JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

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CHAPTER 3
General Principles of Weighing Medical Evidence

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I. Generally
[IV(D)(1)]

The award of benefits in a black lung claim is predominantly dependent upon a claimant's ability to establish the elements of his or her claim by a preponderance of the medical evidence. The primary elements of entitlement in a miner's claim are whether: (1) the miner suffers from pneumoconiosis; (2) his or her pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled; and (4) the total disability is caused by pneumoconiosis. A survivor, on the other hand, must demonstrate that the miner's death was due to coal workers' pneumoconiosis; it is noteworthy that, in limited survivors' claims, lay evidence may be utilized to demonstrate one or more of these elements. For a more detailed look at survivors' claims, *see Chapters 11 - 14.*

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

If a claim falls under Part 727 or § 410.490, and the claimant has established invocation of an interim presumption by a preponderance of the evidence, then the burden shifts to the party opposing entitlement to establish rebuttal by a preponderance of the evidence. Under Part 718, a claimant must demonstrate each of the four previously mentioned elements of entitlement by a preponderance of the evidence. *Lattimer v. Peabody Coal Co.*, 8 B.L.R. 1-509 (1986) (addressing Part 727); *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986)(en banc) (addressing Part 718); *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986)(en banc) (addressing Part 718); *Gilson v. Price River Coal Co.*, 6 B.L.R. 1-96 (1983) (if party opposing entitlement fails to carry its burden of proof, claimant prevails).

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

This chapter is divided into the main types of medical evidence received in a black lung claim with citations to regulatory and/or case law to assist in weighing such evidence. Note that the limitations on admission of medical evidence under the amended regulations will be addressed in Chapter 4. 20 C.F.R. § 725.414 (Dec. 20, 2000).[1]

[1] The amended provisions at 20 C.F.R. Part 725 are applicable to claims filed after January 19, 2001. These provisions do not apply to petitions for modification (§ 725.310) or subsequent claims (§ 725.309) pending on January 19, 2001.

II. Rules of general application

A. The "true doubt" rule
[IV(D)(3)(c)]

1. Prior to applicability of December 2000 regulations

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

The United States Supreme Court, in *Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251 (1994), *aff'g. sub. nom., Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993), dispensed with the "true doubt" rule to state that it violated § 556(d) of the Administrative Procedure Act by improperly placing the burden of persuasion upon the party opposing entitlement. Consequently, under any of the regulatory schemes, a claimant must establish the requisite elements of his or her claim by a preponderance of the evidence.

As a result of the Court's holding in *Greenwich*, cases wherein this rule was applied have been remanded for reevaluation of the evidence. On remand, some administrative law judges concluded that, because the "true doubt" rule was utilized in the prior decision, then the evidence is necessarily deficient and a claimant could not prevail on remand. However, in *Cole v. East Kentucky Collieries*, 20 B.L.R. 1-50 (1996), the Board concluded otherwise and stated the following:

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

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

2. After applicability of December 2000 regulations

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

> The Department has not adopted a 'true doubt' rule in these regulations. The 'true doubt' rule was an evidentiary weighing principle under which an issue was resolved in favor of the claimant if the probative evidence for and against the claimant was in equipoise. The Department believes that evaluation of conflicting medical evidence

> requires careful consideration of a wide variety of disparate factors affecting the credibility of that evidence. The presence of these factors makes it unlikely that a fact-finder will be able to conclude that conflicting evidence is truly in equipoise. See preamble to § 718.3.

Regulations Implementing Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,924 (2000).[2]

B. The "later evidence" rule
[IV(D)(3)(b)]

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). This rule should not be mechanistically applied, however, in situations where the evidence would tend to demonstrate an "improvement" in the miner's condition. The following are cases involving application of the "later evidence rule" by the Benefits Review Board and circuit courts of appeals:

- ***Benefits Review Board***. In *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (Oct. 29, 1999) (en banc on recon.), the Board held that it was proper for the administrative law judge to give greater weight to the more recent evidence of record as the Sixth Circuit, in which jurisdiction the case arose, has held that pneumoconiosis is a "'progressive and degenerative disease.'" *See Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993). The Board also cited to *Mullins Coal Co. of Virginia v. Director, OWCP*, 483 U.S. 135 (1987), *reh'g. denied*, 484 U.S. 1047 (1988) wherein the Supreme Court stated that pneumoconiosis is a "'serious and progressive pulmonary condition.'"

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

- ***Fourth Circuit***. The Fourth Circuit Court of Appeals re-examined application of the "later evidence" rule in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 B.L.R. 2-61 (4th Cir. Feb. 28, 1992) and noted the following:

  > The 'later evidence is better' rationale began as a reasonable way to discount old nonqualifying test results or physical examinations in favor of subsequent results that reveal a deterioration of the miner's condition. In recent years the BRB has applied the concept

[2] *See also* 64 Fed. Reg. 54,969 (Oct. 8, 1999) and 62 Fed. Reg. 3,341 (Jan. 22, 1997) (regulatory history to support the failure to promulgate the "true doubt" rule was purposeful).

> wholesale, in situations like this one, where it cannot have any logical force.

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

The Fourth Circuit's subsequent decision in *Thorn v. Itmann Coal Co.*, 3 F.3d 713 (4th Cir. 1993) further provides that, while "recency" by itself is an arbitrary benchmark for weighing evidence, "[t]here may be new or additional evidence developed that discredits an earlier opinion; a comparison of medical reports and tests over a long period of time may conceivably provide a physician with a better perspective than the pioneer physician." The court concluded that "[t]he reasons for crediting such an opinion could be perfectly rational."

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 miner had 26 years of coal mine employment which ended in 1973. Of the x-rays dated from 1963 to 1991, the court noted that the studies conducted prior to 1970 were consistently interpreted as negative for the existence of pneumoconiosis. A 1970 study was interpreted both positively and negatively. Subsequent studies were consistently read as positive for the existence of simple pneumoconiosis and the most recent study, dated February 7, 1991, was read as demonstrating the presence of complicated pneumoconiosis. The court held that the administrative law judge properly determined that the x-ray studies revealed a progressively worsening condition over time and the most recent studies of record were properly accorded greater weight. In particular, the court found it persuasive that seven doctors interpreted the most recent February 7, 1991 study as revealing an opacity measuring greater than one centimeter. The court concluded that the "'later is better' rule" was not mechanically applied in this case; rather, it was properly used where the later x-rays were not inconsistent with earlier studies given the progressiveness and irreversibility of pneumoconiosis.

