JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

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CHAPTER 10
Living Miners' Claims: Entitlement Under Part 727

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I. Applicability of Part 727, generally[1]
[IX(A)]

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

If, however, a miner files a claim between January 1, 1974 and March 31, 1980, inclusive of these dates, but has less than ten years of coal mine employment, the claim must be adjudicated under § 410.490. *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991); *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988).

This conclusion is the result of a long line of conflicting decisions among the circuit courts and the Board. In *Pittston Coal Group v. Sebben*, 109 S.Ct. 414 (1988), the Supreme Court, upon determining that the invocation provisions of § 727.203 were more restrictive than the criteria at § 410.490, held that miners with fewer than ten years of coal mine employment are entitled to have their claims decided under § 410.490, rather than Part 410. Following *Sebben*, a number of circuits held that the Part 727 rebuttal provisions were more restrictive than the § 410.490 rebuttal provisions and a claim denied under Part 727 must be considered under what was interpreted as the less restrictive rebuttal provisions of § 410.490(c). *See Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990). The Supreme Court resolved the issue in *Pauley v. Bethenergy Mines*, 111 S.Ct. 2524 (1991), holding that the rebuttal provisions of Part 727 were not more restrictive than those of § 410.490(c). Therefore, the logical result of *Pauley* is that once a claim has been denied under Part 727, it need not be considered under § 410.490. As previously noted, however, if Part 727 is inapplicable because the miner has fewer than ten years of coal mine employment, then his or her claim must be adjudicated under § 410.490.

[1] *See* Chapter 3 for a summary of changes by the December 20, 2000 regulations on various principles of weighing medical evidence. *Also see* Chapter 4 for the limitations on evidence imposed by the amended regulations.

II. The interim presumptions
[IX(A)(1)]

A. Generally

A central feature of the Part 727 regulations are the interim presumptions at 20 C.F.R. § 727.203(a), which provide that a miner, with at least ten years of coal mine employment, is entitled to the following rebuttable presumptions of total disability or death arising out of coal mine employment: (1) that the miner is totally disabled due to pneumoconiosis; (2) that the miner was totally disabled due to pneumoconiosis at the time of death; and (3) that the miner's death was due to pneumoconiosis upon invocation. The presumptions are "invoked" if any one of the following five evidential requirements is satisfied: (1) chest x-ray evidence establishes the existence of pneumoconiosis; (2) ventilatory studies establish the presence of a chronic respiratory or pulmonary disease; (3) blood gas studies demonstrate the presence of an impairment in the transfer of oxygen; (4) well-reasoned, well- documented medical reports support a finding of a totally disabling respiratory impairment; or (5) lay testimony as to the miner's condition in the case of a deceased miner. 20 C.F.R. §§ 727.203(a)(1)-(5).

Satisfying the requirements of any one of the separate medical criteria is considered sufficient to invoke the presumptions. *Wise v. Peabody Coal Co.*, 3 B.L.R. 1-119 (1981). Because successful establishment of only one method of invocation is necessary, any error made by the administrative law judge in the evaluation of a particular type of evidence is considered harmless if the presumption was properly invoked under some other section. *Bibb v. Clinchfield Coal Co.*, 7 B.L.R. 1-134 (1984); *Berczik v. U.S. Steel Corp.*, 6 B.L.R. 1-723 (1983); *Elkins v. Beth-Elkhorn Corp.*, 2 B.L.R. 1-683 (1979).

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

B. "Pneumoconiosis" defined
[II(D)]

The definition of "pneumoconiosis" is set forth at § 727.202, which provides the following:

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

related to, or aggravated by, dust exposure in coal mine employment.

20 C.F.R. § 727.202.

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

1. Legal pneumoconiosis versus clinical pneumoconiosis[2]

A pulmonary disease may constitute statutory pneumoconiosis if it is significantly related to or aggravated by dust exposure in coal mine employment. The legal definition of pneumoconiosis is broad and may encompass more respiratory or pulmonary conditions than those specifically, clinically diagnosed in a medical opinion. For example, a physician may conclude that the miner suffers from asthma, which is related to his coal dust exposure. Although the physician did not specifically state that the miner suffered from pneumoconiosis or black lung disease, the respiratory condition which he diagnoses is related to coal dust exposure and, therefore, is supportive of a finding of legal pneumoconiosis.

The Fourth Circuit has issued a number of decisions addressing broad definition of pneumoconiosis in the regulation. "Pneumoconiosis" is a legal term defined by the Act and the administrative law judge "must bear in mind when considering medical evidence that physicians generally use 'pneumoconiosis' as a *medical* term that comprises merely a small subset of the afflictions compensable under the Act." Thus, an administrative law judge should review evidence in light of the much broader legal definition. *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995). *See also Dehue v. Director, OWCP*, 65 F.3d 1189 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995) ("a medical diagnosis of no pneumoconiosis is not equivalent to a legal finding of no pneumoconiosis"). In *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996), the court reiterated that "[c]linical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act" and that "COPD, if it arises out of coal mine employment, clearly is encompassed within the legal definition of pneumoconiosis, even though it is a disease apart from clinical pneumoconiosis." The court also held that the Director's "stipulation," that the miner suffered from legal pneumoconiosis arising from coal dust exposure at the time of death, was binding notwithstanding a lack of medical evidence in the record to support the stipulation. *See also Kline v. Director, OWCP*, 877 F.2d 1175, 1178 (3d Cir. 1989); *Brown v. Director, OWCP*, 851 F.2d 1569 (11th Cir. 1988), *app. dismissed*, 864 F.2d

[2] *See* the discussion of legal and clinical pneumoconiosis at Chapter 11, which addresses the effect of the December 20, 2000 regulations on these concepts.

