PART II

PROCEDURAL ISSUES

A. REQUIREMENT TO FILE STATE WORKERS' COMPENSATION CLAIM; OFFSET

DIGESTS

A miner who had been awarded state benefits for pneumoconiosis subsequently died due to causes unrelated to his pneumoconiosis. Pursuant to §23-4-10(e) of the West Virginia Code, the survivor of the miner was entitled to a lump sum payment since the miner was in payment status at the time of his death and the cause of his death was unrelated to pneumoconiosis. The court held that an offset is mandated in this case since claimant would not have received the lump sum award had her spouse not been disabled due to pneumoconiosis. ***Carbon Fuel Co. v. Director, OWCP* [*Kyle*]**, 20 F.3d 120, 18 BLR 2-228 (4th Cir. 1994).

Section 725.535(b) Validity

Section 725.535(b)(offset regulations) is consistent with Section 422(g) of the Act, 30 U.S.C. §932(g) and is reasonably related to the purpose of the Act. ***Harmon Mining Corp. v. Director, OWCP and Stewart***, 826 F.2d 1388 (4th Cir. 1987), *affirming* ***Stewart v. Harmon Mining Corp.***, 5 BLR 1-854 (1983).

Offset

The Third Circuit agreed with the Director in these consolidated cases regarding offset, where the miners' state awards had been made pursuant to Section 301(i) of the Pennsylvania Occupational Disease Act, that Section 422(g) of the Act, 30 U.S.C. §932(g), was ambiguous. The Court held, however, that the Director's interpretation of 20 C.F.R. §725.533(a)(1) was inconsistent with the regulation. Consequently, the Court affirmed the Board's determination that employers paying federal black lung benefits could offset their payments by the amount of state benefits the miner received pursuant to Section 301(i) of the Pennsylvania Occupational Disease Act. ***Director, OWCP v. Eastern Asso. Coal Corp.* [*O'Brockta*]**, 54 F.3d 141, 19 BLR 2-164 (3d Cir. 1995).

The Fourth Circuit held that the plain language of the West Virginia Code and case law required consideration of the cumulative effect of an employee's injuries and that therefore, the administrative law judge should have aggregated the three awards for permanent partial disability (PPD) in determining what portion of claimant's state

benefits were attributable to pneumoconiosis to determine the offset of any federal award as required by the Act. 30 U.S.C. §932(g). Here, claimant received successive PPD awards for 15%, 15% and 20% for pneumoconiosis over a fourteen year period. The final award was in the form of a second injury life award (SILA) for further injury and the combination of previous injuries. The Court rejected the Board's affirmance of the administrative law judge's reliance on ***Bennett v. Director, OWCP****,* 18 BLR 1-48 (1994), holding it was error to consider only 20% offset in the SILA indicative of the state award attributable to pneumoconiosis. The Court, rather, relied on the West Virginia State Code and the West Virginia Supreme Court of Appeals in concluding that "all prior injuries are to be cumulated toward consideration of the claim for total disability." W.Va. Code at 23-3-1(d)(1); *Gillispie v. State Workmen's Compensation Comm'r*, 205 S.E.2d 164, 168 (W.Va. 1974). Therefore, the Court reversed the Board's affirmance of the administrative law judge's offset of only 20% of claimant's state benefits and aggregated the state PPD and SILA awards to total a 50% offset of federal benefits for state compensation awarded based on claimant's pneumoconiosis. ***Director, OWCP v. Hamm***, 113 F.3d 23, 21 BLR 2-131 (4th Cir. 1997).

The Fourth Circuit rules that benefits to former federal mine employee under the Federal Employees Compensation Act (FECA) for total disability due to pneumoconiosis would offset amount payable claimant by private employer for black lung benefits. ***Consolidation Coal Company v. Borda***, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

PART II

PROCEDURAL ISSUES

B. CONSEQUENCES OF FILING A PART B CLAIM

DIGESTS

Converting Part B Claims to Part C

Part B claims forwarded to DOL by SSA for payment or evaluation are converted to Part C claims for the purposes of benefit liability. ***Helen Mining Co. v. Director, OWCP,*** 924 F.2d 1269 (3d Cir. 1991); *see also* ***Saris v. Director, OWCP,*** 11 BLR 1-65 (1988).

Prior Findings of Entitlement

A prior determination of eligibility under Part B eliminates the requirement of independently establishing eligibility pursuant to Part C. ***Director, OWCP v. Saulsberry,*** 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989).

A finding by the Illinois Industrial Commission that claimant was partially disabled due to pneumoconiosis is not a bar under the theory of collateral estoppel to the administrative law judge's finding [under the Act] that claimant is totally disabled due to pneumoconiosis. ***Freeman United Coal Co. v. OWCP* [*Forsythe*]**, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.701(e), providing, in a medical benefits case, a presumption that a treated pulmonary disorder is caused by pneumoconiosis, shifts only the burden of production, not the burden of proof, to operators to produce evidence that the treated disease was unrelated to pneumoconiosis. Because the ultimate burden of proof remains on claimants at all times, the revised regulation is valid, not arbitrary or capricious, and not inconsistent with ***Director, OWCP v. Greenwich Collieries***, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom*. ***Greenwich Collieries v. Director, OWCP***, 990 F.2d 730, 17 BLR 2-64 (3d Cir.1993). ***Nat'l Mining Ass'n v. Department of Labor* [*NMA*]**, 292 F.3d 849, 872-873, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001). However, Section 725.701 is impermissibly retroactive as applied to pending claims. ***NMA***, 292 F.3d at 866-867.

The Sixth Circuit concluded that the administrative law judge properly found that claimant was entitled to the presumption set forth in ***Doris Coal Co. v. Director, OWCP***

[*Stiltner*], 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991). The Sixth Circuit rejected employer's argument that its settlement agreement (through which employer agreed to accept the initial determination that the miner met the standards of disability) did not give rise to the ***Doris Coal*** presumption because the agreement did not amount to a stipulation that the miner had "legal" pneumoconiosis. The Court held that the medical evidence as well as the settlement agreement reasonably supported the administrative law judge's conclusion that the miner was totally disabled under the Act and that chronic bronchitis figured in that determination. Because the evidence qualified as a predicate for the ***Doris Coal*** presumption, which foreclosed relitigation of the underlying disability determination, the Court held that employer was limited to rebutting the presumption that attached to the miner's medical expenses related to chronic bronchitis by showing that the expenses were actually incurred to treat a separate pulmonary disorder, were unnecessary, or were not for a pulmonary disorder at all. ***Lewis Coal Co. v. Director, OWCP* [*McCoy*]**, 373 F.3d 570, 23 BLR 2-184 (4th Cir. 2004).

The Sixth Circuit rejected employer's contention that the ***Doris Coal*** presumption constitutes an abuse of the doctrine of offensive collateral estoppel. Employer argued that it had no legal interest in the miner's Part B proceeding at the time it was decided because any award would be paid by the federal government. Employer, therefore, contended that it should not be precluded from challenging the merits of that proceeding when its interests would be adversely affected by it. The Sixth Circuit, however, concluded that employer's characterization of the ***Doris Coal*** presumption as "violative of the strictures on non-mutual offensive collateral estoppel" was "a thinly veiled attempt to circumvent the consequences of the settlement to which it [had] agreed." The Court noted that employer understood at the time that it entered into the settlement agreement with the miner that it might form "the basis for the issuance of an Award of Medical Benefits and Order to Pay Medical Benefits in [the] claim." Citing 20 C.F.R. §§410.473 and 410.490(d) (2003), the Court further noted that the regulations would have permitted employer to challenge the miner's Part B award before it began denying the miner's requests for Part C benefits. Finally, the Sixth Circuit held that, because the ***Doris Coal*** presumption is rebuttable (with the burden of proof remaining at all times with the miner), the fairness concerns implicit in the limitations on offensive collateral estoppel simply do not arise. ***Lewis Coal Co. v. Director, OWCP* [*McCoy*]**, 373 F.3d 570, 23 BLR 2-184 (4th Cir. 2004).

<u>Medical Benefits Only</u>

The Sixth Circuit accepted jurisdiction of this medical benefits only case, originally appealed to the Fourth Circuit, as it was discovered that the miner's work had been in Kentucky even though he now resided in Virginia and received his medical treatment there. In reversing and remanding this case, the Sixth Circuit held that since the administrative law judge had applied the law of the Fourth Circuit in ***Doris Coal Co. v. Director, OWCP* [*Stiltner*]**,938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), *aff'g in part and rev'g in part* ***Stiltner v. Doris Coal Co.***, 14 BLR 1-116 (1990)(*en banc*)(Brown, J.,

dissenting; McGranery, J., concurring and dissenting), remand was necessary as his review of the evidence was guided by the burden shifting created in that decision. The Sixth Circuit held that even though the "Doris Coal Presumption," a judicially created presumption which shifts the burden of production from claimant to employer in relating medical expenses to pneumoconiosis, is valid under ***Director, OWCP v. Greenwich Collieries*** **[*Ondecko*]**, 512 U.S. 267, 18 BLR 2A-1 (1994), and does not violate the APA burden of proof provisions, it does destroy the desired uniformity in the Act and is inconsistent with the law of the Sixth Circuit. The Court additionally noted that the two-step process set up by Congress to establish entitlement and relatedness of medical bills insures uniformity in applying the Act and discourages medical fraud in billing. Therefore, the second stage of dispute involves claimant meeting his burden of proof to establish that his medical bills are related to his pneumoconiosis by a preponderance of the evidence. ***Glen Coal Co. v. Seals***, 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998) Boggs, J., concurring; Moore, J., concurring and dissenting), *reversing and remanding,* ***Seals v. Glen Coal Co.***, 19 BLR 1-80 (1995)(*en banc*)(Brown, J., concurring).

In claims for medical benefits only, employer may rebut the presumption of *Doris Coal* that the medical expenses claimed were related to the miner's pneumoconiosis by showing that the expenses exceed that necessary to treat a covered pulmonary disorder, or that the treatment was not for a pulmonary disorder, or by adducing credible evidence that the treatment rendered was for a pulmonary disorder apart from those previously associated with the miner's disability. The *Doris Coal* presumption may not be applied to shift the burden of proof from claimant to employer. ***General Trucking Corp. v. Salyers***, 175 F.3d 322, 21 BLR 2-565 (4th Cir. 1999).

The Fourth Circuit concludes that the application of the "Doris Coal Presumption," which was articulated by the court of appeals in ***Doris Coal Co. v. Director, OWCP*** **[*Stiltner*]**,938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), *aff'g in part and rev'g in part* ***Stiltner v. Doris Coal Co.***, 14 BLR 1-116 (1990)(*en banc*)(Brown, J., dissenting; McGranery, J., concurring and dissenting) in Medical Benefits Only (MBO) claims, does not violate Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §557(d) and is not contrary to the Supreme Court's decision in ***Director, OWCP v. Greenwich Collieries*** **[*Ondecko*]**, 512 U.S. 267, 18 BLR 2A-1 (1994), provided it is not applied in such a manner as to shift the burden of proving the miner's claim to employer. ***Gulf & Western Industries v. Ling***, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999). The court of appeals reiterates that treatment for a miner's pulmonary condition raises the presumption that the condition for which the miner seeks medical benefits was related to, or at least aggravated by, the miner's legal pneumoconiosis. Once the presumption is triggered, the party opposing the claim need only *produce* credible evidence that the treatment rendered is for a pulmonary disorder apart from those previously associated with the miner's disability for which the miner was receiving benefits under Part B of the Act, and that the burden shifts to the MBO claimant to *prove* by a preponderance of the evidence that his medical bills are related to his pneumoconiosis. ***Gulf & Western Industries v. Ling***, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999).

PART II

PROCEDURAL ISSUES

C. PAYMENT OF BENEFITS

1. GENERALLY; ASSESSMENT OF INTEREST

DIGESTS

The court held that prejudgment interest is due thirty days from the date of initial determination of entitlement. *The Youghiogheny and Ohio Coal Co. v. Warren,* 841 F.2d 134, 11 BLR 2-73 (6th Cir. 1988); *see also* ***Stapleton v. Westmoreland Coal Co.,*** 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986), *rev'd on other grounds sub nom.* ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP,*** *supra;* ***Peabody Coal Co. v. Blankenship,*** 773 F.2d 173 (7th Cir. 1985); ***Bethlehem Mines Corp. v. Director, OWCP,*** 766 F.2d 128 (3d Cir. 1985); ***Baldwin v. Oakwood Red Ash Coal Corp.,*** 14 BLR 1-23 (1990) [for M.B.O. claims].

2. UNDER THE 1981 AMENDMENTS TO THE ACT: TRANSFER CASES

DIGESTS

Trust Fund Liability

Under the transfer of liability provisions of the 1981 Amendments, the Trust Fund is liable for claims *denied,* either by SSA or DOL, prior to March 1, 1977, and later approved. It is not liable for claims pending on March 1, 1978. The court held that a miner's claim and the survivor's claim of his widow must be considered separately in determining whether the transfer provisions were applicable to either, or both, claims. ***The Earl Patton Coal Co. v. Patton***, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988); *see also* ***Clark v. Director, OWCP***, 917 F.2d 374 (8th Cir. 1990)[the court agreed with this principle, stating that a survivor's claim does not merge with a miner's claim].

The Eighth Circuit upheld the Board's holding that the term "claim" as contained in Section 932 of the Act refers to an application for benefits and rejected employer's contention that the transfer provisions prohibited its liability in this case. Here, claimant's 1973, 1977 (1973 claim reopened under Section 945 and denied), 1983, 1984, and 1987 claims were all denied. In 1990, however, claimant again filed a claim for benefits which was found by the ALJ to establish entitlement. The Court, in agreeing with the Director, reasoned that the plain meaning of "claim," as defined in the dictionary, along with an unaltered definition throughout the 1981 amendment by

Congress and the applicable legislative history is supportive of the premise that unless subject to merger at Section 725.309, "each...claim must be considered separately to determine whether the claim is subject to the transfer of liability provisions." 20 C.F.R. §725.496(c). ***Lovilia Coal Co. v. Harvey,*** 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997).

The Sixth Circuit upheld a May 1986 Board determination that reversed the ALJ's finding of transfer of liability in the living miner's claim herein while also affirming the Board's holding that the subsequently filed survivor's claim was properly denied on its merits. The Court reasoned that since 1) the miner never elected review of his denied Part B claim, even though presumptively sent an election card based on DOL computer data; 2) the miner could not have been notified of a denial by March 1, 1977 of a claim he did not file until August 4, 1977; and 3) there is no indication of a hearing or formal proceeding prior to March 1, 1978 in the record, there was no basis for transfer of liability in this case to the Trust Fund under Section 932. Having held that the survivor's testimony that her husband normally took care of his correspondences does not rebut the presumption that DOL properly mailed the election card to the miner, the Court then held that substantial evidence supported the denial of benefits on the merits. Even though there had been a previous finding of entitlement in the living miner's claim prior to 1986, the Court noted that the record reviewed by the most recent ALJ contained "a new, more complete picture of Mr. Crace's health," supporting the denial of benefits. ***Crace v. Kentland-Elkhorn Coal Corp.***, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997).