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

In *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4th Cir. 1998), the Fourth Circuit upheld an award of benefits under 20 C.F.R. Part 727. Initially, the

court noted that pneumoconiosis is "progressive and irreversible" such that it is proper to accord greater weight to later positive x-ray studies over earlier negative studies. It further stated that, generally, "later evidence is more likely to show the miner's current condition" where it is consistent in demonstrating a worsening of the miner's condition.

! ***Sixth Circuit.*** Citing to the Fourth Circuit's decision in *Adkins* as well as to its own decision in *Conn v. White Deer Coal Co.*, 862 F.2d 591 (6th Cir. 1988), the Sixth Circuit, in *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), likewise rejected wholesale application of the "later evidence" rule where the recent x-ray evidence was negative for the existence of pneumoconiosis, but prior evidence was positive for the disease. The court noted that, because "pneumoconiosis is a progressive and degenerative disease", the administrative law judge is required to specifically resolve the "disharmony in the x-ray evidence." On the other hand, where newer evidence demonstrates a worsening of the miner's condition consistent with the presence of pneumoconiosis, the "later evidence" rule may be applied.

In a case arising in the Sixth Circuit, *Stewart v. Wampler Brothers Coal Co.*, 22 B.L.R. 1-80 (2000) (en banc), the Board held that the Sixth Circuit's rejection of the later evidence rule in *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), where the earlier x-ray evidence was positive and later x-ray evidence was negative, was consistent with the duplicate claim standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), wherein a material change in conditions was established through the weighing evidence submitted subsequent to the denial of the prior claim. The Board upheld its requirement that, under *Ross*, the administrative law judge must find that the new evidence differs "qualitatively" from evidence submitted with the prior claim in order for a material change in conditions to be established. Said differently, it is insufficient to find a material change in conditions based upon newly submitted evidence without conducting a comparison of such evidence against evidence submitted with the previous claim to determine whether the evidence "differs qualitatively," thus demonstrating that the miner condition has worsened.

In *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163 (6th Cir. 1997), the court held that the denial of benefits by an administrative law judge was supported by substantial evidence in the record:

> Recent evidence is particularly important in black lung cases, where because of the progressive nature of pneumoconiosis, more recent evidence is often accorded more weight. The most recent administrative law judge was presented with a new, more complete picture of Mr. Crace's health. His determination (denying benefits) was supported by substantial evidence.

! ***Seventh Circuit.*** In *Old Ben Coal Co. v. Scott*, 144 F.3d 1045 (7th Cir. 1998), the Seventh Circuit held that it was proper for the administrative law judge to accord greater weight to the more recent x-ray studies submitted by the survivor with her timely petition for modification. Employer argued that the administrative law judge erred in crediting the more

recent x-ray studies of record based on the "'mythology'" that pneumoconiosis is a progressive disease. In rejecting Employer's position, the court stated the following:

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

1. Chest x-rays

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

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

2. Ventilatory studies

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

3. Blood gas studies

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

4. Medical opinions

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

C. The "hostile-to-the-Act" rule
[IV(D)(4)(d)]

The Board has held that the administrative law judge may discredit the opinion of a physician whose medical assumptions are contrary to, or in conflict with, the spirit and purposes of the Act. *Wetherill v. Green Construction Co.*, 5 B.L.R. 1-248, 1-252 (1982). Some examples of "hostility-to-the-Act" are:

- Simple pneumoconiosis cannot be totally disabling is hostile. *Searls v. Southern Ohio Coal Co.*, 11 B.L.R. 1-161 (1988); *Butela v. U.S. Steel Corp.*, 8 B.L.R. 1-48 (1985). *See also Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106 (3d Cir. 1989); *Adams v. Peabody Coal Co.*, 816 F.2d 1116 (6th Cir. 1987); *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987); *Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426 (10th Cir. 1984). However, in *Chester v. Hi-Top Coal Co.*, 22 B.L.R. 1-___ (2001), the Board held that it was error for the ALJ to discredit a physician's opinion as "hostile-to-the-Act" where the physician stated that it "would be highly unusual for simple coal workers' pneumoconiosis of major category I to cause a measurable ventilatory impairment." In so holding, the Board noted that the physician "did not foreclose all possibility that simple pneumoconiosis can be totally disabling."

- A physician stated that he would not diagnose pneumoconiosis in the absence of a positive x-ray interpretation is hostile to the Act. *Black Diamond Coal Co. v. BRB [Raines]*, 758 F.2d 1532 (11th Cir. 1985).

- In *Blakley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995), the Seventh Circuit held that the "hostile-to-the-Act" rule allows a judge to "disregard medical testimony when a physician's testimony is affected by his subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions." The court concluded, however, that "the facts and medical opinions in each specific case answer [the] question" of whether an obstructive impairment may or may not arise from coal dust exposure. Consequently, an assumption on the part of a physician that obstructive impairments cannot arise from coal dust exposure is not necessarily "hostile-to-the-Act."

  Based on the record in *Blakley*, the court concluded that the administrative law judge did not err in according greater weight to the opinion of a physician who assumed that obstructive impairments cannot arise from coal dust exposure such that the miner's impairment was necessarily smoking-induced. The court reasoned that the Act and the regulations define "pneumoconiosis" broadly and do not mandate that dust exposure from coal mine work can necessarily cause obstructive pulmonary disease or impairment. Rather, this issue must be determined on a case-by-case basis.

- The Fourth Circuit, in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995), took a contrary view from the Seventh Circuit in *Blakley* to state that:

  > Chronic obstructive lung disease . . . is encompassed within the definition of pneumoconiosis for purposes of entitlement to Black

> Lung benefits. Dr. Mutchler's assumption to the contrary undermines his conclusions because it is undisputed that (the miner) does suffer from some form of obstructive lung disease, and Drs. Mutchler and Donnerberg failed to give legitimate reasons for ruling out dust exposure in coal mine employment as a cause or aggravation of that disease.

Slip op. at 4. *But see Stiltner v. Island Creek Coal Co.*, 86 F.3d 337 (4th Cir. 1996), where another panel of the court held that a physician's opinion should not be discredited if he merely states that a miner "likely" would have exhibited a restrictive impairment in addition to chronic obstructive pulmonary disease.

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

D. Quality standards

1. Prior to applicability of December 2000 regulations

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

In the Third Circuit, however, the quality standards under Part 718 are mandatory, but the administrative law judge may consider evidence which is in "substantial compliance" with the standards. *Director, OWCP v. Siwiec*, 894 F.2d 635 (3d Cir. 1990); *Mangifest v. Director, OWCP*, 826 F.2d 1318 (3d Cir. 1987). In particular, the court stated as follows in *Mangifest*:

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

Id. at 1327.