120 (11th Cir. 1989); *Biggs v. Consolidation Coal Co.*, 8 B.L.R. 1-317, 1-322 (1985). In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210 (4th Cir. 2000), the court stated that, "[c]ritically, a medical diagnosis of no coal workers' pneumoconiosis is not equivalent to a legal finding of no pneumoconiosis."

2. Evidence relevant to finding pneumoconiosis

Some examples of findings and data which are relevant to the existence of pneumoconiosis are as follows:

a. Anthracosis and anthracotic pigment

Diagnoses of pulmonary anthracosis have been held to be the equivalent of a diagnosis of pneumoconiosis. *Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536 (11th Cir. 1993) (diagnosis of anthracosis is sufficient to establish pneumoconiosis); *Bueno v. Director*, OWCP, 7 B.L.R. 1-337 (1984); *Smith v. Island Creek Coal Co.*, 2 B.L.R. 1-1178 (1980); *Luketich v. Bethlehem Mines Corp.*, 2 B.L.R. 1-393 (1979). The Sixth Circuit held that the administrative law judge must also consider biopsy evidence which indicates the presence of anthracotic pigment. *Lykins v. Director, OWCP*, 819 F.2d 146 (6th Cir. 1987). However, in *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995), the Sixth Circuit held that a finding of pigmentation described as "yellow-black consistent with coal pigment" was insufficient to support a finding of pneumoconiosis.

b. Asthma, asthmatic bronchitis, or emphysema

Asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983).

c. Blood gas studies

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

d. Chronic obstructive pulmonary disease[3]

In *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995), the Fourth Circuit held that, for purposes of entitlement to benefits under the Act, chronic obstructive lung disease is encompassed in the legal definition of pneumoconiosis. Thus, the assumption by a physician that pneumoconiosis causes a restrictive impairment, rather than an obstructive impairment, is erroneous and undermines his conclusions. *But see Stiltner v. Island Creek Coal Co*, 86 F.3d 337 (4th Cir.

[3] *See* the discussion of chronic obstructive pulmonary disease at Chapter 11, which addresses the effect of the December 20, 2000 regulations on this concept.

1996), *reh'g. denied*, 86 F.3d 337 (4th Cir. 1996) (a physician's opinion should not be discredited merely because he states that coal dust exposure would "likely" cause a restrictive, as opposed to obstructive, impairment). Similarly, the Board has held that an obstructive impairment, without a restrictive component, may be considered regulatory pneumoconiosis. *Heavilin v. Consolidation Coal Co.*, 6 B.L.R. 1-1209 (1984).

e. Pulmonary function studies

The Board has held that pulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis. *Burke v. Director, OWCP*, 3 B.L.R. 1-410 (1981).

C. Invocation of the rebuttable presumption of total disability due to pneumoconiosis
[IX(A)]

Pursuant to § 727.203(a)(1), a miner who engaged in coal mine employment for at least ten years will be presumed to be totally disabled due to pneumoconiosis if a chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis. If the existence of pneumoconiosis is conceded, the interim presumption is invoked under § 727.203(a)(1) as a matter of law. *Simpson v. Director, OWCP*, 6 B.L.R. 1-49 (1983). For general principles of weighing x-ray evidence, *see* Chapter 3.

1. Chest roentgenogram evidence
[IX(A)(1)(a)]

a. Generally

To invoke the interim presumption, an x-ray interpretation must meet the quality standards at § 410.428 of the regulations. 20 C.F.R. § 727.206(a). Although the language of § 727.206(a) indicates that the quality standards set forth at § 718.103 apply to evidence submitted subsequent to March 31, 1980, the Board has held that this language is inconsistent with the purposes of the 1977 Reform Act. *Sgro v. Rochester & Pittsburgh Coal Co.*, 4 B.L.R. 1-370 (1981). The Board stated that this section should be interpreted to mean that the applicable quality standards, regardless of the date on which the evidence is submitted, are "those in effect at the time Part 727 became effective, *i.e.*, those provided by Part 410." *Id*. at 1-375.

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

Section 727.206(b)(1) provides, in relevant part, that in claims where there is other evidence of a respiratory or pulmonary impairment, a board-certified or board-eligible radiologist's interpretation of an x-ray shall be accepted by the Director. This x-ray rereading prohibition is designed to implement § 413(b) of the Act and is also known as the "Tobias" rule in light of the Board's clarification of the regulation in *Tobias v. Republic Steel Corp.*, 2 B.L.R. 1-1277 (1981). *See also Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994). Section 413(b) also applies to positive x-rays obtained by the Social Security Administration. *Coburn v. Director, OWCP*, 7 B.L.R. 1-632 (1985).