The Seventh Circuit rejected employer's contention that the administrative delay in the processing of this case and the failure of the DOL to notify employer of the miner's claim before his death required liability for payment of benefits to transfer to the Trust Fund. The Court reasoned that the administrative process allowed employer to defend against this claim following the miner's death and that remand to the administrative law judge was unnecessary as substantial evidence supported the award of benefits for which employer is responsible. The Court, relying on ***Peabody Coal Co. v. Holskey***, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989) and *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 275 (5th Cir. 1979), held that the DOL was not required to notify employer until after the initial determination of eligibility had been made. ***Midland Coal Co. v. Director, OWCP* [*Kelly*]**, 120 F.3d 64, 21 BLR 2-161 (7th Cir. 1997).

The Sixth Circuit agreed with the Board and affirmed the administrative law judge's finding that liability for this claim rests with employer because the miner failed to elect review of his initial claim, filed on June 27, 1973. The Court rejected employer's initial argument that because the language of 30 U.S.C. §932(c) does not require election by the miner, liability transfers to the Trust Fund. In recognizing that HEW and DOL promulgated the controlling regulations, 20 C.F.R. §§410.704(d), 725.496(d), to accomplish Congressional intent to limit Trust Fund liability imposed by the 1981 Amendments and to avoid simultaneous review by both agencies of the same previously denied part B claim, the Court held that the regulations "are a wholly permissible construction of the 1981 Amendment." The Court also rejected employer's

argument that ***Director, OWCP v. Quarto Mining Co.* [*Bellomy*],** 901 F.2d 532, 13 BLR 2-435 (6th Cir. 1990) required transfer, noting that this is not a case that involves "a total lack of notice to claimant" because an SSA computer print-out of mailed election cards included the miner's name and his widow's testimony that she did not remember her husband receiving the election card was insufficient to rebut the presumption that it was reviewed by him. Employer also argued that the miner's second claim, filed two months after mailing of the election card, qualified as an "other equivalent document" for purposes of election. The Court reasoned that since DOL had rejected similar provisions when enacting Section 725.496 on the ground that it would make more claims subject to transfer than Congress had intended, employer's similar contention must also be rejected. Finally, employer's contention that SSA's receipt of the miner's claim on July 2, 1973 was controlling and therefore automatic review by DOL was mandated by the Act was rejected, applying the SSA regulations at 20 C.F.R. §410.227(b) where the date of mailing could be used if the receipt date would result in a potential loss of benefits, here June 1973 benefits. ***Caney Creek Coal Co. v. Satterfield,*** 150 F.3d 568, 21 BLR 2-464 (6th Cir. 1998).

3. OVERPAYMENTS

DIGESTS

a. Erroneous Information

An initial determination of entitlement by the district director as well as the ALJ's award of benefits is not erroneous information under 20 C.F.R. §410.561(f). ***McConnell v. Director***, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993); *see also* ***Bracher v. Director, OWCP***, 14 F.3d 1157, 18 BLR 2-97 (7th Cir. 1994).

The Tenth Circuit held that the agency's initial determination does not constitute erroneous information under Section 725.522(c). ***McConnell v. Director, OWCP***, 993 F.3d 1454, 18 BLR 2-168 (10th Cir. 1993).

b. Income and Expenses

In determining the miner's income, the regulations take a functional approach to discerning income and expenses. Therefore, the income and expenses of both spouses should be considered. ***McConnell v. Director,*** 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993).

Expenses for support of others for whom the miner (and his wife) have no legally responsibility should not be included in discerning income and expenses. Regulations count income and expenses of the household as defined by legal responsibility.

McConnell v. Director, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993).

c. Defeat the Purposes of the Act

In ***McConnell,*** the Tenth Circuit noted that the regulation expressly state that recovery will defeat the purposes of the Act when the claimant needs substantially all of his income to cover his relevant expenses. Consequently, the court recognized that the regulations contemplate a small monthly cushion where warranted. In the instant case, the court concluded that $114 was a sufficient monthly cushion. ***McConnell v. Director***, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993); *but see* ***Benedict v. Director, OWCP***, 29 F.3d 1140, 18 BLR 2-309 (7th Cir. 1994).

The Tenth Circuit held that the income and expenses of both spouses are properly included in determining whether recovery of an overpayment would defeat the purposes of the Act, rejecting claimant's argument that his wife's social security benefits (kept in a separate account and used for the support of close relatives) should be excluded. Only support of others for whom claimant was "legally responsible", Section 410.561c(a)(3), could be considered. A "sufficient monthly cushion of almost $114" was deemed by the Court to meet claimant's concern that repayment of the overpayment would leave he and his wife with enough extra to cushion against expenses caused by their "poor health." ***McConnell v. Director, OWCP***, 993 F.3d 1454, 18 BLR 2-168 (10th Cir. 1993).

d. Changed One's Position for the Worse

Claimant had changed his position for the worse when he took a six week vacation upon receiving benefits. Claimant had spent a substantial and unrecoverable sum of money on an activity which he would not undertaken absent the award of benefits. ***McConnell v. Director***, 993 F.2d 1454, 18 BLR 2-168 (10th Cir. 1993).

The Tenth Circuit reversed and granted a waiver holding that claimant's decision to take a vacation with overpayment monies constituted a change in his position for the worse under 20 C.F.R. §§410.561d, 725.542(b)(2). In enunciating a three part test, the Court held *de novo* that claimant had established (1) a change in position (2) for the worse and (3) a causal relationship between the benefits and the change in position. Determining that the amount of waiver is linked to the change of position, the Court relied on the uncontested testimony by claimant that his vacation cost "about $5,000" and remanded for reduction of the overpayment amount by that figure. [Thorough discussion of this holding by the Court] ***McConnell v. Director, OWCP***, 993 F.3d 1454, 18 BLR 2-168 (10th Cir. 1993).

The Seventh Circuit held that because the receipt of interim benefits aided the claimant's saving efforts and put claimant in no worse position than if he had not

received benefits, the ALJ correctly concluded that requiring claimant to repay the Trust Fund would not contravene equity and good conscience. ***Benedict v. Director, OWCP***, 29 F.3d 1140, 18 BLR 2-309 (7th Cir. 1994).

e. Miscellaneous

All benefit payments paid prior to final adjudication are recoverable if the miner is ultimately determined ineligible for benefits. ***Bracher v. Director, OWCP***, 14 F.3d 1157, 18 BLR 2-97 (7th Cir. 1994).

PART II

PROCEDURAL ISSUES

D. APPLICABLE LAW

DIGESTS

Application of Current Law By Appellate Tribunal

The Sixth Circuit, citing ***Bradley v. School Board,*** 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.476 (1974), held that it must apply the law in effect at the time it renders its decision unless doing so results in manifest injustice or there is legislative history or statutory directive to the contrary. In the instant case, in order to avoid a manifest injustice, the court held that the parties must have an opportunity to present relevant evidence to the ALJ regarding the change in the interpretation of law. ***Tackett v. Benefits Review Board***, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986); *see also* ***Harlan Bell Coal Co. v. Lemar***, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); ***Faries v. Director, OWCP***, 909 F.2d 170, 14 BLR 2-37 (6th Cir. 1990).

The Sixth Circuit held employer entitled to a new trial on the issue of rebuttal pursuant to Section 727.203(b)(3). Here, the Board initially applied the holding in ***York v. Benefits Review Board***, 819 F.2d 134 (6th Cir. 1987), based on the issuance of ***York*** subsequent to the 1985 ALJ decision denying benefits pursuant to subsection (b)(2). As the finding that subsection (b)(3) was not established was not challenged on appeal, it was affirmed by the Board. Subsequent attempts by employer to submit new evidence on subsection (b)(3) were not successful at the ALJ or Board levels. The Sixth Circuit, applying the holdings in ***Harlan Bell Coal Co. v. Lemar***, 904 F.2d 1042 (6th Cir. 1990) and ***Tackett v. Benefits Review Board***, 806 F.2d 640 (6th Cir. 1986), held the "manifest injustice" principle applicable to this case, reasoning that "...the change in (b)(2) altered the significance of (b)(3),...making rebuttal under (b)(2) more difficult to achieve, ***York*** made rebuttal under (b)(3) more attractive by comparison. Forcing Peabody to abide by its pre-***York*** election to rebut primarily under (b)(2) -- just like forcing Peabody to rest on proof offered under the pre-***York*** (b)(2) rebuttal standard -- creates a "manifest injustice" when the ALJ reconsiders the case under ***York***." ***Greer*** slip op at 9. Finally, the Court distinguished ***Wright v. Island Creek Coal Co.***, 824 F.2d 505 (6th Cir. 1987), holding that employer preserved its right to contest subsection (b)(3) through its motion for reconsideration, thereby holding that the Board applied law of case in error. ***Peabody Coal Co. v. Greer***, 62 F.3d 801, 19 BLR 2-235 (4th Cir. 1995).

The Sixth Circuit held that employer was entitled to submit new evidence under 20 C.F.R. §727.203(b)(2), (3) following the issuance of ***York v. Benefits Review Board***, 819 F.2d 134 (6th Cir. 1987). The Sixth Circuit, applying the holdings in ***Harlan Bell Coal Co. v. Lemar***, 904 F.2d 1042 (6th Cir. 1990) and ***Peabody Coal Co. v. Greer***, 62 F.3d 801, 19 BLR 2-235 (4th Cir. 1995), held that "when an employer rebuts the interim presumption under the pre-***York*** standard applicable to 727.203(b)(2), but not under the post-***York*** standard, the BRB commits a manifest injustice if it refuses to allow the employer to present new evidence to the ALJ that the employer believes will establish rebuttal either under the post-***York*** standards applicable to 727.203(b)(2) or another regulatory subsection." The Court, reacting strongly to what they termed the Board's "apparent reluctance" to remand this case to allow employer to present new evidence reasoned that employer, prior to the issuance of ***York***, had no reason to attempt to satisfy the subsection (b)(3) standard as it "was more difficult to satisfy than (b)(2)." Therefore, forcing employer to abide by its pre-***York*** election to rebut primarily under (b)(2) created a "manifest injustice." The Court, in reaching this decision, rejected claimant's arguments that this issue was not properly before them, noting that the ALJ's issuance of an *sua sponte* order stating he would not accept any new evidence reasonably foreclosed employer from offering new evidence, that claimant never objected to employer's subsequent and repeated requests to submit new evidence, and that the Board's consideration of this issue below now made it reviewable on appeal. ***Cal-Glo Coal Co. v. Yeager***, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997).

The Sixth Circuit held that employer was entitled to submit new evidence under 20 C.F.R. §727.203(b)(3) following the issuance of ***York v. Benefits Review Board***, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987), but affirmed the administrative law judge's refusal to allow additional evidence at Section 727.203(b)(2) as employer had not met the less rigorous pre-***York*** standard thereunder. The Sixth Circuit, applying the holdings in ***Harlan Bell Coal Co. v. Lemar***, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990), ***Peabody Coal Co. v. Greer***, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995) and ***Cal-Glo Coal Co. v. Yeager***, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997), held that employer "should be allowed to present evidence based on the post-***York*** standards, as such evidence is necessary to prepare an adequate defense. However, the new evidence should only be allowed to establish rebuttal pursuant to (b)(3). Because (b)(2) rebuttal was never established prior to ***York***, [employer] cannot be allowed to submit new evidence to satisfy a more rigorous standard." Dissenting in part, Circuit Judge Ryan, however, noted that contrary to the reasoning of the majority that employer "could not have been expected" to argue no respiratory impairment under (b)(2) and then argue that the supposedly non-existent respiratory impairment was not caused, in whole or in part, by the employment under (b)(3), that here employer did pursue both sections of rebuttal. "The record clearly shows that Peabody consistently and vigorously pursued (b)(2) and (b)(3) rebuttal simultaneously; at every stage, and in every appeal...." Because of this, and Peabody's failure to enunciate what it would have done differently, or what it would do differently on remand, Judge Ryan would have affirmed the denial to reopen the record under Section 727.203(b)(3). ***Peabody Coal Co. v. White***, 135 F.3d

416, 21 BLR 2-247 (6th Cir. 1998)(Ryan, CJ., concurring in part and dissenting in part); *see also* ***Peabody Coal Co. v. Ferguson***, 140 F.3d 634, 21 BLR 2-345 (6th Cir. 1998) (Ryan, CJ., concurring).

The Sixth Circuit held that employer was entitled to submit new evidence under 20 C.F.R. §727.203(b)(3) following the issuance of ***York v. Benefits Review Board***, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987), noting that the Board's previous remand for submission of new evidence under Section 727.203(b)(2) was unnecessary as the administrative law judge's previous finding that rebuttal thereunder was not established precluded rebuttal under the more rigorous post-***York*** subsection (b)(2) standard. The Circuit, applying the holdings in ***Harlan Bell Coal Co. v. Lamar***, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990), ***Peabody Coal Co. v. Greer***, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995) and ***Cal-Glo Coal Co. v. Yeager***, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997), held that employer should be allowed to present evidence under subsection (b)(3), however, based on the post-***York*** standards. The court reasoned that the litigation strategies changed, focusing employer's defense on subsection (b)(3) in the wake of the more stringent subsection (b)(2) standards post-York. Circuit Judge Ryan noted that " this case is directly and completely controlled by this court's decision in ***Peabody Coal Co. v. White***, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998)(Ryan, CJ., concurring in part and dissenting in part). ***Peabody Coal Co. v. Ferguson***, 140 F.3d 634, 21 BLR 2-345 (6th Cir. 1998)(Ryan, CJ., concurring).

The Seventh Circuit affirmed the Board's holding that employer and its insurer were liable to pay benefits in this case where the miner was a joint owner of a now bankrupt coal mine which did not pay for coverage of the owners under the insurance policies created between the insurer and the operator for the employees. The Court rejected the insurer's contention that the McCarran-Ferguson Act precluded coverage, as there was no clear Congressional intent to preempt Illinois state law regulating insurance. Applying the Supreme Court's three-part test in ***U.S. Dep't of Treasury v. Fabe***, 508 U.S. 491, 500-01 (1993) and their own three-part test in ***American Deposit Corp. v. Schacht***, 84 F.3d 834, 839 (7th Cir. 1996), the court concluded that because the Act specifically relates to the business of insurance it does not implicate the McCarran-Ferguson Act. ***Lovilia Coal Co. v. Williams***, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998), *aff'g*, 20 BLR 1-58 (1996).

Although the law at the time counsel filed his fee request did not require ALJ to consider enhancement for delay, current law requires ALJ to consider such enhancement. On remand, ALJ must consider counsel's petition requesting enhancement for delay in light of current law. ***Kerns v. Consolidation Coal Co.***, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999).