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

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

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

However, in the Sixth and Tenth Circuits, the Part 718 quality standards do apply to Part 727. *Plutt v. Benefits Review Board*, 804 F.2d 597 (10th Cir. 1986); *Prater v. Hite Preparation Co.*, 829 F.2d 1363 (6th Cir. 1987). In the Sixth Circuit, however, where a pulmonary function study is at issue, the Part 718 standards apply only to a study which is performed after March 31, 1980. *Wiley v. Consolidated Coal Co.*, 915 F.2d 1076 (6th Cir. 1990). Additionally, in an unpublished decision, the Third Circuit held that the Part 718 quality standards apply to Part 727, *Patton v. Director, OWCP*, Case No. 88-3296 (3d Cir. 1988)(unpublished). As previously noted, the Third Circuit holds that satisfying the quality standards at Part 718 requires that the medical evidence be in "substantial compliance" with the mandatory standards. *Director, OWCP v. Siwiec*, 894 F.2d 635 (3d Cir. 1990).

2. After applicability of December 2000 regulations[3]

! *Generally*. The amended regulations require "substantial compliance" with the quality standards for all evidence developed after the effective date of January 19, 2001. Subsection (b) of § 718.101 requires "substantial compliance" with the quality standards only for evidence developed after the effective date and reads as follows:

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

20 C.F.R. § 718.101(b) (Dec. 20, 2000). In its comments, the Department noted that

[3] The amended regulations provide that the provisions at 20 C.F.R. Part 718 should be applied to all cases currently pending, as well as claims filed on or after January 19, 2001, as these provisions merely reflect current agency interpretations.

§ 718.101(b) was added "to emphasize that the Part 718 quality standards apply to all evidence developed by any party in connection with a claim filed after March 31, 1980, and to claims governed by Part 727 if the evidence was developed after that date." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79, 927 (Dec. 20, 2000).

! *Chest x-rays.* The amended regulations at 20 C.F.R. § 718.102 provide that, for chest x-ray studies, compliance with the quality standards is presumed in the absence of evidence to the contrary. However, the regulations further provide that "no chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is conducted and reported in accordance with the requirements of (§ 718.102) and Appendix A." 20 C.F.R. § 718.102(c) (Dec. 20, 2000). In its comments to the amended regulations, the Department states that "substantial compliance" with the quality standards for chest x-rays requires compliance with the ILO-UICC classification system:

> In some circumstances, the adjudicator may determine that the x-ray interpretation provides sufficient information to make a factual finding on the presence or absence of pneumoconiosis. For example, the physician may describe the film findings in terms of 'no pneumoconiosis,' rather than classifying the film as '0/-, 0/0 or 0/1.' Such a reading may be considered sufficiently detailed to be in 'substantial compliance' notwithstanding the lack of classification. Conversely, the physician's description or reporting of x-ray film findings may indicate that (s)he read the film for reasons unrelated to diagnosing the existence of pneumoconiosis, *e.g.*, lung cancer or cardiac surgery. The adjudicator may consider that evidence not in substantial compliance because it does not reliably address the presence or absence of pneumoconiosis.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,929 (Dec. 20, 2000).

! *Pulmonary function studies.* The regulations at § 718.103 have been amended to provide the following quality standards for pulmonary function studies:

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

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

20 C.F.R. § 718.103 (Dec. 20, 2000). Subsection 717.103(b) continues to require three tracings for each pulmonary function study and the variability of the MVV values may be within 10% and be valid.

! *Blood gas studies.* The provisions at § 718.105 related to blood gas studies contain a new provisions related to studies conducted during a hospitalization which results in the miner's death:

> (d) If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death.
> (e) In the case of a deceased miner, where no blood gas tests are in substantial compliance with paragraphs (a), (b), and (c), noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the only available tests demonstrate technically valid results. This provision shall not excuse compliance with the requirements in paragraph (d) for any blood gas study administered during a hospitalization which ends in the miner's death.

20 C.F.R. § 718.105 (Dec. 20, 2000). In its comments, the Department stated that "the proposed requirement was necessary because the miner's qualifying test results during a terminal hospitalization may be related to an acute non-pulmonary condition rather than a chronic pulmonary impairment. Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,935 (Dec. 20, 2000).

! *Autopsy and biopsy evidence.* The provisions § 718.106(b) have been modified to state the following:

> In the case of a miner who died prior to March 31, 1980, an autopsy

> or biopsy report shall be considered even when the report does not substantially comply with the requirements of this section. A noncomplying report concerning a miner who died prior to March 31, 1980, shall be accorded the appropriate weight in light of all relevant evidence.

20 C.F.R. § 718.106(b) (Dec. 20, 2000). This language does not present a departure from the prior provisions at subsection (b), the regulation is merely shortened.

! The amended regulations contain specific quality standards for medical opinion evidence at § 718.104 which were not present under the prior regulations:

> (a) A report of any physical examination conducted in connection with a claim shall be prepared on a medical report form supplied by the office or in a manner containing substantially the same information. Any such report shall include the following information and test results:
>
> (1) The miner's medical and employment history;
> (2) All manifestations of chronic respiratory disease;
> (3) Any pertinent findings not specifically listed on the form;
> (4) If heart disease secondary to lung disease is found, all symptoms and significant findings;
> (5) The results of a chest X-ray conducted and interpreted as required by Sec. 718.102; and
> (6) The results of a pulmonary function test conducted and reported as required by Sec. 718.103. If the miner is physically unable to perform a pulmonary function test or if the test is medically contraindicated, in the absence of evidence establishing total disability pursuant to Sec. 718.304, the report must be based on either medically acceptable clinical and laboratory diagnostic techniques, such as a blood gas study.
>
> (b) In addition to the requirements of paragraph (a), a report of physical examination may be based on any other procedures such as electrocardiogram, blood gas studies conducted and reported as required by Sec. 718.105, and other blood analyses which, in the physician's opinion, aid in his or her evaluation of the miner.
> (c) In the case of a deceased miner, where no report is in substantial compliance with paragraphs (a) and (b), a report prepared by a physician who is unavailable may nevertheless form the basis for a finding if, in the opinion of the adjudication officer, it is accompanied by sufficient indicia of reliability in light of all relevant evidence.