In *Tobias*, the Board set forth the threshold requirements of § 413(b). These requirements are: (1) there is other evidence of a pulmonary or respiratory impairment; (2) the x-ray was taken by a radiologist or qualified technician, and it is of a quality sufficient to demonstrate the presence of pneumoconiosis; (3) the physician who first interpreted the x-ray is a board-certified radiologist; and (4) no evidence exists that the claim has been fraudulently represented. *Id.* at 1-1279. If these requirements are satisfied, then the Director must accept the initial interpretation of the x-ray and cannot have the x-ray reread. Under the "Tobias rule," the administrative law judge must exclude such evidence from consideration.

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

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

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

Section 413(b) does not prohibit an employer from rereading positive x-rays. *Horn v. Jewell Ridge Coal Corp.*, 6 B.L.R. 1-933 (1984). However, in *Tobias*, the Board held that if § 413(b) prohibits the Director from admitting an x-ray rereading, the employer cannot introduce the same x-ray rereading. *Id.* at 1-1286.

2. An autopsy or biopsy
[IX(A)(1)(a)]

Autopsy and biopsy evidence may also be used to invoke the interim presumption under § 727.203(a)(1). The Board has held that autopsy evidence is the most reliable method of ascertaining the existence of pneumoconiosis. *Kimick v. National Mines Corp.*, 2 B.L.R. 1-221 (1979). It is important to note, however, that a physician's report or opinion, which is based upon the review of a death certificate and autopsy report of another physician who conducted the autopsy, is not considered autopsy evidence. *Cartwright v. Gibraltar Coal Co.*, 5 B.L.R. 1-325 (1982).

3. Pulmonary function (ventilatory) studies
[IX(A)(1)(b)]

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

4. Blood gas studies
[IX(A)(1)(b)]

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

5. Reasoned medical opinions
[IX(A)(1)(d)]

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

All medical evidence must be weighed prior to invoking the presumptions. However, medical reports are not to be weighed against the evidence considered under prior subsections of § 727.203(a). The phrase "[o]ther medical evidence" as used in this subsection means evidence other than an x-ray, autopsy, biopsy, ventilatory study, and blood gas study. *Thompson v. Director, OWCP*, 6 B.L.R. 1-807 (1984). These types of evidence may only be considered insofar as they relate to the credibility of the medical opinion they document.

In *Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994), the Eleventh Circuit articulated the parameters for weighing medical reports under Part 727. Specifically, the court held that the administrative law judge "need not . . . find that a medical opinion is either wholly reliable or wholly unreliable." Rather, he or she may find a physician's opinion reliable on the issue of degree of impairment, but unreliable on the issue of causation. However, quoting from the dissent in *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 164, 167 (1987), the court noted that "when the weight of evidence in one of the medical-evidence categories invokes the presumption, then the same

evidence cannot be considered during rebuttal to challenge the existence of the fact proved, but it may be considered if relevant to rebut one of the presumed elements of a valid claim for benefits."

6. Lay evidence
[IX(A)(1)(e)]

Section 727.203(a)(5) is applicable in the case of a deceased miner with ten or more years of coal mine employment where no medical evidence is available. Under this section, a miner will be presumed to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, if the affidavit of the survivor or such miner or other persons with knowledge of the miner's physical condition demonstrates the presence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. § 727.203(a)(5). The provisions of § 727.203(a)(5) are available to claims of deceased miners as well as to the claims filed by survivors. *DeForno v. Director, OWCP,* 14 B.L.R. 1-11 (1990).

The Board's position is that § 727.203(a)(5) cannot be used to invoke the interim presumption if the record contains medical evidence relevant to the existence of, or a disability due to, a respiratory or pulmonary impairment. *Gattuso v. Director, OWCP,* 10 B.L.R. 1-155 (1987); *Adams v. Director, OWCP*, 8 B.L.R. 1-369 (1985). Also, in *Koppenhaver v. Director, OWCP*, 11 B.L.R. 1-51 (1988), the Board held that where the record contains medical evidence relevant to the deceased miner's respiratory or pulmonary *condition*, invocation pursuant to this subsection is precluded. This decision followed the Sixth Circuit's holding in *Coleman v. Director, OWCP,* 829 F.2d 3 (6th Cir. 1987). However, the Third and Seventh Circuits rejected this approach, and have held that invocation under this subsection is available where the medical evidence is insufficient to establish total disability or lack thereof under subsections (a)(1) - (a)(4). *Koppenhaver v. Director, OWCP*, 864 F.2d 287 (3d Cir. 1988); *Hillibush v. U.S. DOL,* 853 F.2d 197 (3d Cir. 1988); *Collins v. Old Ben Coal Co.,* 861 F.2d 481 (7th Cir. 1988); *Dempsey v. Director, OWCP,* 811 F.2d 1154 (7th Cir. 1987). In *Cook v. Director, OWCP,* 901 F.2d 33 (4th Cir. 1990), the Fourth Circuit, while it did not specifically accept the Seventh Circuit's decision in *Dempsey*, stated that the Board's standard contravenes the spirit of the Act and is not required by the literal language of the regulations.

