JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

PREPARED BY THE U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC

AUGUST 2001

CHAPTER 11
Living Miners' Claims: Entitlement Under Part 718

Chapter 11

Chapter 11
Living Miners' Claims: Entitlement Under Part 718

I. Applicability of Part 718, generally
[VII(A)]

Section 718 applies to all claims filed after March 31, 1980. Moreover, because the Part 727 regulations were written as interim regulations, the permanent regulations at Part 718 should apply to a claimant who fails to meet the requirements of entitlement under Part 727. Section 727.203(d) provides that "[w]here eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time." 20 C.F.R. § 727.203(d). The Part 727 regulations became effective in March 1978. Since the permanent Part 718 regulations had not been written as of March 1978, the Part 410 regulations became applicable for claims adjudicated prior to March 31, 1980 where a claimant failed to meet the requirements of entitlement under Part 727.

After the Part 718 regulations were written, if a claimant failed to meet the requirements of entitlement under Part 727, the Part 718 regulations were applicable. However, in *Muncy v. Wolfe Creek Collieries Coal Co.,* 3 B.L.R. 1-627 (1981), the Board held that the language in the regulations making Part 718 applicable "as amended from time to time," violated statutory intent. Therefore, under *Muncy,* the new Part 718 regulations do not apply to any claim filed prior to March 31, 1980.

Five circuit courts of appeals have disagreed with the Board's position regarding the applicability of Part 718. The Third, Sixth, Seventh, Eighth, and Eleventh Circuits hold that the regulations at Part 718, not Part 410, apply to Part C claims filed prior to March 31, 1980, yet **adjudicated after March 31, 1980.** *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). Thus, if a claimant cannot meet the requirements of entitlement under Part 727 in these circuits, the claim must be considered under Part 718.

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.

II. Elements of entitlement
[VII(A)(3)]

The claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's total disability is caused by pneumoconiosis. *Gee v. W.G. Moore and Sons*, 9 B.L.R. 1-4 (1986)(*en banc)*; *Baumgartner v.*

Director, OWCP, 9 B.L.R. 1-65 (1986)(*en banc)*. It is noteworthy that, generally, the last element is the most difficult to establish under Part 718. In most cases, a miner's total disability is due to a number of factors. Setting aside disabilities due to accidents and injuries, a miner's total pulmonary disability may be due to the effects of cigarette smoking, or from other non-coal dust related pulmonary diseases such as emphysema, bronchitis, asthma, or lung cancer. Moreover, the miner who experiences shortness of breath on exertion may have a heart condition such as hypertension or arteriosclerotic heart disease.

It is noted that the amended regulations at § 725.202(d)(2) specifically provide that a miner meets the requirements for entitlement by establishing that he or she: (1) has pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) is totally disabled; and (4) the pneumoconiosis *contributes* to the total disability. 20 C.F.R. § 725.202(d)(2) (Dec. 20, 2000).

III. The existence of pneumoconiosis

[VII(B)(1)]

A. "Pneumoconiosis" defined

1. Prior to applicability of December 2000 regulations

Pneumoconiosis under the Act is defined as both *clinical pneumoconiosis* and/or any respiratory or pulmonary condition significantly related to or significantly aggravated by coal dust exposure (*legal pneumoconiosis*):

> For the purpose of the Act, "pneumoconiosis" means a chronic dust 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, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silico-tuberculosis, 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 substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. § 718.201.

Note that the definition appears to combine the first two elements of entitlement, pneumoconiosis and cause of pneumoconiosis. However, the claimant bears the burden of establishing both that he or she has pneumoconiosis and that the pneumoconiosis arose out of coal mine employment.

Legal pneumoconiosis versus clinical pneumoconiosis

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 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 Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000) (the court emphasized the distinction between legal and medical pneumoconiosis; a miner's exposure to coal mine employment must merely contribute "at least in part" to his pneumoconiosis); *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 120 (11th Cir. 1989); *Phipps v. Director, OWCP*, 16 B.L.R. 1-100 (1992) (recognizing the distinction between legal and clinical pneumoconiosis); *Biggs v. Consolidation Coal Co.*, 8 B.L.R. 1-317, 1-322 (1985).

2. After applicability of December 2000 regulations

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of "pneumoconiosis" and they provide the following:

> (a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.
>
> > (1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(3) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000).

3. 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.

In *Hapney v. Peabody Coal Co.*, 22 B.L.R. 1-___ (2001)(en banc), the Board addressed a diagnosis of anthracosis under the amended regulations. Specifically, the Board noted that 20 C.F.R. § 718.202(a)(2) (2000) contained an amendment to the prior version of the regulation "to add that a finding on autopsy *or biopsy* of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis." On the other hand, the Board agreed with the ALJ that a diagnosis of anthracosis on biopsy or autopsy fell within the definition of pneumoconiosis at 20 C.F.R. § 717.201(a)(1) (2000).

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). In *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-139 (1999), the Board held that chronic bronchitis and

emphysema fall within the definition of pneumoconiosis if they are related to the claimant's coal mine employment.

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

Before the regulations were amended in December 2000, the Fourth Circuit held, in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995), that 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. 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). 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).

The amended regulations specifically provide that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b) (Dec. 20, 2000). Moreover, the definition of "legal pneumoconiosis" specifically "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2) (Dec. 20, 2000).

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). It is noted that, in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the circuit court held that a medical opinion attributing the miner's respiratory impairment to his smoking history on grounds that pulmonary function testing produced a purely obstructive defect was not well-reasoned. The court stated the following:

> Each of the three doctors unfavorable to Cornett reported that his respiratory problems were caused by his smoking habit *only*. If this is so, Cornett's ailments do not qualify as statutory pneumoconiosis. *See* 20 C.F.R. § 718.201. But, of the three, only Dr. Fino attempted to explain his rationale for completely excluding Cornett's exposure to coal dust as an aggravating factor. Dr. Fino attributed Cornett's obstructive lung disease solely to cigarette smoking because, in his opinion, the pulmonary function tests were not consisted with 'fibrosis as would be expected in

simple coal workers' pneumoconiosis. What the ALJ did not consider in his opinion is that, although 'fibrosis' is generally associated with 'medical' pneumoconiosis, it is not a required element of the broader concept of 'legal' pneumoconiosis. *Cf. Hobbs*, 45 F.3d at 821. The legal definition does not require 'fibrosis' but instead requires evidence that coal dust exposure aggravated the respiratory condition. *See Southard*, 732 F.2d at 71-72. Unlike Dr. Fino, Drs. Broudy and Dahhan make no attempt to explain on what basis they believe that coal dust exposure did not contribute to Cornett's respiratory problems. By contrast, the opinions of Drs. Vaezy and Baker--which, as noted, were discredited by the ALJ as having an inadequate basis--clearly address the statutory requirements by acknowledging that coal dust, while not conclusively the cause of Cornett's condition, was certainly an aggravating factor, contributing to Cornett's respiratory impairment.