20 C.F.R. § 718.104 (Dec. 20, 2000). In its comments to the amended regulation requiring that medical opinions comply with certain quality standards, the Department states the

following:

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

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79932 (Dec. 20, 2000).

! *Hospitalization and treatment records.* In its comments to the amended regulations, the Department further stated that "there was no need to add an exemption from the quality standards for hospitalization and treatment records because § 718.101 is clear that it applies quality standards only to evidence developed in connection with a claim for black lung benefits." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,927 (Dec. 20, 2000).

3. Challenging quality of evidence, burdens for

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

E. Party affiliation

In the seminal case of *Richardson v. Perales*, 402 U.S. 387, 404 (1971), the Supreme Court held the fact that certain physicians' reports "were adverse to Perales' claim is not in itself bias or an indication of nonprobative character." Moreover, the Board has held that the opinions of Department of Labor physicians should not automatically be accorded greater weight absent a foundation in the record that the Department's expert is independent and the opinions offered by the parties are properly held to be biased. *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991)(en banc).

In *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946 (4th Cir. 1997), the court held the following with regard to party affiliation of experts:

> To the extent that ALJs determine that a particular expert's opinion is not, in fact, independently based on the facts of a particular claim, but is instead influenced more by the identity of his or her employer, ALJs have clear discretion to disregard such an expert's opinion as being of exceedingly low probative value.

While the court, in *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), indicated that party affiliation may be considered when weighing numerous x-ray interpretations, accomplishment of this task in a judicial manner may be impossible. The determination of a medical witness' credibility is for the fact-finder. In *Brown v. Director, OWCP*, 7 B.L.R. 1-730 (1985), the Board held the following:

> Claimant argues that Dr. Altose is biased because he consults for coal companies and the government and spends only five percent of his time seeing patients directly. The determination of a medical witness's credibility is for the trier-of-fact. (citation omitted). We cannot say, on these facts, that claimant's allegations establish that it was irrational to credit Dr. Altose's opinion.
>
> . . .
>
> Claimant also contends that, since the government paid Dr. Altose, his report should be given less weight. Dr. Altose was actually hired by claimant's employer, which had the right to have claimant examined by its chosen physician prior to the hearing. 20 C.F.R. § 725.414(a). Medical reports prepared for litigation are not unusual and, absent evidence to the contrary, should be considered as equally reliable as other reports. (citation omitted).

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

F. Cumulative, repetitious, or immaterial evidence

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

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

However, for claims filed on or after January 19, 2001, see Chapter 4 regarding the limitation on evidence under the amended regulations.

III. Chest roentgenogram evidence
[IV(D)(6)]

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

A. Physicians' qualifications

The following categories provide general principles for weighing x-ray evidence based upon qualifications of the physicians. A physician's qualifications *at the time the interpretation is rendered* should be considered. *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985). However, an administrative law judge may utilize any reasonable method of weighing such evidence. For example, in *Sexton v. Director, OWCP*, 752 F.2d 213 (6th Cir. 1985), the court held that the x-ray interpretation of an examining physician, whose credentials entailed several pages of achievements, was entitled to greater weight than that of a B-reader.

1. Dually qualified physicians

Greater weight may be accorded the x-ray interpretation of a dually-qualified (B-reader and board-certified) physician over that of a board-certified radiologist. *Herald v. Director, OWCP*, BRB No. 94-2354 BLA (Mar. 23, 1995)(unpublished). The Board has held that it is also proper to credit the interpretation of a dually qualified physician over the interpretation of a B-reader. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). *See also Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985) (weighing evidence under Part 718).

2. Board-certified and board-eligible radiologists

The interpretation of a board-certified radiologist is entitled to greater weight than that of a radiologist who is board-eligible given the expertise of a certified radiologist. 20 C.F.R. § 718.202(a)(1)(iii).

3. C-readers and B-readers

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

4. B-readers and A-readers

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

5. B-readers and board-certified radiologists

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

6. Credentials unknown

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

7. Taking official notice of credentials

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

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

See also Simpson v. Director, OWCP, 9 B.L.R. 1-99 (1986). Consequently, although it is proper to take official notice of the qualifications of physicians from the *NIOSH Approved B-Reader List*, the parties should first be given notice and an opportunity to be heard regarding such information.

B. Numerical superiority

The issue of numerical superiority most often arises with regard to the x-ray evidence. In particular, a party may submit multiple studies or re-readings of the same study to counter evidence from the opposing party. Consequently, evidential development of a claim may be largely determined by the financial resources of a party.

The Board has held that an administrative law judge is not required to defer to the numerical superiority of x-ray evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990). *See also Schetroma v. Director, OWCP*, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies); *Tokaricik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1984) (the judge properly

assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease).

This rule should not be applied without reasoning. The Sixth Circuit, disturbed by the high number of x-ray studies offered by the employer as opposed to those of the claimant, rejected application of the rule in *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), to state that "[a]dministrative factfinders simply cannot consider the quantity of evidence alone, without reference to a difference in the qualifications of the readers or without an examination of the party affiliation of the experts."

Similarly, the Seventh Circuit, in *Sahara Coal Co. v. Fitts*, 39 F.3d 781 (7th Cir. 1994), remanded a claim for further consideration and concluded that "[t]o base a decision on which side produced more witnesses, and to include in the count of witnesses one whose opinion rested on a premise that was later discredited, is not a rational method of decision-making." On the other hand, in *Zeigler Coal Co. v. Director, OWCP*, 23 F.3d 1235 (7th Cir. 1994), the court held that "while our opinions have been critical of decisions based entirely on 'head counts' of experts," there was no evidence in the record to suggest that the administrative law judge erred in crediting three negative x-ray readings over two positive readings.

The Fourth Circuit has also addressed the use of numerical superiority in weighing x-ray evidence. In *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992), the court exhibited disfavor in "counting heads" and, in *Copley v. Arch of West Virginia, Inc.*, Case No. 93-1940 (4th Cir. June 21, 1994)(unpublished), the court held:

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

Slip op. at 5.

Under the amended regulations, the parties are limited in the quantity of medical evidence which may be submitted in support of a claim. See Chapter 4 for a discussion of these limitations.

