia*, Employer's contention that it was not the operator that last employed Claimant for at least one year because Claimant was self-employed as a coal truck driver for at least a year following his work with Employer. The Board noted that the District Director designated Employer "as the responsible operator because claimant's only employment after leaving [Employer] was as an uninsured, self-employed coal truck driver." Furthermore, the District Director noted that a self-employed coal truck driver is not required to obtain insurance, Claimant did not obtain such insurance, and Claimant "cannot be required to pay his own benefits should he be found eligible to receive benefits." The Board noted that the Administrative Law Judge found no evidence that Claimant "would be capable of paying benefits." The Board concluded that the District Director "investigated whether [C]laimant was covered by black lung insurance," and that, as a coal transportation employer, Claimant was under no obligation to purchase insurance or qualify as a self-insurer. The Board

concluded that Employer failed to establish, pursuant to Section 725.495(c), that Claimant was able to assume liability to pay his own benefits. Therefore, the Board affirmed the Administrative Law Judge's finding that Employer was the responsible operator.

H. Insurance carrier as a named party

2. Insolvent carrier, liability of guaranty association

In *RB&F Coal, Inc., v. Mullins*, 842 F.3d 279 (4th Cir. 2016), the Fourth Circuit addressed an employer's appeal of a decision by the Board holding it responsible for payment of benefits.

Relevant to the responsible operator issue, RB&F Coal, Inc. ("RB&F"), employed the miner between 1985 and 1986, and Wilder Coal ("Wilder") employed the miner between 1986 and 1988. Below, the District Director found that RB&F was the responsible operator. RB&F contested its liability, and requested a hearing before an Administrative Law Judge, who agreed with the District Director's designation of RB&F as the responsible operator. Of note, Wilder had gone out of business by the time the miner filed his claim, and Wilder's insurer, Rockwood Insurance Co. ("Rockwood"), had been declared insolvent in 1991. Furthermore, while Rockwood was a member of the Virginia Property and Casualty Insurance Guaranty Association ("VPCIGA"), the Administrative Law Judge determined that VPCIGA was not liable for the claim, as the claim at issue was filed well after the bar date controlling VPCIGA liability: August 26, 1992. Finding that RB&F failed to establish that Wilder or Rockwood was capable of assuming liability for the claim or that VPCIGA was obligated to assume liability, the Administrative Law Judge found RB&F to have been properly named as the responsible operator.

RB&F appealed the Administrative Law Judge's decision, and the Board affirmed the finding and denied a motion for reconsideration filed by RB&F.

On appeal, RB&F grounded its argument on Rockwood, a member of VPCIGA, having fully covered Wilder's liability. RB&F argued that VPCIGA was under an obligation to pay benefits on the claim, and therefore that Rockwood could not be declared unable to assume liability. The court disagreed. In support, it noted the undisputed facts that neither Wilder nor Rockwood is capable of assuming liability. Therefore, the court construed the issue presented as being whether claims against Wilder are "otherwise guaranteed." The court answered this question in the negative, concluding that VPCIGA did not guarantee Wilder's obligations, as the miner's claim was filed some 17 years after the bar date controlling VPCIGA liability.

Furthermore, the court rejected RB&F's attempt to argue that holding it liable for benefits was contrary to prior Fourth Circuit precedent. The court also disagreed with RB&F's contention that, even if VPCIGA's liability is limited, the BLBA preempts any such limitation, as the court concluded VPCIGA is not covered by the BLBA because it is not an "insurer" under the Act.

In light of the above, the court affirmed the Board's decision.

In *Island Fork Construction v. Bowling*, 872 F.3d 754 (6th Cir. 2017), the Sixth Circuit addressed the question of whether the Black Lung Disability Trust Fund or the Kentucky Insurance Guaranty Association¹⁰ ("KIGA") was liable for the payment of benefits in light of the insolvency of Employer and its original insurer, Frontier Insurance. There was no dispute that Claimant was entitled to benefits.

At the hearing on the miner's black lung claim, which was held in December of 2014, the Administrative Law Judge was informed that both Employer and Frontier were insolvent. Following briefing, the Administrative Law Judge concluded that Employer was still the responsible operator in light of KIGA's ability to pay benefits. The Board affirmed the Administrative Law Judge's decision, and Employer then appealed to the Sixth Circuit.

The court first addressed KIGA's argument that it had never properly been made a party in the case and, therefore, that the court lacked personal jurisdiction over it. In rejecting KIGA's argument, the court noted that Frontier did not become insolvent until the District Director had issued a Proposed Decision and Order and the claim had been forwarded to the Administrative Law Judge. The court summarized KIGA's conduct after Frontier's insolvency in the following way:

At that time, KIGA filed a letter that stated: "all of [Frontier's] claims have been turned over to KIGA." KIGA also indicated that it "had received a notification letter advising of potential liability as a result of the insolvent carrier. In response, KIGA made an entry of appearance and defended the case while it investigated whether Claimant was eligible for assistance under the Kentucky guarantees law." At the hearing before the ALJ, counsel stated that she was making an appearance "on behalf of Island Fork Construction which was previously insured by Frontier Insurance Company which is now insolvent so my client in fact at this point is KIGA." Counsel for Island Fork and KIGA raised arguments on the merits at the ALJ and Board level, and introduced medical evidence. She briefed both decision makers on whether Island Fork was properly considered a responsible party, but did not challenge KIGA's status.

Bowling, 872 F.3d at 757-58 (footnote omitted). The court concluded that KIGA had forfeited its personal jurisdiction challenge because it did not raise the issue with the Administrative Law Judge or the Board and, in fact, participated in the proceedings.

¹⁰ The Sixth Circuit described KIGA as follows:

KIGA is a nonprofit body created by the Kentucky Insurance Guaranty Association Act (Guaranty Act) to provide benefits when a member insurance company is insolvent. All providers of property and casualty insurance in Kentucky are required to be KIGA members and pay fees—assessed with insurance premiums—to the association. Ky. Rev. Stat. § 304.36-080(1)(d). KIGA covers "claims made against insureds whose carrier becomes insolvent." *Ky. Ins. Guar. Ass'n v. Jeffers*, 13 S.W.3d 606, 608 (Ky. 2000). KIGA also "assist[s] in the detection and prevention of insurer insolvencies." Ky. Rev. Stat. § 304.36-020. The Guaranty Act provides exceptions for "[o]cean marine insurance" and "[a]ny insurance provided, written, reinsured, or guaranteed by any government or governmental agencies." Ky. Rev. Stat. § 304.36-030.

Bowling, 872 F.3d at 756.

After distinguishing the instant case from a recent unpublished decision, *Appleton & Ratliff Coal Corp. v. Ratliff*, 664 Fed.Appx. 470 (6th Cir. 2016), involving KIGA, the court addressed KIGA's argument that one or more exclusions under the Guaranty Act apply, thereby rendering KIGA not liable for benefits payments. See Ky. Rev. Stat. § 304.36-030(1)(f), (h). First, the court considered and rejected KIGA's argument that insurance coverage under the BLBA is "[o]cean marine insurance," in light of how the Guaranty Act uses and defines that term. Second, the court held that the Guaranty Act's exception for insurance "guaranteed by ... governmental agencies" also does not apply, as "[t]he Trust Fund has not 'guaranteed' the Black Lung Benefits Act coverage under Kentucky law." 872 F.3d at 760.

In light of the above, the court determined that KIGA was liable for the Frontier-issued insurance coverage and affirmed the Board's decision below.

J. Due process rights of the employer violated; Trust Fund held liable for payment of benefits

2. Delay in notice of claim

In *Johnson v. MOR Coal Inc., c/o Hughes Group, Inc.*, BRB No. 15-0014 BLA (Sept. 16, 2015) (unpub.), the Board initially addressed Employer's argument that, because the District Director failed to issue a Notice of Claim, Employer's due process rights were violated and liability should be transferred to the Black Lung Disability Trust Fund. The Board agreed with Employer that the District Director failed to issue a formal Notice of Claim. However, it concluded that, because "the Proposed Decision and Order constituted actual notice of the claim, and afforded employer a fair opportunity to defend against it, employer was not deprived of due process by the district director's declination to issue a formal Notice of Claim."

Employer additionally argued that, even if its due process rights were not violated, the District Director violated 20 C.F.R. §§725.407¹¹ and 725.418(d)¹² by failing to notify Employer of the claim prior to issuing the Proposed Decision and Order. The Board rejected this argument as well:

The version of the regulation at 20 C.F.R. §725.418 in effect when the district director acted contains an exception that specifically allowed the district director to bypass the normal adjudication process and issue a proposed decision and order 'at any time during the adjudication' if the district director determined that its issuance would 'expedite the adjudication of the claim.' 20 C.F.R. §725.418(a)(2); see *Sextet Mining Corp. v. Whitfield*, 604 Fed. Appx. 442, (6th Cir. Mar. 12, 2015); Director's Brief at 2 n.2 [footnote omitted]. Moreover, . . . the Department of Labor recently promulgated

¹¹ According to Section 725.407, "upon receipt of the miner's employment history, and the identification of the potentially liable responsible operators, the district director 'shall notify each such operator of the existence of the claim.'" 20 C.F.R. §725.407(a), (b). In addition, "[t]he district director may not notify . . . operators of their potential liability after a case has been referred to the Office of Administrative Law Judges." 20 C.F.R. §725.407(d).

¹² According to the regulation at Section 725.418(d) in effect at the time in question, "[n]o operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to [Section] 725.407 . . ." 20 C.F.R. §725.418(d).

regulations implementing amended Section 932(*l*). Those regulations make clear that a district director who determines that the claimant is a survivor entitled to benefits under Section 932(*l*) may issue a proposed decision and order at any time during adjudication of the claim, and may designate the responsible operator in the proposed decision and order, without first notifying the responsible operator of its potential liability. 20 C.F.R. §725.418(a)(3). Thus, contrary to employer's contention, the district director's issuance of the Proposed Decision and Order, without first having issued a formal Notice of Claim, was appropriate and consistent with both the former and current regulations.

While the Board rejected Employer's argument that it must be dismissed from the present action, the Board agreed with Employer that the Administrative Law Judge, "[i]n declining to address employer's arguments regarding its responsible operator status," deprived Employer of the opportunity to challenge its designation as the responsible operator. Accordingly, the Board remanded the matter "for further consideration of any arguments, and evidence, employer submits with respect to its responsible operator status."

3. Employer neglected to exercise its rights under the Department of Labor's regulations [new]

By unpublished decision in *Fleetwood Trucking Co. v. Dir.*, *OWCP*, 586 Fed. Appx. 518 (11th Cir. September 30, 2014) (unpub.), the Eleventh Circuit affirmed the Administrative Law Judge's award of benefits. In so doing, the court held that Employer's due process rights were not violated in its unsuccessful challenge to its designation as the responsible operator. Instead, the court concluded that Employer simply neglected to exercise its rights under the Department's regulations. The court noted that Employer was notified by the Department that if it failed to respond, it would be deemed to have (1) conceded its status as the responsible operator, and (2) waived its right to contest its liability in any further proceedings, pursuant to 20 C.F.R. § 725.412(a)(2).

The court further noted that the administrative record made clear that the claims examiner engaged in a thorough investigation. Specifically, the court explained:

[The claims examiner] interviewed [Claimant] on several occasions to determine the nature of his work while he was self-employed and while he was working for Fleetwood. She asked [Claimant] whether he had a supervisor while he was working as an independent contractor The examiner also corroborated [Claimant's] employment history by reviewing his social security earnings record. That record confirmed that [Employer] had been [Claimant's] last employer before he became self-employed. Finally, the claims examiner also sought information directly from [Employer] to determine whether it was the responsible operator. [Employer] never responded to that request for information.

In light of the above, the Eleventh Circuit held that the Department did not fail to comply with its own regulations and that it sufficiently investigated whether Employer was the liable operator.

Chapter 11
Living Miners' Claims: Entitlement Under Part 718, Judicial Notice, Stipulations,
and the Statute of Limitations at 20 C.F.R. § 725.308

Citation updates for this chapter:

Consolidation Coal Co. v. Director, OWCP [Burriss], 732 F.3d 723 (7th Cir. 2013); *Kanawha Coal Co. v. Director, OWCP [Kuhn]*, 539 Fed. Appx. 215 (4th Cir. Sept. 11, 2013) (unpub.) (per curiam).

II. Official notice and stipulations

A. Official notice

3. Examples of official notice

f. Investigative reporting [new]

In *Eastern Assoc. Coal Co. v. Dir., OWCP [Vest]*, 578 Fed. Appx. 165 (4th Cir. 2014), while the Fourth Circuit did not address the underlying merits of the award of benefits in the living miner's claim, the court did note the following regarding Dr. Wheeler in a footnote:

Although the underlying merit of Mrs. Vest's benefits determination is not at issue in this appeal, we are compelled to note that ALJ Tureck found 'the [negative] CT scan interpretations by Dr. [Paul] Wheeler,' an Associate Professor of Radiology at the Johns Hopkins Medical institutions, to be 'most probative' in concluding that Claimant did not suffer from pneumoconiosis. J.A. 82. Dr. Wheeler's opinions have since been challenged in a joint investigation by ABC News and the Center for Public Integrity ('CPI'), which found that he had never once, in reading more than 3,400 x-rays over the course of thirteen years, *interpreted an x-ray as positive for pneumoconiosis*. The DOL recently issued a bulletin instructing its district directors to '(1) take notice of this reporting and (2) not credit Dr. Wheeler's negative readings for pneumoconiosis in the absence of persuasive evidence either challenging the CPI and ABC conclusions or otherwise rehabilitating Dr. Wheeler's readings.' Div. of Coal Mine Workers' Comp., U.S. Dep't of Labor, BLBA Bulletin No. 14-09 (June 2, 2014), available at <http://www.dol.gov/owcp/dcmwc/blba/indexes/BL14.09OCR.pdf>.

578 Fed. Appx. at 169, n.7 (emphasis added). In the above passage, however, it is important to note that the Fourth Circuit mischaracterized the findings of the CPI report referenced in BLBA Bulletin No. 14-09. The CPI report "indicated that since 2000 in more than 1,500 black lung claims, Dr. Wheeler had never once, in more than 3,400 x-ray readings, interpreted an x-ray as positive for *complicated pneumoconiosis*." BLBA Bulletin No. 14-09 at 1 (June 2, 2014) (emphasis added).

In *Gallion v. Kale Trucking, Inc.*, Case No. 2013-BLA-05887 (May 6, 2015) (unpub. Order), an Administrative Law Judge declined to take official notice of documents concerning Dr. Wheeler, namely BLBA Bulletin No. 14-09, a news article by CPI, an ABC News report,

and a statement released by Johns Hopkins Medicine. The Administrative Law Judge noted that these documents do not “constitute facts which are not subject to reasonable dispute.” Furthermore, the Administrative Law Judge stated that, unlike a criminal conviction or a physician’s B-reader status, the reports represent the “distinct opinion[s] and viewpoint[s]” of ABC News and CPI. The statement from Johns Hopkins similarly represents that institution’s “point of view concerning the investigative reports.” In addition, “the reports’ opinions and accuracy can certainly be questioned,” and the documents at issue are not “derived from a not reasonably questioned scientific, medical, or other technical process[;] they are [] written by journalists and the Department of Labor.” The Administrative Law Judge concluded that, “[a]s opinions, the investigative reports and bulletin are not facts of which official notice may be taken,” and thereby granted Employer’s motion to exclude the documents and denied the Director’s motion for the court to take official notice of them.

In contrast, in *Barr v. Eastern Assoc. Coal Corp.*, 25 B.L.R. 3-261 (2015), the Administrative Law Judge considered whether Employer rebutted the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. In doing so, the Administrative Law Judge took “official notice of the Pulitzer Prize winning investigative reporting that CPI conducted with ABC news on the topic of Dr. Wheeler’s record of rarely, if ever, finding complicated pneumoconiosis.” The Administrative Law Judge employed this reasoning to explain why he closely reviewed the numerous x-rays in Claimant’s prior four claims to assess Dr. Wheeler’s credibility. The Administrative Law Judge found Dr. Wheeler’s x-ray interpretations to be less than credible because, in contrast to fourteen prior x-ray interpretations that identified at least simple pneumoconiosis, Dr. Wheeler found neither simple nor complicated pneumoconiosis. He therefore accorded Dr. Wheeler’s interpretations little weight, “in light of the Miner’s longitudinal history of clinical coal worker’s pneumoconiosis, the Preamble, and the general trends outlined in the CPI report”

In *Dixie Fuel Co., LLC and Bituminous Casualty Corp. v. Director, OWCP [Hensley]*, 820 F.3d 833 (6th Cir. 2016), the Sixth Circuit addressed, *inter alia*, whether the Board erred in concluding that the Administrative Law Judge’s failure to rule on Employer’s request to substitute an x-ray reading from Dr. Wheeler for one by Dr. Rosenberg was harmless error. Employer contended that the Board predicated its harmless error conclusion on the Department’s BLBA Bulletin 14-09, which directed District Directors to take notice of the ABC News and CPI reports and not credit Dr. Wheeler’s negative x-ray readings in the absence of persuasive evidence (1) challenging the reports’ conclusions, or (2) otherwise rehabilitating his readings. The court concluded that Employer’s argument – that the Board’s decision turned on reliance on the BLBA Bulletin – “simply diverges from any literal reading of the decision.” The court noted that, instead, the Board clearly stated that any failure on the part of the Administrative Law Judge to substitute Dr. Wheeler’s reading was harmless, as the substitution “would not render inaccurate the administrative law judge’s determinations that ‘the most recent x-rays have been found to be either positive for pneumoconiosis or in equipoise,’ and that ‘the only negative x-ray is from 2004.’” Accordingly, the court rejected Employer’s argument.