The D.C. Circuit held that the revised regulations at 20 C.F.R. §§718.104(d), 718.201(a)(2), 718.201(c), 718.204(a), 725.101(a)(6), 725.101(a)(31), 725.204, 725.212(b), 725.213(c), 725.214(d), 725.219(d), 725.309(d) and 725.701, promulgated

by the Secretary of Labor in 2000, are applicable to all subsequent claims filed pursuant to 20 C.F.R. §725.309(d), as these claims are considered to be new claims. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 861, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001). [Note: While the court also referenced Section 725.219(c), this is a typographical error, as no changes were made to Section 725.219(c) from the prior edition of the regulations.]

PART II

PROCEDURAL ISSUES

E. VIABILITY OF CLAIMS

1. ABANDONMENT

Distinguishing Sections 725.409 and 725.410

The Fourth Circuit distinguished Section 725.409 from Section 725.410 (Notice to claimant) by noting that Section 725.409 applies where the record does not contain sufficient evidence to allow the agency to make a factual determination while Section 725.410 covers situations where there is enough evidence in the record and the appropriate agency has made its factual determination, citing ***Clark v. Director, OWCP***, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988). ***Adkins v. Director, OWCP***, 878 F.2d 179, 12 BLR 2-313 (4th Cir. 1989).

The Seventh Circuit held that if a claimant does not submit new evidence or request a hearing within the sixty-day period provided in 20 C.F.R. §725.410(c) following the denial of his claim by the district director, the claim is automatically denied by reason of abandonment. In adopting the Director's position, the Court reasoned that the finality concerns on which the regulation is based were not served here with claimant's submission of a letter within that sixty-day period that stated that additional medical evidence would be submitted "as soon as possible" and requested that "if the additional medical evidence is...insufficient," the case be referred for a hearing. The Court therefore reversed the Board's rationale that this timely letter was sufficient because it expressed an unconditional intent to pursue the claim in a formal hearing. As the abandoned claim was filed in 1981 and became finally denied on March 31, 1982 following no further action from claimant, claimant's submission of new evidence thereafter was returned and claimant filed a new claim on November 29, 1982. As a result of the Court's holding, claimant's widow did not have the benefit of the presumption under 20 C.F.R. §718.305(a) on remand. ***Freeman United Coal Mining Co. v. Director, OWCP*** [***Tasky***], 94 F.3d 384, 20 BLR 2-348 (7th Cir. 1996).

The Eleventh Circuit adopted the reasoning of the Fourth, Sixth, and Eighth Circuits and held in this case involving a duplicate survivor's claim, that the district director was not required to provide the claimant with the thirty-day abandonment notice addressed in 20 C.F.R. §725.409(b) in addition to the sixty-day abandonment notice that the district director provided pursuant to 20 C.F.R. §725.410(c). ***Coleman v. Director, OWCP***, 345 F.3d 861, 23 BLR 2-1 (11th Cir. 2003), citing ***Adkins v. Director, OWCP***, 878 F.2d

151, 12 BLR 2-213 (4th Cir. 1989); ***Tonelli v. Director, OWCP***, 878 F.2d 1085, 12 BLR 2-319 (8th Cir. 1989); ***Clark v. Director, OWCP***, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988); *see also* ***Garcia v. Director, OWCP***, 12 BLR 1-24 (1988); ***Fetter v. Peabody Coal Co.***, 6 BLR 1-1173 (1984).

PART II

PROCEDURAL ISSUES

E. VIABILITY OF CLAIMS

2. MERGER OF CLAIMS/DUPLICATE CLAIMS

a. Tenth Circuit's Duplicate Claim Approach

In ***Lukman v. Director, OWCP***, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), the court ruled that " ... the purpose of Section 725.309(d) was to provide relief from the ordinary principles of finality and *res judicata* to miners whose physical condition deteriorates" so as " ... to permit new claims to be filed even where modification under Section 725.310(a) was no longer available because more than a year had passed since the first claim was denied." 896 F.2d at 1253 - 1254, 13 BLR at 2-345 - 2-346. The Court, thereafter, determined that all claims, whether the initial claim or a subsequent (duplicate) claim, must be processed essentially the same and must be adjudicated on the traditional three-tier system. After rejecting the Board's bifurcated approach, the court held that the district director:

> must determine simultaneously whether (1) there has been a material change in condition, and (2) whether the claimant is entitled to benefits. After such determinations by the deputy commissioner, a claimant is entitled to a hearing before an ALJ to examine both issues *de novo.* Finally, review on the merits of the ALJ's decision by the Board and the appropriate court of appeals is to be made available.

896 F.2d at 1254, 13 BLR at 2-345 - 2-346 (footnote omitted).

In ***Dotson v. Director, OWCP***, 14 BLR 1-10 (1990)(*en banc*), the Board decided to follow the ***Lukman*** court's three-tier approach in all circuits. The Board held, therefore, that " ... any party dissatisfied with a District Director's determination on a duplicate claim is entitled to have the matter considered by the Office of Administrative Law Judges." 14 BLR at 1-11.

DIGESTS

The Tenth Circuit rejected employer's argument that claimant was bared in bringing a duplicate claim under Section 725.309 in violation of the Statute of Limitations provisions in 30 U.S.C. §932(f), 20 C.F.R. §725.308(a) that requires a miner to bring a

claim within three years from the date of a medical determination of total disability due to pneumoconiosis. The Court reasoned that claimants prior claim had been rejected and the administrative rejection of prior medical evidence provided an opportunity to bring this duplicate claim with new evidence. ***Wyoming Fuel Co. v. Director, OWCP*** [***Brandolino***], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996).

The Tenth Circuit, noting that every circuit (the 3d, 4th, 6th and 7th) that has addressed the Board's ***Spese*** standard has rejected it, joined these circuits and also rejected the approach of these circuits and the Director in evaluating duplicate claims. The Court fashioned its own rule, holding that the traditional notions of res judicata and the plain language of the statute and regulations should be applied. "Thus, we hold that in order to bring a duplicate claim, a claimant must prove for each element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." The ALJ must compare the "evidence obtained after [the] prior denial to evidence considered in or available at the time of [the] prior claim..." to determine if claimant's condition in these elements has "worsened materially since the time of his earlier denial...." In footnotes, the Court clarified that the ALJ cannot consider evidence that could have been produced in the prior proceedings or re-evaluations of this evidence, applying the theory of res judicata. ***Wyoming Fuel Co. v. Director, OWCP*** [***Brandolino***], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996).

PART II

PROCEDURAL ISSUES

E. VIABILITY OF CLAIMS

2. MERGER OF CLAIMS/DUPLICATE CLAIMS

b. Material Change of Conditions

Having rejected the Board's definition of "material change in conditions" as evidence which is relevant and probative, demonstrating a "reasonable possibility" that the prior administrative result would change, ***Spese v. Peabody Coal Co***., 11 BLR 1-174, 1-176 (1988), *dismissed with prejudice*, No. 88-3309 (7th Cir., Feb. 6, 1989) (unpub.), the courts have now adopted the Director's "one-element standard." This standard provides that claimant's duplicate claim proceeds once he demonstrates a material change in at least one of the elements previously adjudicated against him. *See* ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); ***Lisa Lee Mines v. Director, OWCP*** [**Rutter**], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(en banc), *cert. denied,* 117 S.Ct. 763 (1997); ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); ***Lovilia Coal Co. v. Harvey***, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997); *but see* ***Wyoming Fuel Co. v. Director, OWCP*** [**Brandolino**], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). In summarizing the current application of the "one-element standard," the United States Court of Appeals for the Seventh Circuit clarified their holding in ***Sahara Coal Co. v. Director, OWCP*** [***McNew***], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991), stating that:

> [T]he key point is that the claimant cannot simply bring in new evidence that addresses his condition at the time of the earlier denial. His theory of recovery on the new claim must be consistent with the assumption that the original denial was correct. To prevail on the new claim, therefore, the miner must show that something capable of making a difference has changed since the record closed on the first application...If by that the Director means that at least one element that might independently have supported a decision against the claimant has now been shown to be different (implying that the earlier denial was correct), then we would agree that the "one-element" test is the correct one.

Peabody Coal Co. v. Spese, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc* rehearing), *modifying,* 94 F.3d 369 (7th Cir. 1996), *and affirming* 19 BLR 1-45 (1995).

In making a "material change of conditions" finding, the ALJ may consider not only the evidence available to the district director but also evidence considered for the first time by the ALJ. ***Rice v. Sahara Coal Co***., 15 BLR 1-19 (1990).

In cases arising in circuits in which the United States Courts of Appeals have not yet addressed the standard applicable to a duplicate claim pursuant to 20 C.F.R. §725.309, the Board overruled its previous holding in ***Shupink v. LTV Steel Co.***, 17 BLR 1-24 (1992), and adopted the Director's position in ***Peabody Coal Co. v. Spese***, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*); ***Lovilia Coal Co. v. Harvey***, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997); ***Lisa Lee Mines v. Director, OWCP* [*Rutter*]**, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim at least one of the elements of entitlement previously adjudicated against him. ***Allen v. Mead Corp.***, 22 BLR 1-61 (2000).

DIGESTS

The Sixth Circuit reviewed the ***Spese*** (Board) standard, ***McNew*** (7th Circuit) standard, and the Director's position in determining the proper standard to be utilized to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). The Court adopted the Director's position, *i.e.*, to determine whether a material change in conditions is established, "the ALJ must consider all the new evidence, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, support a finding of entitlement to benefits." The Court granted due deference to the Director's position in this case involving statutory interpretation because the Director's interpretation is "reasonable in light of the purpose of the statute and the language included in Section 725.309(d)." The Court also held that the miner timely filed his duplicate claim pursuant to Section 725.308. ***Sharondale Corp v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

The Fourth Circuit, in an en banc rehearing of this case, reversed its panel's decision and held in a split decision that claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." This "one-element" standard for establishing a material change in condition under Section 725.309, was proffered by the Director and has been adopted in the Third and Sixth Circuits. *See* ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1995). The dissenting members of the Court expressed concern with

abuse of the administrative system and concluded that "the only standard which both requires a 'material change in conditions' and respects the finality of the initial judgement" is the Seventh Circuit's approach in ***Sahara Coal Co. v. Director, OWCP*** [***McNew***], 946 F.2d 554, 556, 15 BLR 2-227 (7th Cir. 1991). ***Lisa Lee Mines v. Director, OWCP*** [***Rutter***], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g,* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

The Third Circuit, following the holdings in the Fourth Circuit in ***Lisa Lee Mines v. Director, OWCP***, 57 F.3d 402 (4th Cir. 1995)[**note: this decision has now been overruled by full Court rehearing, as digested above**], the Sixth Circuit in ***Sharondale Corp. v. Ross***, 42 F.3d 993 (6th Cir. 1994), and the Seventh Circuit in ***Sahara Coal Co. v. Director, OWCP***, 946 F.2d 554 (7th Cir. 1991), rejected the Board's ***Spese/Shupink*** standard and adopted the Director's interpretation: "...the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits." ***Swarrow***, slip op at 15. The Court stated that "pneumoconiosis is a latent dust disease" that may not become manifest until long after exposure to the causative agent, noting that Congress recognized the "perniciously progressive nature of the disease" which does not improve. An extensive discussion of this issue is included with various references. The Court therefore vacated the award of benefits and remanded for the ALJ to apply the proper standard in finding a material change in conditions established. Note that the Court holds that applying the wrong standard does constitute error. ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

The Third Circuit held that the doctrine of *res judicata* does not apply in this case regarding material change in conditions because the second claim asserts a new cause of action, citing ***Board of Trustees of Trucking Employees v. Centra***, 983 F.2d 495, 504 (3d Cir. 1992), a claim preclusion case. Denial of first claim established only that claimant was not **then** totally disabled due to pneumoconiosis, and while claimant may not attack that denial, he may file subsequent claims based on disability occurring after the date of that denial. ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

The Eighth Circuit rejected employer’s argument that claimant’s duplicate claims should be barred under the claim preclusion concept of the doctrine of res judicata. Noting that this concept provides that final judgement on the merits bars further claims based on the same cause of action, the Court held that claimant here was not attempting to re-litigate previous denials but to establish entitlement based on a change in conditions. The Court reaffirmed its holdings in ***Robinson v. Missouri Mining Co.***, 955 F.2d 1181, 16 BLR 2-27 (8th Cir. 1992) and ***Newman v. Director, OWCP***, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984), recognizing the progressive nature of pneumoconiosis that

followed ***Mullins Coal Co. of Va. v. Director, OWCP***, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), and are in agreement with the Third, Fourth and Tenth Circuits' holdings in this area, ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); ***Lisa Lee Mines v. Director, OWCP* [*Rutter*]**, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); ***Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*]**, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). The Court refused to "revisit the issue." ***Lovilia Coal Co. v. Harvey***, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997).

The Eight Circuit joined the Third, Fourth and Sixth Circuits in rejecting the Board's holding in ***Spese v. Peabody Coal Co.***, 11 BLR 1-174, 1-176 (1988)(*en banc*), and adopting the Director's one-element standard at Section 725.309, holding that "there is an 'adequate fit' between the Director's one-element standard and the finality and efficiency policies it is designed to serve...[including] the remedial purpose of the Act." The Court noted that while the Seventh and Tenth Circuits have also rejected ***Spese***, the alternative approaches reached by these two circuits would not be addressed. ***Lovilia Coal Co. v. Harvey***, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997).

In cases arising in circuits in which the United States Courts of Appeals have not yet addressed the standard applicable to a duplicate claim pursuant to 20 C.F.R. §725.309, the Board overruled its previous holding in ***Shupink v. LTV Steel Co.***, 17 BLR 1-24 (1992), and adopted the Director's position in ***Peabody Coal Co. v. Spese***, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*); ***Lovilia Coal Co. v. Harvey***, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997); ***Lisa Lee Mines v. Director, OWCP* [*Rutter*]**, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim at least one of the elements of entitlement previously adjudicated against him. ***Allen v. Mead Corp.***, 22 BLR 1-61 (2000).

The Board held that in determining whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit in ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the administrative law judge must determine:

> 1) whether the newly submitted evidence demonstrates at least one of the elements of entitlement that was the basis of the prior denial, and,
>
> 2) if the administrative law judge determines that it does, the administrative law judge must then analyze whether the new evidence differs qualitatively from the evidence submitted with the previously denied claim, or was merely cumulative of, or similar to, the earlier evidence.

If the trier-of-fact finds this qualitative difference, it follows that claimant's condition has worsened in accordance with the Court's requirement that claimant show there has been a "worsening" in his physical condition. ***Stewart v. Wampler Brothers Coal Co.***, 22 BLR 1-80 (2000).

The Seventh Circuit held that a claimant may advance a second claim for benefits on the merits and is not required to demonstrate a "material change in conditions" in accordance with the standard enunciated in ***Sahara Coal Co. v. Director, OWCP* [*McNew*]**, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991) where a claimant's initial claim was denied solely on procedural grounds. The Court held that ***McNew*** is inapplicable to the specific and unique facts of this case, where the claimant had pursued his initial claim without the benefit of counsel and the procedural denial of the claimant's initial claim was explained by the claimant's illiteracy and misinformation provided by the social security office. The Court noted, however, that its holding is limited to the specific and unique facts of this case and in no way overrules ***McNew***. ***Crowe v. Director, OWCP***, 226 F.3d 609, 22 BLR 2-80 (7th Cir. 2000).