C. Format of the x-ray report

An x-ray interpretation need not be submitted on an official form, but may be contained in the body of a medical report. *Consolidation Coal Co. v. Chubb*, 741 F.2d 968 (7th Cir. 1984).[4] All

[4] For x-ray evidence developed after January 19, 2001, see the discussion of quality standards in this Chapter, *supra*.

x-ray interpretations should be weighed in determining whether the miner suffers from pneumoconiosis and an explanation regarding the crediting or discounting of certain readings should be provided. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983) (all interpretations must be weighed prior to invocation under Part 727); *Justice v. Jewell Ridge Coal Corp.*, 3 B.L.R. 1-547 (1981) (Part 727). Failure to consider all x-ray interpretations generally will result in a remand of the claim. *Isaacs v. Bailey Mining Co.*, 7 B.L.R. 1-62 (1984).

D. Interpretation which is silent regarding pneumoconiosis

Chest x-rays which are classified as less than 1/0 do not constitute affirmative evidence of pneumoconiosis. However, in some instances, a physician will not specifically indicate whether the disease is present or not. In *Marra v. Consolidation Coal Co.*, 7 B.L.R. 1-216 (1984), a case arising under Part 727, the Board held that, under some circumstances, it is proper for the administrative law judge to infer that an interpretation, which does not mention the presence of pneumoconiosis, as negative. On the other hand, in *Sacolick v. Rushton Mining Co.*, 6 B.L.R. 1-930 (1984), the Board upheld invocation under § 727.203(a)(1) where one x-ray was interpreted as positive for the disease and the remainder of the studies, which were interpreted for purposes of diagnosing cancer, included no diagnosis of pneumoconiosis. *See also Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 BLA (June 19, 1997)(en banc)(unpublished) (Board reiterated that "when an x-ray is not classified, and makes no mention of pneumoconiosis, the administrative law judge has discretion to infer whether or not the x-ray is negative for pneumoconiosis").

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

E. Film quality

If the quality of the film is not noted on the x-ray report, then it is assumed to be of acceptable quality if the study is read. *Auxier v. Director, OWCP*, 8 B.L.R. 1-109 (1985); *Lambert v. Itmann Coal Co.*, 6 B.L.R. 1-256 (1983). However, if the film quality is "poor" or "unreadable," then the study may be given little weight. *Gober v. Reading Anthracite Co.*, 12 B.L.R. 1-67 (1988).

F. Physician's comment on x-ray report not relevant to finding pneumoconiosis

In *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (Oct. 29, 1999) (en banc on recon.), the Board held that it was proper for the administrative law judge to consider a physician's x-ray interpretation "as positive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1) without considering the doctor's comment." In particular, the interpreting physician's comment that the Category 1 pneumoconiosis found on the chest x-ray was not coal workers' pneumoconiosis did not affect his diagnosis of the disease under § 718.202(a)(1), "but merely addresses the source of the diagnosed pneumoconiosis."

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

IV. Pulmonary function (ventilatory) studies
[IV(D)(8)]

A. Resolving height discrepancies

The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995) (the fact-finder erred in failing to resolve height discrepancies in the record particularly where the discrepancies affected whether the tests were qualifying). It is prudent to review the file prior to the hearing to ascertain whether total disability is at issue and, if so, whether the record contains discrepancies in the recorded height of the miner. If so, testimony may be elicited at the hearing or the parties may be required to stipulate to the miner's height for purposes of weighing the ventilatory study evidence.

B. Qualifying test results

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

All ventilatory studies of record, both pre-bronchodilator and post-bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). In addition, the results of a study cannot be "rounded off" to render it qualifying. *Bolyard v. Peabody Coal Co.*, 6 B.L.R. 1-767 (1984); *Sexton v. Peabody Coal Co.*, 7 B.L.R. 1-411, 1-412 n. 2 (1984).

C. Determination of reliability or conformity

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

In assessing the reliability of a study, an administrative law judge may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). However, the administrative law judge should not invalidate a study based upon the opinion of a reviewing technician. *Bolyard v. Peabody Coal Co.*, 6 B.L.R. 1-767 (1984). On the other hand, more weight may be given to the observations of technicians who administered the studies than to physicians who reviewed the tracings. *Revnack v. Director, OWCP*, 7 B.L.R. 1-771 (1985). Indeed, if the administrative law judge credits an consultant's opinion over one who actually observed the test, a rationale must be provided. *Brinkley v. Peabody Coal Co.*, 14 B.L.R. 1-147 (1990). Further, a consulting physician who merely places a checkmark in a box indicating "poor or unacceptable technique," without explanation, has not provided sufficient evidence to support his or her rejection of the study. *Gabino v. Director, OWCP*, 6 B.L.R. 1-134 (1983). It is also noted that, in *Chester v. Hi-Top Coal Co.*, 22 B.L.R. 1-___ (2001), the Board held that the ALJ properly

accorded no weight to a physician's "failure to fully identify the evidence he relied upon in reaching his conclusions regarding the validity of (a) pulmonary function study."

For pulmonary function studies conducted on or after January 19, 2001, see the discussion regarding quality standards in this Chapter, *supra*.

1. Cooperation and comprehension

Little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981). If "fair" effort is noted on the study, however, the study may be conforming. *Laird v. Freeman United Coal Co.*, 6 B.L.R. 1-883 (1984); *Verdi v. Price River Coal Co.*, 6 B.L.R. 1-1067 (1984); *Whitaker v. Director, OWCP*, 6 B.L.R. 1-983 (1984). However, the Board concluded that a study was nonconforming where "fair" effort was noted and the administering physician also noted that the miner was "coughing" during the test. *Clay v. Director, OWCP*, 7 B.L.R. 1-82 (1984).

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

> [T]he lack of these statements does not lessen the reliability of the study. Despite any deficiency in cooperation and comprehension, the demonstrated ventilatory capacity was still above the table values. Had the claimant understood or cooperated more fully, the test results could only have been higher.
>
> . . .
>
> It should be noted, however, that the only non-conforming pulmonary function tests that may be considered on invocation are those with non-qualifying results and that are non-conforming only due to a lack of statements of cooperation and/or comprehension.

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

2. Requirement of three tracings

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

3. Testing conducted during hospitalization

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

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

Id. at 1-1014. It is noted that, in the comments to the amended regulations, the Department stated that "there was no need to add an exemption from the quality standards for hospitalization and treatment records because § 718.101 is clear that it applies quality standards only to evidence developed in connection with a claim for black lung benefits." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,927 (Dec. 20, 2000).