The court also rejected Employer’s contention “that the ALJ impermissibly relied on internet research outside the administrative record to refute Dr. Rosenberg’s opinion,” thereby substituting his opinion for the physician’s and violating the APA and Employer’s right to a fair hearing. The court concluded that the Administrative Law Judge did not “play doctor,” but instead fulfilled his role as the fact-finder. In opining that Claimant’s interstitial scarring

was not due to coal mine dust exposure, Dr. Rosenberg referenced a study indicating a correlation between age and lung abnormalities, and “criticized several studies that indicated a link between coal mine dust exposure and linear interstitial lung disease.” According to the court, “[t]he ALJ properly examined the articles upon which Dr. Rosenberg relied and determined that, while some of the articles supported Dr. Rosenberg’s conclusions, others did not.” The court rejected Employer’s argument that, because these articles were “outside the administrative record,” the Administrative Law Judge erred in taking official notice of them:

[Employer] do[es] not claim to have been unaware of the articles or their contents. Nor could [it] do so reasonably, having submitted a medical opinion that relied on them. And, [Employer] makes no attempt to argue that the ALJ misread or misinterpreted the articles. Any error by the ALJ was, thus, harmless.

820 F.3d at 846.

In *Paulukonis v. Bear Ridge Shops, Inc.*, BRB No. 15-0411 BLA (July 26, 2016) (unpub.), the Board addressed Claimant’s contention that the Administrative Law Judge had erred in failing to take official notice of BLBA 14-09, the CPI and ABC News reports concerning Dr. Wheeler, and the suspension of the Johns Hopkins B reader program:

The administrative law judge observed correctly that decisions to reopen the record and/or take judicial notice of a matter are procedural issues within her sound discretion. See *Troup v. Reading Anthracite Coal Co.*, 22 B.L.R. 1-14, 1-21 (1999) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-153 (1989) (en banc); Decision and Order on Reconsideration at 4. The administrative law judge also accurately found, “the CPI and ABC News reports, as well as the Johns Hopkins statement, do not indicate that Dr. Wheeler has been charged with, or convicted of, any criminal activity, nor do they indicate that his medical license has been suspended or revoked.” Decision and Order on Reconsideration at 4. We conclude that the administrative law judge acted within her discretion in determining that the CPI and ABC News reports “are not appropriate for the official notice claimant seeks because, as news reports, they may be subject to reasonable dispute.” *Id.* at 4 n.2.; see *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 B.L.R. 1-135, 1-139 (1990). In addition, the administrative law judge rationally found that, although an administrative law judge could find the BLBA Bulletin 14-09 persuasive, “administrative law judges are not beholden to such direction as it is well-settled that determinations of credibility lie within the discretion of the presiding administrative law judge.” Decision and Order on Reconsideration at 5; see *Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 B.L.R. 2-386, 2-394-95 (3d Cir. 2002).

Accordingly, as the Administrative Law Judge acted within her discretion in resolving the above procedural issues, the Board affirmed “her denial of claimant’s request that she take judicial notice of the reports regarding the credibility of Dr. Wheeler’s x-ray interpretations”

IV. The existence of pneumoconiosis**A. "Pneumoconiosis" defined****3. "Legal" coal workers' pneumoconiosis****b. Not established**

In another unpublished decision, *Stewart v. Performance Coal Co.*, BRB Nos. 15-0081 BLA and 15-0081 BLA-A (Dec. 23, 2015) (unpub.), the Board agreed with Employer that the Administrative Law Judge's rationale, based on the preamble, for rejecting the opinions of Drs. Zaldivar and Castle on the issue of legal pneumoconiosis was not adequately explained. The Board noted that neither physician believed the miner suffered from a fixed, chronic impairment or obstruction; instead, the physicians believed that the miner's asthma-induced impairment was sporadic or intermittent and unrelated to coal mine dust exposure.

D. Fifteen-year presumption at 20 C.F.R. § 718.305**4. Method of calculating length of coal mine employment**

In *Aberry Coal, Inc., v. Fleming*, 843 F.3d 219 (6th Cir. 2016), the Sixth Circuit addressed whether the Administrative Law Judge's calculation of Mr. Fleming's ("Claimant") length of coal mine employment was supported by substantial evidence. The court, in an opinion written by Judge Levy, concluded that it was not, reversed the Administrative Law Judge's length of coal mine employment finding, and remanded the matter for further proceedings.

Most recently, on remand from the Board, the Administrative Law Judge issued a Decision and Order awarding Claimant benefits. In this decision, he found Claimant worked for more than 15 years in qualifying coal mine employment, based on his review of Claimant's testimony and employment records, and again awarded benefits pursuant to the 15-year presumption of total disability due to pneumoconiosis. The Board affirmed his decision, and Employer appealed to the Sixth Circuit.

On appeal, after listing Claimant's work history, which spanned from 1970 to 1991, the court summarized the coal mine employment findings as follows:

The ALJ determined that Fleming should receive no credit for coal-mine employment in 1972, because Fleming showed no earnings from coal-mine employment that year. Fleming also showed no employment between 1981 and 1984, or in 1986. Fleming's work in 1987 was also not coal-mine employment. Accordingly, he showed no coal-mine related employment during six of the twenty-two years between the beginning of 1970 and end of 1991.

Despite earning only \$72 in 1970, the ALJ credited Fleming with a full year of coal-mine employment at Peem Coal Co. based on Fleming's testimony that he knew he "was there close to a year." For 1971, the ALJ credited Fleming with a year of employment at High Point Coal Co., despite earning only \$57.50 that

year, again based on Fleming's testimony that he "worked there almost a year." The ALJ credited Fleming with a second year of employment in 1971 at Archer & Club Coal Co., despite Fleming's having earned only \$200 that year, based on Fleming's testimony that he "worked there for about a year, maybe longer." The ALJ next credited Fleming with a year of employment in 1971 and 1972 at the POM Corp. (erroneously called T.O.M. Corp.) based on Fleming's testimony. The ALJ then credited Fleming with a year of work at various employers in 1973 and with a year of work in 1974 for his work for the Scotia Employees Association. We assume that the ALJ meant Scotia Coal Co., where Fleming worked in 1974, and not Scotia Employees Association, where Fleming worked in 1975. In all, despite having found that Fleming had no coal-mine employment in 1972, the ALJ credited him with five years of work in the five-year period between 1970 and 1974.

The ALJ credited Fleming with three years of employment at Scotia Employees Associates from 1975 to 1977, despite his not working at Scotia Employees Associates in 1976. Again, we will assume the ALJ meant to refer to Scotia Coal Co., where Fleming worked in 1976. The ALJ credited Fleming with two and one-half years of employment between 1978 and 1980, and with three years of employment in 1985, 1988, and 1989 for his work at Everidge & Nease Coal Co. Inc. and Wampler Bros. Coal Co. Inc. Finally, the ALJ credited Fleming with an additional year of work in 1989 for his work at Aberry, along with another two years of work in 1990 and 1991. This gave Fleming an additional eleven and one-half years of coal-mine employment, for a total of sixteen and one-half years. The ALJ determined that Fleming qualified for the fifteen-year service presumption under the BLBA, and awarded benefits.

Aberry, 843 F.3d at 222-23 (internal citations omitted). The court concluded that the Administrative Law Judge twice erroneously credited Claimant with two years of coal mine employment in one calendar year: (1) once in 1971, when he credited Claimant with full years of employment at High Point Coal Co. and Archer & Club Coal Co. and a partial third overlapping year at POM Corp., and (2) once in 1989, when he credited Claimant with a full year of employment at Wampler Bros. Coal Co., Inc., and a full year at Aberry. In doing so, the court concluded that "the ALJ created two additional years of work that cannot exist." Furthermore, the court concluded that the Administrative Law Judge improperly credited Claimant with at least 4 additional months of employment in 1970 and 1991.

In light of the above, the court determined that "[a] reasonable calculation based on the substantial evidence presented would allow the ALJ to conclude that [Claimant] had no more than fourteen years and two months (sixteen years and six months minus the two years and four months outlined above) of coal mine employment." Therefore, the court concluded that, on remand, the claim must be addressed without affording Claimant the benefit of the 15-year rebuttable presumption.

In a concurrence, Judge Batchelder wrote separately concerning the court's analysis to explain his "understanding of the ALJ's errors in calculating [Claimant's] years of coal mine employment." He wrote that "[t]he ALJ's opinion is so inexact that it makes impossible any attempt to understand for which years he credited [Claimant] with one year of coal mine employment." *Id.* Noting his agreement with various aspects of the Board's Judge Judith S.

Boggs, who dissented from the Board's affirmance of the Administrative Law Judge's decision on remand, Judge Batchelder wrote that he would reverse the Board's order for the reasons she gave and remand the matter for further proceedings.

Of note, the court issued an amended opinion in this case on January 24, 2017. See *Aberry Coal, Inc., v. Fleming*, 847 F.3d 310 (6th Cir. 2017). The court's conclusion remained the same, as it concluded that the evidence "did not and could not have established that Fleming had over sixteen years of coal-mine employment, or even the fifteen necessary for the presumption of total disability." Therefore, the court reaffirmed its decision to reverse the award of benefits and remand the matter for further proceedings. However, the court's analysis in the amended opinion was substantially similar to analysis Judge Batchelder provided in his concurrence in the judgment in the original decision. The amended opinion, though again written by Judge Levy, contained no concurrence.

5. Underground mine versus surface mine, an important distinction

a. Generally

In *Central Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483 (6th Cir. 2014), Employer contended that the Administrative Law Judge erred in crediting, as qualifying coal mine employment, the miner's 23 years of work at an aboveground mine. Specifically, Employer argued that the Administrative Law Judge erred in failing to explain how the conditions of the miner's aboveground coal mine employment were substantially similar to the conditions in underground mines, and thereby improperly applied the Section 411(c)(4) presumption.

The court concluded that Employer's argument "is inconsistent with [this regulation, which provides] that '[t]he conditions in a mine other than an underground mine will be considered substantially similar to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there.'" 20 C.F.R. § 718.305(b)(2). Therefore, the court held that "the Administrative Law Judge did not err by failing to discuss the conditions that are prevalent in underground mines," and further held that the miner "needed only to establish that he 'was regularly exposed to coal-mine dust while working' at the mine." Accordingly, the court affirmed the Administrative Law Judge's substantial similarity finding.

In *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331 (10th Cir. 2014), the miner testified "about his working conditions at surface coal mines in the various positions he held, which included warehouse worker for four to five years, equipment operator for 11-12 years, and equipment oiler in the mine pit for nine years." In concluding that the miner's working conditions at the surface mine were "substantially similar" to those of an underground miner, the court stated:

[S]urface miners do not need to provide evidence of underground mining conditions to compare with their own working conditions. (citations omitted). These decisions validate the Department's longstanding position that consistently dusty working conditions are sufficiently similar to underground mining conditions. (citations omitted). The revised regulation (at 20 C.F.R. §

718.305(b)(2)) codifies that interpretation by making regular exposure to coal mine dust the standard to determine substantial similarity of surface working conditions to those in underground mines.

The court cited to the miner's testimony in support of finding his surface employment conditions were "substantially similar" to that of underground mining conditions:

As an equipment operator, he drove a truck with an attached shovel, drove a water truck, and operated a machine called a scraper. Although he was located in the cabs of the vehicles, and some trucks had air filtration, 'there was no way [to keep the dust out], even when you closed the doors, it was just like a cloud of dust inside the cabs.' (citation omitted). He also described that the truck was 'always kicking up a puff of dust,' and the dust would just hang in the air. (citation omitted). When the wind blew, it was 'like a sand blaster sometimes.' (citation omitted). His duties frequently required him to get in and out of the equipment and work outside for a period of time. (citation omitted). Mr. Goodin next worked as an equipment oiler for nine years. During this time, he serviced the equipment exclusively in the mine pit while the other equipment was running, 'so it would get pretty dusty out there . . .'

The court noted that the Administrative Law Judge found the miner was credible, and stated, "Based on my experience with the testimony of underground miners, I find [Mr. Goodin's] description of the conditions in the strip mines where he worked to be substantially similar." While the court held it was error for the Administrative Law Judge to base his opinion on his "personal experience with the testimony of underground miners," the error was harmless because "the evidence the ALJ properly accepted was sufficient to meet the 'regular exposure' standards under the revised regulation.

The court followed its *Goodin* decision in *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, (10th Cir. Feb. 5, 2018), when it rejected Employer's challenge to the legitimacy of Section 718.305(b)(2). Specifically, the court concluded that, in revising and adopting the current version of the regulation in 2013, the Department reasonably and persuasively explained "why the standard adopted in §718.305(b)(2) is consistent with §921(c)(4)'s 'substantial similarity' standard." *McLean*, 881 F.3d at 1222.

In *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050 (6th Cir. 2013), the Sixth Circuit accepted the Board's holding in *Alexander v. Freeman United Coal Mining Co.*, 2 B.L.R. 1-497 (1979), and concluded that a miner need not demonstrate "substantially similar" conditions for work performed on the surface of an underground mine site. Thus, the miner in *Ramage* was entitled to invocation of the 15-year presumption where he worked five years underground and 23 years aboveground at an underground mine site.

In *Rister v. Scrubet, Inc.*, BRB No. 13-0185 BLA (Jan. 23, 2014) (unpub.), the Board noted that the amended regulations at 20 C.F.R. § 718.305(b)(2) provide that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." In a footnote, the Board quoted from the preamble to the amended regulation, which states the following:

[T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term 'regularly' has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013); *see also Yocum v. NESCO, Inc.*, BRB No. 14-0072 BLA (Aug. 27, 2014) (unpub.) (noting that "[e]xposure to any kind of coal mine dust, in sufficient quantity, may constitute qualifying coal mine employment" and that the interchangeable terms of coal mine dust and coal dust refer to "the various dusts around a coal mine, which include, among other substances, limestone and sandstone").

In *Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657 (6th Cir. 2015), Employer challenged the Administrative Law Judge's finding that the conditions of Claimant's aboveground coal mine employment were substantially similar to those at an underground mine, and that Claimant was therefore entitled to invoke the amended Section 411(c)(4) presumption. Specifically, Employer contended that the Administrative Law Judge failed to consider that Claimant "did not spend every day blasting at coal mines"; therefore, Employer posited that Claimant's work was "dissimilar to the work of an underground miner." The court disagreed, concluding that the Administrative Law Judge treated Claimant "as he would have treated a miner who spent the same number of days in an underground mine, with the remaining days spent doing non-mining work." Employer also argued that the Administrative Law Judge miscalculated the length of Claimant's coal mine employment because he was exposed primarily to rock and dirt dust, as opposed to coal dust. The court found no merit to Employer's "proposed distinction," noting that (1) "the definition of clinical pneumoconiosis includes silicosis, a disease caused by rock dust," and (2) "[r]ock dust is part of the respiratory hazard faced by underground coal miners" Accordingly, the court affirmed the Administrative Law Judge's finding that Claimant's working conditions were substantially similar to those in an underground mine.

Finally, in *Zurich American Ins. Group v. Duncan*, 889 F.3d 293 (6th Cir. May 3, 2018), the Sixth Circuit considered Carrier's argument that the Administrative Law Judge had erred in finding that the miner had worked for at least 15 years in qualifying coal mine employment. Initially, the court rejected Carrier's challenge to the validity of 20 C.F.R. §718.305(b)(2), which states that "[t]he conditions in a coal mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." The court held that Section 718.305(b)(2) is a valid regulation, thereby (1) according the Department's interpretation of the statute's "substantially similar" standard *Chevron* deference, and (2) joining the Tenth Circuit in so holding. *See McLean*, 881 F.3d at 1219-23 (10th Cir. 2018). Furthermore, the court affirmed the Administrative Law Judge's finding that

the miner was regularly exposed to coal mine dust exposure for at least 15 years during his surface coal mine employment. 889 F.3d at 304.

6. Rebuttal

a. Apply rebuttal standards at 20 C.F.R. § 727.203(b)(3) and (b)(4)

Sixth Circuit

In *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013), the court noted the plain language at 30 U.S.C. § 921(c)(4) provides the following for rebutting the 15-year presumption:

The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

30 U.S.C. § 921(c)(4). In *Ogle*, the West Virginia Coal Workers' Pneumoconiosis Fund (Fund) argued, based on the foregoing language, only the Secretary is limited to two forms of rebuttal, and the Fund should not be limited. The court disagreed, and concluded the Administrative Law Judge properly set forth the rebuttal standard as follows:

[Employer must] demonstrate by a preponderance of the evidence either: (1) the miner's disability does not, or did not, arise out of coal mine employment; or (2) the miner does not, or did not, suffer from pneumoconiosis.

The court rejected the Fund's argument that a third rebuttal method exists as follows:

. . . the Fund posits that it ought to be able to contend that a miner's pneumoconiosis is mild and that the totally disabling respiratory impairment is the product of another disease. This argument, however, is not a unique third rebuttal method, but merely a specific way to attack the second link in the causal chain—that pneumoconiosis caused total disability. Nothing in the record suggests that the Fund was prevented from making this argument.

With regard to disability causation, the *Ogle* court acknowledged that its precedent, at times, lacked clarity and the court specifically stated that it would apply the "rule out" standard:

The regulation implementing the fifteen-year presumption states that 'the presumption will be considered rebutted' if the 'total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment. (citation omitted). A prior panel of this court equated this language with showing 'that the disease is not related to coal mine work.' (citation omitted). Other panels of this court, when interpreting identical language in an interim regulation, have not distinguished meaningfully between a 'play no part' or a 'rule-out' standard and the 'contributing cause' standard.