The Sixth Circuit held that in order to measure a "change in conditions," the administrative law judge must compare the sum of the new evidence with the sum of the earlier evidence on which the denial of the claim had been premised. A "material change" exists only if the new evidence both establishes the element and is substantially more supportive of claimant, *i.e.*, the evidence shows that there was in fact a worsening of claimant's condition. The Court noted that the "change" is the actual difference between the bodies of evidence presented at different times; the "materiality" of the change is marked by the fact that this difference has the capability of converting an issue determined against the claimant into one determined in his favor. The Court explained that this standard requires only a substantial difference in the bodies of evidence, not a complete absence of evidence at the earlier time; if this difference can alter one of the legal bases of the prior claim denial, it is material. The Court also held that the miner timely filed his duplicate claim pursuant to 20 C.F.R. §725.308. ***Tennessee Consolidated Coal Co. v. Kirk***, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

The Sixth Circuit held that the administrative law judge properly found a material change in conditions established where the issue of the existence of pneumoconiosis was previously adjudicated against claimant, and new evidence relating solely to claimant's condition after the prior denial demonstrated that claimant subsequently developed pneumoconiosis and became totally disabled by it. ***Peabody Coal Co. v. Odom***, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003).

Reiterating the holding of in ***Sharondale Corp v. Ross***, 42 F.3d 993 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit held that in order to establish a material change in conditions pursuant to Section 725.309, a claimant must prove one

of the elements previously adjudicated against her. ***Mills v. Director, Office of Workers Compensation Programs***, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003).

The Sixth Circuit held that, pursuant to 20 C.F.R. §725.309 (1999), in order to grant a subsequent claim for benefits more than a year after an earlier claim has been denied, the administrative law judge must (i) determine, based upon all of the evidence accompanying the subsequent claim, that the miner has proven at least one of the elements of benefit entitlement previously adjudicated against him; (ii) find, based upon a comparison of the sum of the evidence considered in connection with the earlier claim denial, that the new evidence is sufficiently more supportive to warrant a change in the outcome; and, finally (iii) determine on the merits, based upon the entirety of the record, that the miner is entitled to benefits. ***Grundy Mining Co. v. Flynn***, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003).

The Sixth Circuit held that the material change standard set out at 20 C.F.R. §725.309 (1999) does not demand that a claimant's new evidence point uniformly and unmistakably toward a more favorable outcome. It is sufficient that the evidence be sufficiently different to warrant a different outcome on one of the relevant elements of entitlement, so that there is no concern that two factfinders are making different assessments of essentially the same record. ***Grundy Mining Co. v. Flynn***, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003).

In ***Sahara Coal Co. v. Director, OWCP*** **[*McNew*]**, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991), the court took exception with the Board's definition of material change in conditions. The court held that in determining whether the evidence established a material change in conditions it was not enough that the new application was supported by new evidence of disease or disability. Rather the court defined material change in conditions as either that the miner did not have black lung at the time of the first application but had since contracted it and became totally disabled by it, or that his disease had progressed to the point of becoming totally disabled although it was not at the time of the first application. The court further stressed that the initial determination of whether there is a material change in conditions is for the fact-finder, not the Board.

The Seventh Circuit noted in dicta that claimant and employer had failed to substantiate arguments before the Board and the Court regarding material change in conditions. Here, the Court noted that the parties' failure to site medical authority for or against the proposition made by employer that since the miner had quit working in 1986, followed by a denial of his first claim in 1987, he could not now prove pneumoconiosis in a 1990 duplicate claim "because he could not have contracted the disease after ceasing to be a coal miner." The Court goes into a discussion of the progressive nature of pneumoconiosis that is a good resource. ***Freeman United Coal Mining Co. v. Hilliard***, 65 F.3d 667, 19 BLR 2-282, 2-287 (7th Cir. 1995).

The Seventh Circuit clarified their holding in ***Sahara Coal Co. v. Director, OWCP* [*McNew*]**, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991), following the Director's one-element standard, providing that:

> ...the claimant cannot simply bring in new evidence that addresses his condition at the time of the earlier denial. His theory of recovery on the new claim must be consistent with the assumption that the original denial was correct. To prevail on the new claim, therefore, the miner must show that something capable of making a difference has changed since the record closed on the first application...If by that the Director means that at least one element that might independently have supported a decision against the claimant has now been shown to be different (implying that the earlier denial was correct), then we would agree that the "one-element" test is the correct one.

Peabody Coal Co. v. Spese, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(en banc rehearing), *modifying,* 94 F.3d 369 (7th Cir. 1996), *and affirming* 19 BLR 1-45 (1995).

The Seventh Circuit held that a claimant may advance a second claim for benefits on the merits and is not required to demonstrate a "material change in conditions" in accordance with the standard enunciated in ***Sahara Coal Co. v. Director, OWCP* [*McNew*]**, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991) where a claimant's initial claim was denied solely on procedural grounds. The Court held that ***McNew*** is inapplicable to the specific and unique facts of this case, where the claimant had pursued his initial claim without the benefit of counsel and the procedural denial of the claimant's initial claim was explained by the claimant's illiteracy and misinformation provided by the social security office. The Court noted, however, that its holding is limited to the specific and unique facts of this case and in no way overrules ***McNew***. ***Crowe v. Director, OWCP***, 226 F.3d 609, 22 BLR 2-80 (7th Cir. 2000).

The Seventh Circuit held that the administrative law judge's determination that the miner's pneumoconiosis had progressed to the point of total disability (whereas it had not when he filed his original claim) was rational, supported by substantial evidence, and in line with the ***McNew*** standard. ***Kennellis Energies v. Director, OWCP* [*Ray*]**, 333 F.3d 822, 22 BLR 2-591 (7th Cir. 2003).

The Seventh Circuit rejected employer's argument that the miner's fourth claim for benefits was barred on *res judicata* grounds. At the time the claim was filed, the court had interpreted the earlier version of the regulations contained at 20 C.F.R. §725.309, and held in ***Peabody Coal Co. v. Spese***, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*), that traditional principles of *res judicata* do not bar a subsequent application for benefits where a miner demonstrates a material change in at least one of the conditions of entitlement. Although the new version of Section 725.309 does not have retroactive effect, the revised regulations explicitly codified the holding of ***Spese***.

The court noted that because the miner was previously unable to prove any of the elements of entitlement, a finding that he was now totally disabled by pneumoconiosis was sufficient to find a material change in the miner's condition, whether that finding reflected a change from no disease at all to a totally disabling condition, or it rested on a change from a mild form of the disease to a totally disabling condition. ***Midland Coal Co. v. Director, OWCP*** **[*Shores*]**, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

The United States Court of Appeals for the Eleventh Circuit deferred to the Director's interpretation of 20 C.F.R §725.309(d) (2000) and adopted the "one element" standard which permits a claimant to prove a material change in conditions by establishing one of the elements of entitlement previously adjudicated against him. The court rejected employer's argument that it should adopt the standard set forth by the United States Court of Appeals for the Seventh Circuit in ***Sahara Coal Co. v. Director, OWCP*** **[*McNew*]**, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). The court concluded that the Director's "one element" standard "is both reasonable and consistent with §725.309, and . . . will eliminate unnecessary and costly collateral litigation" that would arise under a ***McNew***-type standard requiring comparison of the old and new evidence. The court held that the ALJ properly applied the "one element" standard to find that claimant established a material change in conditions by establishing the existence of pneumoconiosis with the new evidence in his duplicate claim. ***United States Steel Mining Co. v. Director, OWCP*** **[*Jones*]**, 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004).

The Seventh Circuit held that the "fact that pneumoconiosis may be progressive and latent justifies allowing a subsequent claim without additional coal dust exposure since the denial of the earlier claim." ***RAG American Coal Co. v. Director, OWCP*** **[*Buchanan*]**, 576 F.3d 418, 24 BLR 2-223 (7th Cir. 2009).

1). Subsequent Claims

DIGESTS

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.309(d), regarding subsequent claims, is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 863-864, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit rejected the argument that 20 C.F.R. §725.309(d) is impermissibly retroactive in combination with the revised regulation at 20 C.F.R. §718.201(c), which recognizes that pneumoconiosis can be latent and progressive. The court held that the revised regulation at Section 725.309(d), does not create an irrebuttable presumption that a claimant's pneumoconiosis is progressive, but rather places the burden of proof squarely on the claimant to prove a change in an applicable condition of entitlement, such as whether he developed pneumoconiosis since the denial of the prior claim. ***Nat'l***

Mining Ass'n v. Department of Labor, 292 F.3d 849, 863-864, 869-870, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.309(d), requiring a claimant to demonstrate that one of the applicable conditions of entitlement has changed since the denial of the prior claim, is valid, not arbitrary or capricious, and does not "waive [as NMA asserted] *res judicata* or traditional notions of finality." ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 869-870, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

PART II

PROCEDURAL ISSUES

E. VIABILITY OF CLAIMS

2. MERGER OF CLAIMS/DUPLICATE CLAIMS

c. Merging Duplicate Claims

The merger provision of Section 725.309(c) was intended to allow a post-March 1, 1978, claim to be evaluated under the more lenient Part 727 interim regulations only if a claimant's earlier claim had not already been evaluated under those regulations or is otherwise not final. In other words, a post-March 1, 1978, claim can only merge with a prior claim which is still "subject to review under Part 727 of this sub-chapter." 20 C.F.R. §725.309. Principles of finality, therefore, require that a subsection claim, unless merged with an earlier claim by Section 725.309, be denied on the grounds of the earlier denial. Alternatively upon a showing of a "material change in conditions," the subsequent claim may be evaluated as a new claim under the permanent Part 718 regulations. Here, since the miner did provide evidence of a material change in conditions with his subsequent claim, the court determined that the Board properly determined that the subsequent claim was a new claim entitled to review under the Part 718 regulations. ***Bath v. Director, OWCP***, No. 88-3713 (3d Cir., Apr. 10, 1989) (unpub.).

The court, citing ***Spese v. Peabody Coal Co***., 11 BLR 1-178 (1988), *dismissed with prejudice,* No. 88-3309 (7th Cir., Feb 6, 1989)(unpub.), held that merger is available only when a previously denied claim, reopened for review under Part 727, and a subsequent claim are pending at the same time. Once a claim reviewed under Part 727 has been finally denied, even due to abandonment, *see* 20 C.F.R. §727.102(b)(5), it cannot be revived merely by filing a subsequent claim. ***Tonelli v. Director, OWCP***, 878 F.2d 1083, 12 BLR 2-319 (8th Cir. 1989); *see also* ***West v. Director, OWCP***, 896 F.2d 308, 13 BLR 2-323 (8th Cir. 1990).

Merger pursuant to Section 725.309(c) is permissible in cases of pending multiple claims by the same claimant. Therefore, a pending living miner's claim cannot be merged with a pending survivor's claim. ***The Earl Patton Coal Co. v. Patton***, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988).

The Seventh Circuit, in a rehearing of its earlier decision, held that under 20 C.F.R. §725.309(c), merger of a subsequently filed claim more than one year following the final denial of the previous claim is only possible if the earlier claim was pending or finally

denied before March 1, 1978 and both claims must have been "subject to review" under Part 727. "That means...that it is either awaiting review, undergoing review, or (at the most) the one-year period for post-denial reconsideration has not yet run. As the Court found the Director's interpretation to be reasonable, the Court agreed with the Director that this system is consistent with Congressional intent. Therefore, as claimant's husband's 1976 claim, subject to Part 727, had been finally denied long before his 1981 claim, subject to Part 718, was filed, there was no basis for merger of the two claims and any entitlement must be measured from December 1, 1981. The Court, on rehearing, thus affirmed the holding of the Board. ***Peabody Coal Co. v. Spese***, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc rehearing*), *modifying,* 94 F.3d 369 (7th Cir. 1996), *and affirming* 19 BLR 1-45 (1995).

PART II

PROCEDURAL ISSUES

E. VIABILITY OF CLAIMS

2. MERGER OF CLAIMS/DUPLICATE CLAIMS

d. Duplicate Survivors' Claims

In cases where the record contains two survivors' claims filed by the same claimant, the Board has held that the subsequent claim must be denied on the same basis of the earlier claim unless the subsequent claim is filed within one year of the last activity involving the earlier claim. Thus, the "material change in conditions" phrase is not applicable to duplicate survivors' claims; duplicate survivors' claims may only be considered if the subsequent claim satisfies the requirements under Section 725.310 for a request for modification. ***Mack v. Matoaka Kitchekan Fuel***, 12 BLR 1-197 (1989). The United States Court of Appeals for the Sixth Circuit reversed the Board's application of the foregoing principle, holding that the Section 725.309 bar to duplicate survivors' claims was inapplicable to that case because this basis for denying the duplicate survivor's claim had not been relied on by the Director below. ***Jordan v. Director, OWCP***, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989).

Section 22 of the Longshore and Harbor Workers' Compensation Act provides that the one year period in which a party may request modification runs from the date of the rejection of the claim. In deciding ***Garcia v. Director, OWCP***, 12 BLR 1-24 (1988), the Board considered the structure of the regulations, as well as the authority granted the district director, and determined that modification is available within one year from the last denial issued in the judicial or administrative process. If a duplicate claim was filed within one year of the issuance of the last denial, the duplicate claim constitutes a timely request for modification of claimant's initial claim pursuant to 20 C.F.R. §725.310. 33 U.S.C. §932(a); ***Stanley v. Betty B. Coal Co***., 13 BLR 1-72 (1990).

The Eleventh Circuit affirmed the administrative law judge's finding that because the claimant's earlier claims for survivor's benefits had been finally denied, her current duplicate claim must be denied pursuant to 20 C.F.R. §725.309(d)(1999). ***Coleman v. Director, OWCP***, 345 F.3d. 861, 23 BLR 2-1 (11th Cir. 2003).

PART II

PROCEDURAL ISSUES

E. VIABILITY OF CLAIMS

2. MERGER OF CLAIMS/DUPLICATE CLAIMS

e. Under the 2000 Amendments to the Regulations

The D.C. Circuit held that the revised regulations at 20 C.F.R. §§718.104(d), 718.201(a)(2), 718.201(c), 718.204(a), 725.101(a)(6), 725.101(a)(31), 725.204, 725.212(b), 725.213(c), 725.214(d), 725.219(d), 725.309(d) and 725.701, promulgated by the Secretary of Labor in 2000, are applicable to all subsequent claims filed pursuant to 20 C.F.R. §725.309(d), as these claims are considered to be new claims. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 861, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).[Note: While the court also referenced Section 725.219(c), this is a typographical error, as no changes were made to Section 725.219(c) from the prior edition of the regulations.]