V. Blood gas studies

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

A. Qualifying test results

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

B. Determination of reliability or conformity

The following list contains a few of the principles which may be utilized in assigning probative value to the blood gas studies of record:[5]

1. Validation by medical opinion

In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of

[5] For blood gas studies conducted on or after January 19, 2001, see the discussion regarding quality standards in this Chapter, *supra*.

the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated). Similarly, in *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1045 (10th Cir. 1990) and *Twin Pines Coal Co. v. U.S. DOL*, 854 F.2d 1212 (10th Cir. 1988), the court held that the administrative law judge must consider a physician's report which addresses the reliability and probative value of testing wherein he or she attributes qualifying results to non-respiratory factors such as age, altitude, or obesity.

In *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court reviewed the blood gas study of evidence and found that "[o]ut of a total of nine tests, the five initial tests produced qualifying results, and the four later tests did not." The court concluded that it was error for the administrative law judge to credit an earlier qualifying study solely on the grounds that it was "validated" by a Department of Labor physician. Specifically, the court stated that the physician "merely checked a box verifying that the test was technically acceptable" and "provided no reasons for his opinion" such that "his validation lent little additional persuasive authority to (the earlier study)." In addition, the court concluded that the administrative law judge "failed to consider . . . testimony that obesity could affect the blood gas studies, causing the studies to be more likely to qualify; nor did the ALJ address the potential effect of (Claimant's) heart disease and intervening coronary artery surgery on the tests."

2. Test conducted during hospitalization

a. Prior to applicability of December 2000 regulations

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

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

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

b. After applicability of December 2000 regulations

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

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

20 C.F.R. § 718.105(d) (Dec. 20, 2000).

VI. Medical reports
[IV(D)(4)]

There are several basic principles of weighing evidence which are relevant to medical reports and opinions.[6]

A. Well-documented, well-reasoned opinion defined

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

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

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

An unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). *See also Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986) (a report which is internally inconsistent and inadequately reasoned may be entitled to little probative value). However, it is noteworthy that, in *Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994), the Eleventh Circuit held that an administrative law judge "need not . . . find that a medical opinion is either wholly reliable or wholly unreliable"; rather, the opinion may be divided into the relevant issues of entitlement to determine whether it is reasoned and documented with regard to any particular issue. However, in applying this holding to cases arising under Part

[6] For medical reports generated on or after January 19, 2001, the amended regulations provide that such reports must be in "substantial compliance" with certain quality standards. See the discussion of quality standards in this Chapter, *supra*.

727, the court held 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."

An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP,* 768 F.2d 982 (8th Cir. 1985)*; Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

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

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

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

C. Physicians' qualifications

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

1. Treating or examining physician

a. Prior to applicability of December 2000 regulations

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

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

though not necessarily dispositive, weight."

An administrative law judge "is not required to accord greater weight to the opinion of a physician based solely on his status as claimant's treating physician. Rather, this is one factor which may be taken into consideration . . .." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). Other factors to be considered include whether the report is well-reasoned and well-documented. *McClendon v. Drummond Coal Co.*, 12 B.L.R. 2-108 (11th Cir. 1988) (a well-reasoned, well-documented treating physician's report may be given greater weight); *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992) (a treating physician's report which is not well-reasoned or well-documented should not be given greater weight); *Amax Coal Co. v. Beasley*, 957 F.2d 324 (7th Cir. 1992). Similarly, in *Lango v. Director, OWCP*, 104 F.3d 573 (3d Cir. 1997), the court held that a treating physician's opinion may be accorded greater weight than the opinions of other physicians of record but "the ALJ may permissibly require the treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to the miner's death."

Moreover, the length of time in which the physician has treated the miner is relevant to the weight given the physician's opinion. *Revnack v. Director, OWCP*, 7 B.L.R. 1-771 (1985). It is logical that a physician who recently began "treating" the miner will not necessarily have a more thorough understanding of the miner's condition than other examining physicians of record. *Gomola v. Manor Mining & Contracting Corp.*, 2 B.L.R. 1-130, 1-135 (1979) (the length of time a particular physician treats a claimant is a valid factor to be considered in the weighing process).

It is noted, however, that the Seventh Circuit has held that a treating physician may not be entitled to greater weight because of his or her status. In *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001)[7], the circuit court found that it was "irrational" to accord greater weight to the opinion of a treating physician, who may not be a specialist. The court stated:

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

b. After applicability of December 2000 regulations

At 20 C.F.R. § 718.104(d) (Dec. 20, 2000), the amended regulations require that a treating physician's opinion be considered and state the following:

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

[7] It is noted that the Seventh Circuit does not mention the amended regulations in its decision.

the opinion of the miner's treating physician:

> (1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;
> (2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;
> (3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition;
> (4) Extent of treatment. The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition;
> (5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

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

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

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,334 (Dec. 20, 2000).

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

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

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,334 (Dec. 20, 2000). District Judge Emmet G. Sullivan likewise held that the treating physician regulation does not apply retroactively in *Nat'l. Mining Ass'n., et al v. Chao*, Civil Action No. 00-3086 (D. D.C. 2001).

2. Non-examining or consultative physician

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

A non-examining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984); *Easthom v. Consolidiation Coal Co.*, 7 B.L.R. 1-582 (1984). Indeed, in *Collins v. J & L Steel (LTV Steel)*, 21 B.L.R. 1-182 (1999), the Board cited to the Fourth Circuit's decision in *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438 (4th Cir. 1997) and held that it was error for the administrative law judge to discredit a physician's opinion solely because he was a "non-examining physician." Also, in *Chester v. Hi-Top Coal Co.*, 22 B.L.R. 1-___ (2001), the Board cited to *Millburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998) to hold that an administrative law judge may not discredit a medical opinion solely because the physician did not examine the claimant. *But see Sewell Coal Co. v. O'Dell*, Case No. 00-2253 (4th Cir. July 26, 2001) (unpub.) (citing to *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440 (4th Cir. 1997) to hold that opinions of examining physicians, although not necessarily dispositive, deserve special consideration").

3. Criminal conviction of the physician

In *Boyd v. Clinchfield Coal Co.*, 46 F.3d 1122, 1995 WL 10226 (4th Cir. 1995) (table), the Fourth Circuit held that it was proper for the administrative law judge to take judicial notice of Dr. Vinod Modi's criminal conviction. Moreover, citing to *Adams v. Canada Coal Co.*, Case No. 91-3706 (6th Cir. July 13, 1992)(unpublished) (the administrative law judge "was obviously justified" in not crediting the testimony of Dr. Modi because of his conviction), the court upheld the administrative law judge's decision to accord no weight to Dr. Modi's medical opinion in light of his conviction for tax evasion.