Thus, the court in *Ogle* clarified its standards as follows:

Simply put, the 'play no part' or 'rule out' standard and the 'contributing cause' standard are two sides of the same coin. Where the burden is on the employer to disprove a presumption, the employer must 'rule-out' coal mine employment as a cause of the disability. Where the employee must affirmatively prove causation, he must do so by showing that his occupational coal dust exposure was a 'contributing cause' of his disability. Because the burden here is on the Fund, the Fund must show that the coal mine employment *played no part* in causing the total disability.

Finally, in assessing medical opinions for the purposes of rebutting disability causation, the court, in *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050 (6th Cir. 2013), held it was proper for the Administrative Law Judge to accord less weight to opinions of physicians who concluded the miner did not suffer from pneumoconiosis where the Administrative Law Judge found presence of the disease was not rebutted based on the evidence of record as a whole.

In *Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657 (6th Cir. 2015), the court addressed, *inter alia*, Employer's contention that the Administrative Law Judge erred in finding that it did not disprove the existence of legal pneumoconiosis at the first prong of rebuttal. On the issue of the existence of legal pneumoconiosis, all three physicians – Dr. Alam, Dr. Broudy, and Dr. Dahhan – diagnosed COPD; however, they disagreed as to the cause of Claimant's COPD. Dr. Alam "equivocally diagnosed" legal pneumoconiosis based on Claimant's COPD, while Drs. Broudy and Dahhan each believed that Claimant's COPD was unrelated to coal mine dust exposure. The Administrative Law Judge found none of these opinions to be persuasive, and therefore concluded that Employer failed to rebut the presumption of legal pneumoconiosis. The court concluded that substantial evidence supported the Administrative Law Judge's credibility determinations regarding Employer's physicians' opinions:

Dr. Dahhan's opinions contained a number of leaps of logic, including ignoring the possibility that [Claimant's] COPD could have multiple causes – smoking and dust exposure. Dr. Dahhan's opinion also relied on his belief that the COPD was responsive to bronchodilators, but there was no evidence before the ALJ that the disease did not respond to bronchodilators. As for Dr. Broudy, his opinion relied only on the lack of a finding of clinical pneumoconiosis, providing no explanation for why he did not believe dust exposure played a role in the COPD.

The court also rejected Employer's contention that Dr. Alam's "equivocal opinion" should be sufficient to rebut the presumption of legal pneumoconiosis, as Employer failed to point to any "affirmative proof of the absence of pneumoconiosis, in Dr. Alam's opinion evidence or elsewhere." See *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 n.5 (6th Cir. 2011). Therefore, the court held that "[s]ubstantial evidence supports the ALJ's finding that [Employer] failed to rebut the presumption of legal pneumoconiosis."

Finally, the court rejected Employer's argument that the Administrative Law Judge erred in finding that Employer failed to establish that no part of Claimant's totally disabling

respiratory impairment was caused by his legal pneumoconiosis. The court held that the Administrative Law Judge appropriately considered this issue and “did not err in finding that [Employer] failed to rebut the 15-year presumption of eligibility.” Accordingly, the court denied Employer’s petition for review.

Fourth Circuit

In *West Virginia CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015), Employer challenged the “rule out” evidentiary standard, which the Administrative Law Judge applied in finding that Employer had failed to establish rebuttal of the 15-year presumption at amended Section 411(c)(4).

Initially, Employer argued that a lesser standard of rebuttal should be applied to employers, as amended Section 411(c)(4) is unambiguous and applies only to “the Secretary.” Therefore, Employer contended that it should be entitled to rebut the second prong of the amended Section 411(c)(4) presumption by having to establish only that Claimant’s pneumoconiosis was not a substantially contributing cause of his total disability. The court noted that the statute is not unambiguous, but is in fact silent as to the evidentiary standard applicable to employers; therefore, this gap may properly be filled by an agency by way of regulation. Furthermore, the court noted that the Supreme Court’s decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 35-37 (1976) does not affect this conclusion. Therefore, the court rejected Employer’s argument.

Next, the court concluded that the regulation outlining the rebuttal standard applicable to operators was “a reasonable choice within [the] gap left open by Congress,” in accordance with the dictates of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In addressing the reasonableness of the regulation, the court noted the following: (1) “the rule-out standard was made a part of the Act’s regulatory scheme in 1980, in the original version of 20 C.F.R. § 718.305,” (2) “the rule-out standard unquestionably advances Congress’ purpose in enacting the statutory presumption” in the first place, (3) “in practice, operators will be required to satisfy the rule-out standard only in a clearly defined class of black lung claims,” and (4) “the intent of Congress in enacting the presumption would be thwarted if the operator’s proposed ‘alternative’ rebuttal standard were applied.”

The court concluded by clarifying the evidentiary standard that employers must meet in rebutting the Section 411(c)(4) presumption:

To rebut the presumption of disability due to pneumoconiosis, an operator must establish that ‘no part of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis.’ 20 C.F.R. § 718.305(d). Therefore, the rule-out standard is not satisfied by showing that pneumoconiosis was one of several causes of a miner’s disability, or that pneumoconiosis was a minor or even an incidental cause of the miner’s respiratory or pulmonary impairment.

...

Instead, an operator opposing an award of black lung benefits affirmatively must establish that the miner’s disability is attributable exclusively to a cause or causes other than pneumoconiosis. [citation omitted] . Thus, to make the required showing when a miner has qualified for the statutory presumption, a medical expert testifying in opposition to an award of benefits must consider

pneumoconiosis together with all other possible causes, and adequately explain why pneumoconiosis was not at least a partial cause of the miner's respiratory or pulmonary disability.

The court then upheld, as supported by substantial evidence, the Administrative Law Judge's weighing of the medical expert opinions in determining that Employer did not rebut the amended Section 411(c)(4) presumption.

In *Hobet Mining, LLC v. Epling*, 783 F.3d 498 (4th Cir. 2015), the Fourth Circuit affirmed the Administrative Law Judge's award of benefits pursuant to the rebuttable presumption at amended Section 411(c)(4). The court echoed its decision in *Bender*, noting that an employer has two options in rebutting the amended Section 411(c)(4) presumption:

First, an operator may establish that the miner does not have pneumoconiosis arising from coal mine employment. 20 C.F.R. § 718.305(d)(1)(i). Second, the operator may establish that 'no part' of the miner's disability was caused by such a disease, *id.* § 718.305(d)(1)(ii), a standard under which it must 'rule out' the mining-related disease as a cause of the miner's disability

Before the Fourth Circuit, Employer conceded that Claimant had properly invoked the rebuttable presumption, and further conceded that Claimant had established the existence of pneumoconiosis arising out of his coal mine employment; therefore, the only issue before the court was whether the Administrative Law Judge's finding – that Employer had failed to establish the second prong of rebuttal – could be affirmed.

In attempting to establish the second prong of rebuttal, Employer relied solely on the opinion of Dr. Hippensteel. The Administrative Law Judge, however, determined that Dr. Hippensteel's opinion at disability causation was entitled to "little weight." In support of this finding, the Administrative Law Judge noted (1) that Dr. Hippensteel "failed to diagnose pneumoconiosis, in direct contradiction to [my] own finding," and (2) that Dr. Hippensteel's position, "that it would be unusual for [Claimant] to have pneumoconiosis ten years after he ended his coal mine employment," was "not in accord with the accepted view that [coal workers' pneumoconiosis] is both latent and progressive." After discounting Dr. Hippensteel's opinion, the Administrative Law Judge found that Employer had failed to rebut the presumption that Claimant's total disability was due to pneumoconiosis, and awarded benefits.

In addressing Employer's argument on appeal, the court concluded that the Administrative Law Judge did not err in discrediting Dr. Hippensteel's causation analysis on the basis that he failed to diagnose pneumoconiosis arising from Claimant's coal mine employment. The court agreed that Dr. Hippensteel's opinion as to disability causation "was entitled to no more than the 'little weight' assigned it by the ALJ." In support, the court noted that Dr. Hippensteel did not diagnose pneumoconiosis, contrary to the Administrative Law Judge's finding. Furthermore, the court pointed out that "this is not a case in which there are 'specific and persuasive reasons' for thinking that a doctor's view of disability causation is independent from any misdiagnosis." Instead, the court stated that "substantial evidence supports the conclusion that [Dr.] Hippensteel's disability-causation opinion was closely tied to his belief that [Claimant] did not suffer from pneumoconiosis arising from coal mine employment." Furthermore, the court disagreed with Employer's argument that Dr.

Hippensteel “salvaged the credibility of his causation opinion when he asserted that he would have reached the same conclusion,” assuming that Claimant did suffer from pneumoconiosis:

[A]s we have held, it is not enough for the expert simply to recite, without more, that his causation opinion would not change if the claimant had pneumoconiosis. [citation omitted]. Rather, such an alternative causation analysis, like any causation opinion, must be accompanied by some reasoned explanation — in this context, an explanation of why the expert would continue to believe that pneumoconiosis was not the cause of a miner's disability, even if pneumoconiosis were present.

The court also noted that Dr. Hippensteel’s disability causation opinion was not saved by his conclusion, in 2012, that Claimant did in fact have pneumoconiosis arising out of his coal mine employment. Importantly, “the entirety of Hippensteel's causation reasoning predate[d] his ultimate diagnosis of pneumoconiosis and . . . rest[ed] primarily on the absence of that disease.” In addition, Dr. Hippensteel never revisited his disability causation opinion after determining, in 2012, that Claimant suffered from coal worker’s pneumoconiosis.” Therefore, as Dr. Hippensteel provided no explanation as to how he might reach the same conclusion at disability causation in light of his changed opinion on the existence of pneumoconiosis, the court concluded that “[Dr.] Hippensteel's 2012 restatement of his causation opinion was no more credible than its earlier iterations, and the ALJ permissibly discounted it.”

In light of the above, the court concluded that substantial evidence supported the ALJ’s determination that Employer did not rebut the 15-year presumption.

Finally, in *WV CWP Fund v. Director, OWCP [Smith]*, 880 F.3d 691 (4th Cir. Jan. 26, 2018), the Fourth Circuit rejected Employer’s main allegation of error: that because none of the physicians affirmatively diagnosed legal pneumoconiosis, legal pneumoconiosis is “proven absent” and thus the Section 411(c)(4) presumption had been rebutted. The court stated that Employer’s assertion “has the fifteen-year presumption exactly backwards.” It explained that once the presumption is invoked, the existence of pneumoconiosis arising from coal mine employment is presumed, until and unless its existence is rebutted by the party opposing entitlement. As the court noted, the question at the first prong of rebuttal is whether the party opposing entitlement has come forward with affirmative proof that Claimant does not have legal pneumoconiosis.

Tenth Circuit

In *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331 (10th Cir. 2014), the court noted that Section 921(c)(4) of the Black Lung Benefits Act provides:

. . . the Secretary may rebut the 15-year presumption only two ways: by proving (1) the claimant does not have pneumoconiosis (legal and clinical), or (2) the claimant’s impairment ‘did not arise out of, or in connection with, employment in a coal mine.’ 30 U.S.C. § 921(c)(4). The Department has applied this limitation to both the Secretary and mine operators like Antelope, and it has enacted regulations reflecting this interpretation. See 20 C.F.R. § 718.305(d)(1).

Employer challenged limitation of its rebuttal to the foregoing two methods, stating that this limitation applied only to the Secretary. The court concluded that “Antelope failed to rebut Mr. Goodin’s claim even without the rebuttal limitations and therefore any error in applying the rebuttal limitations was harmless.”

Specifically, the Administrative Law Judge found the x-ray evidence was in equipoise such that it did not support rebuttal of the presence of clinical pneumoconiosis. And, although CT-scan evidence did not yield findings “typical of pneumoconiosis,” the court held Employer “failed to show why this lung disease was not pneumoconiosis because Antelope’s experts were not persuasive.”

With regard to legal pneumoconiosis, the court observed that Dr. Repsher and Dr. Farney opined that smoking is a statistically significant factor in the development of obstructive lung disease, and they attributed the miner’s disabling lung disease to his 40-pack-year smoking history and/or asthma, but not coal mine dust. The court affirmed the Administrative Law Judge’s decision to accord less weight to the opinions of these physicians:

The ALJ found the Antelope’s experts’ reliance on statistical probabilities undermined their ultimate conclusion that Mr. Goodin did not have pneumoconiosis because they did not show why Mr. Goodin is not among the cohort of those who suffer COPD from surface coal mining. (citation omitted). Antelope did not show that Mr. Goodin did not have legal pneumoconiosis. It therefore did not rebut the presumption.

As a result, the court held the Administrative Law Judge properly concluded the existence of legal pneumoconiosis was not rebutted. And, although the Administrative Law Judge did not conduct a separate disability causation analysis, the court concluded “the reasoning and evidentiary analysis throughout the ALJ’s opinion supports the ALJ’s holding that the presumption was not rebutted.”

Finally, the court addressed Employer’s argument that it should not be limited to two methods of rebuttal (*i.e.*, rebuttal of clinical and legal pneumoconiosis, or rebuttal of disability causation) to defeat a claim for benefits. Here, the court noted that, even absent application of the limitations, the 15-year presumption was not rebutted. The court stated:

First, as to Mr. Goodin suffering from pneumoconiosis, we have already upheld the ALJ’s finding that Antelope did not rebut this element.

Second, as to Mr. Goodin’s pneumoconiosis arising out of coal mine employment, the ALJ noted that legal pneumoconiosis by statutory definition arises from coal mining. (citations omitted). Because Antelope failed to rebut the first element—the presence of legal pneumoconiosis—Antelope also failed to rebut the presumption that the pneumoconiosis arose out of Mr. Goodin’s coal mine employment. (citation omitted).

Third, as to Mr. Goodin being totally disabled, Drs. Bodoni, Rose, and Farney all agreed Mr. Goodin was totally disabled. (citation omitted). The ALJ discounted Dr. Repsher’s opinion to the contrary because Dr. Repsher appeared

to misunderstand Mr. Goodin's job duties and because he did not consider Mr. Goodin's more recent test results.

Fourth, as to pneumoconiosis having caused Mr. Goodin's total disability, Antelope needed to show that coal mining was not a 'substantially contributing cause' to rebut this fourth element. It did not do so.

With regard to the fourth element, the court noted the "rule-out standard does not factor into this analysis because it is tied to the rebuttal limitations." Said differently, if the rebuttal limitations at 20 C.F.R. § 718.305 apply to an employer, then the rule-out standard is applied to rebut disability causation. On the other hand, if the rebuttal limitations do not apply, then the employer may rebut the disability causation element by presenting evidence sufficient to demonstrate that pneumoconiosis was not a "substantially contributing cause" of the miner's totally disabling respiratory impairment as defined at 20 C.F.R. § 718.204(c)(1). In this case, the court did not rule on applicability of the rebuttal limitations to Employer; rather, the court held that Employer failed to present evidence sufficient to rebut the 15-year presumption even without limiting its methods of rebuttal.

In *Consolidation Coal Co. v. Director, OWCP [Noyes]*, 864 F.3d 1142 (10th Cir. 2017), the Tenth Circuit addressed an appeal concerning an award of benefits in a survivor's claim that was filed in 2008. At issue, generally, was application of the 15-year rebuttable presumption of death due to pneumoconiosis arising out of coal mine employment. See 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b), (c), (d).

On second remand from the Board, the second Administrative Law Judge to be assigned to the case awarded benefits, finding that Claimant had invoked the 15-year presumption and that Employer had failed to rebut it. The Board then affirmed the appeal, and Employer filed an appeal with the Tenth Circuit.

On appeal, the court first addressed Employer's contention that the rebuttal provisions at Section 718.305(d) represent "an impermissible construction of the BLBA" by requiring an employer to disprove not only clinical, but also legal, pneumoconiosis. *Noyes*, 864 F.3d at 1146. Generally, in a survivor's claim, an employer may rebut the presumption by either (1) disproving the existence of legal and clinical pneumoconiosis arising out of coal mine employment, or (2) establishing that no part of the miner's death was due to pneumoconiosis. Considering the longstanding statutory, regulatory, and judicial definitions of pneumoconiosis, the court concluded that it "must presume that the BLBA's broad definition of 'pneumoconiosis' also applies to the fifteen-year presumption contained in § 921(c)(4)." *Id.* at 1147. Distinguishing this case from an earlier case involving the definition of pneumoconiosis in the context of the 10-year rebuttable presumption that a miner's clinical pneumoconiosis arises out of his or her coal mine employment, the court saw no "reason to depart from the general, inclusive definition of pneumoconiosis employed throughout the BLBA." *Id.* at 1148; see 30 U.S.C. §921(c)(4); 20 C.F.R. §718.203(b). The court also noted that several other Circuits have recognized that legal pneumoconiosis may be established by way of the 15-year presumption. Accordingly, the court held that this presumption applies to clinical and legal pneumoconiosis.

The court next considered Employer's argument that the rebuttal standard contained at Section 718.305(d) violates the Administrative Procedure Act because the regulation shifts

the burden of persuasion to the employer, the party opposing entitlement. The court noted that, according to the APA, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. §556(d). Because Section 921(c)(4) of the BLBA shifts the burden of proof to the party opposing entitlement, the court concluded that Section 556(d) of the APA “does not apply.” *Id.* at 1150.

Third, the court rejected Employer’s challenge to the “rule-out” or “no part” standard at Section 718.305(d). In doing so, the court pointed out that the Third and Fourth Circuits have also ruled that this standard is in keeping with the BLBA. Accordingly, the court held that this standard “is consistent with both Congress’ intent in enacting the fifteen-year presumption and the broad remedial purposes of the BLBA.” *Id.* at 1151.