PART II

PROCEDURAL ISSUES

E. VIABILITY OF CLAIMS

3. SUBSEQUENT CLAIMS/REVISED VERSION OF 20 C.F.R. §725.309

DIGESTS

The Tenth Circuit held that the standard set forth in ***Wyoming Fuel Co. v. Director, OWCP*** **[*Brandolino*]**, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), which required proof that the miner's condition had worsened, has been supplanted by the "one element" standard adopted by the Department of Labor in the revised version of 20 C.F.R. §725.309. The court further held that employer was not prejudiced by the destruction of records associated with the prior claim, as employer conceded total disability - the element of entitlement previously adjudicated against the miner. ***Energy West Mining Co. v. Oliver***, 555 F.3d 1211, 24 BLR 2-155 (10th Cir. 2009).

In a case involving a subsequent claim filed under the revised regulations, the United States Court of Appeals for the Fourth Circuit rejected employer's assertion that the administrative law judge did not properly consider evidence from the prior claim. The court explained that because 20 C.F.R. §725.309 states that any evidence from the prior claim is part of the record, and "because the administrative law judge must review the entire record before making a determination, . . . it follows that she must also take into account the existence of any pre-denial evidence." The court determined that the administrative law judge had fulfilled her obligation under Section 725.309, as she specifically referred to evidence from the prior claim and found that it was consistent with her finding, based on the newly submitted evidence, that claimant "had since established statutory complicated pneumoconiosis." ***Westmoreland Coal Co. v. Cox***, 602 F.3d 276, BLR (4th Cir. 2010).

PART II

PROCEDURAL ISSUES

E. VIABILITY OF CLAIMS

4. STATUTE OF LIMITATIONS

DIGESTS

The United States Court of Appeals for the Sixth Circuit held that a medical determination of total disability due to pneumoconiosis does not begin the running of the three year time limit for filing a claim, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308(a), if it was discredited or found to be outweighed by contrary evidence in a prior adjudication. The court determined that the language in ***Tennessee Consol. Coal Co. v. Kirk***, 264 F.3d 602, 611, 22 BLR 2-288 (6th Cir. 2001), indicating that the time limit begins to run even if the medical determination was found to be outweighed, was dicta. ***Arch of Kentucky, Inc. v. Director, OWCP*** **[*Hatfield*]**, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009).

The Tenth Circuit rejected employer's argument that the miner's subsequent claim was untimely under 20 C.F.R. §725.308, holding that medical determinations of total disability due to pneumoconiosis submitted in a prior claim are repudiated by the denial of that claim. ***Energy West Mining Co. v. Oliver***, 555 F.3d 1211, 24 BLR 2-155 (10th Cir. 2009).

PART II

PROCEDURAL ISSUES

F. MODIFICATIONS

1. GENERALLY

Section 22 of the LHWCA, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), governs the modification of awards. It authorizes the district director to "review a compensation ... in accordance with the [claims] procedure prescribed in ... section 919" and to issue a new compensation order "on the ground of a change in conditions or ... a mistake in determination of fact by the deputy commissioner." The implementing regulations are found at 20 C.F.R. §725.310.

DIGESTS

The Sixth Circuit reversed and remanded the Board's affirmance of a denial of benefits, holding that the administrative law judge's failure to hold a hearing, requested by this pro se claimant in his modification case, was a fatal error to this proceeding. The Court noted that the plain language of the Act, 30 U.S.C. §932(a), as implemented by 20 C.F.R. §725.451 "...mandates that the ALJ hold a hearing on any claim filed with the [district director] whenever a party requests such a hearing." The Court further noted that its deference is with the Secretary and that regardless of the Board's reliance on its own case law, the Director has made clear that the Secretary's interpretation of the regulations require the ALJ to hold a hearing in a modification proceeding when requested by a party, as here. Therefore, the Court remanded without reaching the merits of the case. The Court finally rejected claimant's objection to the reassignment of this case to another ALJ, noting that no party had objected to the reassignment after notice was properly given under 29 C.F.R. §18.30. ***Cunningham v. Island Creek Coal Co.***, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998).

The Sixth Circuit reversed and remanded the Board's affirmance of a denial of benefits, holding that the administrative law judge's failure to hold an "in-person" hearing, requested by this pro se claimant in his modification case, was a fatal error to this proceeding. The Court, relying on their recent holding in ***Cunningham v. Island Creek Coal Co.***, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998), again noted that the plain language of the Act, 30 U.S.C. §932(a), as implemented by 20 C.F.R. §725.451 "...mandates that the ALJ hold a hearing on any claim filed with the [district director] whenever a party requests such a hearing." The Court further noted that Section 725.421(a) requires the OALJ to hold a hearing once requested unless there is written

waiver, Section 725.461(a) or a party moves for summary judgement and it is determined that there is no genuine issue of material fact resulting in judgement as a matter of law, Section 725.452(c). As its deference is with the Secretary, the Court then proceeded to distinguish the Board's reliance on its own case law, stating that neither ***Napier v. Director, OWCP***, 17 BLR 1-111, 1-113 (1993) nor ***Wojtowicz v. Duquesne Light Co.***, 12 BLR 1-162 (1989) discussed the statutory or regulatory requirements, and stated that the Director had made clear that the Secretary's interpretation of the regulations require the ALJ to hold a formal (as in ***Cunningham***) and more specifically, an "in-person" hearing in a modification proceeding when requested by a party. In rejecting employer's contention that because there were no factual issues to be decided in the modification request that the failure to hold a hearing was harmless error, the Court declared that claimant should have the opportunity, once requested, to present witnesses, request the right to introduce additional evidence and present his argument before an administrative law judge. Therefore, the Court remanded without reaching the merits of the case. ***Robbins v. Cyprus Cumberland Coal Co.***, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998).

On appeal to the Sixth Circuit, employer asserted that claimant's letter did not constitute a request for modification because, *inter alia*, it simply manifested an intent to file a request in the future. The court rejected this argument, noting the "very low" standard for what constitutes a modification request. ***Youghiogheny and Ohio Coal Co. v. Milliken***, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999).

The United States Court of Appeals for the Fourth Circuit held that the administrative law judge and the Board erred in failing to consider whether granting employer's request for modification of an award of benefits in a miner's claim would render justice under the Act. The court stated that in addition to assessing whether there has been a change in conditions or a mistake in a determination of fact, the adjudicator must exercise the discretion granted under 20 C.F.R. §725.310 by assessing several factors relevant to the rendering of justice under the Act. These factors include the diligence and motive of the party seeking modification; futility or mootness, *i.e.*, any overpayment made to the miner cannot be recovered; the preference for accuracy in entitlement determinations; and the possibility that under certain circumstances, finality interests outweigh the other factors. ***Sharpe v. Director, OWCP***, 495 F.3d 125, 24 BLR 2-56 (4th Cir. July 17, 2007).

PART II

PROCEDURAL ISSUES

F. MODIFICATIONS

2. PROCEDURAL ISSUES

DIGESTS

A request for modification need not be formal in nature. It simply must be a writing which indicates an intention to seek further compensation. ***Fireman's Fund Insurance Co. v. Bergeron,*** 493 F.2d 545 (5th Cir. 1974). For example, in ***Cobb v. Schirmer Stevedoring Co.,*** 2 BRBS 132 (1975), *aff'd,* 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978), the Board held that a district director's written memorandum summarizing his telephone conversation with claimant was sufficient to constitute a modification request under Section 22 because the memorandum indicated that claimant was dissatisfied with his compensation. *See also* ***McKinney v. O'Leary,*** 460 F.2d 371 (9th Cir. 1972); ***Madrid v. Coast Marine Construction Co.***, 22 BRBS 148 (1989).

The district director need not issue a modification order within one year; rather, the modification process need only be initiated within that time period. ***Banks v. Chicago Grain Trimmers Assoc.,*** 390 U.S. 459, 88 S.Ct. 1140 (1968); ***Candado Stevedoring Corp. v. Willard,*** 185 F.2d 23 (2d Cir. 1950); ***American Mutual Liability Ins. Co. of Boston v. Lowe,*** 85 F.2d 625 (3d Cir. 1936).

Where employer has been determined not to be the responsible operator and thus has ended its payment of benefits (but the Trust Fund continues to pay benefits), the one year statute of limitations for modifying the dismissal of the employer runs from the date of the employer's last payment of benefits. ***USX Corp. v. Director, OWCP,*** 918 F.2d 656, 17 BLR 2-29 (11th Cir. 1992).

A petition for modification must be initiated before the district director. ***Lee v. Consolidation Coal Co.,*** 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988); ***Saginaw Mining Co. v. Mazzulli,*** 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987); ***Director, OWCP v. Peabody Coal Co.*** **[*Sisk*]**, 837 F.2d 295, 11 BLR 2-31 (7th Cir. 1988); ***Director, OWCP v. Palmer Coking Coal Co.*** **[*Manowski*],** 867 F.2d 552 (9th Cir. 1989); ***Director, OWCP v. Kaiser Steel Corp.*** [***Zupon***], 860 F.2d 377, 12 BLR 2-25 (10th Cir. 1988); ***Director, OWCP v. Drummond Coal Co.*** **[*Cornelius*]**, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); ***Hoskins v. Director, OWCP,*** 11 BLR 1-144 (1988). For cases arising in the Seventh, Ninth, Tenth, and Eleventh Circuits, a district director may only correct his or her own mistakes of fact and not those made by an ALJ. ***Director, OWCP v. Jourdan***, 975 F.2d 1286, 17 BLR 2-9 (7th Cir. Sept. 21, 1992); ***Sisk***, *supra;* ***Manowski,***

*supra; **Zupon,** supra; **Cornelius**, supra; see generally **Yates v. Armco Steel Corp.,*** 10 BLR 1-132 (1987).

Under the provisions of the Longshore and Harbor Workers' Compensation Act made applicable to the adjudication of black lung benefits claims by 30 U.S.C. §932(a), initial administrative determinations become final after 30 days if not appealed to the Benefits Review Board, *see* 33 U.S.C. §921(a), and persons aggrieved by a final order of the Board may have such an order set aside only by petitioning for review in a Court of Appeals within 60 days of the final order, *see* 33 U.S.C. §921(c). ***Pittston Coal Group v. Sebben,*** 488 U.S. 105, 12 BLR 2-89 (1988).

In ***Garcia v. Director, OWCP,*** 12 BLR 1-24 (1988), the Board noted the regulatory scheme providing for continuing availability of modification proceedings within one year following any denial by the district director, even after the district director has considered modification once. ***Garcia,*** *supra* at 1-26. Under the regulatory sections referenced in Section 725.310(c), the resulting actions by the district director at the conclusion of modification proceedings all provide subsequent opportunities to seek modification of that action. *See* 20 C.F.R. §§725.310(c), 725.409(b), 725.418(a), 725.419(d), 725.421. To achieve the intent of Congress underlying Section 22, the parties as well as the district director on his or her own motion, may request modification of <u>any</u> decision issued by the district director as the condition of the miner may change with the progressive nature of pneumoconiosis or a mistake in fact could be discovered as the district director considers new evidence in the procedure. *See generally **Orange v. Island Creek Coal Co.,*** 786 F.2d 724, 8 BLR 2-192, 2-197 (6th Cir. 1986). Furthermore, the modification process remains available throughout appellate proceedings. *See **O'Keeffe v. Aerojet-General Shipyards, Inc.,*** 404 U.S. 254 (1971); *see generally **Director, OWCP v. Peabody Coal Co.*** [***Sisk***], 837 F.2d 295, 11 BLR 2-31 (7th Cir. 1988); ***Director, OWCP v. Drummond Coal Co.,*** 831 F.2d 240, 10 BLR 2-322 (11th Cir 1987); ***Ashworth v. Blue Diamond Coal Co.*** 11 BLR 1-167 (1988); ***Hoskins v. Director, OWCP***, 11 BLR 1-144 (1988).

The Sixth Circuit held that "[O]nce a request for modification is filed, no matter the grounds stated, if any, the district director has the authority, if not duty, to reconsider all the evidence for any mistake of fact or change in conditions" concluding that claimant's second claim, filed within one year of the denial of his initial claim, constituted a request for modification and entitled claimant to review under Part 727. The Court then upheld the award based on substantial evidence. ***Consolidation Coal Co. v. Worrell***, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

The Third Circuit rejected employer's argument that the district director improperly reopened this claim more than 30 days following an unchallenged award of benefits. The Court noted that "33 U.S.C. §922 authroizes the DOL to repoen an otherwias final award to "render justice under the act." [***O'Keeffe*** at 255] and also explained that DOL's realization that it had failed to properly serve the carrier in this case, resulting in a

potential violation of its due process rights, "DOL reasonably could treat Old Republic's submissions [of evidence submitted more than 30 days following the award] as a request for time to file a timely controversion." ***National Mines Corp. v. Carroll***, 64 F.3d 135, 19 BLR 2-329 (3d Cir. 1995).

The Third Circuit held that claimant's handwritten note wherein he stated "I am appealing this as of now" on the last page of the DD's Order to Show Cause why benefits should not be terminated, required the forwarding of his case to the OALJ for a hearing even though it pre-dated the final determination by the District Director. As "in the context of premature filings of notices of appeal to this court...that...may be regarded as an appeal from the final order in the absence of a showing of prejudice to the other party...", the Court held that no showing of prejudice was made by the Director and this premature request for a hearing was effective as an invocation of claimant's right to a hearing under Section 725.421(a). Claimant's subsequent claim therefore merged with his original claim under Section 718.404, implementing Section 22 of the Act, *see also* Section 725.310. [The Court noted that the issues of 1) whether the Director must initially identify the basis for reopening an award under Section 22 of the Act and 2) whether the Director has the burden of proof or production were not briefed by either party.] ***Plesh v. Director, OWCP***, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995).

Recognizing that proceedings under the Act are informal, and reiterating that the principle of finality does not apply to longshore and black lung claims as it does in ordinary lawsuits, the Fourth Circuit holds that a letter from claimant which unambiguously expressed dissatisfaction with claims examiner's findings constitutes a valid request for modification, because a reasonable person would be put on notice that claimant was requesting reconsideration of the denial of his claim. *Cf.* ***I.T.O. Corporation of Virginia v. Pettus***, 73 F.3d 523, 30 BRBS 6 (CRT)(4th Cir.), *cert. denied*, 519 U.S. 807 (1996) (claimant's "too sparse" letters to OWCP in LHWCA case deemed insufficient to trigger modification because they made no reference to mistake of fact, additional evidence, dissatisfaction with earlier order or to anything that would alert reasonable person that earlier order might warrant modification). ***Consolidation Coal Company v. Borda***, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

OWCP's failure to respond timely to claimant's request for reconsideration of denial does not dictate whether letter from claimant is a valid request for modification, because "content and context of the letter itself" must govern whether it is a request for modification, according to the Fourth Circuit. Court of appeals thus articulates an objective standard for determining whether correspondence is sufficient to trigger modification procedures under Section 22. *Cf.* ***I.T.O. Corporation of Virginia v. Pettus***, 73 F.3d 523, 30 BRBS 6 (CRT) (4th Cir.), *cert. denied*, 519 U.S. 807 (1996)(claimant's "too sparse" letters to OWCP in LHWCA case deemed insufficient to trigger modification because they made no reference to mistake of fact, additional evidence, dissatisfaction with earlier order or to anything that would alert reasonable person that earlier order might warrant modification). ***Consolidation Coal Company v.***

Borda, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

The Fourth Circuit, deferring to the Director's interpretation, held that a denial of modification is the "rejection of a claim" under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), as implemented by 20 C.F.R. §725.310, and that a new modification petition may be filed within one year of the denial of a prior one. ***Betty B Coal Co. v. Director, OWCP* [*Stanley*]**, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999).