f. Stipulations

In the survivor's claim of *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622 (4th Cir. 1999), Employer stipulated to the presence of coal workers' pneumoconiosis, but argued that it did not hasten the miner's death. In weighing the autopsy evidence of record, the administrative law judge credited Claimant's physicians' opinions over physicians' opinions offered by Employer who found only a "'mild' or 'minimal" level of simple coal workers' pneumoconiosis. The administrative law judge reviewed the definition of pneumoconiosis as "a chronic dust disease of the lung and its sequelae, *including respiratory and pulmonary impairments*, arising out of coal mine employment . . .." 20 C.F.R. § 718.201 (emphasis added). From this, the administrative law judge concluded that "[b]ecause Clinchfield stipulated that Mr. Fuller had pneumoconiosis, . . . it must also have stipulated that his pneumoconiosis was impairing . . .." The court disagreed to state that § 718.201 does not contain a requirement that "coal dust-specific diseases . . . attain the status of an 'impairment' to be classified as 'pneumoconiosis.'" The court further noted that the definition of pneumoconiosis is satisfied "whenever one of these diseases is present in the miner at a detectable level; whether the particular disease exists to such an extent as to be compensable is a separate question." As a result, the case was remanded to the administrative law judge to re-weigh the autopsy evidence to determine whether the disease hastened the miner's death.

In *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996), the Director stipulated to the existence of coal workers' pneumoconiosis with regard to the living miner's claim. The court held that it was error, therefore, for the administrative law judge to find that the record did not support a finding of the disease in the survivor's claim. The court further stated that the stipulation was binding even though presence of the disease was not "manifest from the medical records." The court then remanded the case to the administrative law judge for a determination of whether coal workers' pneumoconiosis hastened the miner's death.

With regard to the effect of stipulations and uncontested issued in subsequent claims under 20 C.F.R. § 725.309, *see* Chapter 24.

B. Regulatory methods of establishing pneumoconiosis
[VII(B)]

The existence of pneumoconiosis may be established through the following four methods: (1) chest x-rays; (2) autopsy or biopsy; (3) the presumptions contained at §§ 718.304, 718.305, or 718.306; or (4) a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a). For claims filed on or after January 19, 2001, see Chapter 4 regarding the limitations on evidence imposed by the amended regulations.

1. Chest roentgenogram (x-ray) evidence

Under § 718.202(a)(1), a chest x-ray conducted and classified in accordance with § 718.102, may form the basis for a finding of the existence of pneumoconiosis. In general, where two or more x-ray reports are in conflict, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays. The following list contains some principles for evaluating x-ray evidence under Part 718:

a. Negative readings

The Board has upheld a finding that the x-ray evidence does not establish the existence of pneumoconiosis where that finding was based on the negative report of a B-reader and board-certified radiologist, *i.e.*, the most qualified physician of record found no pneumoconiosis. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985). The Board has also upheld a finding that the x-ray evidence does not establish the existence of pneumoconiosis where that finding was based on the readers' qualifications and the preponderance of the readings, *i.e.*, the majority of the most qualified B-readers of record found no pneumoconiosis. *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985).

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

The actual x-rays must be submitted for review by the parties opposing entitlement. 20 C.F.R. § 718.102(d). Section 413(b) of the Act, however, prohibits the Director from rereading certain positive x-rays in claims filed before January 1, 1982. 30 U.S.C. § 923(b), implemented at 20 C.F.R. § 718.202(a)(1)(i). In *Tobias v. Republic Steel Corp.*, 2 B.L.R. 1-1277 (1981), the Board set forth the threshold requirements of § 413(b). These requirements are as follows: (1) there is other evidence of a pulmonary or respiratory impairment; (2) the x-ray was taken by a radiologist or qualified technician and it is of a 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. *Id*. Under the "Tobias rule," the administrative law judge must exclude such evidence from consideration. Section 413(b) also applies to positive x-rays obtained by the Social Security Administration. *Coburn v. Director, OWCP*, 7 B.L.R. 1-632 (1985). *See also Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994) (the rereading prohibition was applicable to evidence submitted by the claimant on modification).

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 that constitutes sufficient "other evidence" to establish a pulmonary or respiratory impairment, *see Coburn v. Director, OWCP*, 7 B.L.R. 1-632 (1985), and *Bobbitt v. Director, OWCP*, 8 B.L.R. 1-380 (1985).

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 reread the x-ray. *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. *Tobias*, 2 B.L.R. at 1-1286.

The § 413(b) prohibition was eliminated by the 1981 Amendments to the Act. Consequently, *the prohibition does not apply to claims filed after January 1, 1982*. 20 C.F.R. § 718.202(a)(1)(i).

2. Autopsy or biopsy

A biopsy or autopsy conducted and reported in compliance with § 718.106 may be the basis for a finding of the existence of pneumoconiosis. 20 C.F.R. § 718.202(a)(2). Section 718.106 sets forth the quality standards for autopsies and biopsies; however, the Board, in *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113 (1988), held that the quality standards are not mandatory and failure to comply with the standards goes to the reliability and weight of the evidence. Section 718.202(a)(2) also provides that a finding in an autopsy of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis.

In *Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536 (11th Cir. 1993), the Eleventh Circuit held that a biopsy need only be in "substantial compliance" with the quality standards at § 718.106 to be admissible. Specifically, the court held that a biopsy report diagnosing anthracosis that does not include the surgical report is in "substantial compliance" with the regulations. *See Chapter 3* for further discussion of autopsy evidence and quality standards.

3. Evidence under all sections must be weighed together

Over the years, the Board has held that pneumoconiosis may be established by operation of presumption or by a preponderance of the evidence at any one of the individual subsections at § 718.202(a)(1) through (a)(4). For example, in *Jones v. Badger Coal Co.*, 21 B.L.R. 1-103 (1998)

(*en banc*), the Board held that the administrative law judge properly weighed the medical evidence under § 718.202 of the regulations. Specifically, the administrative law judge separately evaluated the x-ray evidence at § 718.202(a)(1) to find no evidence of pneumoconiosis, but he concluded that the medical opinion evidence at § 718.202(a)(4) did support a finding of the disease. Employer had argued that, under § 718.202(a), "all relevant evidence must be weighed together to determine whether claimant suffers from the disease," and it cited to the Third Circuit's holding in this regard in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3d Cir. 1997). The Board countered to note that *Jones* did not arise within the Third Circuit such that the *Williams* decision was not controlling. Moreover, it stated that the circuit court failed to distinguish between clinical and legal pneumoconiosis. In this vein, the Board reasoned that legal pneumoconiosis "is a broader category which is not dependent upon a determination of clinical pneumoconiosis, and the absence of clinical pneumoconiosis does not necessarily influence a physician's diagnosis of legal pneumoconiosis."[1]

The Third and Fourth Circuit courts, however, have held that all evidence under § 718.202(a) must be weighed together to determine whether pneumoconiosis is present.