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

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

A. Generally
[IX(A)(2)]

Once a claimant has submitted evidence sufficient to invoke the interim presumption, the party opposing entitlement has the burden of going forward with evidence establishing rebuttal by a preponderance of the evidence. *Laird v. Alabama By-Products Corp.*, 6 B.L.R. 1-1146 (1984); *Burt v. Director,* 7 B.L.R. 1-197 (1984)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936 (4th Cir. 1980). All relevant evidence must be considered and weighed, including any nonqualifying x-rays, test results, and opinions, regardless of the section under which the presumption was invoked, *York v. BRB*, 819 F.2d 134, 10 B.L.R. 2-99 (6th Cir. 1987) and *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424 (4th Cir. 1986) (reversed on other grounds), as well as exams and tests not conducted in compliance with the regulations and, therefore, which are insufficient to invoke the presumptions. *Saginaw Mining Co. v. Ferda*, 879 F.2d 198 (6th Cir. 1989). Establishing one method of rebuttal precludes entitlement to benefits and renders a discussion of other methods unnecessary. *Endrizzi v. Bethlehem Mines Corp.*, 8 B.L.R. 1-11 (1985).

B. Total disability; weighing the medical opinion evidence

1. Exertional requirements; claimant's burden

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

2. Specific medical opinion of severity of impairment required

A physician's opinion must establish the severity of the miner's respiratory impairment in order to support a finding of a totally disabling respiratory condition. *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981); *Sansone v. Director, OWCP*, 3 B.L.R. 1-422 (1981). A diagnosis of chronic respiratory or pulmonary disease resulting in a "moderate" impairment is insufficient to establish total disability. *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). A physician's report advising the claimant to discontinue coal mine employment and diagnosing "severe coronary and pulmonary disease" is similarly insufficient to support total disability because it fails to evaluate the extent of the claimant's disability. *Wheatley v. Peabody Coal Co.*, 6 B.L.R. 1-1214 (1984). *See also Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984).

3. Medical assessment versus subjective narration of limitations

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

In *DeFelice v. Consolidation Coal Co.*, 5 B.L.R. 1-275 (1982), the administrative law judge relied on a physician's opinion to invoke the presumption which set forth a medical assessment of the claimant's abilities to walk, climb, lift, and carry. The Board held that on the basis of these exertional limits, it was proper for the administrative law judge to conclude that the claimant's physical abilities were severely limited and would effectively rule out all types of work. This case is distinguishable from those Board decisions which have held that a narrative of symptoms in the "Medical Assessment" section of the Department of Labor examination form or elsewhere is not the equivalent of a diagnosis of total disability. *Heaton v. Director, OWCP*, 6 B.L.R. 1-2222 (1984); *Parsons v. Director, OWCP*, 6 B.L.R. 1-212 (1983). Similarly, a physician's opinion that a claimant's respiratory or pulmonary disease prevents him from engaging in gainful activity because of one block dyspnea does not establish that the claimant is totally disabled. *Parino v. Old Ben Coal Co.*, 6 B.L.R. 1-104 (1983).

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

4. Exertional requirements verses physical limitations

An opinion need not be phrased in terms of total disability if it elaborates on the miner's impairment in such a way as to permit the administrative law judge to infer that the miner is totally disabled. *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Bueno v. Director, OWCP*, 7 B.L.R. 1-337 (1984). Where a physician states that a miner is limited to "light work" or that he is unable to do "heavy physical labor," or offers a similar opinion, the administrative law judge must assess the actual requirements of the miner's usual coal mine work and compare it to the physician's opinion to determine whether the opinion establishes a totally disabling respiratory or pulmonary impairment to invoke the interim presumption. *Bueno v. Director, OWCP*, 7 B.L.R. 1-337 (1984); *Shepherd v. Allied Coal Inc.*, 6 B.L.R. 1-1138 (1984). For example, if a physician states that a miner is restricted from "heavy exertion and other strenuous activity" and the claimant's usual coal mine work is determined by the Judge to involve "heavy exertion and other strenuous activity," the physician's opinion is sufficient to establish invocation. *Andrini v. Director, OWCP*, 5 B.L.R. 1-844 (1983). *See also Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236 (1984); *Meeks v. Director, OWCP*, 6 B.L.R. 1-794 (1984).

5. No respiratory or pulmonary impairment supports rebuttal

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

C. Means of rebuttal

1. Miner is engaged in usual coal mine work or comparable and gainful work
[IX(A)(2)(a)]

a. Generally

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

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

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

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

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

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

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

The Board has held that, while physical exertion is a factor to consider, identical physical exertion is not required. *Parks v. Director, OWCP*, 9 B.L.R. 1-82 (1986); *Chabala v. Director, OWCP*, 7 B.L.R. 1-6 (1984); *Caton v. Amax Coal Co*., 6 B.L.R. 1-571 (1983). However, the Board has upheld an administrative law judge's finding of no comparability where the claimant's current job was higher paying, but involved sedentary activity and some supervisory but no technical skills. *Carter v. Beth-Elkhorn Corp*., 7 B.L.R. 1-15 (1984).