The Sixth Circuit held that the one-year period for filing a request for modification should not be measured from the date of issuance of the circuit court's opinion, but rather from the date on which the court's mandate issues, because this is the time at which the OWCP regains jurisdiction over the case. Therefore, in the case before it, court determined that claimant's petition for modification, filed within one year of the March 23, 1989 issuance of the court's order rejecting claimant's request for an extension of time to file a petition for rehearing, was timely under Section 725.310(a). ***Youghiogheny and Ohio Coal Co. v. Milliken***, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999).

On appeal to the Sixth Circuit, employer argued that the administrative law judge lacked jurisdiction to consider claimant's argument on modification that she was entitled to the "widow's presumption" set forth in 20 C.F.R. §727.204, because the court had already rejected that argument in denying her petition for rehearing. The court held that this contention was without merit, noting that it had never addressed claimant's presumption argument because it did not dispose of her petition for rehearing on the merits, but instead simply denied her permission to file the petition. Therefore, the court held that its prior opinion did not foreclose the subsequent administrative law judge from considering claimant's modification request on the merits. ***Youghiogheny and Ohio Coal Co. v. Milliken***, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999).

The Sixth Circuit rejected the miner's argument that an employer is not entitled to pursue modification once the Board has affirmed an administrative law judge's decision to award benefits, holding that 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, by its plain language, is a broad reopening provision that is available to employers and employees alike. ***King v. Jericol Mining, Inc.***, 246 F.3d 822, 22 BLR 2-2-305 (6th Cir. 2001).

The Seventh Circuit was persuaded by the Department of Labor's position that the requirements of 20 C.F.R. §725.414 apply to modification proceedings and, therefore, vacated the administrative law judge's determination that the claimant was under no duty to cooperate with the employer's request for claimant to authorize access to the miner's medical records in its attempt to have the award of benefits reversed on modification. The Court noted that 20 C.F.R. §725.310(b) provides that "[m]odification proceedings shall be conducted in accordance with the provisions of this part as

appropriate ....” and Section 725.414 is included within Part 725 and states in relevant part that “[i]f a miner unreasonably refuses ... [t]o provide the Office or the designated responsible operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records ... the miner’s claim may be denied by reason of abandonment,” 20 C.F.R. §725.414(a)(3)(i); *see also* 20 C.F.R. §§718.402 (2000); 725.4(a)(2000). Consequently, the Court remanded the case for the administrative law judge to determine whether claimant’s refusal to cooperate with the employer’s request for claimant to authorize access to the miner’s medical records on modification was reasonable under the circumstances. ***Old Ben Coal Co. v. Director, OWCP* [*Hilliard*]**, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002).

The Seventh Circuit agreed with the conclusion of the Fourth Circuit in *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 500, 22 BLR 2-1, 2-16 (4th Cir. 1999), that a denial of modification is the “rejection of a claim” under Section 22 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), and 20 C.F.R. §725.310, and that a new modification petition may be filed within one year of the denial of a prior one. ***Old Ben Coal Co. v. Director, OWCP* [*Hilliard*]**, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002).

Section 22 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), and 20 C.F.R. §725.310, is a broad reopening provision that is not limiting as to party - it is available to employers and miners alike. ***Old Ben Coal Co. v. Director, OWCP* [*Hilliard*]**, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002).

PART II

PROCEDURAL ISSUES

F. MODIFICATIONS

3. MISTAKE OF FACT/CHANGE IN CONDITIONS

DIGESTS

The intended purpose of modification based on a mistake in fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." ***O'Keeffe v. Aerojet-General Shipyards, Inc.,*** 404 U.S. 254, 257 (1971). *See* ***Director, OWCP v. Drummond Coal Co.*** **[*Cornelius*]**, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); ***Dobson v. Todd Pacific Shipyards Corp.,*** 21 BRBS 174 (1988).

The fact-finder must determine if a mistake in a determination of fact was demonstrated or if a change in condition had occurred and, if so, whether reopening the case would render justice under the Act. ***Banks v. Chicago Grain Trimmers Association, Inc.,*** 390 U.S. 459 (1967); ***McCord v. Cephas,*** 532 F.2d 1377, 3 BRBS 371, 376 (D.C. Cir. 1976); ***Wynn v. Clevenger Corp.,*** 21 BRBS 290 (1988).

The language of Section 22 of the LHWCA is a relic of a time when district directors had full adjudicative authority over benefits claims. The adjudicative authority has been transferred to ALJs in order to satisfy the procedural requirements of the APA, leaving district directors principally with administrative functions. ***Cornelius,*** *supra;* ***Yates v. Armco Steel Corp.,*** 10 BLR 1-132 (1987). *See also* ***Eifler v. Director, OWCP***, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991).

Modification may be relied upon by the district director to correct misidentification in the case of a responsible carrier, even where a final compensation order has been issued against the operator. ***Caudill Construction Company v. Abner***, 878 F.2d 179, 12 BLR 2-335 (6th Cir. 1989).

The modification procedure does not "render meaningless" the finality of a Decision and Order which is not appealed within the requisite appeal time. The appellate process concerns the legal validity of an award whereas the modification procedure is aimed toward reviewing factual errors in an effort to render justice under the Act. ***O'Keeffe***, *supra.*

Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes the district director to modify an award or denial of benefits based upon a mistake in fact or change in conditions. It is well settled, however, that an error or change of law is not a proper ground for modification. ***Stokes v. George Hyman Construction Co.,*** 19 BRBS 110, 113 (1986); ***Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.,*** 17 BRBS 183, 185 (1985); ***Swain v. Todd Shipyards Corp.,*** 17 BRBS 124, 125 (1985); ***Donadi v. Director, OWCP,*** 12 BLR 1-66 (1989), *aff'd on reconsideration,* 13 BLR 1-24 (1989). The authority of a district director is restricted to administrative and ministerial matters, which relate to the development and processing of claims. *See* ***Saginaw Mining Company v. Mazzulli***, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987); ***Director, OWCP v. Drummond Coal Company,*** 831 F.2d 240, 10 BLR 2-323 (11th Cir. 1987). If the case involves neither a mistake in fact nor a change in condition, but rather an error of law, initiation of modification procedures under Section 22 of the LHWCA, 33 U.S.C. §922 is not proper. However, a mixed question of law and fact would be subject to modification under Section 22 of the LHWCA, 33 U.S.C. §922. *See* ***Jenkins***, *supra;* ***Presley v. Tinsley Maintenance Service***, 9 BRBS 588, 592 (1979).

The First Circuit noted that while the basic criterion is whether reopening will "render justice" under the Longshore Act, "[a] bare claim of need to reopen to serve the interests of justice...is not enough. In deciding whether to reopen a case under §22, a court must balance the need to render justice against the need for finality in decision making." ***General Dynamics Corp. v. Director, OWCP,*** 673 F.2d 23, 25 (1st Cir. 1982); *see also* ***McDonald v. Director, OWCP,*** 897 F.2d 1510, 23 BRBS 56 (CRT)(9th Cir. 1990).

In considering the modification issue, the ALJ must conduct an independent assessment of the newly submitted evidence to determine whether the newly submitted evidence, including any evidence submitted subsequent to the district director's determination, is sufficient to establish the requisite change in conditions or mistake in a determination of fact. ***Kovac v. BCNR Mining Corp.,*** 14 BLR 1-156 (1990).

There is an important difference between change in condition and a mistake of fact. A change in condition--a worsening of the applicant's black lung disease to the point where it is now totally disabling--entitles him to benefits from the date of the change. The correction of a mistake of fact, showing that he had totally disabling black lung disease at the time of the original hearing, entitles him to benefits from the date--which might be long before that hearing--on which he became totally disabled. ***Jarka v. Hughes,*** 299 F.2d 534, 536-37 (2d Cir. 1962); ***Eifler v. Director, OWCP,*** 926 F.2d 633, 15 BLR 2-1 (7th Cir. 1991).

In establishing modification based on a change in condition, the deterioration in the miner's condition need not be great. It need only be a perceptible change. On the other hand, in seeking "reconsideration" of a claim based on a mistake of fact, the moving party's submission need only establish "a high probability of error to warrant a hearing." Definitive proof of the mistake is for the hearing. ***Amax Coal Co. v. Franklin,*** 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992).

If a claimant avers generally that the ultimate fact was mistakenly decided, the district director (or alj) has the authority, without more, to modify the denial of benefits. [According to the court, there is no need for a smoking gun factual error, changed conditions, or startling new evidence]. ***Jessee v. Director, OWCP,*** 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

The Third Circuit held that claimant was entitled to *de novo* factual findings based on the lay evidence in this case under the modification procedures, Section 725.310, as here there had been a mistake in the "ultimate fact" of entitlement, citing ***Jessee v. Director, OWCP***, 5 F.3d 723, 725, 18 BLR 2-26 (4th Cir. 1993). ***Keating v. Director, OWCP***, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

The Sixth Circuit held that "[O]nce a request for modification is filed, no matter the grounds stated, if any, the district director has the authority, if not duty, to reconsider all the evidence for any mistake of fact or change in conditions" concluding that claimant's second claim, filed within one year of the denial of his initial claim, constituted a request for modification and entitled claimant to review under Part 727. The Court then upheld the award based on substantial evidence. ***Consolidation Coal Co. v. Worrell***, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

The Seventh Circuit rejected employer’s challenge to the Board’s affirmance of the award of benefits in this claim originally filed in 1976. The Court held that the administrative law judge acted within his discretion in giving the most weight to x-ray readings of the most recent films of record that were submitted by the widow in a timely motion for modification. Noting that employer did not raise the issue as to whether claimant had properly requested modification in alleging that the mistake of fact had been ”the bottom line - that the evidence did not meet the standards of sec.727.203(a),” the Court discusses the purpose of Section 22 of the Act, “limited to [correcting] errors in the record, rather than to errors in the conclusions drawn from the record.” In concluding that “([P]erhaps the special rule in 30 U.S.C. sec.945(b)(2) for cases pending on March 1, 1978, explains [employer’s] decision.)”, the Court held that the “administrative process must end” in this prolonged case and affirmed the award of benefits based on the invocation of the interim presumption at Section 727.203(a)(1). **[NOTE:** While not cited in this case, the Third and Fourth Circuits have issued holdings on this issue, as digested above in ***Keating v. Director, OWCP***, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); ***Jessee v. Director, OWCP***, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).**]** ***Old Ben Coal Co. v. Scott***, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998).

On appeal to the Sixth Circuit, employer asserted that claimant's letter did not constitute a request for modification because it simply manifested an intent to file a request in the future and because it asserted a mistake of law, *e.g.*, that the administrative law judge should have applied the "widow's presumption" set forth in 20 C.F.R. §727.204. The court rejected this argument, noting the "very low" standard for what constitutes a modification request. The court also rejected employer's distinction between errors of law and fact, holding that such a distinction is unpersuasive on modification, where the district director has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. ***Youghiogheny and Ohio Coal Co. v. Milliken***, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999).

The Seventh Circuit reversed the Board's affirmance of the administrative law judge's denial of the employer's request for modification pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), and 20 C.F.R. §725.310, because the evidence submitted by employer in support of its request could have been presented at an earlier stage in the proceedings. In accordance with the Department of Labor's interpretation, which the Court concluded is reasonable and persuasive, the Court held that the standard for determining whether reopening a claim on modification would render justice under the Act, in accordance with the Supreme Court's holding in ***O'Keeffe v. Aerojet-General Shipyards, Inc.***, 404 U.S. 254 (1971), articulates a preference for accuracy over finality. The Court noted that the Supreme Court in ***O'Keeffe*** was explicit that "new" evidence was not a prerequisite for reopening a claim on modification, but that "justice under the Act" should be considered in reopening decisions, requiring that an administrative law judge's administration of "justice" be grounded in the stated purpose of the Act, *i.e.*, to ensure the accurate distribution of benefits. Consequently, in light of the Act's preference for accuracy of determination over finality, the Court held that a modification request cannot be denied solely on the basis that the argument or evidence submitted in support of a request for modification could have been presented at an earlier stage in the proceedings or on the number of times modification has been requested. ***Old Ben Coal Co. v. Director, OWCP* [*Hilliard*]**, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002).

Nevertheless, the Court held that the administrative law judge is not precluded from determining, within the administrative law judge's discretion, that there are important reasons grounded in the language and policies of the Act that overcome the preference for accuracy and would justify the denial of a request to reopen a claim on modification, such as: the moving party's disregard of the administrative process, abuse of the adjudicatory system or sanctionable conduct; if it were clear from the moving party's submissions that reopening would not alter the substantive award; or an employer requests modification in an unreasonable effort to delay payment. In determining whether to reopen a claim on modification, the Court held that the administrative law

judge is in a unique position to assess the motivations of the party, the merits of the motion as well as institutional concerns, and the administrative law judge needs to take into consideration many factors including the diligence of the parties, the number of times that the party has sought reopening, the quality of the new evidence which the party wishes to submit and other factors deemed relevant by the administrative law judge. While the Court held that the administrative law judge is not required to give no weight to the concern of finality of decision, nor is the possibility precluded that, in a given case, it might be quite appropriate to permit this consideration to prevail in the adjudication of a case, the Court concluded that a determination as to whether reopening a claim on modification would render "justice under the Act" in accordance with the standard enunciated in *O'Keeffe* cabins the discretion of the administrative law judge to keep in mind that accuracy of determination is to be given great weight in all determinations under the Act. ***Old Ben Coal Co. v. Director, OWCP* [*Hilliard*]**, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002).

The United States Court of Appeals for the Fourth Circuit held that the administrative law judge and the Board erred in failing to consider whether granting employer's request for modification of an award of benefits in a miner's claim would render justice under the Act. The court stated that in addition to assessing whether there has been a change in conditions or a mistake in a determination of fact, the adjudicator must exercise the discretion granted under 20 C.F.R. §725.310 by assessing several factors relevant to the rendering of justice under the Act. These factors include the diligence and motive of the party seeking modification; futility or mootness, *i.e.*, any overpayment made to the miner cannot be recovered; the preference for accuracy in entitlement determinations; and the possibility that under certain circumstances, finality interests outweigh the other factors. ***Sharpe v. Director, OWCP***, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007).