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the administrative law judge concluded that the miner did not establish pneumoconiosis through chest x-ray evidence under § 718.202(a)(1), but he did find pneumoconiosis established via medical opinion evidence at § 718.202(a)(4). The Fourth Circuit vacated this finding of pneumoconiosis and held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from the disease. This is contrary to the Board's view that an administrative law judge may weigh the evidence under each subsection separately, *i.e.* x-ray evidence at § 718.202(a)(1) is weighed apart from the medical opinion evidence at § 718.202(a)(4). The circuit court cited to the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24-25 (3d Cir. 1997) which requires the same analysis and reasoned as follows:

> [W]eighing all of the relevant evidence together makes common sense. Otherwise, the existence of pneumoconiosis could be found even though the evidence as a whole clearly weighed against such a finding. For example, suppose x-ray evidence indicated that the miner had pneumoconiosis, but autopsy evidence established that the miner did not have any sort of lung disease caused by coal dust exposure. In such a situation, if each type of evidence were evaluated only within a particular subsection of § 718.202(a) to which it related, the x-ray evidence could support an award for benefits in spite of the fact that more probative evidence established that benefits were not due. *See Griffith v. Director, OWCP*, 49 F.3d 184, 187 (6th Cir. 1995) (noting that autopsy evidence is generally accorded greater weight than x-ray

[1] The Board has also held that all evidence relevant to the existence of pneumoconiosis must be considered and weighed. In *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986), the Board upheld a finding that the claimant had not established the existence of pneumoconiosis even where the x-ray evidence of record was positive. The Board concluded that the "administrative law judge's assignment of less weight to the record's positive x-rays was rational and based on substantial evidence," where "the weight of other medical evidence indicat[ed] that claimant's impairment was due to interstitial fibrosis of unknown etiology." *Id*. at 1-68.

evidence).

The Director took the position that x-ray evidence should not be weighed with medical opinion evidence as these two types of evidence measure different types of pneumoconiosis, *i.e.* clinical versus legal pneumoconiosis. The court agreed that there are two types of pneumoconiosis and stated that "[m]edical pneumoconiosis is a particular disease of the lung generally characterized by certain opacities appearing on the chest x-ray." The court further noted that legal pneumoconiosis encompasses a broader category of coal dust induced respiratory diseases and concluded the following:

> In that sense, the Director's point is well-taken: Evidence that does not establish medical pneumoconiosis, *e.g.*, an x-ray read as negative for coal workers' pneumoconiosis, should not necessarily be treated as evidence weighing against a finding of legal pneumoconiosis.

However, the circuit court rejected the Director's position and held that it was not a reasonable interpretation of either the Act or the regulations:

> [A]lthough we recognize that there is a meaningful distinction between evidence of medical pneumoconiosis and evidence of legal pneumoconiosis, it cannot be said that evidence showing that a miner does not have medical pneumoconiosis is irrelevant to the question of whether the miner has established pneumoconiosis for purposes of a black lung claim. Further, nothing in the text of the regulation supports his position.

Similarly, in an earlier decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3d Cir. 1997), the Third Circuit stated the following with regard to establishing pneumoconiosis pursuant to the methods set forth at § 718.202(a):

> We agree with the Director that 'although section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease.' (citations omitted).
>
> It is significant that the language of the regulation does not list the methods in the disjunctive. The word 'or' does not appear between the paragraphs enumerating the four approved means of determining the presence of pneumoconiosis. It follows that the Board erred when it found the presence of pneumoconiosis based on the x-ray evidence alone without evaluating the other relevant evidence.

In its brief before the Third Circuit, the Director argued the following:

> The Act requires that 'all relevant evidence' must be considered in determining the validity of claims. (citations omitted). Thus, if a record contains both x-ray interpretations and biopsy reports relevant to the question, the Act prohibits the conclusion that the miner did or did not have pneumoconiosis based on the x-ray

evidence alone. The biopsy evidence must also be weighed. Further extending this analysis, if the x-ray and biopsy evidence proves negative for 'clinical' pneumoconiosis, the Act requires that the record must then be evaluated for the adequacy of the physicians' opinions that the miner suffered from the broader category of 'legal' pneumoconiosis; that is, 'pneumoconiosis' as defined by the Act and section 718.201.

Our construction of section 718.202(a) to include consideration of all the relevant evidence also advances the intent of Congress to compensate victims of disabling pneumoconiosis caused by coal dust exposure.

C. Presumptions related to the existence of pneumoconiosis [VII(B)(4)]

The regulations at 20 C.F.R. § 718.202(a)(3) provide that "[i]f the presumptions described in §§ 718.304, 718.305 or 718.306 are applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis." 20 C.F.R. § 718.202(a)(3).

1. Complicated pneumoconiosis

Under § 718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, if the miner is suffering from complicated pneumoconiosis. Complicated pneumoconiosis is established by x-rays classified as Category A, B, or C, or by an autopsy or biopsy which yields evidence of massive lesions in the lung. The determination of whether the miner has complicated pneumoconiosis is a finding of fact, and the administrative law judge must consider and weigh all relevant evidence. *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991); *Maypray v. Island Creek Coal Co.*, 7 B.L.R. 1-683 (1985).

! ***Benefits Review Board.*** The Board has not set forth a standard for the size of nodules on autopsy which will support a finding of complicated pneumoconiosis. In *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 B.L.R. 1-1264 (1984), the Board concluded that the evidence did not support a finding of complicated pneumoconiosis even though a doctor indicated that "the lung parenchyma also has underspread black modules which vary up to 0.9 to 1.2 centimeters." Similarly, the evidentiary basis for the advanced disease was found lacking in *Smith v. Island Creek Coal Co.*, 7 B.L.R. 1-734 (1985), where the doctor who performed the autopsy indicated that the lungs revealed two nodular areas measuring 1.2 to 1.3 centimeters, but no attempt was made to equate the nodules found with the size of x-ray opacities. *See also Reilly v. Director, OWCP*, 7 B.L.R. 1-139 (1984).