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

[IX(A)(2)(b)]

The interim presumptions shall be rebutted if, in light of all relevant evidence, it is established that the individual is *able* to do his usual coal mine work or comparable and gainful work although he or she may not be presently employed. 20 C.F.R. § 727.203(b)(2).

The factors applicable to a determination of a miner's usual coal mine work are the same under this section as those set forth above regarding § 727.203(b)(1). The Board has interpreted this section to allow two methods of rebuttal to demonstrate that the miner can do his usual coal mine work by establishing either of the following: (1) the absence of a respiratory or pulmonary impairment; or, (2) the miner's impairment is not totally disabling. *Bibb v. Clinchfield Coal Co*., 7 B.L.R. 1-134 (1984); *Coleman v. Kentland-Elkhorn Coal Co*., 5 B.L.R. 1-260 (1983); *Sykes v. Itmann Coal Co*., 2 B.L.R. 1-1089 (1980).

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

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

! ***Third Circuit.*** In *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158 (3d Cir. 1986), the court stated that "[b]ecause it is undisputed that Kertesz is totally disabled and unable to do his usual coal mine work or comparable and gainful work, we believe the BRB erred in invoking § 727.203(b)(2). We believe to the contrary, that evidence showing the presumed disease does not exist goes to rebuttal under § 727.203(b)(4) . . ., and evidence showing some other disease caused the disability goes to rebuttal under § 727.203(b)(3). . .." *Id*. at 162, fn. 5. Therefore, for a party to establish rebuttal under (b)(2), the party must also show that the miner is not disabled for *any* reason. *See also Oravitz v. Director, OWCP*, 843 F.2d 738 (3d Cir. 1988).

! ***Fourth Circuit.*** In *Sykes v. Director, OWCP*, 812 F.2d 890 (4th Cir. 1987), the court stated that "for an employer to rebut the interim presumption under § 727.203(b)(2), consideration should be given to the health requirements for work comparable to that performed by the claimant. *Id*. at 893. *See also Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994) (employer must demonstrate "that the claimant is able, from a whole-man standpoint, of doing his usual coal mine or comparable gainful work"); *Adkins v. Director, OWCP*, 824 F.2d 287 (4th Cir. 1987). In *Harman Mining Co. v. Layne*, 21 B.L.R. 2-507, Case No. 97-1385 (4th Cir. 1998) (unpub.), the court held that the administrative law judge properly refused to reopen the record on remand where Employer was on notice of the standard for establishing (b)(2) rebuttal, *i.e.*, that it must demonstrate that the miner was not disabled for any reason, from the plain language of the regulation which requires that Employer establish "that the individual is able to do his usual coal mine work or comparable and gainful work." *See* 20 C.F.R. § 727.203(b)(2). The court reasoned that Board decisions, which had held that (b)(2) rebuttal requires that Employer demonstrate that the miner is not totally disabled for any pulmonary or respiratory reason, were inconsistent with the language of the regulation and the fact that Employer "chose to restrict its evidence to the lesser standard . . . does not allow it to avoid the fact that it was on notice of the higher standard."

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

! ***Seventh Circuit.*** The Seventh Circuit has gone in a different direction with regard to (b)(2) rebuttal. In *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995), a panel held that rebuttal under § 727.203(b)(2) may be accomplished if the totally disabling impairment is wholly unrelated to black lung disease. In so holding, the panel found that the miner's totally disabling back injury was sufficient to establish (b)(2) rebuttal. The court reasoned that the rebuttal provisions at § 727.203(b) should be read "as a whole" to "identify and compensate 'total disability due to pneumoconiosis.'" *See also Peabody Coal Co. v. Director, OWCP [Goodloe]*, 116 F.3d 207

(7th Cir. 1997); *Old Ben Coal Co. v. Director, OWCP*, 62 F.3d 1003, 1008 (7th Cir. 1995).

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

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

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

- *Clinical tests and medical reports.* It is error for the trier-of-fact to weigh the results of clinical tests against a physician's opinion; to do so would allow the administrative law judge to substitute his opinion of the documentation for that of a physician. Accordingly, clinical tests may not be weighed against a physician's report under § 727.203(b)(2). *Carpeta v. Mathies Mining Co*., 7 B.L.R. 1-145 (1984).

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

- *Exertional requirements versus physical limitations.* As under § 727.203(a)(4), many physicians' opinions are not phrased in terms of "total disability" in which case the administrative law judge must determine the miner's usual coal mine work and then compare the physical requirements of that work with the physical limitations noted by the physicians. *Daft v. Badger Coal Co*., 7 B.L.R. 1-124 (1984); *Bibb v. Clinchfield Coal Co*., 7 B.L.R. 1-134 (1984).

- *Nonqualifying ventilatory and blood gas studies*. Nonqualifying pulmonary function studies and blood gas tests alone are insufficient to establish subsection (b)(2) rebuttal. *Whicker v. U.S. Department of Labor* 733 F.2d 346 (4th Cir. 1984); *Patellas v. Director, OWCP*, 7 B.L.R. 1-661 (1985); *Addison v. Jewell Ridge Coal Corp*., 7 B.L.R. 1-438 (1984); *Sykes v. Itmann Coal Co*., 2 B.L.R. 1-1089 (1980). According to the Board, the "current legal standard permits a finding of rebuttal based on nonqualifying studies when accompanied by a physician's opinion based in part on the studies." *Wagner v. Badger Coal Co*., 9 B.L.R.