Fourth, the court disagreed with Employer’s assertion “that the retroactive application of § 718.305(d)(2) violates its right to due process.” *Id.* at 1152. Concluding that its decision in a published 2014 decision is controlling, the court held “that § 718.305(d)(2) may be applied retrospectively to benefits claims that were filed before the regulation’s effective date.” *Id.*; see *Antelope Coal Co./ Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1342 (10th Cir. 2014) (upholding application of the new rebuttal standard applicable to a miner’s claim). The court thus also rejected Employer’s “related argument that it is entitled to an opportunity to develop further evidence in light of the revised rebuttal standard.” *Id.* n.4.

Finally, however, the court agreed with Employer that the Administrative Law Judge erred in his recitation of the applicable rebuttal standard in addressing whether Employer disproved the existence of legal pneumoconiosis pursuant to Section 718.305(d)(2)(i). Specifically, the Administrative Law Judge used the term “rule-out” on two occasions in analyzing the etiology of two diseases: lung cancer and emphysema. The court concluded that remand was appropriate and that the proceedings on remand “should be very brief” if the Administrative Law Judge had intended to use the “rule-out” term “in its colloquial sense.” *Id.* at 1154. If he did not, the court clarified that “the ALJ will be required to reconsider the existing evidence under the proper standard.” *Id.*

The court therefore remanded the matter for further proceedings consistent with its opinion.

Third Circuit

In *PBS Coals, Inc. v. Director, OWCP [Davis]*, 607 Fed. Appx. 159 (3rd Cir. July 20, 2015) (unpub.), the Third Circuit affirmed the award of benefits pursuant to the rebuttable presumption at amended Section 411(c)(4). In denying Employer’s petition for review, the court noted that, “in order to rebut a presumption of pneumoconiosis [in the Third Circuit] . . . the party opposing the award of benefits must ‘rule out a possible causal connection between a miner’s disability and his coal mine employment.’” 607 Fed. Appx. at 160, citing *Plesh v. Dir., OWCP*, 71 F.3d 103, 113 (3rd Cir. 1995) (quoting *Kline v. Dir., OWCP*, 877 F.2d 1175, 1179 (3rd Cir. 1989)).¹³ Furthermore, the court rejected Employer’s argument that its

¹³ In citing to *Plesh*, the court noted that the language of 20 C.F.R. §718.305(d)(1) “requires a showing that ‘no part of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis.’” 607 Fed. Appx. at 160, n.5. The court concluded that “[t]his language is effectively identical to the regulatory language at issue in *Plesh*; as such the ‘rule out’ standard applies.” *Id.*; see

experts' testimony ruled out coal mine dust exposure as a cause of Claimant's disability, as (1) "Dr. Fino testified that the effect of coal mine dust was 'not clinically significant' but that it 'may be contributing [to] a numerical reduction in FEV1,'" and (2) "Dr. Kaplan testified that coal dust contributed to 'ten percent' of [Claimant's] disability."

In *Helen Mining Co. v. Elliott*, 859 F.3d 226 (3rd Cir. 2017), the Third Circuit addressed, for the first time in a published decision, the validity of the recent regulatory amendments at 20 C.F.R. §718.305, which implements the revived 15-year rebuttable presumption at 30 U.S.C. §921(c)(4).

Following a summary of the history of the BLBA and the implementing regulations, the court reviewed the facts of the case and its procedural history. Initially, the Administrative Law Judge found that the miner had established total disability and at least 15 years of qualifying coal mine employment. Therefore, the Administrative Law Judge found Claimant invoked the 15-year presumption. The Administrative Law Judge further determined that Employer failed to rebut the presumption pursuant to Section 718.305(d)(1) and thus awarded benefits. On appeal, the Board specifically rejected Employer's contention that the Administrative Law Judge had erred in requiring it to meet the "rule out" standard on rebuttal because, according to Employer, the statute imposes this standard on only the Secretary of the U.S. Department of Labor, not employers. The Board affirmed the award, and Employer thereafter filed a petition for review with the Third Circuit.

The court initially addressed Employer's challenge to the validity of Section 718.305(d)(1)(ii), to the extent that it requires employers or operators, and not only the Secretary, to rule out a connection between a miner's total disability and his or her pneumoconiosis arising out of coal mine employment. In considering this challenge, the court applied the two-step analysis of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). At the first step of this analysis, the court described Employer's argument that the "rule out" rebuttal standard at Section 718.305(d)(1)(ii) is contrary to Section 921(c)(4) of the Act:

In a nutshell, Helen Mining's argument is that: (a) by providing miners with a presumption described as "rebuttable," Congress confirmed that any opposing party—whether the Secretary or an operator—has the opportunity to rebut disability causation; (b) Congress expressly constrained the Secretary to rebut disability causation by "establishing that ... [the miner's disease] did not arise out of, or in connection with, employment in a coal mine," 30 U.S.C. § 921(c)(4), and was silent as to the rebuttal standard for operators; *ergo* (c) Congress clearly and unambiguously intended to allow operators to rebut disability causation without having to "establish[] that ... [the disease] did not arise out of, or in connection with, employment in a coal mine[.]"

Elliott, 859 F.3d at 234. According to Employer's argument, then, the regulation is invalid to the extent that it requires an employer or operator to meet this "rule out" standard. The court disagreed, noting that "[t]he fact that Congress spoke explicitly to the rebuttal standard for the Secretary and was silent as to operators is the very reason we must conclude that

W.Va. CWP Fund v. Bender, 782 F.3d 129, 133-35 (4th Cir. 2015); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1337 (10th Cir. 2014).

Congress did not unambiguously reject or accept that rebuttal standard for operators.” Instead, Congress’s silence at Section 921(c)(4) of the Act left “a void for the agency to set the causal standard for operators seeking to rebut the presumption of entitlement.” The court concluded that, if anything, the Supreme Court’s opinion in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), confirms that the question of the validity of the regulation cannot be decided at step one of the *Chevron* analysis.

At the step two of this analysis, the court considered whether the Department’s “regulation that fills a statutory gap is ‘based on a permissible construction of the statute.’” *Id.* at 236-37, quoting *Chevron*, 467 U.S. at 843. In holding that the regulation constitutes the Secretary’s permissible exercise of his rulemaking power, the court relied on three points: (1) that “the [r]egulation furthers Congress’s goals in enacting [Section] 924(c),” which references the Secretary in the context of rebuttal and was first enacted “at a time when the Secretary was the only payor,” (2) that the court has “long approved of the rule out standard as a reasonable burden of proof for operators seeking to disprove disability causation and to avoid paying black lung benefits,” and (3) that it is proper for the court “to defer to the agency’s interpretation of this statute because it forms the basis for a complex regulatory scheme.” *Id.* at 237-38.

Finally, the court addressed Employer’s argument that, even assuming the validity of the regulation in question, it had rebutted the presumption in this case. In support, Employer alleged that the Administrative Law Judge had erred in relying on the preamble to the 2001 regulatory amendments when weighing its experts’ opinions and by mischaracterizing the testimony of one of its experts. The court rejected each argument in turn.

Benefits Review Board

In *Minich v. Keystone Coal Mining Corp.*, 25 B.L.R. 1-149 (2015) (J. Boggs, dissenting), which involved a subsequent claim arising out of the Third Circuit, the Board addressed “the correct interpretation and application of the recently enacted statutory amendment at 30 U.S.C. §921(c)(4) and its implementing regulation at 20 C.F.R. § 718.305, particularly subsection 718.305(d)(ii), which sets forth the disability causation standard on rebuttal.” See also *Griffith v. Terry Eagle Coal Co., LLC*, ___ BLR ___, BRB No. 16-0587 BLA (Sept. 6, 2017) (following *Minich* and clarifying the analysis to be applied on rebuttal at 20 C.F.R. §718.305(d)).

On appeal, Employer did not challenge the Administrative Law Judge’s finding that Claimant invoked the rebuttable presumption at amended Section 411(c)(4). Instead, *inter alia*, Employer argued that application of a “rule-out” standard “would permit an award of benefits to a miner whose pneumoconiosis was an insignificant contributor to his totally disabling respiratory impairment.” Employer posited that it should be entitled to rebut the presumption by establishing that pneumoconiosis was merely an insignificant or *de minimis* contributor to the miner’s impairment. The Board disagreed and concluded that, pursuant to Section 718.305(d)(1)(ii), an employer must establish “with credible proof that no part, not even an insignificant part, of [a] claimant’s pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis.”

The Board agreed with the Director, however, that the Administrative Law Judge applied the incorrect rebuttal standard, as he required that Employer rule out *coal dust*

exposure, and not *pneumoconiosis*, as a contributing cause of Claimant's totally disabling respiratory impairment. Therefore, the Board vacated the Administrative Law Judge's finding that Employer failed to rebut the presumption, and remanded the case for further consideration. The Board also clarified that, even if Employer fails to disprove the existence of legal pneumoconiosis at the first prong of rebuttal,¹⁴ the Administrative Law Judge must also determine whether Employer disproved the existence of clinical pneumoconiosis arising out of coal mine employment, "as both of these determinations are important to satisfy the statutory mandate to consider all relevant evidence pursuant to 30 U.S.C. §923(b), and to provide a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii), the second rebuttal prong."

In dissent, Judge Boggs disagreed with the majority that Employer, in order to rebut the presumption at amended Section 411(c)(4), must establish that not even a *de minimis* or insignificant part of a miner's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. Instead, Judge Boggs would have held that an employer can rebut the presumption at prong two of rebuttal if it "establishes that pneumoconiosis is merely a *de minimis* factor, and has no material adverse effect on the miner's respiratory or pulmonary condition or does not materially worsen the miner's totally disabling respiratory or pulmonary impairment."

In *Tobin v. Cumberland Cyprus Resources*, BRB No. 14-0299 BLA (May 29, 2015) (unpub.), the Board addressed Claimant's appeal of an Administrative Law Judge's denial of benefits in a survivor's claim. Below, the Administrative Law Judge had found that Claimant had invoked the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4), but further found that Employer had rebutted the presumption.

On appeal, the Board agreed with Claimant that the Administrative Law Judge had inappropriately shifted the burden to her to establish that the miner's death was due to pneumoconiosis:

Rather than assess whether the opinions of employer's experts were sufficient to rebut the amended Section 411(c)(4) presumption, the administrative law judge weighed Dr. Begley's opinion against the opinions of Drs. Rosenberg and Zaldivar, and found it insufficient to establish a causal connection between coal dust exposure and the miner's totally disabling respiratory impairment. [citations omitted]. In so doing, the administrative law judge improperly placed the burden of proof on claimant to establish that the miner had legal pneumoconiosis and that the miner's death was due to legal pneumoconiosis. Because the administrative law judge's rebuttal analysis does not conform to 20 C.F.R. §718.305(d)(2), we must vacate his finding that employer successfully rebutted the amended Section 411(c)(4) presumption.

Slip op. at 5.

¹⁴ In a subsequent unpublished case, the Board clarified that, "[b]ecause the definition of legal pneumoconiosis encompasses only those diseases or impairments that are 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment,' employer must prove that these prerequisites are absent to establish that claimant's obstructive impairment is not legal pneumoconiosis." *Kiblinger v. Performance Coal Co.*, BRB No. 0126 BLA, slip op. at 10 (Jan. 29, 2016) (unpub.), quoting 20 C.F.R. § 718.201(a)(2), (b).

In *Greathouse v. Old Ben Coal Co.*, BRB No. 15-0253 BLA (Mar. 10, 2016) (unpub.), which involved a miner's subsequent claim, the Administrative Law Judge incorporated a prior judge's findings in concluding that Employer rebutted the 15-year presumption because the evidence established the miner suffered from neither clinical nor legal pneumoconiosis. On appeal, the Board agreed with Claimant and the Director that the Administrative Law Judge erred in adopting the prior judge's findings as her own findings, on rebuttal, that the miner did not suffer from legal pneumoconiosis:

The [Administrative Law Judge] stated that [the prior judge] "found that a preponderance of the evidence established that the [m]iner did not suffer from . . . legal pneumoconiosis . . ." Decision and Order on Remand at 5. [The prior judge], however, did not state that "a preponderance of the evidence established" that the miner did not have pneumoconiosis. [The prior judge] placed the burden on claimant to establish the existence of pneumoconiosis, and he found that she did not meet that burden. Decision and Order at 15-16, 22. As the Director notes, "it does not necessarily follow that [the prior judge's] findings that the medical opinion evidence did not affirmatively establish legal pneumoconiosis are sufficient to establish rebuttal of the presumption by showing the absence of legal pneumoconiosis." Director's Brief at 4; see *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1481, 13 B.L.R. 2-196, 2-212 (10th Cir. 1989). Once the [Administrative Law Judge] found that claimant invoked the Section 411(c)(4) presumption, claimant was entitled to a presumption that the miner's diagnosed lung conditions constituted legal pneumoconiosis, and employer bore the burden of rebutting it.

Slip op. at 6 (footnote omitted). The Board concluded that the prior judge's analysis of the opinions of Employer's doctors "was not sufficient for us to determine that substantial evidence supports the current [Administrative Law Judge's] finding that employer disproved legal pneumoconiosis."

b. Applicability of rebuttal to employer

In *Minich v. Keystone Coal Mining Corp.*, 25 B.L.R. 1-149 (2015) (J. Boggs, dissenting), which involved a subsequent claim arising out of the Third Circuit, the Board addressed, *inter alia*, Employer's argument that the Administrative Law Judge applied an incorrect legal standard in finding that it had failed to rebut the presumed fact that Claimant was totally disabled due to pneumoconiosis. Specifically, Employer maintained that, at the second prong of rebuttal, its physicians' opinions "need not rule out any minimal contribution from either coal dust exposure or pneumoconiosis to the miner's disability." The Board rejected Employer's argument. Noting that amended Section 411(c)(4) is silent as to the methods of rebuttal available to employers, the Board agreed with the Director that the Department "promulgated the current regulations in order to fill the statutory gap, to clarify ambiguous phraseology, and to effectuate the purpose of the Act . . ." Furthermore, the Board concluded that, pursuant to "Section 718.305(d)(1)(ii), an employer must establish that no part of the miner's respiratory or pulmonary disability is due to pneumoconiosis," and that this determination by the Department was appropriate in light of Congress's intent in reviving the 15-year rebuttable presumption. See 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013).

7. Use of lay testimony to establish totally disabling respiratory impairment under 20 C.F.R. § 718.305(b)(4) [new]

In *Sword v. G&E Coal Co.*, 25 B.L.R. 1-127 (2014) (Hall, J., dissenting), the Administrative Law Judge's award of benefits through invocation of the 15-year presumption was reversed by the Board, which held that the finding of a totally disabling respiratory impairment may not be made based on lay testimony where medical evidence addressing whether the miner suffered from a totally disabling respiratory impairment is in the record. Notably, the provisions at 20 C.F.R. § 718.305(b)(4), formerly 20 C.F.R. § 718.305(b), state the following:

[I]n the case of a deceased miner, affidavits . . . from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits . . . if the claim were approved.

20 C.F.R. § 718.305(b)(4).

Here, the Administrative Law Judge considered pulmonary function studies, blood gas studies, and medical opinions addressing the existence of a totally disabling respiratory impairment, but accorded this medical data little to no probative value for various reasons, *i.e.*, inconsistency, age of the data, and the like. He then relied on lay testimony of the miner's survivor along with notations in the miner's treatment and hospitalization records to conclude a totally disabling respiratory impairment was demonstrated.

A majority of the three-member panel disagreed. Citing to *Coleman v. Director, OWCP*, 829 F.2d 3, 5 (6th Cir. 1987), the Board stated the following:

In *Coleman*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that the presence in the record of 'medical evidence on the issue of disability due to a respiratory or pulmonary impairment' precludes the use of lay testimony to invoke the presumption of death due to pneumoconiosis. (citation omitted). As employer asserts, and as set forth above, the record in this case contains multiple pulmonary function studies, medical opinions, and treatment notes which address the miner's pulmonary or respiratory condition prior to his death. Thus, pursuant to *Coleman*, claimant is precluded from relying on lay testimony to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis.

Furthermore, while the administrative law judge stated that claimant's testimony is 'consistent with extensive treatment and hospitalization notes which detail the [m]iner's persistent shortness of breath,' . . . the treatment notes cannot establish the presence of a totally disabling respiratory or pulmonary impairment. The administrative law judge discounted the results of all of the pulmonary function studies and blood gas studies contained in the treatment notes, and the physicians' narrative comments do not address the

degree of the miner's impairment, if any, or whether the miner retained the respiratory capacity to perform his usual coal mine work.

Slip op. at pp. 5-6. As a result, the award of benefits was reversed.

In the dissenting opinion, Judge Hall stated the Administrative Law Judge's award of benefits should be affirmed. Initially, Judge Hall cited to the following language at 20 C.F.R. § 718.305(b)(4):

In the case of a deceased miner, affidavits . . . from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other *relevant* evidence exists which addresses the miner's pulmonary or respiratory condition.

20 C.F.R. § 718.305(b)(4) (*italics in original*). Judge Hall explained that "the administrative law judge evaluated the medical evidence in detail, and permissibly concluded that it was not relevant to the issue of total disability." *Slip op.* at p. 7 (*emphasis added*). From this, Judge Hall determined that lay evidence could be used to demonstrate a totally disabling respiratory impairment under 20 C.F.R. § 718.305(b)(4) for purposes of invoking the 15-year presumption.