! ***Third Circuit.*** In *Clites v. Jones & Loughlin Steel Corp.*, 663 F.2d 14 (3d Cir. 1981), the circuit court held that an equivalency determination is necessary when there is a question about whether nodules found in the lung upon autopsy or biopsy would correspond to opacities viewed on an x-ray indicating complicated pneumoconiosis. In *Clites*, a physician testified that nodules found on autopsy, if viewed radiographically, would amount to opacities over one centimeter. Thus, the court upheld the administrative law judge's finding of the existence of complicated pneumoconiosis.

! ***Fourth Circuit.*** In *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000), the circuit court affirmed the administrative law judge's finding that the x-ray and autopsy evidence of record supported invocation of the presumption at 20 C.F.R. § 718.304 (complicated pneumoconiosis). Initially, the court noted that the prosector's autopsy report revealed extensive "pneumoconiotic nodules" which were scattered throughout the lungs and which ranged in size from 0.5 centimeter to one centimeter. The prosector concluded that the miner's "main disease" was extensive chronic obstructive pulmonary disease which was "caused mainly by panlobular macronodular pneumoconiosis." Dr. Naeye reviewed the slides and found the presence of "anthracotic micronodules" which were seven to eight millimeters in diameter and concluded that coal workers' pneumoconiosis may have been severe enough to hasten the miner's death. Dr. Kleinerman found lesions on the slides which varied in size from 0.3 centimeters to 1.7 centimeters. He concluded that the lesions were considered to be "within the range of simple coal workers' pneumoconiosis" and opined that coal workers' pneumoconiosis did not hasten the miner's death. The court noted that Dr. Naeye was requested to conduct a second examination of the slides after which he "concluded that the tissue samples he had previously examined could not in fact have been representative of the lungs as a whole" and that the miner did not suffer from complicated pneumoconiosis. The court stated that Dr. Naeye based his conclusion on the fact that the miner's "exposure to coal dust had ended in 1973," his pulmonary function study results were normal at that time, and "simple coal workers' pneumoconiosis 'rarely progresses to a more severe disorder if a coal worker quits exposure to mine dust.'" Dr. Renn also issued a report wherein he concurred with the findings contained in Dr. Naeye's second report. The court disagreed with Dr. Naeye's conclusions to note that he ignored the "assumption of progessivity that underlies much of the statutory scheme" in black lung. The administrative law judge accorded greater weight to the prosector's opinion over the opinions of reviewing pathologists because the prosector was able to review all of the body systems. While the court determined that the evidence was weighed in error, it disagreed with Employer's arguments that the administrative law judge's weighing of the evidence was "based on two flawed premises": (1) that the statutory definition of complicated pneumoconiosis must be "congruent with a medical or pathological definition"; and (2) that the reports of Drs. Naeye and Kleinerman, who concluded that the autopsy slides did not comport with the pathological definition of complicated pneumoconiosis, undermined the administrative law judge's finding of the disease. The court found, upon review of the plain language of the statute, that it "betrays no intent to incorporate a purely medical definition." As a result, the fact that Dr. Kleinerman concluded that the 1.7 centimeter nodules which he observed did not constitute complicated pneumoconiosis in the medical sense was insufficient to exclude its presence in the legal sense. In this vein, the court noted that Dr. Kleinerman failed to state whether the lesions met the statutory definition of the disease, and not merely the pathological or medical definition. It stated that there was no reason to conclude that the 1.7 centimeter nodules observed by Dr. Kleinerman on autopsy would not be seen as 1.0 centimeter opacities on chest x-ray. The administrative law judge accorded greater weight to the autopsy prosector's opinion because "she had the 'opportunity to see the miner's entire respiratory system, and was the only doctor who commented on the amount of lung tissue damaged by pneumoconiosis.'" The administrative law judge found that the prosector's report supported a finding of "massive lesions" in the miner's lungs having used the dictionary

definition of "massive" to mean "'extensive or severe.'" The court found no error in the administrative law judge's use of a dictionary to define "massive" lesions. However, it noted that "any such definition must be applied so that the term 'massive lesions' will describe the same condition that would be disclosed by application of the prong (A) standard based on the size of the x-ray opacities." The court did conclude that the administrative law judge's analysis of the autopsy evidence was incorrect, but it did not state any reasons for this determination and it did not find that the autopsy evidence contradicted the administrative law judge's previous finding of complicated pneumoconiosis by chest x-ray.[2] Employer argued that autopsy evidence constituted a superior diagnostic tool over chest x-rays in determining whether complicated pneumoconiosis is present. The court held, however, that complicated pneumoconiosis is established through application of "congressionally defined criteria" and the most objective measure of the condition is obtained through chest x-rays. As previously noted, the court found that the autopsy evidence did not contradict the x-ray findings and, therefore, the irrebuttable presumption at § 718.304 was properly invoked based upon the chest x-ray and autopsy evidence.

In *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999), a case involving the issue of complicated pneumoconiosis, the court stated that a diagnosis of "massive lesions" on autopsy or biopsy is the same as requiring a finding of A, B, or C opacities on chest x-ray. In this vein, the court found that a physician's finding of "massive fibrosis" on biopsy, which included a lesion or nodule which was 1.3 centimeters in diameter, was insufficient to determine whether Claimant suffered from complicated pneumoconiosis. Rather, it concluded the following:

> To determine whether Blankenship's condition meets the statutory criteria, we must remand this case to the Board for remand to the ALJ to find whether the 1.3-centimeter lesion would, if x-rayed prior to removal of that portion of Blankenship's lung, have showed as a one-centimeter opacity.
>
> It may be necessary for an ALJ to make a separate equivalency determination each time a miner presents evidence of massive lesions diagnosed by biopsy. On the other hand, it may be possible for the Department of Labor to engage in a single fact-finding exercise to determine how large a lesion must be in order to appear on an x-ray as a greater-than-one-centimeter opacity and thereafter to promulgate a rule imposing this finding on all future cases. Either way, however, an equivalency determination must be made.

The court noted that the Board and medical community have determined that the lesion found on biopsy or autopsy must measure at least two centimeters in diameter in order to

[2] Possibly the court felt that the administrative law judge provided reasons for according greater weight to the prosector's opinion which were in contravention of the court's recent ruling in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186 (4th Cir. 2000) (it is improper to accord greater weight to the prosector's opinion solely on the basis that s/he reviewed the miner's entire respiratory system).

support a finding of complicated pneumoconiosis because nodules are larger on autopsy or biopsy than they appear on a chest x-ray. The court declined to follow this bright-line rule, however, and reasoned that "[t]he statute does not mandate the use of the medical definition of complicated pneumoconiosis."