1-69 (1986); *Kincaid v. Consolidation Coal Co*., 8 B.L.R. 1-256 (1985). Indeed, because the interpretation of pulmonary function studies is a medical conclusion, it is not error for an administrative law judge to rely on a medical opinion of no disability for rebuttal when it is based in part on a qualifying study. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984); *Kendrick v. Kentland-Elkhorn Coal Corp*., 5 B.L.R. 1-730 (1983).

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

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

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

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

The Fourth and Sixth Circuits have held that there is no requirement that the party opposing entitlement show that the miner has a "reasonable opportunity to be hired." *Shamrock Coal Co. v. Lee*, 751 F.2d 187 (6th Cir. 1985); *Central Appalachian Coal Co. v. Fletcher*, 697 F.2d 1086 (4th Cir. 1982). However, the Board reached a contrary conclusion in *Temple v. Big Horn Coal Co*., 7 B.L.R. 1-573 (1984).

3. Total disability did not arise in whole or in part out of coal mine employment
[IX(A)(2)(c)]

The interim presumptions shall be rebutted if the evidence establishes that the total disability of the miner did not arise in whole or in part out of coal mine employment. 20 C.F.R. § 727.203(b)(3). Whether a miner is totally disabled due to pneumoconiosis is primarily a medical determination. *Harlow v. Imperial Colliery Coal Co*., 5 B.L.R. 1-896 (1983). However, lay evidence corroborated by some medical evidence may support such a determination. *Rickard v. C & K Coal Co*., 7 B.L.R. 1-372 (1984); *Wilson v. U.S. Steel Corp*., 6 B.L.R. 1-1055 (1984). Moreover, a physician's opinion which is equivocal regarding the etiology of the miner's respiratory impairment is insufficient to satisfy the "rule out" standard at subsection (b)(3). *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000) (a physician who concluded that simple pneumoconiosis "probably" would not disrupt a miner's pulmonary function did not support (b)(3) rebuttal).

a. Evolution of the "rule out" standard

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

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

The following citations constitute the current state of the law on the standard for demonstrating subsection (b)(3) rebuttal:

! ***The Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuit Courts*.** The Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have adopted the "rule out" standard. To establish rebuttal under subsection (b)(3), the party opposing entitlement "must rule out the causal relationship between the miner's total disability and his coal mine employment." *Plesh v. Director, OWCP*, 71 F.3d 103 (3d Cir. 1995) (an equivocal physician's opinion is insufficient to sustain this burden); *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994); *The Youghiogheny & Ohio Coal Co. v. Angus*, 996 F.2d 130 (6th Cir. 1993), *cert. den.* No. 93-390 (Jan. 10, 1994), (an employer cannot accomplish (b)(3) rebuttal by demonstrating that the miner suffers from a second disability which is independent of his pneumoconiosis); *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999); *Cox v. Shannon-Pocahontas Mining Co.*, 6 F.3d 190 (4th Cir. 1993) (a physician's statement that the miner's total

disability did not contribute to his cardiac disease or diabetes was insufficient to "rule out" the causal nexus between the miner's total disability and his coal mine employment); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143 (4th Cir. 1991); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198 (6th Cir. 1989); *Kline v. Director, OWCP*, 877 F.2d 1175 (3d Cir. 1989); *Thomas v. United States Steel Corp.*, 843 F.2d 503 (11th Cir. 1988); *Rosebud Coal Sales Co. v. Weigand*, 831 F.2d 926 (10th Cir. 1987)*; Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123 (4th Cir. 1984)*; Palmer Coking Coal Co. v. Director, OWCP*, 720 F.2d 1054 (9th Cir. 1983). In *Harman Mining Co. v. Layne*, 21 B.L.R. 2-507, Case No. 97-1385 (4th Cir. 1998) (unpub.), the court held that it was not an abuse of discretion for the administrative law judge to refuse to reopen the record on remand for additional evidence under subsections 727.203(b)(2) and (b)(3) 25 years after the filing of the claim. Employer argued that the court's decision in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984), which was issued after the record closed, changed the legal standard for subsection (b)(3) rebuttal such that Employer was entitled to present new evidence on the issue. The Fourth Circuit held, to the contrary, that it did not change the law in *Massey*; rather, it "simply reaffirmed existing law" that Employer must present evidence sufficient to "rule-out" any causal nexus between the miner's coal mine employment and his total disability. In so holding, the court cited to its decisions in *Hampton v. Dept. of Labor*, 678 F.2d 506 (4th Cir. 1982) (per curiam) and *Rose v. Clinchfield Coal Co.*, 614 f.2d 936 (4th Cir. 1980) which were issued prior to the time the record closed in *Layne*.