VI. Establishing total disability

A. Methods of demonstrating total disability

5. Reasonable medical opinions

a. Burden of proof

In a series of recent unpublished decisions, the Board has clarified this principle. For example, in *Pyle v. Rochester and Pittsburgh Coal Co.*, BRB No. 15-0149 BLA, *slip op.* at 6, n.9 (Dec. 8, 2015) (unpub.), the Administrative Law Judge, at the beginning of his total disability analysis, stated "that claimant had established 'a prima facie case that the miner was incapable of performing his usual coal mine employment' and that the burden fell to employer to prove otherwise." The Board concluded that this statement was inaccurate, "as claimant bears the burden of proof of establishing, based on the evidence as a whole, that the miner was totally disabled by a respiratory or pulmonary impairment from performing his usual coal mine work." *Id.*, citing *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 B.L.R. 2A-1 (1994); 20 C.F.R. §§718.204(b)(1)(i), (ii); 718.305(b)(1)(iii); 725.103.

VII. Etiology of total disability**A. "Contributing cause" standard****2. For claims filed after January 19, 2001****a. The regulation**

See *Keene v. Davis & Whited Coal Co., Inc.*, BRB No. 14-0368 BLA (Aug. 25, 2015) (unpub.) (in addressing the issue of disability causation, concluding that the Administrative Law Judge erred in revisiting "the question of the extent to which claimant's respiratory impairment is attributable to *coal mine dust exposure*, which is the relevant inquiry in establishing the existence of legal pneumoconiosis," and further noting that the Administrative Law Judge should have focused on the contribution that *pneumoconiosis* made to Claimant's totally disabling respiratory impairment) (emphasis included) (footnote omitted).

B. Blood gas and ventilatory studies not determinative

See also *Ross v. Consolidation Coal Co./Consol Energy, Inc.*, BRB No. 15-0007 BLA (Oct. 20, 2015) (unpub.) (concluding that the Administrative Law Judge improperly combined his analysis of the issues of total disability and disability causation, and noting that the cause of Claimant's totally disabling hypoxemia, which was manifested by his qualifying ABGs post-exercise, is properly considered either at disability causation or at the second prong of rebuttal pursuant to Section 718.305(d)(1)(ii)).

c. Sixth Circuit [new]

In *Arch on the Green, Inc. v. Groves* 761 F.3d 594 (6th Cir. 2014), the court vacated the Administrative Law Judge's finding that Claimant was totally disabled due to his legal pneumoconiosis.

In making this finding, the Administrative Law Judge had credited the opinion of Dr. Rasmussen, who opined that coal dust exposure "contributes minimally to [Claimant's] disabling chronic lung disease." Although the Administrative Law Judge stated that he must "address whether Dr. Rasmussen's opinion, viewed in its entirety, established that pneumoconiosis is a substantially contributing cause of claimant's total disability," he also explained that this standard is satisfied when the total disability is "'due at least in part' to pneumoconiosis." The Administrative Law Judge concluded that Dr. Rasmussen's opinion was better reasoned and was sufficient "to satisfy the *de minimis* standard." The Board affirmed the Administrative Law Judge's finding and cited to *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), "for the proposition that disability causation is established when 'pneumoconiosis [is] a contributing cause of some discernible consequence to claimant's totally disabling respiratory impairment.'"

The court held that the Administrative Law Judge and the Board erred in failing to appropriately apply the "substantially contributing cause" standard. According to the court:

Although the Administrative Law Judge did initially cite 20 C.F.R. § 718.204(c) and the correct standard, he never again referenced the ‘substantially contributing cause’ language. Instead, the Administrative Law Judge appears to have applied a less rigorous standard in which ‘a claimant must affirmatively establish only that his totally disabling respiratory impairment ... was due - at least in part - to his pneumoconiosis.’ The Administrative Law Judge repeatedly referenced this less demanding standard when performing his analysis of the doctors’ evaluations. For example, when summarizing his assessment, the Administrative Law Judge stated that ‘Drs. Majmudar and Baker both opined that Claimant’s coal mine employment contributed, *at least in part*, to his total disability.’ (emphasis added).

The Administrative Law Judge never found that Calloway’s coal mine employment or his pneumoconiosis was a ‘substantially contributing cause’ of his total disability. Rather, the Administrative Law Judge very clearly stated that ‘I find that Claimant has established by a preponderance of the evidence that his total disability was due in part to his pneumoconiosis.’ This conclusion clearly fails to use the correct standard in which the claimant’s pneumoconiosis must be a *substantially* contributing cause of his or her total disability.

Accordingly, the court remanded the case with instructions to the Administrative Law Judge to apply the substantially contributing cause standard at 20 C.F.R. § 718.204(c) in determining whether Claimant’s total disability is due to pneumoconiosis.

IX. Applicability of 20 C.F.R. § 718.308, statute of limitations for filing a miner’s claim

D. Applicability to subsequent claim under 20 C.F.R. § 725.309

2. Medical opinions from prior claim; deemed premature or misdiagnosis

b. Third Circuit

In *Eighty Four Mining Co. v. Director, OWCP [Morris]*, 812 F.3d 308 (3rd Cir. 2016), the court addressed “whether a state workers’ compensation board’s denial of pneumoconiosis benefits due to the repudiation of the claimant’s black lung diagnosis resets the BLBA three-year statute of limitations period.” A majority of the court concluded that such a denial does reset the statute of limitations period, and the court therefore denied Employer’s petition for review. The majority noted that its decision “rests primarily on the liberal interpretation to be accorded the BLBA” and that “it is immaterial that [Claimant’s] first claim was filed under a state workers’ compensation law.” In dissent, Judge Nygaard disagreed with the majority’s conclusion that the denial of a state workers’ compensation claim renders a prior medical determination as a “misdiagnosis” for purposes of the statute of limitations under the BLBA. Judge Nygaard concluded that, because the denial of the state workers’ compensation claim “does not have any conclusive effect upon subsequent federal claims, and it is not tantamount to a ruling (for purposes of a federal claim) that the underlying diagnosis is a misdiagnosis, the state ALJ’s decision does not reset the statute of limitations clock under the [BLBA] for purposes of a subsequent federal black lung claim.”

F. Commencement of the three-year period**2. Nature of medical opinion required**

[to be included after *Brigance* summary] *See also Stewart v. Cliffco Enterprises, Inc.*, BRB No. 14-0118 BLA, slip op. at 5 (Nov. 25, 2014) (unpub.) (affirming “the administrative law judge’s finding that, because Dr. Ammisetty failed to clearly diagnose pneumoconiosis or link claimant’s impairment to pneumoconiosis, his report did not constitute a medical determination of total disability due to pneumoconiosis pursuant to 20 C.F.R. §725.308(a)); *Mabe v. Westmorland Coal Co.*, BRB No. 13-0316 BLA (Apr. 30, 2014) (unpub.) (in which the Board, in a case arising within the jurisdiction of the Fourth Circuit, followed the Sixth Circuit’s approach in *Brigance*).

Chapter 12
Introduction to Survivor's Claims

B. Child

3. Disabled child, special issues

d. Marriage or remarriage of disabled child, effect of

In *Kreider v. Director, OWCP*, BRB No. 13-0311 BLA (Apr. 11, 2014) (unpub.), the Administrative Law Judge denied a claim for survivor's benefits filed by the deceased miner's disabled child. The Administrative Law Judge found that Claimant failed to satisfy the "unmarried" eligibility requirement for establishing dependency on the deceased miner at 20 C.F.R. § 725.209(a).

In determining whether Claimant satisfied this requirement, the Administrative Law Judge considered whether Claimant was unmarried for a reasonable period of time prior to the miner's death, not whether Claimant was unmarried at the time she filed her claim. The Administrative Law Judge noted that Section 725.227 provides that the determination of dependency for potentially eligible survivors "is based on the facts and circumstances with respect to a reasonable period of time ending with the miner's death." Because Claimant was continuously married from October 27, 1979 to February 12, 1987, the date of the miner's death, the Administrative Law Judge found that Claimant failed to demonstrate that she was "unmarried" for a reasonable period of time prior to the miner's death. On appeal, the Board agreed with the Director's assertion that a child, in order to satisfy the dependency requirement, must initially demonstrate that he or she was unmarried for "a reasonable period of time ending with the miner's death."

Additionally, the Board noted that the fact that Claimant was separated from her second husband at the time of the miner's death is irrelevant for purposes of determining Claimant's dependency, as the regulations condition entitlement on whether a child is married and provide no exception for legal separation. Accordingly, the Board affirmed the Administrative Law Judge's determination that Claimant is not an eligible dependent surviving child of the deceased miner.

e. How is "disability" determined?

[After *Campbell* summary] See also *Endicott v. Vandyke Bros. Coal Co., Inc.*, BRB No. 14-0182 BLA (Oct. 20, 2014) (unpub.) (holding, in a claim for augmented benefits, that the Administrative Law Judge "considered all the evidence of record, and reasonably found that SSA's determination and continued payment of benefits was probative evidence that the miner's son was disabled and that the other evidence in the record did not show that he was not disabled").

Chapter 16
Survivors' Claims: Entitlement Under Part 718

Citation updates for this chapter:

Thorne v. Eastover Mining Co., 25 B.L.R. 1-121 (2013); *Moser v. Director, OWCP*, 25 B.L.R. 1-97 (2013).

II. Standards of entitlement

D. Survivors' claims filed on or after January 1, 1982 where there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982

2. "Hastening death" standard

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

In *Collins v. Pond Creek Mining Co.*, 751 F.3d 180 (4th Cir. 2014), the court reversed an Administrative Law Judge's denial of benefits in a survivor's claim. The Administrative Law Judge had found that Claimant's doctors' opinion were not sufficiently reasoned or documented to support a finding that the miner's pneumoconiosis caused his death. The Administrative Law Judge determined that he could not give any weight to these opinions, as they were "similarly conclusory" when compared with the physicians' opinions held to be insufficient by the court in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000). The Administrative Law Judge also refused to consider, as supportive of Claimant's case, the opinions of two of Employer's doctors who found that the miner's death was in fact hastened by COPD, though these doctors attributed the miner's COPD to smoking and not pneumoconiosis.

The Fourth Circuit held that the Administrative Law Judge erred in according no weight to Claimant's physicians' opinions. The court noted that the miner's treating physician had compiled copious treatment notes, made during the three years he was the miner's doctor, which showed both the seriousness of the miner's pulmonary condition and the toll it had taken on his body. Furthermore, in a letter to the Department, the treating physician laid out the details of the miner's final weeks and months, demonstrating his intricate understanding of the miner's worsening health. The other physician stated that his opinion was based on a review of the case file, which at the time included the miner's treatment history, death certificate, and additional hospital records. The court distinguished the present case from that of *Sparks*, in which "a doctor with no significant ties to the patient decreed in a few cryptic words that pneumoconiosis had been a contributing cause of death" In contrast, the court noted that, in this case, the treating physician's "explanatory letter relied upon a lengthy treatment history and his first-hand observations of the damage the coal-dust triggered pulmonary disability inflicted upon his patient."

The court therefore held that Claimant's physicians' opinions provided sufficient evidence that the miner's pneumoconiosis hastened his death. While the physicians could have explained in more detail the exact manner in which the miner's pneumoconiosis contributed to his respiratory and cardiac failure, the court held that their opinions were not poorly documented and that their explanations were adequate and entitled to more weight than the physicians who had, mistakenly, found no pneumoconiosis.

The court also held that, contrary to the finding of the Administrative Law Judge, the opinions of two of Employer's doctors, each of whom found that the miner's totally disabling COPD was unrelated to his coal mine employment, provided at least some additional support for a finding that the miner's pneumoconiosis hastened his death. The court noted that, while these physicians believed that the miner's COPD was due to smoking, they conceded that the COPD hastened the miner's death. Moreover, Claimant had established that the miner's COPD qualified as pneumoconiosis.

E. The survivor's claim is filed after January 1, 2005, and is pending on or after March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his or her death

2. Applicability of automatic entitlement

a. Threshold criteria

The award of benefits in the miner's claim need not be final. In *Rothwell v. Heritage Coal Company*, 25 B.L.R. 1-141 (2014), the Board held that an award of benefits in an underlying miner's claim need not be final for a survivor to be entitled to receive benefits pursuant to amended Section 932(I). Instead, the Board concluded that "Section 932(I) provides automatic entitlement to survivor's benefits to eligible survivors of miners who were determined to be eligible for benefits — including miners whose determinations of eligibility are not yet final, and are subject to potential appeal and reversal." The Board determined that this conclusion is supported by the plain language of amended Section 932(I), which requires only that "the miner 'was determined to be eligible to receive benefits . . . at the time of his or her death . . .'" Furthermore, the Board concluded that such a reading of amended Section 932(I) is consistent with (1) similar language found elsewhere in the Act, see 30 U.S.C. § 923(d); (2) the manner in which the Director administers the Act concerning the payment of miners' benefits; and (3) the Act's implementing regulations, see 20 C.F.R. § 725.212(a)(3)(ii). Finally, the Board noted that such a reading of amended Section 932(I) comports with Congress's intent to provide for "the continuation of benefits for eligible survivors of miners who were determined to be eligible to receive benefits."

The Board therefore held that Section 932(I) does not require a final award of benefits in a miner's claim in order for an eligible survivor to be automatically awarded benefits pursuant to Section 932(I).

In *Murdock v. Mountain Laurel Resources Co.*, BRB No. 15-0169 BLA (Jan. 20, 2016) (unpub.), Employer alleged on appeal that the Administrative Law Judge had inappropriately relied upon Section 932(I) in awarding survivor's benefits. In support, Employer noted that the underlying miner's claim remained pending before the Office of Administrative Law Judges; therefore, in light of Employer's request for a formal hearing before that Office, the District Director's award was not effective. The Board rejected Employer's argument, noting that "Section 932(I) requires only that a miner be 'determined to be eligible to receive benefits . . . at the time of his . . . death.'" *Slip op.* at 3, quoting 30 U.S.C. § 932(I) (emphasis in Board decision). Furthermore, its decision in *Rothwell v. Heritage Coal Co.*, 25 B.L.R. 1-141 (2014), clarified that an award in an underlying miner's claim "need not be final or effective" in order to support an award pursuant to Section 932(I) in a related survivor's claim. Therefore, the Board concluded that, "contrary to employer's contention, the miner in this

case was 'determined to be eligible to receive benefits' for the purpose of determining eligibility for derivative benefits under Section 932(I)." See also *Robinson v. Lady H Coal Co.*, BRB No. 15-02212 BLA (Jan. 27, 2016) (unpub.).

In *Ferguson v. Oak Grove Resources, LLC*, ___ BLR ___, BRB No. 16-0570 BLA (Aug. 7, 2017), the Board further clarified surviving spouses' entitlement to benefits pursuant to the automatic entitlement provision at 30 U.S.C. §932(I). Specifically, the decision addressed the question of whether Section 932(I) covers only those cases in which miners were awarded benefits before their death, or if in fact the amendment also covers a claim awarded after a miner dies. The Board in *Ferguson* noted that the BLBA requires that the miner was simply "determined to be eligible to receive benefits . . . at the time of his or her death . . ." Slip op. at 4, quoting 30 U.S.C. §932(I). Furthermore, the Board stated that its "decision in [*Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014),] made clear that, for purposes of determining eligibility for derivative benefits under Section 932(I), there is no requirement that the miner have been awarded benefits prior to his death." Slip op. at 5. The Board also noted its agreement with the Director that the current regulation at 20 C.F.R. §725.212(a)(3)(i), (ii) (2015) is consistent with a reading of Section 932(I) and that, "like the prior regulations, the current regulation provides no basis for distinguishing between survivors of miners who were awarded benefits prior to their deaths and survivors of miners who were awarded benefits posthumously." *Id.* Finally, the Board rejected Employer's contention that an award pursuant to Section 932(I) in the instant case would be contrary to binding Eleventh Circuit precedent.

In light of the above, the Board affirmed the Administrative Law Judge's decision granting the claimant's request for summary decision and thus affirmed her award of benefits pursuant to Section 932(I).

b. Date of filing survivor's claim controls

- Subsequent claim by survivor

In *Consolidation Coal Co. v. Maynes*, 739 F.3d 323 (6th Cir. 2014), the court affirmed application of the automatic entitlement provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010) (PPACA), to a subsequent survivor's claim meeting the filing requirements (*i.e.* filed after January 1, 2005 and pending on or after March 23, 2010) where the miner was finally awarded benefits in his lifetime claim. In denying application of *res judicata* to bar the subsequent survivor's claim, the court stated, "A comparison of the determinative factual elements underlying each claim demonstrates that Mrs. Maynes' original claim and her subsequent claim were not the same cause of action." The court explained:

In her original claim, Mrs. Maynes could recover only by proving that her husband's death was due to pneumoconiosis. In her subsequent claim, the cause of Mr. Maynes' death was not at issue. Rather, Mrs. Maynes' eligibility simply hinged upon whether Mr. Maynes had received benefits during his lifetime, an administrative fact.

Slip op. at p. 6.

In *Jim Walter Res. v. Dir., OWCP*, 766 F.3d 1333 (11th Cir. 2014), the Eleventh Circuit held that a miner's surviving spouse was properly awarded benefits pursuant to amended Section 932(I). The court held that amended Section 932(I) applied to the surviving spouse's new claim even though her claims filed prior to the amendments had been denied.