PART II

PROCEDURAL ISSUES

G. COMMENCEMENT OF BENEFITS

1. ONSET OF TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

a. Section 727.302 Validity

The Eleventh Circuit held that Section 435(c) and Section 727.302(c) are constitutionally valid. Thus, it is proper to distinguish Section 435 claims from other claims regarding the onset of disability date. ***Curse v. Director, OWCP,*** 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988).

b. Generally

DIGESTS

The Third Circuit applied Section 725.503(b) which provides that benefits are payable from the month when a claim is filed only when the evidence does not establish when the disease progressed to such a stage as to render the miner totally disabled. Thus, the court held that since the uncontradicted evidence in this case established that the miner was not totally disabled as of 1983, and since the miner has produced no evidence to establish disability prior to 1985, a finding of onset of disability as of 1977 (the date of filing) is precluded. The Court remanded the case to the ALJ to reconsider the onset date. ***Rochester & Pittsburgh Coal Co. v. Krecota,*** 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989).

The Tenth Circuit held that where the miner's disability clearly occurred prior to Jan. 1, 1974, the earliest date from which benefits are payable under Part C, the ALJ need not make a specific finding as to the actual month of onset of the miner's disability. ***Velasquez v. Director, OWCP,*** 835 F.2d 262, 11 BLR 2-19 (10th Cir. 1987).

The Fourth Circuit held that where the evidence contains insufficient evidence as to the precise month of the miner's onset of disability, the claim filing date is the appropriate onset of disability date. ***Green v. Director, OWCP,*** 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986).

The Seventh Circuit held that positive x-ray evidence plus lay testimony was sufficient to establish the miner's onset of disability date based upon the facts of this case. ***Zettler v. Director, OWCP,*** 886 F.2d 831 (7th Cir. 1988).

The Board summarized its holdings in ***Gardner v. Consolidation Coal Co.,*** 12 BLR 1-184 (1989) and ***Lykins v. Director, OWCP,*** 12 BLR 1-181 (1989) by stating the principle that if medical evidence does not establish the date on which claimant became totally disabled, then claimant is entitled to benefits as of his filing date, unless uncontradicted medical evidence indicates that claimant was not totally disabled at some point subsequent to his filing date. ***Edminston v. F & R Coal Co.,*** 14 BLR 1-65 (1990).

The Seventh Circuit rejected employer's challenge to the ALJ's finding that the date of filing was the onset date of disability under Section 725.503(b), noting that "[H]ere the regulations seem to trump common sense...[W]ith no clearly established onset date, the benefit of the doubt and the concomitant back-dated benefits go to the miner." ***Ziegler Coal Co. v. Kelley***, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997).

The Seventh Circuit upheld the administrative law judge's determination that the appropriate date upon which benefits commenced was the date of the miner's request for modification, as the administrative law judge noted correctly that the record did not establish the exact date of onset of total disability due to pneumoconiosis pursuant to 20 C.F.R. §725.503(b). ***Zeigler Coal Co. v. Director, OWCP*** **[*Griskell*]**, 490 F.3d 609, 24 BLR 2-38 (7th Cir. 2007).

2. THE EFFECT OF CONTINUED EMPLOYMENT

Continued employment has been deemed not inconsistent with total disability where the work is characterized by sporadic work, poor performance, or marginal earnings. ***Hanna v. Califano,*** 579 F.2d 67 (10th Cir. 1978).

The Seventh Circuit affirmed the administrative law judge's award of benefits under 20 C.F.R. Part 727. The Seventh Circuit held that the administrative law judge, in finding invocation under 20 C.F.R. §727.203(a)(1), permissibly accorded greater weight to the x-ray readings rendered by physicians with superior radiological credentials. The Seventh Circuit also held that the administrative law judge, in finding that employer failed to establish rebuttal under 20 C.F.R. §727.203(b)(3), permissibly discounted Dr. Tuteur's opinion on disability causation because Dr. Tuteur did not believe that the miner had pneumoconiosis, and permissibly found Dr. Myers' opinion to be too equivocal to carry employer's burden. The Seventh Circuit reversed the administrative law judge's onset determination based on the date of filing pursuant to 20 C.F.R. §725.503, and held that where, as in the instant case, the miner temporarily returns to work subsequent to the date of filing, the proper course is to award benefits suspended during the period of coal mine employment pursuant to 20 C.F.R. §725.503A (now codified at 20 C.F.R. §725.504). The Seventh Circuit rejected employer's argument that the sixteen-year delay in adjudicating this claim deprived employer of its right to due process. The court noted that employer received notice of, and participated in, all proceedings since the 1978 filing of the claim. Further, the court detected no prejudice

to employer despite this delay. ***Amax Coal Co. v. Director, OWCP* [*Chubb*]**, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002).

PART II

PROCEDURAL ISSUES

H. SCOPE OF REVIEW

1. GENERALLY; TIMELINESS

a. Thirty Day Notice; Section 725.458

The Sixth Circuit ruled that F.R.C.P. 32(d)(1) is applicable to the Black Lung Act. Therefore, all errors and irregularities in the giving of the 30-day notice required under 20 C.F.R. §725.458 are waived unless a written objection is promptly served upon the party giving notice. ***Brown Badgett, Inc. v. Jennings***, 842 F.2d 899, 11 BLR 2-122 (6th Cir. 1988).

Pursuant to 20 C.F.R. §725.478, the thirty-day period in which a party is entitled to appeal to the Board is triggered by the date on which the ALJ's decision is filed with the district director's office. ***Director, OWCP v. Seals***, 942 F.2d 986, 15 BLR 2-193 (6th Cir. 1991).

The United States Court of Appeals for the Sixth Circuit held that because employer did not receive a copy of the Board's October 30, 1995 Decision and Order when it was served upon the other parties of record, the timeliness requirements for filing a motion for reconsideration, see 20 C.F.R. '802.410(a), were tolled. The court stated that the 60-day period did not begin to run until November 7, 1996, when employer received a copy of the Decision and Order accompanied by a letter specifically indicating that the correspondence constituted official notice of the Board's Decision and Order. The court rejected the Director's argument that service occurred and, therefore, the time for filing a motion for reconsideration began to run, when a copy of the Board's Decision and Order was faxed to employer's counsel on August 2, 1996. Accordingly, the court held that employer's motion for reconsideration was timely and that the court had jurisdiction to consider employer's appeal. ***Island Creek Coal Co. v. Holdman***, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000).

2. ADMINISTRATIVE PROCEDURE ACT

Unless the ALJ has sufficiently explained the weight he has given to obviously probative exhibits to say that his decision is supported by substantial evidence approaches an abdication of the court's duty to scrutinize the record as a whole to determine whether the conclusions reached are rational. ***Ziegler Coal Co. v. Sieberg***, 839 F.2d 1280, 11 BLR 2-80 (7th Cir. 1988)(quoting Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th

Cir. 1977)); ***see also Old Ben Coal Co. v. Warren Battram***, 18 BLR 2-42 (7th Cir. 1993); ***Peabody Coal Co. v. Helms***, 859 F.2d 486 (7th Cir. 1988); ***Schaaf v. Mathews***, 574 F.2d 157 (3d Cir. 1978); ***Litwaitis v. Mathews***, 427 F.Supp. 458 (E.D. Pa. 1976).

The Fourth Circuit held that the administrative law judge (ALJ) properly admitted and considered all evidence submitted by employer in this case, rejecting claimant's argument that he violated the Administrative Procedure Act's (APA) prohibition against "unduly repetitious" evidence by admitting cumulative or repetitive evidence submitted by employer. Claimant contended that employer's "obscene overdevelopment" of evidence allowed the mere counting of heads prohibited by Adkins v. Director, OWCP, 958 F.2d 49, 52, 16 BLR 2-61 (4th Cir. 1992). While the Court recognized that an ALJ is authorized to exclude "unduly repetitious" evidence under the APA, Adkins "...did not suggest that two or three independent, qualified opinions were necessarily of less probative value than one." The Court noted that qualifications, reasoning, reliance on objectively determinable symptoms, the physician's freedom from irrelevant distractions and prejudices were all factors that may distinguish various opinions of record submitted for consideration by the ALJ. The Court therefore held that an ALJ should admit all relevant evidence, "erring on the side of inclusion" but that it is within the ALJ's discretion to exclude evidence that becomes unduly repetitious, i.e. provides little or no additional probative value. The Court finally notes that "admission of cumulative evidence, when it increases confidence in the outcome of the proceedings," would not constitutes prejudicial error as evidence that is cumulative is not necessarily "unduly repetitious" under the APA. ***Underwood v. Elkay Mining, Inc.***, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

The Third Circuit vacated the Board's affirmance of the award of benefits herein and remanded to the ALJ for findings under 20 C.F.R. §718.204(c) in compliance with the Administrative Procedures Act (APA). Noting their dismay at the "inexplicable delay" in the disposition of this claim, originally filed in October 1984, the Court held, however, that "meaningful review [was] impossible" due to the ALJ's failure to adequately set forth the reasons or bases for his finding of total disability under Section 718.204(c). While reluctant to prolong the litigation further, the Court held that review of the ALJ's holdings was not possible until they could be sure they were "reasoned" through an adequate statement of the bases of his decisions that was in compliance with the APA. ***Barren Creek Coal Co. v. Witmer***, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997).

The Sixth Circuit held that the administrative law judge properly concluded that claimant demonstrated total disability under Section 718.204(c)(4), rejecting employer's contention that the administrative law judge's findings did not provide sufficient explanation of his analytic process to meet the requirements of the Administrative Procedures Act, 5 U.S.C. §556(d). ***Peabody Coal Co. v. Hill***, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997).

The Fourth Circuit rejected employer's argument that the administrative law judge violated the requirements of the Administrative Procedures Act (APA) in discussing only the positive x-ray readings, all dated 1981-1985 and failing to discuss the negative x-ray readings, all dated 1974-1980. In noting that the administrative law judge awarded benefits as of October 1981, the Court held that the administrative law judge's reasoning was obvious and his brevity in no way hampered their review. "The basic purpose of the APA's duty of explanation is to help the ALJ get it right...but its secondary purpose is to allow us to discharge our own duty to review the decision. [citations omitted] If we understand what the ALJ did and why he did it, we, and the APA, are satisfied....Brevity can foster clarity." ***Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*]**, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

The Fourth Circuit, in a detailed opinion, rejected the Board's affirmance of the administrative law judge's award of benefits. The first two opinions issued by the administrative law judge were remanded by the Board, which thereafter affirmed the third opinion awarding benefits. The Court held that there were numerous errors in the weighing of evidence under Section 718.204 and an insufficient explanation under the Administrative Procedures Act (APA) for the crediting of certain evidence, compounded by the multiple remands necessitated herein. The Court reversed the award and remanded for reassignment of the case to a new administrative law judge for expeditious review as "...review of this claim requires a fresh look at the evidence, unprejudiced by the various outcomes of the ALJ and the Board's orders below." ***Milburn Colliery Co. v. Hicks***, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

The Fourth Circuit, while noting that the exclusionary rule applicable to an agency proceeding for the admission of evidence is essentially limited to relevance, held that the agency process requires that the administrative law judge perform a gate keeping function while assessing evidence to decide the merits of a claim. To assure both a fairness in the process and an outcome consistent with the underlying statutory scheme, the administrative law judge has, under §556(d) of the APA, the affirmative duty to qualify evidence as "reliable, probative, and substantial" before relying upon it to grant or deny a claim. ***U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*]**, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999).

The Fourth Circuit vacated an award of benefits after concluding that two administrative law judge's failed to explain adequately their reasoning for crediting some medical evidence over other medical evidence in finding that pneumoconiosis hastened the miner's death. One administrative law judge briefly recounted the opinions of five pulmonary experts before explaining that he had "carefully considered the opinions and rationale of these pulmonary experts" and "[w]hile their opinions are probative, I find more probative the opinions of the pathologists." The administrative law judge then rejected the opinion of the lone pathologist who found that pneumoconiosis did not hasten death, stating only that he found the report "unconvincing," without explaining why he found it unconvincing or why he found other evidence more persuasive. The

Court noted that when administrative law judge's simply state that they have considered certain evidence and have decided to discount it, reviewing courts are left to guess at the judges' rationale. ***Bill Branch Coal Corp. v. Sparks***, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

3. LAW OF THE CASE

The Seventh Circuit, citing ***Bridges v. Director, OWCP,*** 6 BLR 1-988 (1984), held that issues not preserved as a result of a remand, cannot be raised in a second appeal. The "law of the case" doctrine permits an exception where an intervening change in controlling law dictates a result different from that directed by the appellate body. ***Freeman United Coal Co. v. Benefits Review Board,*** 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990); ***Richardson v. United States,*** 841 F.2d 993 (9th Cir. 1988); *see also* ***Piambino v. Barley,*** 757 F.2d 1112 (11th Cir. 1985); ***Goodpasture, Inc. v. M. F. Pollet,*** 668 F.2d 1003 (5th Cir. 1982); ***Delano v. Kitch,*** 663 F.2d 990 (10th Cir. 1981).

In a footnote, the Sixth Circuit rejected employer's argument that the ALJ's true doubt finding under Section 727.203(a)(1) was reviewable on appeal under the "law of the case" doctrine. The Court reasoned that since neither it nor a higher court had ever reviewed the ALJ's finding, this doctrine was inapplicable, *citing* ***Richardson v. United States***, 841 F.2d 993, 996 (9th Cir. 1988), and other cases. ***Consolidation Coal Co. v. McMahon***, 77 F.3d 898, 20 BLR 2-152 (6th Cir. 1996).

PART II

PROCEDURAL ISSUES

H. SCOPE OF REVIEW

4. ISSUES ON APPEAL

a. Board's Authority

DIGESTS

The Courts of Appeals for the Sixth and Third Circuits have held that the Board has the authority to determine the constitutional validity of the regulations underlying the programs which the Board administers. *Gibas v. Saginaw Mining Co.,* 748 F.2d 1121, 7 BLR 2-53 (6th Cir. 1984); ***Carozza v. United States Steel Corp.,*** 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984); *see also* ***McCluskey v. Ziegler Coal Co.,*** 2 BLR 1-1248 (1981).

The Third Circuit rejected employer's assertion that the Board violated its statutory authority by engaging in *de novo* fact finding when it reversed the ALJ's Section 727.203(b)(3) finding and reinstated the ALJ's previous finding that Section 727.203(b)(3) was not established. The Court held that the Board acted within its scope of review in making the legal determination that the ALJ's decision on reconsideration was clearly contrary to law. "While the board could have remanded the matter, we hardly can fault it for bringing these protracted proceedings to a close." As all the critical factual determinations had been made by the ALJ, the Board would have had to determine that "the ALJ might deviate from his prior finding" to justify remand. ***BethEnergy Mines, Inc. v. Director, OWCP*** **[*Vrobel*]**, 39 F.3d 458, 19 BLR 2-95 (3d Cir. 1994).