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

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

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

! ***The Seventh and Eighth Circuit Courts*** *and the "contributing cause" standard.* The Seventh and Eighth Circuits have adopted a "contributing cause" standard in addressing subsection (b)(3) rebuttal. In two post-*Pauley* decisions, the Seventh Circuit reaffirmed its earlier holding in *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987), that rebuttal under § 727.203(b)(3) requires that the party opposing entitlement must establish that the miner's pneumoconiosis was not a contributing cause of his total disability.

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

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

The Eighth Circuit Court of Appeals likewise holds that subsection (b)(3) rebuttal is accomplished where the party opposing entitlement demonstrates that pneumoconiosis did not contribute to the miner's total disability. *Consolidation Coal Co. v. Smith*, 837 F.2d 321 (8th Cir. 1988).

! ***Benefits Review Board*** *adopts the "rule out" standard*. As a result of the historically diverse circuit court opinions on this issue, the Board reexamined its position and now employs the "rule out" standard. *Borgenson v. Kaiser Steel Corp.*, 12 B.L.R. 1-169 (1989) (*en banc*).

c. Specific principles of weighing evidence under § 727.203(b)(3)

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

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

! *Equivocal opinion.* The Board has held that where the medical evidence is equivocal, rebuttal is not established under § 727.203(b)(3). *DeKnuydt v. Zeigler Coal Co.*, 7 B.L.R. 1-78 (1984). Thus, where a physician states that a claimant's respiratory symptoms "could" have been caused by his smoking history, aortic stenosis, or high blood pressure, such an opinion does not have the requisite degree of medical certainty to support rebuttal. *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236 (1984). *See also Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000) (a physician who concluded that simple pneumoconiosis "probably" would not disrupt a miner's pulmonary function did not demonstrate (b)(3) rebuttal); *R&H Steel Buildings, Inc. v. Director, OWCP*, 146 F.3d 514 (7th Cir. 1998); *Carpeta v. Mathies Coal Co.*, 7 B.L.R. 1-145 (1984).

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

! *Hostile-to-the-Act*. The report of a physician whose basic opinions are contrary to the Act may not be used as rebuttal evidence under § 727.203(b)(3), in contrast to § 727.203(b)(2), since such a physician would conclude that a miner's total disability can never be due to pneumoconiosis. *Dillow v. Duquesne Light Co.*, 6 B.L.R. 1-813 (1984).

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

! *Non-examining physician*. The Fourth Circuit holds that, as a matter of law, rebuttal is not accomplished under (b)(3) based upon a non-examining physician attributing the miner's total disability to a source not discussed by the examining physicians. *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123 (4th Cir. 1984) (non-examining physician's conclusion that the miner's emphysema was related to his smoking history was outweighed by examining physicians' opinions which did not discuss the impact of the miner's smoking history and attributed his lung condition to coal dust exposure); *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 (4th Cir. 1994) (subsection (b)(3) rebuttal not accomplished where only non-examining physicians attributed miner's total disability to alcoholism). *See also Johnson v. Old Ben Coal Co.*, 19 B.L.R. 1-103 (1995) (applying *Malcomb* to a case arising in the Fourth Circuit).

The Board, however, holds to the contrary. *Cochran v.Consolidation Coal Co.*, 12 B.L.R. 1-136 (1989); *Presley v. Sunshine, Inc.*, 8 B.L.R. 1-410 (1985).

! *Nonqualifying studies*. In *Bates v. Creek Coal Co.*, 18 B.L.R. 1-1 (1993), the Board held that

"non-qualifying objective studies of record are not determinative of causation, and are on their own, insufficient to establish rebuttal at Section 727.203(b)(3)."

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

d. A finding of "no impairment"

While the language of the rebuttal provisions at § 727.203(b)(3) focuses the fact-finder upon the etiology of the miner's total disability, controversy has arisen regarding whether a finding of "no impairment" is sufficient to establish such rebuttal.

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

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

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

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

In *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994), the court reiterated its standard in *Massey* that, to establish (b)(3) rebuttal, "the respondent must '*rule out* the causal relationship between the miner's total disability and his coal mine employment.'" The court concluded that the *Massey* standard is satisfied "only where the relevant medical opinion states, without equivocation, that the miner suffers *no* respiratory or pulmonary impairment of any kind." Moreover, the court notes that "[s]uch opinions are more persuasive if they

identify what the physician considers the actual cause or causes of the miner's disability." Consequently, where invocation occurs under (a)(1), opinions which address only the existence of a pulmonary impairment are insufficient to establish (b)(3) rebuttal.

The *Grigg* court further held that invocation under (a)(4) would preclude (b)(3) rebuttal based solely upon finding no respiratory or pulmonary impairment "because (a)(4) invocation presupposes that the greater weight of the evidence shows a totally disabling respiratory or pulmonary impairment." To then "credit an opinion on rebuttal denying *any* impairment would be irreconcilable with the finding at the presumption invocation phase." The court declined to rule on whether the same rule applies where invocation occurs under (a)(2) or (a)(3) of the regulations.

Finally, the *Grigg* court held that (a)(1) invocation cannot be rebutted under (b)(3) "if the physician rendering the opinion has premised it on an erroneous finding that the claimant does not suffer from pneumoconiosis." The court concluded that "such opinions are not worthy of much, if any, weight." *But see Dehue Coal Co. v. Ballard*, 65 F.3d 1189 (4th Cir. 1995).