The Eleventh Circuit rejected Employer's argument that a claim must have been pending on March 23, 2010, for the amendments to apply, noting that the statute's text states that the section affects claims "that are pending on *or after* the date of enactment of this Act." See PPACA, Pub. L. No. 111-148, §1556(c), 124 Stat. 119, 260 (2010). The court similarly rejected arguments that the amendments apply only to first-time claims, noting that that it had rejected a similar line of argument in *U.S. Steel Mining Co., LLC v. Dir., OWCP*, 719 F.3d 1275, 1280 (11th Cir. 2013).

Furthermore, the court found no merit in Employer's contention that a survivor's application cannot be a claim for the purposes of establishing a filing date, even though the express language of the statute indicates that the widow is not "required to file a new claim." Again quoting from *U.S. Steel Mining*, the court reasoned:

Section 1556(c) applies the amended § 932(I) to all claims filed between January 1, 2005, and March 23, 2010. During that period, both miners and survivors were required to file claims to receive benefits. Section 1556(c) therefore applies the amended § 932(I) to survivors' claims as well as miners' claims. Just because the application of the amended § 932(I) to a claim operates to eliminate the need for that claim does not render its application illogical or unworkable.

Because the court in *U.S. Steel Mining* ultimately concluded that Section 932(I) merely "operates to eliminate the need for [a survivor's] claim" and does not eliminate the application procedure itself or prevent previously denied claimants from benefiting from the PPACA amendments, the Eleventh Circuit rejected the conclusion that the operative date for determining eligibility cannot be the date the survivor's claim was filed. Therefore, an eligible survivor of a miner whose previous application for survivor's benefits had been denied under the pre-PPACA version of the Act was not barred from taking advantage of the automatic entitlement provision of the PPACA.

d. No hearing required; automatic entitlement

However, in *Cree v. Central Cambria Drilling Co.*, BRB No. 15-0129 BLA (Nov. 2, 2015) (unpub.), the Board addressed Employer's challenge to the Administrative Law Judge's finding, without holding a hearing, that Claimant was automatically entitled to survivor's benefits pursuant to Section 422(I) of the Act, 30 U.S.C. §932(I).

The Board began by summarizing the relevant regulations, noting that a hearing need not be held "if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and the moving party is entitled to the relief requested as a matter of law." *Cree*, slip op. at 3, citing 20 C.F.R. §725.452(c). Furthermore, if an Administrative Law Judge "believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the administrative law judge shall notify the parties by written order and allow at least thirty days

for the parties to respond.” 20 C.F.R. §725.452(d). However, if any party files a timely request in response to the order, the Administrative Law Judge “shall hold the oral hearing.” *Id.* Finally, “[w]hile the parties may waive the right to a hearing before an administrative law judge, such waiver must be in writing and filed with the Chief Administrative Law Judge or the administrative law judge assigned to hear the case.” *Cree*, slip op. at 3, citing 20 C.F.R. §725.461(a).

The Board concluded that, “[b]ecause the parties did not agree to a decision on the record, and no party filed a motion for summary judgment, the administrative law judge was obligated to hold a hearing before issuing his decision.” *Id.* at 3-4. Therefore, the Board vacated the award of benefits and remanded the matter to the Administrative Law Judge “for a hearing consistent with the aforementioned regulatory requirements.” *Id.* at 4.

Chapter 17
Onset, Augmentation, Termination, and Interest

[No updates at this time.]

II. Augmentation of benefits

B. Date of commencement

In *Toy v. Carpenter Coal & Coke Co.*, BRB No. 13-0384A (Apr. 30, 2014) (unpub.), the Administrative Law Judge determined that benefits augmented by reason of Claimant's dependent disabled adult stepson begin with the first month in which Claimant demonstrated that his stepson met the conditions of relationship and dependency. The Administrative Law Judge therefore found that Claimant qualified for augmented benefits for his stepson as of December 21, 2011, the date Claimant submitted a benefit report from the Social Security Administration, which provided sufficient evidence that the stepson was disabled. The Administrative Law Judge noted that initial documentation submitted to the District Director established that Claimant's disabled adult son met the relationship requirements.

On appeal, the Board agreed with the Director's interpretation of the plain language of 20 C.F.R. § 725.210: that the operative date for determining an augmentee's entitlement to benefits is the date the conditions of relationship and dependency are met or satisfied, rather than the date that the evidence of those conditions is submitted into the record. Consequently, the Board modified the Administrative Law Judge's decision to reflect that Claimant is entitled to augmented benefits on behalf of his stepson as of June 2007, the date that Claimant was determined entitled to benefits.

Chapter 21
Interest on Past-Due Medical Bills (BMI) and Penalties

II. Jurisdiction

[to be included after the citation to 20 C.F.R. §725.530(a)]; see *Vialpando v. Chevron Mining, Inc.*, No. 18-251-BRB-SCY, 2018 WL 5017754 (D.N.M. Oct. 16, 2018) (concluding that the miner is entitled to additional compensation on overdue payments, plus interest, in accordance with Section 914(f) of the Act); *Burton v. Drummond Co., Inc.*, No. 2:18-CV-00795-RDP, 2018 WL 4951972 (N.D. Ala. Oct. 12, 2018) (determining that the court has subject matter jurisdiction over the claim and that the miner's widow has stated a claim upon which relief can be granted).

C. Sixth Circuit

In *Byrge v. Premium Coal Co., Inc.*, 2017 WL 1208586 (E.D. Tenn. Mar. 31, 2017), the magistrate judge addressed and granted Claimant's Motion for Summary Judgment. Prior to the federal court action, the miner filed his black lung claim in June 2010. In April 2011, the District Director awarded benefits and, following Employer's request for a hearing, an Administrative Law Judge awarded benefits in January 2013, with an onset date of June 2010. Employer appealed to the Board, which affirmed the decision in February 2014. The Board denied Employer's motion for reconsideration, and the Sixth Circuit thereafter affirmed the award in 2015. Only following the Sixth Circuit's decision did Employer repay the Black Lung Disability Trust Fund the \$52,676.50 in interim benefits paid to the miner.

In March 2016, Claimant filed the action at issue, which involved Claimant's seeking 20% additional compensation and interest in light of the Employer's failure to pay the miner his benefits from February 2013 until February 2015, while Claimant's black lung claim was pending on appeal. See 33 U.S.C. §§914(f), 921(d); 20 C.F.R. §§725.530(a), 725.604, 725.607(a), 725.608(a)(3).

Following a finding that Claimant had standing to sue, the magistrate judge addressed her contention that she is entitled to 20% additional compensation. Upon finding that the "compensation order" at issue was the Administrative Law Judge's January 2013 award and that Claimant's action was properly filed in accordance with Section 921(d), as incorporated into the BLBA, the magistrate judge further found that the Administrative Law Judge's award became effective when it was filed with the District Director in February 2013. The magistrate judge therefore found that Employer was "required to start paying benefits because the ALJ's Order became effective and [it] did not receive, let alone request, a stay of the ALJ's decision granting benefits." In addition, the magistrate judge rejected Employer's challenge to Section 725.607, the regulation which, generally, provides for 20% additional compensation when benefits payable pursuant to an effective award "are not paid by an operator or other employer ordered to make such payments within 10 days after such payments become due . . ." The magistrate judge also concluded that Claimant is entitled to interest on the additional compensation from March 25, 2013, to February 23, 2015, the date the miner died.

In light of the above, the magistrate judge granted Claimant's Motion for Summary Judgment.

Chapter 23
Petitions for Modification Under 20 C.F.R. § 725.310

Citation update for this chapter: *Kern v. Walcoal, Inc.*, 25 B.L.R. 1-109 (2013); *Gross v. Dominion Coal Corp.*, 23 B.L.R. 1-8 (2003).

I. Generally

E. Two-level inquiry

1. Benefits Review Board

In *Smith v. Director, OWCP*, BRB No. 15-0229 BLA (Mar. 10, 2016) (unpub.), which involved a second petition for modification and in which Claimant submitted no new evidence, the Administrative Law Judge dismissed the request upon finding that consideration of the modification request would not render justice under the Act. In the Order of Dismissal, the Administrative Law Judge stated the following:

Given the fact that Claimant has produced no evidence, I find that she has failed to present “compelling new evidence.” However, as directed by [*O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)], I consider the wholly new evidence, the cumulative evidence, and further reflect upon the evidence initially submitted; I nonetheless find Claimant’s modification petition futile despite the fact that I remain mindful that “modification does not always require ‘a smoking-gun factual error, changed conditions, or startling new evidence.’”

Order of Dismissal at 7, quoting *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 330, 25 B.L.R. 2-157, 2-176 (4th Cir. 2012).

On appeal, the Board held that the dismissal of Claimant’s modification request must be vacated:

Consistent with the stated purpose of the Act, “to ensure that . . . benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis,” 30 U.S.C. § 901(a), Congress “incorporat[ed] within the statute a broad reopening provision to ensure the accurate disposition of benefits.” *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 546, 22 B.L.R. 2-429, 2-447 (7th Cir. 2002). Moreover, parties to federal black lung claims are afforded the right to request modification, without limit as to the number of times that a request may be filed, and need not submit new evidence in support of their requests.

Slip op. at 6, citing 33 U.S.C. § 922, as incorporated into the Act by 30 U.S.C. § 932(a). The Board also noted that the language of the implementing regulation at Section 725.310(c)

signifies that an Administrative Law Judge “is required to consider a request for modification and, when a survivor’s claim is at issue, render a finding as to whether a mistake in a determination of fact has been demonstrated.”

The Board emphasized that an Administrative Law Judge must determine whether the granting of the request renders justice under the Act. Furthermore, the Board agreed with the Director that the Administrative Law Judge, in finding that modification would not render justice under the Act, based his dismissal of the modification request “on an inaccurate understanding of ‘futility’” According to the Board, his futility determination was based on the fact that Claimant’s claim had been denied twice previously, “the miner died several years ago, claimant submitted no new evidence, and did not identify a specific mistake in a determination of fact.” The Board agreed with the Director that, in this context, “futility refers to whether there is any relief available to a party . . . [when] the party establishes that it is entitled to modify a prior decision.” In this modification request, the Board concluded that “relief is plainly available to claimant because, if she succeeds on the merits of her request, she may establish entitlement to benefits.” The Board therefore vacated the Administrative Law Judge’s justice under the Act finding.

In *Bowyer v. Central Appalachian Coal Co.*, BRB No. 16-0271 BLA (Mar. 21, 2017) (unpub.), the Board noted the following in an appeal concerning a claimant’s request for modification of a subsequent claim:

We note that the administrative law judge held that he was required to make a “threshold” determination of whether granting modification would render justice under the Act prior to considering the modification petition on the merits. Decision and Order at 22, citing *Sharpe v. Director, OWCP* [*Sharpe I*], 495 F.3d 125, 128, 24 BLR 2-56, 2- 68 (4th Cir. 2007). While *Sharpe I* held that an administrative law judge must consider the question before ultimately granting the relief requested in a modification petition, nothing in *Sharpe I* establishes that an administrative law judge must make the determination at the outset. Instead, the timing of the inquiry will be dictated by the individual facts of the case. While it might make sense to make a threshold determination in cases of bad faith, for example, it does not follow that a threshold determination is appropriate in cases such as this where newly submitted evidence establishes a mistake in the ultimate fact of entitlement, which depends on a thorough consideration of the merits. See *O’Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (the plain purpose of modification is to vest an adjudicator “with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.”).

Slip op. at 5-6 n.5.

5. Office of Administrative Law Judges [new]

In *Massey v. Peabody Coal Co.*, 25 B.L.R. 3-213 (2015), which involved a third request for modification of a living miner’s claim and a first request for modification of a survivor’s claim, the Administrative Law Judge noted that diligence, motive, and finality are factors to be considered in determining whether reopening the matter would render justice under the

Act; however, the Administrative Law Judge observed that the law favors accuracy as the most important factor. In considering the request for modification of the living miner's claim, the Administrative Law Judge found Claimant's modification petition to be futile, based upon the new and cumulative evidence, as well as upon further reflection of the initially submitted evidence. Instead, the Administrative Law Judge found that the previous decision on the modification request represented the most accurate assessment of the claim. Therefore, after finding that Claimant failed to present compelling new evidence, the Administrative Law Judge dismissed the petition for modification in the living miner's claim because it would not further justice under the Act. However, in considering the request for modification of the survivor's claim, the Administrative Law Judge found that Claimant had produced compelling new evidence in the form of a physician's credentials and his analysis of a previously submitted autopsy report. The Administrative Law Judge therefore found that consideration of Claimant's modification request in the survivor's claim would further justice under the Act. After an analysis of the evidence at 20 C.F.R. § 718.205(c) on the merits, the Administrative Law Judge found that Claimant did not establish that the miner's death was due to pneumoconiosis and denied the petition for modification in the survivor's claim.

IV. Review by the Administrative Law Judge

B. Entitlement to a hearing

2. For claims filed after January 19, 2001

In *Hatfield v. Director, OWCP*, BRB No. 16-0511 BLA (Nov. 30, 2016) (unpub.), which involved a survivor's claim, the Board vacated the Administrative Law Judge's decision denying benefits. In *Hatfield*, the Administrative Law Judge issued an Order allowing the parties 12 days in which to submit a letter stating why a decision on the record should not be issued. Claimant was proceeding unrepresented and, within the 12-day period, agreed in writing to a decision on the record. The Director, who was the respondent in the case, indicated he did not object to a decision on the record. The Administrative Law Judge eventually issued a decision denying benefits. In this decision, he found that, while the miner worked as a miner for at least 16 years in surface coal mine employment, Claimant did not establish that the miner worked for at least 15 years in conditions substantially similar to those of an underground mine; therefore, he found Claimant could not invoke the 15-year rebuttable presumption. The Administrative Law Judge further found that Claimant established that the miner suffered from pneumoconiosis arising out of his coal mine employment, but failed to establish that the miner died due to the disease. Accordingly, the Administrative Law Judge denied benefits.

On appeal, the Director challenged, as contrary to law, the Order allowing the parties only 12 days in which to state why a decision on the record should not be issued. The Director posited that the shortened timeframe "may have contributed to claimant's determination to waive her right to a hearing," and he further argued that the Administrative Law Judge's findings in his decision denying benefits "make clear that claimant was adversely impacted by her agreement to waive her right to a hearing."

The Board agreed with the Director that the Administrative Law Judge "erred in allowing the parties only twelve days to state why this case should not be decided on the

record.” The Board, quoting 20 C.F.R. §725.452(d), emphasized that “[i]f the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least thirty days for the parties to respond.” Noting the Director’s concerns as to the shortened period in which Claimant was allowed to respond and how the absence of a hearing may have impacted her potential to prevail on the merits of her claim, the Board agreed “with the Director that claimant’s right to a full and fair adjudication of her claim may not have been fully protected.”

Accordingly, the Board vacated the decision denying benefits and remanded the matter “for a formal hearing.”

V. Onset date for the payment of benefits

B. For claims filed after January 19, 2001

In *Dalton v. Director, OWCP and Frontier-Kemper*, 738 F.3d 779 (7th Cir. 2013), the court held the Administrative Law Judge properly determined the date of onset for the payment of benefits. Specifically, on modification, the Administrative Law Judge *sua sponte* reviewed evidence underlying the onset date found by a prior deciding judge, and determined a mistake in a determination of fact was made such that the miner’s claim was payable as of August 1991. This date was nearly eight years earlier than the June 1999 onset date found by the prior deciding judge, which resulted in additional benefits to payable on the miner’s claim.

On appeal, the Board held the Administrative Law Judge had authority to *sua sponte* modify the date of onset, but the Board vacated the August 1991 onset date and it reinstated the June 1999 onset date. As noted by the Seventh Circuit:

The Board wrote that because ‘neither Dr. Beck nor Dr. Cohen opined that the miner was disabled *due to pneumoconiosis* in 1991’ it had to vacate the ALJ’s designation of August 1991 as the date for the commencement of benefits. The Board thought that there was no medical evidence that reflected the date upon which Mr. Dalton became totally disabled on account of pneumoconiosis, and thus that his benefits were limited to the period beginning with the month in which he filed his original claim.

Slip op. at p. 6.

The court disagreed with the Board and reinstated the earlier August 1991 onset date based on “ample evidence that Mr. Dalton was totally disabled (from a respiratory standpoint) as of the time he quit his job in August 1991.” The court explained:

Frontier submitted no evidence indicating that the totally disabling lung disease Mr. Dalton had by 1991 was caused by something different from the disabling lung disease from which he still suffered in 1995 and 1999. The regulations specifically recognize pneumoconiosis ‘as a latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure. 20 C.F.R. § 718.201(c). More to the point for this case, the

Department of Labor has concluded that the risk of significant airway obstruction from coal-mine dust is additive with cigarette smoking. This provides further support for the ALJ's finding that the totally disabling breathing difficulties Mr. Dalton faced in 1991 were caused by both smoking and coal-mine dust, given his long exposure to both. That is all the regulations require.

Slip op. at p. 12. The court added:

There is nothing wrong with circumstantial evidence, and so it is of no moment that Mr. Dalton did not have more direct evidence to support his case, such as a doctor in August 1991 who spelled out that Mr. Dalton suffered from totally disabling pneumoconiosis and that his condition was totally disabling.

. . .

Indeed, such a requirement would be in some tension with both the rebuttable presumption (at 20 C.F.R. § 718.203(b)) . . . and the rule that in cases where the onset date is not clearly established, the benefit of the doubt and back-dated benefits, go to the miner.

Slip op. at p. 13.

Chapter 24
Multiple Claims Under 20 C.F.R. § 725.309

Citation update for this chapter:

Consolidation Coal Co. v. Director, OWCP [Burris], 732 F.3d 723 (7th Cir. 2013).