D. Equivocal or vague conclusions

An opinion may be given little weight if it is equivocal or vague. *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, was equivocal and insufficient to "rule out" causal nexus as required by 20 C.F.R. § 727.203(b)(3)); *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995) (treating physician's opinion entitled to little weight where he concluded that the miner "probably had black lung disease); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988) (an equivocal opinion regarding etiology may be given less weight); *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236 (1984) (equivocal regarding disability).

In addition, an opinion of the inadvisability of returning to coal mine employment because of pneumoconiosis is not the equivalent of a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988); *Bentley v. Director, OWCP*, 7 B.L.R. 1-612 (1984); *Brusetto v. Kaiser Steel Corp.*, 7 B.L.R. 1-422 (1984).

E. Silent opinion

A physician's report, which is silent as to a particular issue, is not probative of that issue. However, the report should not be discredited as a whole on this basis as he or she may provide documented and reasoned opinions relevant to the resolution of other entitlement issues in the claim. For example, 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 held that it was proper for the administrative law judge to accord less weight to the opinions of physicians who did not consider pneumoconiosis as a possible cause of the miner's total disability where the administrative law judge found that pneumoconiosis was established on the record.

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.

In *Osborne v. Clinchfield Coal Co.*, BRB No. 96-1523 BLA (Apr. 30, 1998) (*en banc on recon.*)(unpub.), the Board held that it was proper for the administrative law judge to accord less weight to physicians' opinions which found that pneumoconiosis did not contribute to the miner's disability on grounds that the physicians did not diagnose pneumoconiosis.

F. Internally inconsistent reports

A report may be given little weight where it is internally inconsistent and inadequately reasoned. *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986). *See also Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.) (the Board concluded that it was proper for the administrative law judge to give less weight to the report of Dr. Fino because his opinion was based upon a CT-scan which was not in the record and he did not have the benefit of reviewing the two most recent qualifying pulmonary function studies).

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

G. Better supported by objective medical data

Although a report cannot be discredited simply because a physician did not consider all medical data of record, it is proper to accord greater weight to an opinion which is better supported by the objective medical data of record, *i.e.*, x-ray, blood gas, and ventilatory studies. *Minnich v. Pagnotti Enterprises, Inc.*, 9 B.L.R. 1-89, 1-90 n. 1 (1986); *Wetzel v. Director, OWCP*, 8 B.L.R. 1-139 (1985). In *Church v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-8 (1996), the Board held that it was proper to accord greater weight to a medical report "on the grounds that the doctor specifically identified the studies upon which he relied and the conclusion he reached was consistent with the underlying objective evidence of record." It is noted that the Board rejected Employer's argument that a administrative law judge is compelled to discredit a physician's opinion that the miner suffered from pneumoconiosis where the physician based his findings, in part, upon x-ray evidence which the administrative law judge ultimately concluded did not support a finding of the disease. In so holding, the Board noted that the physician also based his finding upon observations gathered during the time he physically examined Claimant.

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 held that the administrative law judge erred in crediting a

physician's opinion finding pneumoconiosis where that opinion was based solely upon a positive interpretation of an x-ray study when the administrative law judge found the x-ray evidence of record did not establish pneumoconiosis. On the other hand, the circuit court held that the administrative law judge properly credited another physician's report which was based upon the miner's medical history, a physical examination, and a pulmonary function test. The court concluded that an administrative law judge "may choose to discredit an opinion that lacks a thorough explanation, but is not legally compelled to do so." In particular, the court held that a physician's opinion was reasoned and sufficiently documented even though the physician did not explain his conclusion that Claimant's disease was partially caused by exposure to coal dust.

In *Church v. Eastern Assoc. Coal Corp.*, 21 B.L.R. 1-51 (1997), *rev'g in part and aff'g in part on recon.*, 20 B.L.R. 1-8 (1996), the Board reaffirmed its earlier holding that the administrative law judge properly analyzed the medical evidence under § 718.202(a)(4) in crediting physicians' opinions which were supported by underlying objective studies. Moreover, the Board reiterated that "an administrative law judge may not discredit an opinion solely on the ground that it is based, in part, upon an x-ray reading which is at odds with the administrative law judge's finding with respect to the x-ray evidence of record."

H. Reliance upon nonqualifying or nonconforming testing

It is error to discredit a physician's report solely because of his or her reliance upon nonqualifying testing where the physician also relied upon a physical examination, work and medical histories, and symptomatology of the miner. *Baize v. Director, OWCP*, 6 B.L.R. 1-730 (1984); *Wike v. Bethlehem Mines Corp.*, 7 B.L.R. 1-593 (1984); *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Sabett v. Director, OWCP*, 7 B.L.R. 1-299 (1984). *See also Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000) (it "is clearly an inappropriate reason to reject a physician's opinion" which is based upon non-qualifying pulmonary function study values "as the regulations explicitly provide (that) a doctor can make a reasoned medical judgment that a miner is totally disabled even 'where pulmonary function tests and/or blood-gas studies are medically contraindicated.' 20 C.F.R. § 718.204(c)(4)"); *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994) (it was improper for the administrative law judge to discredit a physician's finding of total disability where the miner's ventilatory and blood gas studies produced non-qualifying results but the physician relied upon the miner's medical history and "significant physical symptoms and limitations").

On the other hand, in *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th Cir. 1997), the Sixth Circuit concluded that the administrative law judge properly weighed medical evidence in finding that the miner was totally disabled and noted the following:

> Although DelVecchio and Garson relied on pulmonary tests exhibiting levels of impairment below that required to establish total disability under section 718.204(c)(1), these tests did demonstrate some impairment and can form a basis, along with other evidence, for a reasoned medical decision establishing total disability under Section 718.204(c)(1).

The Board, in *Arnoni v. Director, OWCP*, 6 B.L.R. 1-423 (1983), held that an administrative law judge properly discredited a physician's opinion which was based upon an x-ray study later

interpreted as negative for existence of the disease by a B-reader and a ventilatory study which was later found nonconforming. However, in *Winters v. Director, OWCP*, 6 B.L.R. 1-877 (1984), the Board held that it was improper to discredit a physician's opinion merely because the underlying x-ray and pulmonary function studies are determined to be outweighed by other studies of record. *See also Fitch v. Director, OWCP*, 9 B.L.R. 1-45, 1-47 n. 2 (1986) (physician's report may not be discredited as undocumented and unreasoned only on grounds that it was based upon an x-ray interpretation which was outweighed by the other interpretations of record). In *Church v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-8 (1996), the Board rejected Employer's argument that an administrative law judge is compelled to discredit a physician's opinion that the miner suffered from pneumoconiosis where the physician based his findings, in part, upon x-ray evidence which the administrative law judge ultimately concluded did not support a finding of the disease. In so holding, the Board noted that the physician also based his finding upon observations gathered during the time he physically examined Claimant. It is noteworthy that, under Part 727, the Sixth Circuit holds that, in assessing the probative value of a physician's opinion, the administrative law judge should consider any contrary test results or diagnoses in the record in reaching a decision regarding whether the presumption applies. *Rowe v. Director, OWCP*, 710 F.2d 251 (6th Cir. 1983).