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

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

4. The miner does not suffer from pneumoconiosis
[IX(A)(2)(d)]

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

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

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

Rebuttal under § 727.203(b)(4) is precluded where the administrative law judge finds invocation of the interim presumption established under § 727.203(a)(1). *Curry v. Beatrice Pocahontas Coal Co.*, 18 B.L.R. 1-59 (1994)(*en banc*) (J. Brown and McGranery concurring and dissenting); *Bates v. Creek Coal Co.*, 18 B.L.R. 1-1 (1993); *Buckley v. Director, OWCP*, 11 B.L.R. 1-37 (1988) (*citing Mullins Coal Company of Virginia v. Director, OWCP*, 108 S. Ct. 427 (1987)); *Dockins v. McWane Coal Co*., 9 B.L.R. 1-57 (1986).

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

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

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

- *Hostile-to-the-Act*. A physician who provides an opinion contrary to the Act concerning impairment, such as a statement that the obstructive impairment which coal miners develop is never severe, may still provide a relevant opinion concerning the existence or nonexistence

of pneumoconiosis. *Rapavi v. The Youghiogheny and Ohio Coal Co.*, 7 B.L.R. 1-435 (1984); *Morgan v. Bethlehem Steel Corp*., 7 B.L.R. 1-226 (1984).

! *Improperly classified x-rays.* There is no requirement that x-ray interpretations be classified according to the quality standards of § 410.428(a) to be considered under § 727.203(b)(4). Thus, x-rays interpreted as "negative," "no evidence of pneumoconiosis," or "normal chest" are relevant evidence. An administrative law judge may infer that an x-ray is negative where the physician fails to mention pneumoconiosis. *Wiggins, supra*.

! *Lung condition unrelated to coal dust exposure*. If a miner is found to be suffering from emphysema arising from smoking as opposed to pneumoconiosis, such evidence is relevant to § 727.203(b)(4) rebuttal. *Blaize v. Old Ben Coal Co*., 3 B.L.R. 1-719 (1981). However, where a physician provides a diagnosis of emphysema related to coal mine employment or caused by coal dust exposure, such evidence would not be sufficient to establish rebuttal under § 727.203(b)(4). *Heavilin v. Consolidation Coal Co*., 6 B.L.R. 1-1209 (1984). It is also noteworthy that, in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984), the Fourth Circuit held that, as a matter of law, a non-examining physician's opinion that the etiology of a miner's emphysema was cigarette smoking was insufficient to rebut the interim presumption at § 727.203(a) where no examining physician mentioned smoking as a possible cause of the claimant's condition. The Board has held to the contrary with regard to a non-examining physician's opinion in *Cochran v. Consolidation Coal Co.*, 12 B.L.R. 1-136 (1989) and *Presley v. Sunshine, Inc.*, 8 B.L.R. 1-410 (1985).

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

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

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

! *Ventilatory studies*. Pulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis. *Burke v. Director, OWCP*, 3 B.L.R. 1-410 (1981). Therefore, such studies have no effect on a physician's conclusion regarding the existence of the disease. The fact that a physician conducted studies which produced nonconforming results is not a

sufficient reason to discredit the opinion under § 727.203(b)(4).

IV. Applicability of Parts 410 and 718 and § 410.490
[IX(A)(3)]

Section 727.203(d) states that where eligibility is not established under Part 727, such eligibility may be established under Part 718. The Board has held that this provision, as written, is inconsistent with § 402(f)(2) of the Act and has stated that claims denied under Part 727 should be reviewed under Part 410. *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 B.L.R. 1-627 (1981).

However, the Third, Sixth, Seventh, Eighth and Eleventh Circuits have held that if a claimant cannot establish entitlement under Part 727, and the claim is adjudicated after March 31, 1980, then the regulations at Part 718, not Part 410, are applicable. *Terry v. Director, OWCP*, 956 F.2d 251 (11th Cir. 1992); *Oliver v. Director, OWCP*, 888 F.2d 1239 (8th Cir. 1989); *Knuckles v. Director, OWCP*, 869 F.2d 996 (6th Cir. 1989); *Caprini v. Director, OWCP*, 824 F.2d 283 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987).

Some administrative law judges may nevertheless choose to analyze claims under Part 410 in addition to Part 718 on the theory that the Part 410 regulations are less restrictive (and not more restrictive as stated in *Caprini*) than the Part 718 regulations and that Part 718 is written to apply to claims filed after April 1, 1980. *But see Ezell v. Illinois Central Gulf Railroad*, BRB No. 88-0760 BLA (Mar. 30, 1993)(unpublished) (for a claim denied under Part 727, then apply Part 410 or 718, depending upon circuit court jurisdiction, but do not apply both).

It is important to note that rebuttal under § 727.203(b)(2) precludes entitlement under Parts 410 and 718. *Wheaton v. North American Coal Corp.*, 8 B.L.R. 1-21 (1985) (consideration under Part 410 precluded); *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989) (consideration under Part 718 precluded).

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