IV. Proper review of the record

B. For claims filed after January 19, 2001

1. Establishing an element of entitlement previously denied

e. Application of the 15-year presumption; used to demonstrate element of entitlement

[For inclusion before the sentence, "For additional discussion of the 15-year presumption, see Chapter 11."]

In *Eastern Associated Coal Corp. v. Director, OWCP [Toler]*, 805 F.3d 502, 25 B.L.R. 2-743 (4th Cir. 2015), which involved a subsequent claim filed in 2008,¹⁵ the Administrative Law Judge awarded benefits pursuant to the 15-year presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4). See 20 C.F.R. §718.305; *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35 (4th Cir. 2015). The Board eventually affirmed the award. On appeal before the Fourth Circuit, Employer contended that, by applying the 15-year presumption to the miner's subsequent claim, the Administrative Law Judge violated the Black Lung Benefits Act (BLBA), its implementing regulations, and the "principles of finality and separation of powers." *Toler*, 805 F.3d at 504.

Before the Administrative Law Judge, the parties stipulated that the miner was totally disabled due to a pulmonary impairment; therefore, as the miner had worked for twenty-seven years in coal mine employment, sixteen of which were underground, the Administrative Law Judge applied the 15-year presumption to the miner's subsequent claim. After examining the opinions of Employer's two doctors, the Administrative Law Judge found that Employer failed to disprove the existence of pneumoconiosis or demonstrate that the miner's impairment did not arise out of, or in connection with, his coal mine employment. Accordingly, the Administrative Law Judge awarded benefits. Employer appealed the award, and the Board remanded the matter to the Administrative Law Judge to provide Employer with an opportunity to submit new evidence addressing the 15-year presumption.

On remand, the Administrative Law Judge again awarded benefits by applying the 15-year presumption to the miner's subsequent claim and finding that Employer failed to rebut the presumption. Employer appealed the Administrative Law Judge's decision to the Board, which affirmed the award. The appeal to the Fourth Circuit then followed.

¹⁵ The miner's only prior claim was denied based upon a failure to establish the existence of pneumoconiosis, despite an Administrative Law Judge finding the miner had established a totally disabling pulmonary or respiratory impairment. The Board affirmed the Administrative Law Judge's denial of benefits, and the Fourth Circuit thereafter denied the miner's petition for review.

The court first rejected Employer's argument that the Administrative Law Judge erred in using the 15-year presumption to establish a change in an applicable condition of entitlement. The court concluded that "the Act and the regulations show plainly that a coal miner *armed with new evidence* may invoke the [15]-year presumption to establish a change in an applicable condition of entitlement." *Id.* at 511 (emphasis added). The court noted that the preamble to the 2001 regulations reinforces this conclusion, as the Department there stated that "the miner continues to bear the burden of establishing all of the statutory elements of entitlement, except to the extent that he is aided by [the] statutory presumptions' in effect at the time the Secretary promulgated the 2000 Final Rule." *Id.* at 512, quoting 65 Fed. Reg. 79,920, 79,972 (Dec. 20, 2000). Finally, the court concluded that, even if it harbored doubts as to this conclusion, it "would defer to the Director's reasonable and consistent interpretation of the applicable regulations." *Id.*

The court also rejected Employer's arguments against such application of the 15-year presumption in a subsequent claim. In so doing, the court disagreed that application of the presumption amounted to a "double presumption," and instead noted that its use simply assists a miner in establishing the applicable conditions of entitlement in a subsequent claim. The court disagreed with Employer's argument that use of the 15-year presumption to establish a change in an applicable condition of entitlement is inconsistent with the Secretary of Labor's concession in *National Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002), that "the most common forms of pneumoconiosis are not latent." *Id.* at 23-25. In addition, the court rejected Employer's contention that the miner's first claim and subsequent claim are the same "with a new label," as the court had held that such "claims are not the same" in *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc). *Toler*, 805 F.3d at 513. The court also concluded that *Lisa Lee Mines* foreclosed any suggestion that the miner must "prove that the etiology of his condition has changed by comparing the evidence pertaining to [his] second claim with the evidence underlying the denial of his first claim." *Id.*, citing *Lisa Lee Mines*, 86 F.3d at 1361. Finally, the court rejected, as factually incorrect, Employer's assertion that the miner had not submitted new evidence postdating the denial of his first claim pursuant to 20 C.F.R. §725.309(c)(4) and *Consol. Coal Co. v. Williams*, 453 F.3d 609 (4th Cir. 2006). Therefore, the court concluded that the Administrative Law Judge violated neither the BLBA nor the applicable regulations in applying the 15-year presumption to the miner's subsequent claim.

Second, the court turned to Employer's argument that, by applying the 15-year presumption to the miner's subsequent claim, the Administrative Law Judge improperly reopened an Article III court's final judgment: the Fourth Circuit's 1998 denial of the miner's petition for review in his first claim. The court concluded that the award in the miner's subsequent claim "did not 'retroactively . . . reopen' anything, much less a final judgment of an Article III court." *Toler*, 805 F.3d at 515. The court noted that, in fact, *Lisa Lee Mines* required that the Administrative Law Judge "accept the correctness of the administrative denial of [the miner's] 1993 claim – and, by necessary extension, our 1998 denial of [his] petition for review." *Id.* (emphasis in original). Accordingly, the court rejected Employer's contention that the Administrative Law Judge inappropriately exercised "the judicial Power" in granting the miner's subsequent claim." *Id.*

2. Responsible operator designation

In *Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309 (6th Cir. 2014), re-litigation of designation of the responsible operator in a subsequent claim was at issue. As noted by the court:

The claimant originally brought suit in 1992 and an administrative law judge determined that he was not medically qualified for benefits. In the same decision, the administrative law judge indicated that Arkansas Coals was not the 'responsible operator' required to pay benefits. Approximately seventeen years later, the claimant filed a second claim alleging a change in his medical condition and requesting relief. After finding that his medical condition had worsened and that the claimant was now disabled, an administrative law judge awarded benefits and determined that Arkansas Coals was the responsible operator.

Slip op. at 2. The court held designation of the responsible operator issue could be re-litigated in the second claim because (1) the miner was entitled to bring the claim under 20 C.F.R. § 725.309(d)(4), and (2) designation of the responsible operator was not a "necessary" finding in the originally-denied claim. The court concluded that the Director's failure to participate at the hearing in the first claim, or to appeal the decision in that claim, did not preclude its participation in the second claim with regard to re-litigation of the responsible operator issue.

Chapter 25

Principles of Finality

I. Generally

B. Mistake (or change) of law, not a basis for modification

1. Generally

In *Stacy v. Diamond May Coal Co.*, BRB No. 15-0084 BLA (Dec. 22, 2015) (unpub.), the Board rejected Employer's argument that the Administrative Law Judge's award of benefits based on modification represented an improper modification based on a change in law. The Board noted that it "has held that modification is available to permit re-examination of entitlement in circumstances similar to those in the [present] case," and that it "has applied [the holding in *Mullins v. ANR Coal Co., LLC*, 25 B.L.R. 1-49, 1-53 (2012),] to cases such as this involving Section 411(c)(4)." *Stacy*, slip op. at 5.

E. Two-level inquiry

1. Benefits Review Board

In a recent unpublished decision, *Stacy v. Diamond May Coal Co.*, BRB No. 15-0084 BLA (Dec. 22, 2015) (unpub.), the Board rejected Employer's allegation that Claimant filed her modification request based on an improper motive: to avail herself of the 15-year presumption. Noting at the outset that Claimant had actually filed her modification request before the PPACA was enacted, the Board also stated that, "by filing a request for modification, claimant was exercising her right to pursue a claim for benefits under the Act." *Slip op.* at 5. Therefore, the Board concluded that "there was nothing improper about her motive in seeking modification of her denied claim." *Id.*

III. Res judicata

B. Subsequent claims under 20 C.F.R. § 725.309 Designation of the responsible operator

In *Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309 (6th Cir. 2014), re-litigation of designation of the responsible operator in a subsequent claim was at issue. As noted by the court:

The claimant originally brought suit in 1992 and an administrative law judge determined that he was not medically qualified for benefits. In the same decision, the administrative law judge indicated that Arkansas Coals was not the 'responsible operator' required to pay benefits. Approximately seventeen years later, the claimant filed a second claim alleging a change in his medical condition and requesting relief. After finding that his medical condition had worsened and that the claimant was now disabled, an administrative law judge awarded benefits and determined that Arkansas Coals was the responsible operator.

Slip op. at p. 2. The court held designation of the responsible operator issue could be re-litigated in the second claim because (1) the miner was entitled to bring the claim under 20 C.F.R. § 725.309(d)(4), and (2) designation of the responsible operator was not a “necessary” finding in the originally-denied claim. The court concluded that the Director’s failure to participate at the hearing in the first claim, or to appeal the decision in that claim, did not preclude its participation in the second claim with regard to re-litigation of the responsible operator issue.

Chapter 26

Motions

IX. Submission of post-hearing evidence and leaving the record open

A. Curing a violation of the 20-day rule

In *Boyd v. Island Creek Coal Co.*, ___ BLR ___, BRB No. 16-0524 BLA (July 28, 2017), the Board addressed the issue of the Director's attempts to submit a supplemental report from Dr. Forehand, who had conducted the DOL-sponsored complete pulmonary evaluation in the case. Specifically, 7 weeks before the hearing, the Director filed a motion with the Administrative Law Judge in which he sought leave to submit this supplemental report, as he believed that submission of the report would be untimely under Section 725.456(b) of the regulations. In this motion, the Director noted that the case met the requirements of the DOL pilot program concerning supplemental reports prepared by DOL-sponsored examining physicians. The Director also argued that good cause existed for the late submission of the supplemental report. Employer opposed the motion, arguing that (1) good cause for the supplemental report did not exist, (2) the supplemental report pilot program is authorized by neither the BLBA nor the regulations, and (3) the case did not meet the program's criteria in any event. In the alternative, if the Administrative Law Judge were to admit the supplemental report, Employer asked that it be provided an opportunity to develop responsive evidence.

The Administrative Law Judge informed the parties at the hearing that, should she receive the supplemental report, she would consider their positions. Two weeks later, the Director submitted the supplemental report in question and asked that it be admitted. In the supplemental report, Dr. Forehand took into account the opinions of Employer's physicians, Drs. Fino and Dahhan, in opining that he still believed Claimant to be totally disabled due to pneumoconiosis. Thereafter, Employer renewed its objections to admission of the supplemental report.

In her decision on the merits, the Administrative Law Judge admitted the supplemental report, finding good cause established. In addition, she denied as "vague" Employer's request for an opportunity to respond to the supplemental report. She then awarded benefits pursuant to Section 411(c)(4).

On appeal and at the outset, the Board affirmed the Administrative Law Judge's finding that Claimant invoked the 15-year rebuttable Section 411(c)(4) presumption as unchallenged on appeal. It then decided, however, that she had abused her discretion in admitting the supplemental report. The Board concluded that the Administrative Law Judge's stated reason for admitting the supplemental report – that "it 'w[ould] assist' her 'in assessing Dr. Forehand's opinion in the absence of a deposition'" – amounted to a finding of good case based on relevancy. Slip op. at 6, quoting D&O at 3 n.6. Citing to, *inter alia*, its decision in *Conn v. White Deer Coal Co.*, 6 BLR 1-979, 1-982 (1984), in which it held that "mere reference to the relevance of the evidence" does not establish good cause under Section 725.456(b) of

the regulations, the Board held that the Administrative Law Judge “erred in finding good cause established merely because Dr. Forehand’s supplemental report was relevant.” Slip op. at 6.

Second, the Board determined that the Administrative Law Judge “further erred in denying employer’s request to respond to Dr. Forehand’s supplemental report.” *Id.* The Board noted that Section 725.456(b)(4) requires that a medical report that is not timely exchanged “shall not be admitted into evidence in any case unless the hearing record is kept open for at least 30 days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence.” 20 C.F.R. §725.456(b)(4). Accordingly, “having admitted Dr. Forehand’s supplemental report, the administrative law judge should have allowed employer the opportunity to respond.” Slip op. at 6.

Chapter 27
Representative's Fees and Representation Issues

I. Entitlement to fees

G. Preparation of the fee petition; litigation of the fee petition

[to be inserted following the *Kerns* citation]; *Clisso v. Elro Coal Co.*, 25 B.L.R. 1-165 (2016) (Order on Recon.) (en banc) (affirming its prior order awarding Claimant's counsel a fee for services rendered in defense of his fee petition).

II. Fee Petitions

B. Limiting time to file fee petition

However, the issue of jurisdiction must be considered. In *Dameron v. Big Bear Mining Co.*, BRB No. 15-0389 BLA (Aug. 16, 2016) (unpub.), the Board addressed Employer's appeal of an Administrative Law Judge's order awarding Claimant's counsel \$2,659.84 in reimbursements for costs associated with a successfully prosecuted claim.

Below, the District Director issued a Proposed Decision and Order awarding benefits on April 24, 2009. Following Employer's request for a hearing, the Administrative Law Judge issued a Decision and Order awarding benefits on August 17, 2010. As part of this Decision and Order, the Administrative Law Judge ordered Claimant's counsel to file a petition for attorney's fees and costs within 30 days of the Decision and Order's issuance. On August 30, 2010, Claimant's counsel filed a petition seeking \$7,497.50 in fees, but not costs, incurred while litigating the case before the OALJ. On November 8, 2010, counsel filed a petition for \$2,669.84 in costs incurred relating to proceedings before the OALJ; however, counsel incorrectly filed this petition with the District Director, not the Administrative Law Judge. The Administrative Law Judge fully awarded counsel's request for attorney's fees in a December 21, 2010 fee award.

Employer filed an appeal of the December 21, 2010 fee award with the Board on January 5, 2011. Claimant's counsel did not file a cross-appeal addressing the Administrative Law Judge's failure to consider the petition seeking reimbursement for costs. On April 14, 2011, pursuant to Employer's motion to withdraw its appeal of the fee award, the Board dismissed the appeal, which became final 60 days thereafter. See 20 C.F.R. § 802.406.

In the meantime, Employer continued to contest the underlying benefits award. Employer appealed the Administrative Law Judge's August 17, 2010 Decision and Order, and the Board affirmed the award in an August 25, 2011 Decision and Order. Employer thereafter appealed the Board's decision to the Fourth Circuit, which later granted Employer's motion to dismiss the appeal on October 3, 2013. No further action was taken on the underlying claim for benefits.

On May 4, 2015, Claimant's counsel submitted the petition for costs, originally incorrectly submitted to the District Director, to the Administrative Law Judge. Counsel

indicated that the petition "was erroneously sent to the District Director instead of" the Administrative Law Judge. Despite Employer's opposition to the petition as being untimely filed, the Administrative Law Judge allowed the filing, struck one of the claimed expenses, and directed Employer to reimburse Claimant's counsel for \$2,659.84 in costs. Employer appealed the award for costs to the Board.

On appeal, the Board agreed with Employer that the Administrative Law Judge "lacked jurisdiction to allow claimant's counsel to file his request for costs, or to consider counsel's request, and therefore erred in awarding costs." According to the Board:

Jurisdiction over counsel's fee petition was transferred from the administrative law judge to the Board in January of 2011, when employer filed its appeal of the administrative law judge's order awarding claimant's counsel \$7,497.50 in fees. At that point, the administrative law judge no longer had authority to issue orders or take any other action with respect to the fee petition.

Slip op. at 4. The Board further noted that, because it then dismissed Employer's appeal of the fee award and did not remand the matter to the Administrative Law Judge for further consideration, the Administrative law Judge never regained jurisdiction. In addition, the dismissal of the petition became final 60 days thereafter, "bringing litigation over the fee petition to a close." As the Administrative Law Judge never regained jurisdiction over the petition, "he had no authority to reopen the litigation by granting claimant's counsel's request to 'amend' his fee petition." Accordingly, the Board deemed as void, and therefore reversed, the order awarding counsel \$2,659.84 in costs.

III. Amount of the fee award

C. "Necessary work" defined

In *Sharpe v. Westmoreland Coal Co.*, BRB Nos. 14-0136 BLA, 14-0136 BLA-A, 14-0156 BLA, and 14-0156 BLA-A (Nov. 6, 2014) (unpub.), Claimant's counsel appealed, *inter alia*, the Administrative Law Judge's disallowance of 22.5 hours claimed for preparing briefs on remand before the Administrative Law Judge. In support of his fee petition, counsel had "referred to 'the complexity of the legal issues involved in this matter,' *i.e.*, modification requests, offensive non-mutual collateral estoppel, complicated pneumoconiosis, finality, accuracy and justice under the Act." In limiting the time compensable for the preparation of counsel's 2004 brief and 2008 brief to 10.00 hours for each, as opposed to 18.50 hours and 23.75 hours, respectively, the Administrative Law Judge noted that she found merit in Employer's objections to counsel's requested time. The Board noted the following in vacating this portion of the fee award:

The administrative law judge did not elaborate on the rationale underlying her disallowance of the hours claimed by claimant's counsel, nor did she set forth the basis for her determination that the hours requested were excessive. The administrative law judge also omitted an explanation for her decision to accept employer's suggestion that allowing ten hours for each brief was more appropriate. Absent adequate explanations, the Board cannot discern the basis

for the administrative law judge's reduction in the number of hours she approved.

Therefore, the Board remanded the matter for further consideration.

2. Examples

c. Preparing and litigating fee petition

In *Clisso v. Elro Coal Co.*, 25 B.L.R. 1-165 (2016) (Order on Recon.) (en banc), the Board addressed Employer's contention that the U.S. Supreme Court decision in *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158 (2015), precluded its being held liable for Claimant's counsel's fee for defending his fee petition. In *Baker Botts*, the Court held that, as Section 330(a)(1) of the Bankruptcy Code "does not explicitly override the American Rule with respect to fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation." As the Court noted, the American Rule provides that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."