! ***Sixth Circuit.*** In *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999), the court held that a miner who died of a self-inflicted gunshot wound may nevertheless be awarded black lung benefits if it is determined that he suffered from complicated pneumoconiosis and, therefore, invoked the irrebuttable presumption of total disability due to the disease. The court then reviewed the record to determine whether it supported a finding of complicated pneumoconiosis. It noted that a diagnosis of the disease may be made based upon chest x-ray evidence revealing opacities which are greater than one centimeter in diameter or autopsy or biopsy evidence which demonstrates "massive lesions." The court then determined that x-ray evidence of opacities measuring at least one centimeter does not, alone, trigger the irrebuttable presumption where conflicting autopsy evidence exists. Moreover, the "one-centimeter standard applicable to x-rays simply does not apply to autopsy evidence." The court stated that x-rays are the "least accurate method" of diagnosing complicated pneumoconiosis such that "all relevant evidence" must be weighed prior to invocation of the presumption. In this vein, the court concluded that the autopsy evidence did not support a finding of complicated pneumoconiosis as Dr. Kleinerman testified "that the lesions on the lung-tissue slides would not appear as opacities of greater than one centimeter on an x-ray" and the nodules observed in the miner's lung on autopsy did not constitute "'massive lesions'" as required by the regulation.

2. Fifteen years of coal mine employment

Under § 718.305, if a miner was employed for fifteen years or more in one or more underground coal mines, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis. 20 C.F.R. § 718.305(a). A spouse's affidavit or testimony may not be used by itself to establish the applicability of the presumption. 20 C.F.R. § 718.305(a). The presumption may be rebutted by establishing that the miner does not have pneumoconiosis or that his or her respiratory or pulmonary impairment did not arise out of coal mine employment. The presumption can never be rebutted, however, on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of *unknown* origin. 20 C.F.R. § 718.305(d). This presumption is not applicable to any claim filed on or after January 1, 1982. 20 C.F.R. § 718.305(e).

In *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995), the court reiterated that, under § 718.305, "[o]n claims filed before January 1, 1982, where a miner has fifteen years of employment and a totally disabling respiratory impairment, it is presumed that pneumoconiosis is a contributing cause of his impairment." Rebuttal was not established in *Barber* where, as noted by the court, the autopsy report and related opinions "do not identify the origin of (the miner's) diseases" in light of the broad legal definition of pneumoconiosis.

In *Blakley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995), the Seventh Circuit held that,

under § 725.305(a), the claimant must demonstrate that "he worked for fifteen years in an underground mine or in a surface mine with dust conditions substantially similar to those found in underground mines." In this vein, the court further held that the claimant "'bears the burden of establishing comparability' but 'must only establish that he was exposed to sufficient coal dust in his surface mine employment.'" The court stated that it will generally defer to the expertise of the judge in determining the similarity of surface and underground mine conditions.

Once invoked, the presumption at § 725.305(a) may be rebutted if the employer demonstrates, by a preponderance of the evidence, that either (1) the miner does not, or did not, have pneumoconiosis, or (2) his respiratory or pulmonary impairment did not arise out of his coal mine employment. Citing to *Shelton v. Director, OWCP*, 899 F.2d 690 (7th Cir. 1990), the court stated that, with regard to the second avenue of rebuttal, if the employer establishes that the miner would have been disabled notwithstanding his exposure to coal dust, then his disability did not arise out of coal mine employment. Moreover, although the experts in *Blakley* did not conclusively "rule out" coal workers' pneumoconiosis as a possible factor in the claimant's condition, rebuttal of the presumption was nevertheless accomplished by the Employer as the record evidenced that the miner would have been disabled notwithstanding any complications arising from his exposure to coal mine dust.

3. Presumption in survivors' claims

Under § 718.306, death due to pneumoconiosis or total disability at the time of death will be presumed in certain cases. This presumption is applicable to a claim for survivor's benefits and is discussed in detail in *Chapter 16.*

D. Reasoned medical opinions

A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. § 718.202(a)(4). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 C.F.R. § 718.202(a)(4). Quality standards for reports of physical examinations are found at 20 C.F.R. § 718.104. For example, in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the circuit court held that, if a physician bases his or her finding of coal workers' pneumoconiosis only upon the miner's history of coal dust exposure and a positive chest x-ray, then the opinion "should not count as a reasoned medical judgment under § 718.202(a)(4)." However, the court found that the opinions of Drs. Veazy and Baker were not, as characterized by the administrative law judge, based only upon the miner's exposure to coal dust. Rather, in addition to consideration of coal mine employment and chest x-rays, the physicians "considered their examinations of Cornett, his history in the mines, his history as a smoker and pulmonary functions studies."

Under § 718.202(a)(4), "the administrative law judge must consider and weigh all relevant medical evidence to ascertain whether or not claimant has established the presence of

pneumoconiosis by a preponderance of the evidence . . .." *Perry v. Director, OWCP*, 9 B.L.R. 1-1, 1-2 (1986). Where the medical opinions are in conflict, the administrative law judge must discuss the conflicting evidence and provide a rationale for choosing one physician's opinion over another. *McGinnis v. Freeman United Coal Mining Co.*, 10 B.L.R. 1-4 (1987).

It is also noteworthy that the Board has held that the employer is not required to establish a "cohesive theory" with regard to whether the miner suffers from coal workers' pneumoconiosis. In *Bentley v. Kentucky Elkhorn Coal, Inc.*, BRB No. 00-0140 BLA (Apr. 6, 2001) (unpub.), the ALJ noted that Employer's three physicians "disagreed as to the possible contribution of factors such as cigarette smoking, a predisposition to asthma, and hereditary factors, as well as the extent to which the symptoms were related to emphysema, asthma, bronchitis, or asthmatic bronchitis." The ALJ found that "'it would be absurd to suggest that the credibility of the three physicians retained by the [e]mployer is not undermined at all by the fact that they disagree with each other on the material issues.'" The Board disagreed to state that a finding regarding whether a physician's opinion is well-reasoned and well-documented "requires analysis of the document within its four corners." As a result, the Board remanded the case for further analysis of the evidence.

IV. Etiology of the pneumoconiosis
[VII(C)]

Once it is determined that the miner suffers (or suffered) from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a).

A. Ten years or more coal mine employment

If a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b).