I. Extensive medical data versus limited data

In *Church v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-8 (1996), the Board held that it was proper to accord greater weight to a medical report "on the grounds that the doctor specifically identified the studies upon which he relied and the conclusion he reached was consistent with the underlying objective evidence of record." Moreover, the administrative law judge correctly assigned greater weight to a treating physician's opinion whose diagnosis was based upon "'extensive medical information gathered over a period of many years.'" As a result, the Board rejected Employer's argument that an administrative law judge is compelled to discredit a physician's opinion that the miner suffered from pneumoconiosis where the physician based his findings, in part, upon x-ray evidence which the administrative law judge ultimately concluded did not support a finding of the disease. In so holding, the Board noted that the physician also based his finding upon observations gathered during the time he physically examined Claimant.

Greater weight may be accorded that opinion which is supported by more extensive documentation over the opinion which is supported by limited medical data. *Sabett v. Director, OWCP*, 7 B.L.R. 1-229 (1984). An opinion may be given less weight where the physician did not have a complete picture of the miner's condition. *Stark v. Director, OWCP*, 9 B.L.R. 1-36 (1986).

J. Physical limitations contained in medical report

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 an 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).

K. Death certificates

A death certificate, in and of itself, is an unreliable report of the miner's condition and it is error for an administrative law judge to accept conclusions contained in such a certificate where the record provides no indication that the individual signing the death certificate possessed any relevant qualifications or personal knowledge of the miner from which to assess the cause of death. *Smith v. Camco Mining, Inc.*, 13 B.L.R. 1-17 (1989); *Addison v. Director, OWCP*, 11 B.L.R. 1-68 (1988).

Similarly, in *Lango v. Director, OWCP*, 104 F.3d 573 (3d Cir. 1997), the court adopted the Eighth Circuit's holding in *Risher v. Office of Workers' Compensation Programs*, 940 F.2d 327, 331 (8th Cir. 1991), to state that "the mere fact that a death certificate refers to pneumoconiosis cannot be viewed as a reasoned medical finding, particularly if no autopsy has been performed." *See also Bill Branch Coal Co. v. Sparks*, 213 F.3d 186 (4th Cir. 2000) (a death certificate stating that pneumoconiosis contributed to the miner's death, without some further explanation, is insufficient).

However, the Board has held that a physician's opinion expressed on a death certificate in addition to his testimony is sufficient to establish the cause of the miner's death. *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113 (1988).

L. Determinations by other agencies

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

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

M. Medical literature and studies

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

VII. Autopsy reports

[IV(D)(7)]

Autopsy evidence is the most reliable evidence of the existence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985). *See also Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001).

A. Principles of weighing autopsy evidence

1. Performing the autopsy versus review of the slides

Greater weight may be accorded to a physician who performs the autopsy over one who reviews the autopsy slides. *Similia v. Bethlehem Mines Corp.*, 7 B.L.R.1-535 (1984); *Cantrell v. U.S. Steel Corp.*, 6 B.L.R. 1-1003 (1984). *See also Peabody Coal Co. v. Shonk*, 906 F.2d 264, 269 (7th

Cir. 1990)*; U.S. Steel Corp. v. Oravetz*, 686 F.2d 197 (3d Cir. 1982); *Gruller v. Bethenergy Mines, Inc.*, 16 B.L.R. 1-3 (1991) (a case involving complicated pneumoconiosis). Indeed, the Board has held that autopsy reports must be accorded significant probative value regarding the existence and degree of pneumoconiosis because the pathologist who performs the autopsy sees the entire respiratory system as well as other body systems. *Fetterman v. Director, OWCP*, 7 B.L.R. 1-688, 1-691 (1985). In *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871 (10th Cir. 1996), the court held that it was proper for the administrative law judge to accord greater weight to the opinion of an autopsy prosector over the opinions of reviewing pathologists.

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

It is also noted that, if the opinion of one who reviews the autopsy slides conflicts with that of the prosector, then the report must contain evidence indicating whether the tissue samples were representative of the total lung condition and whether they were properly prepared and stored, which has an impact upon their value as valid samples. *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 B.L.R. 1-103, 1-109 (1979).

The Seventh Circuit has also held that it is error to accord more weight to a prosector's opinion over the opinion of a reviewing pathologist. In *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001)[8], the ALJ accorded greater weight to the opinion of an autopsy prosector, who found anthracotic pigment with reactive fibrosis and diagnosed the presence of pneumoconiosis, over the contrary opinions of reviewing pathologists. While the Seventh Circuit held that autopsy evidence was the most probative evidence of the presence of pneumoconiosis, it disagreed with the ALJ's weighing of such evidence and stated the following:

> A scientific dispute must be resolved on scientific grounds, rather than by declaring whoever examines the cadaver dictates the outcome. (citation omitted). If there were a medical reason to believe that visual scrutiny of gross attributes is more reliable than microscopic examination of tissue samples as a way to diagnose pneumoconiosis, then relying on the conclusions of the prosector would be sensible. But neither the ALJ nor the BRB made such a finding. The mine operator contends--and on this record we have no reason to doubt--that examining tissue samples under a microscope and testing them for silica, is the best way to diagnose black lung disease. What we have, therefore, is a conflict among physicians based on their analysis of tissue samples. Bockelman's visual examination of the whole lung played little or no role.

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[8] It is noted that the Seventh Circuit does not mention the amended regulations in its decision.

The court stated that "[b]ad science is bad science, even if offered by the first expert to express a view" and that it is incumbent upon the ALJ to use his or her expertise to evaluate technical evidence. In this vein the court noted that "[a]n agency must act like an expert if it expects the judiciary to treat it as one."

2. Opinion of autopsy prosector versus review of findings

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

B. Quality standards

An autopsy report should be found in compliance with the quality standards unless there is good cause to believe that the autopsy report is not accurate or that the condition of the miner is being fraudulently represented. *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 B.L.R. 1-103, 1-108 (1979). *See* 20 C.F.R. § 718.106 (2000).