In *Clisso*, the Board noted that "*Baker Botts* clearly distinguishes Section 330(a)(1) of the Bankruptcy Code from statutes that explicitly provide for fee-shifting, such as the Longshore Act."¹⁶ The Board also referred to numerous instances in which courts have rejected the application of *Baker Botts* to fee-shifting statutes. Accordingly, the Board held "that *Baker Botts* is not applicable to Section 28(a) of the Longshore Act because it is a fee-shifting provision that abrogates the American Rule to the extent that the statutory requirements are satisfied, as in this case." As Employer did not challenge the reasonableness of the fee award, the Board affirmed its prior order awarding Claimant's counsel a fee for services rendered in defense of his fee petition.

¹⁶ Section 28(a) of the Longshore Act, 33 U.S.C. § 928(a), which governs the award of attorney's fees following the successful prosecution of a claim, is incorporated into the Black Lung Benefits Act by way of 33 U.S.C. § 932(a).

Chapter 28
Rules of Evidence and Procedure

I. Applicability of the Federal Rules of Civil Procedure

H. "Fraud on the court," FRCP 60(d)(3) applies

In the subsequent claim of *Fox v. Elk Run Coal Co.*, 739 F.3d 131 (4th Cir. 2014), the Administrative Law Judge concluded Employer committed "fraud on the court" in conjunction with adjudication of the miner's prior claim by failing to disclose the existence of two pathology reports diagnosing the miner with pneumoconiosis to its experts and to Claimant. From this, the Administrative Law Judge awarded benefits in the miner's second claim, and concluded benefits would commence from January 1997, the date of initial x-ray evidence in the miner's first claim identifying a large mass in his right lung.

On appeal, the Fourth Circuit vacated the Administrative Law Judge's finding that Employer committed "fraud on the court" in the miner's first claim pursuant to Federal Rule of Civil Procedure (FRCP) Rule 60(d)(3) such that the denial of benefits in the miner's prior claim would not be set aside. As noted by the court:

Fox asks this court to set aside the ALJ's 2001 judgment (in the miner's first claim), which would have the effect of moving the onset of her entitlement to benefits under the BLBA (in the subsequent claim) from June 2006 to January 1997. She claims the judgment was fraudulently procured because, although Elk Run knew that the Naeye and Caffrey (pathology) reports diagnosed her husband with pneumoconiosis, it intentionally failed to disclose those reports to its own experts and later relied on the conclusions of those experts to controvert Fox's 1999 claim that he had pneumoconiosis. While Elk Run's conduct over the course of this litigation warrants nothing approaching judicial approbation, we are unable to say that it rose to the level of fraud on the court.

Slip op. at 8-9.

In declining to affirm the Administrative Law Judge's finding of "fraud on the court," the Fourth Circuit held the standard under FRCP 60(b)(3) must be "construed very narrowly," and it presents "a very high bar for any litigant." The court provided examples as follows:

[T]he doctrine is limited to situations such as 'bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged.'

Slip op. at 11-12. From this, the court found the facts in *Fox* did not rise to the level of "fraud on the court":

Fox does not allege that Elk Run bribed or otherwise improperly influenced any officials involved in the benefits process, nor does she claim that Elk Run encouraged or conspired with its witnesses to suborn perjury.

Slip op. at 13. Thus, the court concluded Employer's nondisclosure amounted to no more than fraud on a single litigant, which constitutes an insufficient basis upon which to invoke relief under FRCP 60(b)(3).

On the other hand, as noted by the court, Employer maintained its conduct was proper and "it did not have any intent to defraud the court by declining to disclose the reports of Dr. Naeye and Dr. Caffrey because, as non-testifying consulting experts, their reports were protected by the work product privilege—a protection that would have been lost if the reports had been provided to Elk Run's testifying experts." *Slip op.* at p. 20. The court declined to address Employer's assertion stating the following:

We see no reason to address these matters when a plain, narrow disposition is available. We bestow no blessing and place no imprimatur on the company's conduct, other than to hold that it did not, under a clear chain of precedent, amount to a fraud upon the court.

Slip op. at 20.

V. Decision of the Administrative Law Judge

A. Compliance with APA's requirements

[to be included after *Wojtowicz* case citation] *Big Branch Resources, Inc., v. Ogle*, 737 F.3d 1063 (6th Cir. 2013) (stating that "we do not require the ALJ to remark on every piece of evidence and every omission by a physician" and that, "[r]ather than review whether the ALJ has meticulously discussed every piece of evidence that may be missing, we review merely whether he has reviewed all relevant evidence, applied the proper legal standard, and reached a conclusion based on substantial evidence").

In *Grayson Coal & Stone Co. v. Teague*, 688 Fed. Appx. 331, 2017 WL 1732239 (6th Cir. May 3, 2017) (unpub.), the court addressed an appeal involving a subsequent claim filed on April 22, 2010. Below, the Board had affirmed the Administrative Law Judge's award of benefits based on a finding that Claimant was totally disabled due to pneumoconiosis arising out of his coal mine employment.

On appeal, Employer at the outset challenged the Administrative Law Judge's failure to render a specific finding as to Claimant's smoking history, arguing that such failure amounted to a violation of the APA. In addressing this issue, the Administrative Law Judge found that Claimant "smoked cigarettes for a substantial amount of time" and addressed the conflicting and varied evidence of record on the issue of Claimant's smoking history. Before reaching his finding, the Administrative Law Judge noted "Claimant's reported smoking history is varied" and that he was unable to "make an exact finding on Claimant's smoking history." The court found no merit to Employer's argument that a more specific smoking history finding was required. Indeed, the court noted its concern that "a more specific finding would have potentially misconstrued the evidence" and concluded that, based on the evidence that was before him, the Administrative Law Judge conducted "a thoughtful analysis of the consistencies and inconsistencies in the record," while acknowledging "that the evidence pointed to a 'substantial' smoking history." The Administrative Law Judge did not lay out an "inaccurate history" or fail to explain how he reached his finding. Therefore, the court

concluded that the Administrative Law Judge met his burden of determining “whether the medical evidence before him [was] sufficiently documented and reasoned, and to weigh the evidence accordingly.”

In *Energy West Mining Co. v. Blackburn*, 857 F.3d 817 (10th Cir. 2017), the Tenth Circuit addressed Employer’s appeal in a deceased miner’s claim filed on November 5, 2009.

In *Blackburn*, the first Administrative Law Judge assigned to the case denied benefits, but on appeal the Board vacated the denial and remanded the matter to provide the Administrative Law Judge with an opportunity to further explain his weighing of the medical opinion evidence. The case was reassigned on remand, and the new Administrative Law Judge awarded benefits based on the rebuttable 15-year presumption at Section 411(c)(4). Employer appealed the award, and the Board affirmed. Employer then appealed to the Tenth Circuit.

In its decision, the court denied Employer’s petition for review and affirmed the decision awarding benefits on remand. The court initially rejected Employer’s contention that the Board erred in vacating the first Administrative Law Judge’s decision. It then addressed the following six challenges Employer made to the award on remand: (1) that the second Administrative Law Judge ruled beyond the scope of the Board’s remand, (2) that his decision on remand was not supported by substantial evidence, (3) that he interjected his own medical opinions for the opinions of Employer’s physicians, (4) that he erred in relying on the preamble to the 2001 amendments to the black lung regulations, (5) that he erred in being “overly generous” when considering the opinion of the physician who believed that the miner’s disabling emphysema was caused by the miner’s coal mine work, and (6) that he applied the incorrect legal standard in determining whether Employer rebutted the 15-year presumption. The court rejected each challenge in turn and thus denied the petition for review.

XVII. Subpoenas

B. Party’s due process right limited to requesting subpoena

In *Fitzpatrick v. Old Ben Coal Co.*, BRB No. 0444 BLA (Aug. 31, 2016) (unpub.), the Board addressed Employer’s appeal in a case arising within the Seventh Circuit. Before a hearing was held in the case, the Administrative Law Judge denied Employer’s request to subpoena Department employees in order to obtain their testimony regarding “the continuing validity of the scientific premises set forth in the preamble to the 2001 regulations.” The Administrative Law Judge also denied Employer’s Motion for Reconsideration and Request for Continuance. In doing so, she found that the request “would only serve to confuse issues and unnecessarily delay the hearing by raising legal challenges already well-settled by case law.” Furthermore, the Administrative Law Judge noted that, “if [e]mployer believes that the preamble language is misapplied to my decision in the current claim before me, [e]mployer may argue that point on appeal.”

On appeal, *inter alia*, Employer argued that the Administrative Law Judge failed to provide a proper basis for denying its subpoena request. The Director disagreed, contending that she acted within her discretion in rejecting Employer’s subpoena request. The Board, agreeing with the Director, held “that employer has failed to show that the administrative law judge abused her discretion in denying employer’s subpoena request.” In support of this

conclusion, the Board noted that “the burden falls on the party challenging the regulation’s validity to establish that the scientific consensus upon which it is based has changed, such that the regulation no longer reflects the prevailing scientific view.” The Board concluded that the Administrative Law Judge “determined correctly that employer could satisfy this burden by offering its own evidence demonstrating that the scientific conclusions accepted by the [Department] in the preamble are no longer accepted as correct.”

Although recognizing that “there is a dearth of case law finding that an employer proffered evidence sufficient to invalidate the science that the [Department] relied on in promulgating the revised definition of legal pneumoconiosis,” the Board pointed out that this fact “does not establish that it is impossible for an employer to develop such evidence.” The Board noted that, in *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491, 25 B.L.R. 2-633, 2-645 (6th Cir. 2014), the Sixth Circuit recognized that an Administrative Law Judge would have to address an employer’s challenge to the science underlying the preamble, but “only after [the employer] submitted ‘the type and quality of medical evidence that would invalidate’ the [Department’s] position in that scientific dispute.” The Board concluded in the instant case that the Administrative Law Judge “reasonably determined that employer could have developed and submitted its own scientific evidence challenging the premises underlying the [Department’s] definition of legal pneumoconiosis without questioning [Department] personnel on this issue.” Therefore, the Board affirmed her decision to deny Employer’s subpoena request.

**Medical Articles, Literature, and Studies
cited in the Department of Labor's Comments
to the Amended Regulations
65 Fed. Reg. 79,920-80,045 (Dec. 20, 2000)**

| Location in the Federal Register | Authors/Editors | Article/Literature/Studies |
|---|-----------------|---|
| 65 Fed. Reg. 79,943 (Dec. 20, 2000) | N/A | "One commenter repeatedly accuses the Department of not supporting its definitional change with 'peer-reviewed' scientific and medical studies, but does not point to any study or article in particular. The Department rejects this assertion. Each of the articles and studies cited . . . , as well as the majority relied upon by NIOSH in the <i>Criteria</i> document, appeared in a peer-reviewed journal: <i>American Review of Respiratory Disease</i> , <i>American Journal of Industrial Medicine</i> , <i>Thorax</i> , <i>Journal of Occupational Medicine</i> , <i>Lancet</i> , <i>British Journal of Industrial Medicine</i> , <i>Occupational and Environmental Medicine</i> , <i>Environmental Research</i> , and others. The textbooks relied upon are authored and edited by highly respected professionals in the field. Textbook editors serve as peer-reviewers of the relevant published literature because they comprehensively survey, evaluate the validity of, and comment on, the literature. Seaton's review in Morgan and Seaton's <i>Occupational Lung Disease</i> is a good example. Moreover, the NIOSH <i>Criteria</i> document, Rulemaking Record, Exhibit 2-1, received extensive peer review prior to its publication. See <i>Criteria</i> , Rulemaking Record, Exhibit 2-1 at xxii-xxiv." |
| 65 Fed. Reg. 79,937 (Dec. 20, 2000) | N/A | "Congress created NIOSH as a source of expertise in occupational disease research." |
| 65 Fed. Reg. 79,944 (Dec. 20, 2000) | N/A | ". . . the relevant scientific and medical information available on these topics has been thoroughly reviewed by highly-qualified experts, including NIOSH, the advisor designated by Congress to consult with the Department in developing criteria for total disability due to pneumoconiosis under the Black Lung Benefits Act." |
| 65 Fed. Reg. 79,951 (Dec. 20, 2000) | N/A | "The Department . . . considers NIOSH's view particularly significant in evaluating the conflicting medical opinions concerning the 'hastening death' standard especially since its |

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| | | views are consistent with other studies submitted into the record." |
| 65 Fed. Reg. 79,936, 79,944, 79,945 (Dec. 20, 2000) | Kleinerman, <i>et al.</i> | "Pathologic Criteria for Assessing Coal Workers' Pneumoconiosis," <i>Archives of Pathology and Laboratory Medicine</i> (1979) |
| 65 Fed. Reg. 79,938, 79,939, 79,940, 79,941, 79,942, 79,943, 79,944, 79,950, 79,951, 79,970 (Dec. 20, 2000) | NIOSH | "Criteria for a Recommended Standard, Occupational Exposure to Respirable Coal Mine Dust" (1995) (in the Department's comments, it stated that "[t]his publication provides the most exhaustive review and analysis of the relevant scientific and medical evidence through 1995, including its evaluation of the evidence regarding the role smoking plays in a coal miner's respiratory status"—65 Fed. Reg. 79,939 (Dec. 20, 2000)). |
| 65 Fed. Reg. 79,939, 79,942, 79,970 (Dec. 20, 2000) | Morgan, WKC, Seaton A, eds. | "Occupational Lung Diseases" (1995) |
| 65 Fed. Reg. 79,939 (Dec. 20, 2000) | Murray J, Nadel J, Becklake | <i>Textbook of Pulmonary Medicine</i> (1988) |
| 65 Fed. Reg. 79,939 (Dec. 20, 2000) | Oxman AD, Muir DCF, Shannon HS, Stock SR, Hnizdo E, Lange HJ | "Occupational dust exposure and chronic obstructive pulmonary disease: A systematic overview of the evidence" <i>Am. Rev. Resp. Dis.</i> , 148: 38-48 (1993) |
| 65 Fed. Reg. 79,939, 79,941, 79,942, 79,951 (Dec. 20, 2000) | Coggon D, Newman Taylor A | "Coal mining and chronic obstructive pulmonary disease: a review of the evidence" <i>Thorax</i> 53:398-407, 400 (1998) |
| 65 Fed. Reg. 79,939, 79,940, 79,941 (Dec. 20, 2000) | Marine WM, Gurr D, Jacobsen M | "Clinically important respiratory effects of dust exposure and smoking in British coal miners" <i>Am. Rev. Resp. Dis.</i> , 137: 106-112 (1988) |
| 65 Fed. Reg. 79,940, 79,941 (Dec. 20, 2000) | Attfield MD, Hodous TK | "Pulmonary function of U.S. coal miners related to dust exposure estimates" <i>Am. Rev. Resp. Dis.</i> , 145: 605-609 (1992) |
| 65 Fed. Reg. 79,940 (Dec. 20, 2000) | Seixas NS, Robins TG, Attfield MD, Moulton LH | "Exposure-response relationships for coal mine dust and obstructive lung disease following enactment of the Federal Coal Mine Health and Safety Act of 1969" <i>Am. J. Ind. Med.</i> 21:715-732 (1992) |
| 65 Fed. Reg. 79,940 (Dec. 20, 2000) | Attfield MD | "Longitudinal decline in FEV ₁ in United States coal miners" <i>Thorax</i> 40:132-137 (1985) |
| 65 Fed. Reg. 79,940 (Dec. 20, 2000) | Love RG, Miller BG | "Longitudinal study of lung function in coal miners" <i>Thorax</i> 37: 193-197 (1982) |

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| 65 Fed. Reg. 79,941 (Dec. 20, 2000) | Brewis RAL, Corrin B, Geddes DM, Gibson GJ, eds. | <i>Respiratory Medicine</i> (1995), Morgan WKC, "Pneumoconiosis" |
| 65 Fed. Reg. 79,941 and 79,751 (Dec. 20, 2000) | Green FHY, Vallyathan V | "Coal Workers' Pneumoconiosis and Pneumoconiosis Due to Other Carbonaceous Dusts" in Chung A and Green FHY, eds., <i>Pathology of Occupational Lung Disease</i> (1998) |
| 65 Fed. Reg. 79,941 (Dec. 20, 2000) | Hasleton PS, ed. | "Occupational Lung Disease" in <i>Spencer's Pathology of the Lung</i> (1996) |
| 65 Fed. Reg. 79,941 (Dec. 20, 2000) | Roy TM, <i>et al.</i> | "Cigarette Smoking and Federal Black Lung Benefits in Bituminous Coal Miners" <i>J. Occ. Med.</i> 31(2):100 (1989) |
| 65 Fed. Reg. 79,941, 79,971 (Dec. 20, 2000) | Surgeon General, U.S. Department of Health and Human Services | "Respiratory Disease in Coal Miners, The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace" 313 (1985) |
| 65 Fed. Reg. 79,941, 79,942 (Dec. 20, 2000) | Cockcroft A, Wagner JC, Ryder R, Seal RME, Lyons JP, Andersson N | "Post-mortem study of emphysema in coalworkers and non-coalworkers" <i>Lancet</i> 2:600-603 (1982) |
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| 65 Fed. Reg. 79,971, 79,972 (Dec. 20, 2000) | Dimich-Ward H, Bates DV | "Reanalysis of longitudinal study of pulmonary function in coal miners in Lorraine France" <i>Am. J. Ind. Med.</i> 25:613-623 (1994) |