The ten year presumption cannot be used as a bootstrap to prove the existence of pneumoconiosis. A miner with ten years of coal mine employment is not presumed to have pneumoconiosis; rather, he or she must establish the *existence* of pneumoconiosis by a preponderance of the evidence. Once the existence of pneumoconiosis is established, however, the causal connection between the pneumoconiosis and the coal mine employment is presumed if the miner has ten years of coal mine employment. Because pneumoconiosis can be defined as a lung disease significantly related to or substantially aggravated by dust exposure in coal mine employment (§ 718.201), the existence of pneumoconiosis and the cause of the pneumoconiosis are sometimes merged in the definition. The claimant, however, still bears the burden of establishing both that he or she has pneumoconiosis and that the pneumoconiosis arose out of coal mine employment.

B. Less than ten years of coal mine employment

If a miner suffers from pneumoconiosis and was employed less than ten years in the Nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c). *See also Stark v. Director, OWCP*, 9 B.L.R. 1-36 (1986); *Hucker v. Consolidation Coal Co.*, 9 B.L.R. 1-137 (1986). Specifically, the burden of proof is met under § 718.203(c) when "competent evidence establish[es] that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment." *Shoup v. Director, OWCP*, 11 B.L.R. 1-110, 1-112 (1987). The Sixth and Eleventh Circuits apply a more relaxed standard to state that the miner need only establish that his pneumoconiosis arose "in part" from his coal mine employment. *See Stomps v. Director, OWCP*, 816 F.2d 1533, 10 B.L.R. 2-107 (11th Cir. 1987); *Southard v. Director, OWCP*, 732 F.2d 66, 6 B.L.R. 2-26 (6th Cir. 1984).

The record must contain *medical* evidence establishing the relationship between pneumoconiosis and coal mine employment. The Board has held that "the administrative law judge could not reasonably infer a relationship based merely upon claimant's employment history." *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986). In another case the Board concluded that "the Judge's sole reliance on lay testimony to find § 718.203(c) satisfied . . . is erroneous." *Tucker v. Director, OWCP*, 10 B.L.R. 1-35, 1-39 (1987).

It is noteworthy that medical opinions which are predicated upon an erroneous coal mine employment history may be given little weight with regard to etiology of the miner's disease. In *Barnes v. Director, OWCP*, 19 B.L.R. 1-71 (1995)(en banc on reconsideration), the Board reiterated that a judge may accord an opinion less weight based upon a discrepancy in the administrative law judge's finding of coal mine employment and that relied upon by the physician. In so holding, the Board stated that "the administrative law judge should . . . consider whether the record contains any documentary or testimonial evidence to suggest that any causal factors other than coal dust exposure as a cause of claimant's pneumoconiosis."

V. Establishing total disability
[VII(D)]

A. Prior to applicability of December 2000 regulations

A miner shall be considered totally disabled if he or she has complicated pneumoconiosis (§ 718.304) or if pneumoconiosis prevents him or her from doing his usual coal mine employment or comparable and gainful employment (§ 718.204(b)). For a discussion of the factors to consider in determining whether a miner is able to perform "comparable and gainful employment," see *Chapter 10*.

Section 718.204(c) provides that, *in the absence of contrary probative evidence*, evidence which meets the quality standards of the subsection shall establish a miner's total disability. The administrative law judge cannot merely weigh like/kind evidence. Specifically, it is error to look at all the pulmonary function studies and conclude that the miner is totally disabled, or to look at all the blood gas studies to conclude that the miner is totally disabled. The administrative law judge

must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If so, the administrative law judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Troup v. Reading Anthracite Coal Co.*, 22 B.L.R. 1-11 (1999) (en banc); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986).

B. After applicability of December 2000 regulations

Under the new regulations, the definition of total disability and its etiology has been modified. Section 718.204 provides, in relevant part, the following:

> (a) General. Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who where totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

20 C.F.R. § 718.204(a) (Dec. 20, 2000).

In its comments to this regulatory amendment, the Department rejected the concept of compensation based upon a "whole person disability" and stated the following:

> [O]nly respiratory and pulmonary impairments are relevant in determining whether the miner is totally disabled for purposes of the Black Lung Benefits Act, and identifying the causes of that disability.
>
> . . .
>
> The Department has consistently taken the position that proof of a totally disabling respiratory or pulmonary impairment is an essential element of a miner's claim for black lung benefits. (citations omitted). Adoption of a 'whole person' definition of total disability would greatly expand the black lung benefits program and transform it into a general disability program for coal miners.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,947 (Dec. 20, 2000). The Department specifically noted that the amended regulatory provisions constituted a departure from the Seventh Circuit's holding in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994) wherein the court held that Claimant's entitlement to benefits was precluded because he suffered from a disabling stroke, which was unrelated to coal mine employment and which occurred before there was evidence of disability due to pneumoconiosis in the record.

It is noted that the Seventh Circuit issued a decision on June 29, 2001 in *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001)[3], and did not apply the amended regulations in its disability analysis under § 718.204. In this vein, the court stated that, assuming the miner suffered from pneumoconiosis, the court would find it difficult to conclude that the miner was totally disabled by the disease:

> Given his many other ailments it is hard to see how it could have been, for the other problems appear to be sufficient to cause disability (implying that pneumoconiosis was not a necessary condition of disability). (citations omitted).

Moreover, the court found that it was "irrational" to accord greater weight on this issue to the opinion of a treating physician, who may not be a specialist. The court stated:

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

C. Methods of demonstrating total disability

Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a). The regulations at § 718.204(b) provide the following five methods to establish total disability: (1) pulmonary function (ventilatory) studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinions; and (5) lay testimony. 20 C.F.R. § 718.204(b). However, it is noted that in a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish total disability." *Tedesco v. Director, OWCP,* 18 B.L.R. 1-103 (1994). For the use of lay testimony in a survivor's claim, see *Chapter 17*.

1. Pulmonary function (ventilatory) studies

The quality standards for pulmonary function studies are found at 20 C.F.R. § 718.103. The standards require that the studies be accompanied by three tracings of each test performed, FEV_1, FVC, and MVV. The standards also require that a statement signed by the physician or technician indicate the following: (1) date and time of test; (2) name, claim number, age, height, and weight of the claimant; (3) name of the technician; (4) signature of the physician supervising the test; (5) the claimant's ability to understand the instructions, ability to follow directions, and degree of cooperation in performing the tests; (6) paper speed; (7) name of the instrument used; (8) whether a bronchodilator was used; and (9) that the test is in compliance with the quality standards. 20 C.F.R. § 718.103(b).

It is noteworthy that the Board and some circuit courts have emphasized that pulmonary function and blood gas testing measure different types of impairment. In *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993), the court noted that the Board has held that the results of blood gas and pulmonary function testing "may consistently have no correlation since coal

---

[3] At the time the Seventh Circuit's decision was issued, application of the amended regulations was stayed by the U.S. District Court in *Nat'l. Mining Ass'n., et al. v. Chao*, Civil Action No. 00-3086 (D. D.C. 2001).

workers' pneumoconiosis may manifest itself in different types of pulmonary impairment.'" The court cited to *Gurule v. Director, OWCP*, 2 B.L.R. 1-772, 1-777 (1979), *aff'd.*, 653 F.2d 1368 (10th Cir. 1981). *See also Sheranko v. Jones and Laughlin Steel Corp*., 6 B.L.R. 1-797, 1-798 (1984) (blood gas studies and ventilatory studies measure different types of impairment).

2. Blood gas studies

The quality standards for blood gas studies are found at 20 C.F.R. § 718.105. The standards require that no blood gas study shall be performed if medically contraindicated. 20 C.F.R. § 718.105(a). A blood gas study shall initially be administered at rest and in a sitting position. If the results of the blood gas test at rest do not satisfy the requirements of Appendix C, an exercise blood gas test shall be offered unless medically contraindicated. 20 C.F.R. § 718.105(b). The report of the blood gas study shall specify: (1) date and time of test; (2) altitude and barometric pressure; (3) name and claim number of the claimant; (4) name and signature of the physician; (6) recorded values for PCO_2, PO_2, and pH collected at rest and if performed, during exercise; (7) duration and type of exercise; (8) pulse rate; (9) time between drawing of sample and analysis of sample; and (10) whether the equipment was calibrated before and after each test. 20 C.F.R. § 718.105(c).

It is noteworthy that the Board and some circuit courts have emphasized that pulmonary function and blood gas testing measure different types of impairment. In *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993), the court noted that the Board has held that the results of blood gas and pulmonary function testing "may consistently have no correlation since coal workers' pneumoconiosis may manifest itself in different types of pulmonary impairment.'" The court cited to *Gurule v. Director, OWCP*, 2 B.L.R. 1-772, 1-777 (1979), *aff'd.*, 653 F.2d 1368 (10th Cir. 1981). *See also Sheranko v. Jones and Laughlin Steel Corp*., 6 B.L.R. 1-797, 1-798 (1984) (blood gas studies and ventilatory studies measure different types of impairment).

3. Cor pulmonale

As the pulmonary disease progresses to produce greater pulmonary functional derangement, it produces dysfunction of the pulmonary blood vessels. The resistance to blood flow in the pulmonary vessels rises, causing an elevation in the pressure in the pulmonary artery, putting severe stress on the right ventricle of the heart which eventually fails. Heart disease which is secondary to chronic lung disease is known as *cor pulmonale,* and this form of failure of the circulation is known as congestive heart failure. A miner's total disability may be established where the miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. § 718.204(c)(3).

4. Reasoned medical opinions

Where total disability cannot be established under paragraphs (c)(1), (2), or (3), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual or comparable coal mine employment. 20 C.F.R. § 718.204(c)(4). Under § 718.204(c)(4), "all the evidence relevant to the

question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element." *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201, 1-204 (1986).

a. Burden of proof

In assessing total disability under § 718.204(c)(4), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, Case No. 99-3469 (6th Cir. Sept. 7, 2000) (a finding of total disability may be made by a physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations); *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993) (a qualified opinion regarding the miner's disability may be given less weight). *See also Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(en banc on recon.). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

b. Nonrespiratory, nonpulmonary impairments

In *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994), the Fourth Circuit concluded that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." Rather, the miner must demonstrate that he "has a totally disabling respiratory and pulmonary condition . . . and show that his pneumoconiosis is a contributing cause to this total disability."

Similarly, the Board has held that nonrespiratory and nonpulmonary impairments are irrelevant to establishing total disability under § 718.204(c). *Beatty v. Danri Corp.*, 16 B.L.R. 1-11 (1991), *aff'd.* 49 F.3d 993 (3d Cir. 1995). It is noted that, in *Carson v. Westmoreland Coal Co.*, 20 B.L.R. 1-64 (1996), *mod'g. on recon.*, 19 B.L.R. 1-16 (1994), the Board concluded that the following holding was an error and struck the language from its prior decision:

> The disabling loss of lung function due to extrinsic factors, *e.g.*, loss of muscle function due to stroke, does not constitute respiratory or pulmonary disability pursuant to 20 C.F.R. § 718.204(c).

See also 20 C.F.R. § 718.204(a) (Dec. 20, 2000) (non-respiratory and non-pulmonary impairments, which cause an independent disability unrelated to the miner's pulmonary or respiratory condition, "shall not be considered in determining whether the miner is totally disabled due to pneumoconiosis").

For a discussion of non-respiratory and non-pulmonary impairments under the amended regulations, see the discussion at pages 17-18 of this Chapter, *supra*.

5. Lay testimony

In a living miner's claim, lay testimony cannot support the finding of a totally disabling respiratory impairment in the absence of corroborating medical evidence. For example, in *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122 (1999), the administrative law judge properly found no "material change in conditions" in a miner's claim filed after 1982 under § 725.309. In so holding, the Board rejected Claimant's argument that the administrative law judge's failure to consider and weigh Claimant's testimony regarding the miner's extreme difficulty in "'performing even the simplest of tasks'"was error. Rather, the Board held that "lay testimony offered by claimant at the hearing . . . is generally insufficient to establish total disability unless it is corroborated by at least a quantum of medical evidence." Moreover, in *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court held that "[w]hile relevant to the issue of whether there is a totally disabling respiratory impairment, a miner's own statements about his history of coal mine employment or symptoms of pneumoconiosis are not conclusive in resolving conflicting medical opinion evidence." The court then stated that "the length of a miner's coal mine employment does not compel the conclusion that the miner's disability was solely respiratory" and the "mere presence of pneumoconiosis (by x-ray) is not synonymous with a totally disabling respiratory condition."

In a case involving a deceased miner in which a claim was filed prior to January 1, 1982, and where there is no medical or other relevant evidence, affidavits from persons knowledgeable of the miner's physical condition shall be sufficient to establish total disability. 20 C.F.R. § 718.204(c)(5); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). The medical or other relevant evidence refers to evidence "relevant to the existence of, or disability due to, a respiratory or pulmonary impairment." *Gessner v. Director, OWCP,* 11 B.L.R. 1-1, 1-3 (1987). The use of lay testimony alone is available only on claims filed prior to January 1, 1982, and only in the case of a deceased miner. In the case of a living miner's claim, a finding of total disability shall not be made solely on the miner's statements or testimony. 20 C.F.R. § 718.204(d)(2). For further discussion of the use of lay testimony in survivors' claims, *see* Chapter 16. *See also* 20 C.F.R. § 718.204(d) (Dec. 20, 2000).

VI. Etiology of total disability
[VII(E)]

Unless one of the presumptions at §§ 718.304, 718.305, or 717.306 is applicable, a miner with less than 15 years of coal mine employment, must establish that his or her total disability is due, at least in part, to pneumoconiosis. The Board has held that "[i]t is [the] claimant's burden pursuant to § 718.204 to establish total disability due to pneumoconiosis . . . by a preponderance of the evidence." *Baumgartner v. Director, OWCP,* 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons,* 9 B.L.R. 1-4, 1-6 (1986)(en banc).

A. "Contributing cause" standard

1. Prior to applicability of December 2000 regulations

The following list of cases are those which set forth variations of the "contributing cause" standard delineated by the Board and circuit courts:

! ***Benefits Review Board.*** The Board requires that pneumoconiosis be a "contributing cause" to the miner's disability. *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990) (*en banc*), *overruling Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988).

It is noteworthy that, in *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 BLA (June 19, 1997)(en banc)(unpublished), the Board stated the following:

> Contrary to employer's argument, the issues of total disability and causation are independent; therefore, the administrative law judge was not required to reject Dr. Baker's August 23, 1991 opinion on causation simply because the doctor did not consider claimant's respiratory impairment at that time to be totally disabling.

! ***Third Circuit***. The Third Circuit requires that pneumoconiosis be a "substantial contributor" to the miner's total disability. *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734 (3d Cir. 1989).

! ***Fourth Circuit.*** Pneumoconiosis must be a "contributing cause" to the miner's disability. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). In *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994), the Fourth Circuit concluded that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." Rather, the miner must demonstrate that he "has a totally disabling respiratory or pulmonary condition . . . and show that his pneumoconiosis is a contributing cause to this total disability."

In *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court concluded that the administrative law judge erred in stating that, even if Claimant's cardiac condition was the primary cause of his total disability, it was not the exclusive cause. Citing to *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994), the court "rejected the argument that '[a] miner need only establish that he has a total disability, which may be due to pneumoconiosis in combination with nonrespiratory and nonpulmonary impairments.'" Thus, the court held that, even if it is determined that Claimant suffers from a totally disabling respiratory condition, he "will not be eligible for benefits if he would have been totally disabled to the same degree because of his other health problems."

! ***Sixth Circuit***. The Sixth Circuit requires that total disability be "due at least in part" to pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1989); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 566 (6th Cir. 1989); *Roberts v. Benefits Review Board*, 822 F.2d 636, 639 (6th Cir. 1987). However, in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997), the Sixth Circuit held that, although pneumoconiosis need only be a "contributing cause" to the miner's total disability, a claimant must demonstrate that the disease was more than a *de minimus* or "infinitesimal" factor in the miner's total disability.

! ***Seventh Circuit.*** Pneumoconiosis must be a "*simple* contributing cause" of the miner's total disability (pneumoconiosis must be a necessary, but need not be a sufficient, cause of miner's

total disability). *Hawkins v. Director, OWCP*, 907 F.2d 697, 707 (7th Cir. 1990); *Shelton v. Director, OWCP*, 899 F.2d 690, 693 (7th Cir. 1990).

! ***Tenth Circuit***. The Tenth Circuit requires that the pneumoconiosis be "at least *a contributing cause*." *Mangus v. Director, OWCP*, 882 F.2d 1527, 1531 (10th Cir. 1989) (emphasis added).

! ***Eleventh Circuit***. The Eleventh Circuit requires that pneumoconiosis be a "substantial contributor" to the miner's total disability. *Lollar v. Alabama By-Products, Corp.*, 893 F.2d 1258, 1265 (11th Cir. 1990).

2. After applicability of December 2000 regulations

The amended regulations at § 718.204(c) contain a standard for determining whether total disability is caused by the miner's pneumoconiosis and provides the following:

> (c)(1) Total disability due to pneumoconiosis defined. A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in Sec. 718.201, is a *substantially contributing cause* of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a 'substantially contributing cause" of the miner's disability if it: (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.
> (2) Except as provided in Sec. 718.305 and paragraph (b)(2)(iii) of this section, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iv) and (d) of this section shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis. Except as provided in paragraph (d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report.

20 C.F.R. § 718.204(c) (Dec. 20, 2000) (emphasis added).

In its comments, the Department noted that addition of the word "material" or "materially" to the foregoing provisions reflects the view that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause to that disability." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,946 (Dec. 20, 2000).

B. Blood gas and ventilatory studies irrelevant

With respect to the use of blood gas studies and pulmonary function (ventilatory) studies, "the Board consistently has held that pulmonary function studies and blood gas studies are not diagnostic of the etiology of the respiratory impairment, but are diagnostic only of the severity of the

impairment." *Tucker v. Director, OWCP*, 10 B.L.R. 1-35, 1-41 (1987). As a result, the Board concluded that "a claimant who establishes the existence of total disability pursuant to subsections (c)(1) or (c)(2) of 20 C.F.R. § 718.204 with pulmonary function studies or blood gas studies . . ., has not also established that the total disability is due to pneumoconiosis." *Id*. at 1-41 and 1-42. The claimant must also establish, by a preponderance of the evidence, that the impairment evidenced by pulmonary function studies and blood gas studies was caused by pneumoconiosis.

C. Weighing medical opinion evidence

In reviewing the medical opinion evidence regarding etiology, it is noteworthy that those opinions wherein the physicians did not diagnose the miner as suffering from pneumoconiosis may be accorded little probative value. In *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995), the court held that the administrative law judge's finding that the miner's total disability was not due to pneumoconiosis was supported by substantial evidence as "[t]he medical opinions upon which he relied most strongly were not tainted by underlying conclusions of no pneumoconiosis pursuant to the broad legal definition contained in 20 C.F.R. § 718.201." On the other hand, in *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995), the court held that, where the administrative law judge determines that a miner suffers from pneumoconiosis or is totally disabled or both, then a medical opinion wherein the miner is determined not to suffer from pneumoconiosis or is not totally disabled "can carry little weight" in assessing the etiology of the miner's total disability "unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon her disagreement with the ALJ's finding as to either or both of the predicates (pneumoconiosis and total disability) in the causal chain."

VII. Applicability of Parts 410 and 727 and § 410.490

As Part 718 contains the permanent black lung regulations for the Department of Labor, a case which is properly adjudicated and denied under Part 718 need not be considered under any other regulatory scheme.