The United States Court of Appeals for the Sixth Circuit held that the brief that employer filed before the Board was adequate to invoke Board review. The court indicated that employer complied with the requirements of 20 C.F.R. §802.211(b) by alleging specifically that the ALJ erred in crediting Dr. Baker's opinion under 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2)(iv) without addressing the equivocal nature of the doctor's diagnosis of pneumoconiosis and without resolving the conflict created by the administrative law judge's prior finding that the objective studies upon which Dr. Baker relied in diagnosing a totally disabling respiratory impairment did not support such a diagnosis. The court noted that employer also argued specifically that the administrative law judge did not adequately explain his finding that Dr. Dahhan's opinion on the issue of total disability was not reasoned. Accordingly, the court vacated the

portion of the Board's Decision and Order in which the Board held that employer did not properly invoke Board review. The court then addressed employer's contentions, rejected them, and affirmed the award of benefits. ***Crockett Colleries, Inc. v. Barrett***, 478 F.3d 350, 355, 23 BLR 2-472, 434 (6th Cir. 2007).

b. Jurisdiction

DIGESTS

An affected or aggrieved party may initiate an appeal in any circuit in which the miner was engaged in coal mine employment, as provided for under 33 U.S.C. §921(c). ***Hon v. Director, OWCP***, 699 F.2d 441, 5 BLR 2-43 (8th Cir. 1983). *see* ***Danko v. Director, OWCP***, 846 F.2d 366, 368, 11 BLR 2-157, 2-159 (6th Cir. 1988); ***Wetherill v. Director, OWCP***, 812 F.2d 376, 379 n.6, 9 BLR 2-239, 2-242 n.6 (7th Cir. 1987); ***Bernardo v. Director, OWCP***, 772 F.2d 576, 578 (9th Cir. 1985); ***Consolidation Coal Co. v. Chubb***, 741 F.2d 968, 6 BLR 2-92 (7th Cir. 1984). ***See also Shupe v. Director, OWCP***, 12 BLR 1-200 (1989).

The Third Circuit held that, pursuant to 33 U.S.C. §921(c), it does not have jurisdiction to review an order of an administrative law judge, "upon which the Board has not yet passed." Consequently, as the Board had not issued a final order, the petition for review was dismissed as interlocutory. ***Elliott Mining Co., Inc. v. Director, OWCP*** **[*Kovalchick*]**, 956 F.2d 448, 16 BLR 2-24 (3d Cir. 1992).

The district court (rather than the administrative law judge or the Board) has jurisdiction over the reimbursement of principal and interest upon interim payments made by the Trust Fund. Collection actions, the enforcement of liens and the calculation of statutory interest are all within the traditional purview of the district courts. ***The Youghiogheny and Ohio Coal Co. v. Vahalik***, 970 F.2d 161, 16 BLR 2-94 (6th Cir. 1992).

The Tenth Circuit rejected employer's argument that the pendency of a motion for modification [of the Board's decision] made the Board's decision non-final and therefore not appealable. Consequently, the court held that it had jurisdiction to consider the petition for review. ***Hansen v. Director, OWCP,*** 984 F.2d 364, 17 BLR 2-48 (10th Cir. 1993).

After determining that the proper forum for approval was the body before which the attorney's work was performed, the court, citing 33 U.S.C. §928(c), approved a fee settlement agreement for services before it, even though the final compensation order had not been entered. ***Eifler v. Peabody Coal Co.***, 13 F.3d 236, 18 BLR 2-86 (7th Cir. 1993).

The Third Circuit held that Section 725.603 appeals belong in the District Courts and the case before them concerned an administrative determination of liability and not review of a judgement in a district court enforcement action. ***National Mines Corp. v. Carroll***, 64 F.3d 135, 19 BLR 2-329 (3d Cir. 1995).

The Sixth Circuit held that employer's failure to appeal to the Court within sixty days following the denial of its first motion for reconsideration by the Board rendered its appeal, filed following the denial of a second (and timely) motion for reconsideration before the Board, untimely. The Court reasoned that Federal Rule 59(e) was analogous, concluding that the second motion for reconsideration, here posed on the same grounds as the initial reconsideration request, was untimely and that the Court lacked jurisdiction to consider it in this case that has been pending in the system for eighteen years. ***Peabody Coal Co. v. Abner***, 118 F.3d 1106, 21 BLR 2-154 (7th Cir. 1997).

The Tenth Circuit rejected claimant's argument that jurisdiction for this appeal should be based on the circuit in which her husband lived and received medical treatment by following "the unanimous rulings of our sister circuits rejecting this assertion and adopting the "sensible rule" that jurisdiction is appropriate in the circuit where exposure has occurred." The Court further rejected claimant's argument that place of exposure is irrelevant to her survivor's claim, stating that the statute is applicable to any person aggrieved by a decision of the Board. Therefore, the Court referred this appeal to the Seventh Circuit, the place where all of the miner's exposure to coal dust occurred. ***Broyles v. Director, OWCP***, 143 F.3d 1348, 21 BLR 2-369 (10th Cir. 1998).

Where entitlement and liability had been finally determined and where the sole issue in dispute was employer's obligation to resume benefit payments in light of its setoff agreement with the widow, the Sixth Circuit held that the dispute was "in reality a collection action to enforce the administrative agency's order." The Sixth Circuit, therefore, affirmed the decision of the Board dismissing the petition for lack of subject matter jurisdiction. ***Director, OWCP v. Peabody Coal Co.* [*Givens*]**, 330 F.3d 830, 22 BLR 2-604 (6th Cir. 2003); ***see also Youghiogheny & Ohio Coal Co. v. Vahalik***, 970 F.2d 161, 16 BLR 2-94 (6th Cir. 1992).

Jurisdiction on Interest Cases

The Third Circuit affirmed the Board's decision that it lacked subject matter jurisdiction to resolve disputes regarding interest assessed against coal mine operators on reimbursements to the Black Lung Disability Trust Fund (the Fund) for medical benefits that the Fund previously paid to or on behalf of claimants. The Court held that refusal by the ALJ and the Board to exercise jurisdiction over interest assessment cases did not deny the operators the right to a hearing and review as required by 33 U.S.C. §§919 and 921, stressing that the operator's opportunity to challenge an interest assessment was controlled by statutory provisions concerning access to the district courts for

enforcement of black lung liability. The Court held that the operators' challenge to the interest assessed against them is a collateral attack on a final compensation order, jurisdiction over which rests in the district courts pursuant to 30 U.S.C. §934(b)(4)(A). ***BethEnergy Mines, Inc. v. Director, OWCP* [*Pierson*]**, 32 F.3d 843, 18 BLR 2-351 (3d Cir. 1994).

The Fourth Circuit, agreeing with the Third, Sixth and Seventh Circuits, affirmed the Board's holding that they had "no jurisdiction over issues involving the computation of interest assessed against coal mine operators on reimbursements paid to the Fund by coal mine operators for medical benefits paid by the Fund, as they are not "in respect of a claim" under 33 U.S.C. §919(a)." ***Sea "B" Mining Co. v. Director, OWCP***, 45 F.3d 851, 19 BLR 2-49 (4th Cir. 1995).

The Sixth Circuit, relying on ***Vahalik***, upheld the decisions of the ALJ and the Board, *see* ***Brown v. Sea B. Mining Co.***, 17 BLR 1-115 (1993)(en banc), *aff'd*, ***Sea "B" Mining Co. v. Director, OWCP***, 45 F.3d 851, 19 BLR 2-49 (4th Cir. 1995), that jurisdiction to consider a challenge to the DOL's method of calculating interest due on unpaid reimbursements of monies paid on behalf of coal operators by the Trust Fund in MBO cases lies with the District Courts. ***B & S Coal Co. v. Director, OWCP***, 35 F.3d 1041, 18 BLR 2-373 (6th Cir. 1994).

The Seventh Circuit, agreeing with the Third and Sixth Circuits, held that the federal district court is the appropriate forum for resolving disputes regarding computation of interest on reimbursements to the Fund for medical benefits. *See* ***Bethenergy Mines, Inc. v. Director, OWCP* [*Pierson*]**, 32 F.3d 843, 18 BLR 2-351 (3d Cir. 1994); ***B & S Coal Co. v. Director, OWCP***, 35 F.3d 1041, 18 BLR 2-373 (6th Cir. 1994). The Court reasoned that the interest issue was not "in respect of such claim" pursuant to 33 U.S.C. §919(a) as all questions in respect of such claim were resolved as employer admitted underlying liability and the amount of medical benefits was agreed upon. The Court noted that there was no statute explicitly providing for either administrative or judicial review of the DOL's computation of interest due under 30 U.S.C. §934(b). ***Peabody Coal Co. v. Director, OWCP* [*Ayers*]**, 40 F.3d 906, 19 BLR 2-34 (7th Cir. 1994).

Opinion of Sixth Circuit upholding the determination by the District Court that employer made no showing of affirmative misconduct by a government actor to succeed in its equitable estoppel argument that DOL could not recalculate and collect correct amounts of interest in this MBO case. The Court also rejected employer's argument that interest could not be charged from the date of payments from the Fund. ***Reich v. The Youghiogheny and Ohio Coal Co.***, 66 F.3d 111, 19 BLR 2-345 (6th Cir. 1995).

The Seventh Circuit held that employer’s failure to appeal to the Court within sixty days following the denial of its first motion for reconsideration by the Board rendered its appeal, filed following the denial of a third motion for reconsideration before the Board,

untimely. The Court reasoned that Section 10(c) of the Administrative Procedures Act, 5 U.S.C. §704, specifies that "[e]xcept as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined [a request] for any form of reconsideration...." Noting that the Supreme Court in ***Darby v. Cisneros***, 509 U.S. 137 (1993) had noted this "unambiguous language" in the APA and the fact that the courts had "almost completely ignored" this provision, the Seventh Circuit applied Section 10(c) to this case, holding that appealing parties could exhaust only those administrative remedies expressly provided for by regulation to preserve appeal rights. Citing to 20 C.F.R. §§802.403, 802.407, the Court then noted that the Board's procedural regulations only provide a tolling of the 60 day appeal period based on one request for reconsideration if filed within 30 days of the issuance of the Board's final decision and order. Any subsequent reconsideration request merely tolls the time to appeal the denial of the first request for reconsideration. Following similar holdings issued by the Sixth Circuit in ***Peabody Coal Co. v. Abner***, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997), and the D.C. Circuit in ***Sendra Corp. v. Magaw***, 111 F.3d 162 (D.C. Cir. 1997), the Court dismissed employer's appeal for lack of jurisdiction. ***Midland Coal Co. v. Director, OWCP* [*Luman*],** 149 F.3d 558, 21 BLR 2-451 (7th Cir. 1998).

The Fourth Circuit held that it does not have jurisdiction to review an order of the Board which denies reconsideration, but does have jurisdiction to review an order of the Board which grants reconsideration, even though it denied any relief. ***Betty B Coal Co. v. Director, OWCP* [*Stanley*]**, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999).

c. Secretary's Authority

The D.C. Circuit held that the Black Lung Act invests the Secretary of Labor with the authority to write regulations, 30 U.S.C. §902(f)(1), and to supplement statutory terms, 30 U.S.C. §932(a). ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 869, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

PART II

PROCEDURAL ISSUES

I. POLICIES IN GENERAL

1. SETTLEMENTS AND RELEASES

DIGESTS

There is no authority under the Act for releases or settlement agreements. Therefore, a release agreement executed by the operator and the claimant does not bar liability being imposed upon the operator for black lung benefits. ***Niece Mining Company v. Quillen,*** No. 88-4170 (6th Cir., Aug. 28, 1989)(unpub.).

PART II

PROCEDURAL ISSUES

J. TIMELINESS OF CLAIM FILING

DIGESTS

The Seventh Circuit affirmed the Board's affirmance of the administrative law judge's award of benefits. The Seventh Circuit rejected employer's argument that this claim, filed in 1998, was time-barred because claimant was diagnosed with chronic obstructive pulmonary disease in 1992. The Seventh Circuit noted that it was undisputed that Dr. Carandang's 1999 medical opinion, that claimant was totally disabled by chronic obstructive pulmonary disease due to coal mine employment and smoking, was the first such determination to be communicated to claimant. *See* 20 C.F.R. §725.308(a), (c). The Seventh Circuit also rejected employer's argument that the equitable doctrine of laches bars the claim in light of the gap between the time claimant last worked for employer in 1984 and when he filed the claim in 1998. The Seventh Circuit determined that given the administrative law judge's finding that claimant was first informed that he had pneumoconiosis in 1999, after he filed his claim, the administrative law judge correctly concluded that claimant could not have been expected to file the claim any earlier; there was no lack of diligence on claimant's part. The Seventh Circuit further denied employer's request to have liability for the payment of benefits transferred to the Black Lung Disability Trust Fund, and rejected employer's argument that its procedural due process rights were violated by the Department of Labor's delay in naming it the responsible operator. The Seventh Circuit held that employer failed to prove that the delay deprived it of an opportunity to defend against the claim. ***Roberts & Schaefer Co. v. Director, OWCP* [*Williams*]**, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005).

In view of the Act's characterization of pneumoconiosis as a latent and progressive disease, its treatment of subsequent claims, and its remedial purpose, the Fourth Circuit held that a medical determination of totally disabling pneumoconiosis, later deemed to be a misdiagnosis by virtue of a superseding denial of benefits, cannot trigger the statute of limitations for subsequent claims, regardless of whether the diagnosis was reviewed in the adjudication of the earlier claim. Consistent with ***Lisa Lee Mines v. Director, OWCP* [*Rutter*]**, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), a legal determination that a miner is not entitled to benefits as of the date his claim is finally denied necessarily refutes a medical determination that the miner had totally disabling pneumoconiosis prior to that point, since the factual findings underlying the denial of the claim must be accepted as correct. Consequently, such a medical determination is treated, for legal purposes, as a misdiagnosis which can have no effect on the statute of

limitations for a subsequent claim. ***Consolidation Coal Co. v. Williams***, 453 F.3d 609, 23 BLR 2-346 (4th Cir. 2006).

The Fourth Circuit held that neither the Black Lung Benefits Act nor the implementing regulations requires that the notice to a miner of a medical determination of his total disability due to pneumoconiosis be in writing to trigger the start of the three-year statute of limitations clock on black lung claims. The Fourth Circuit held that the language of 30 U.S.C. §932(f) and the language of 20 C.F.R. §725.308(a) plainly do not contain the written-notice requirement adopted by the Board in ***Adkins v. Donaldson Mine Co.***, 19 BLR 1-36 (1993). ***Island Creek Coal Co. v. Henline***, 456 F.3d 421, 23 BLR 2-321 (4th Cir. 2006).

The Fourth Circuit, citing its unpublished decision in ***Westmoreland Coal v. Amick***, No. 04-1147, 2004 WL 2791653 (4th Cir. Dec. 6, 2004), held that the statute of limitations provided by Section 422(f) of the Act, 30 U.S.C. §932(f), and implemented by 20 C.F.R. §725.308, applies to both initial and subsequent claims. The Court held that because neither the statute nor the Section 725.308 regulation makes any distinction between initial or subsequent claims, simply referring to "any" or "a" claim for benefits, an interpretation of the statute or regulation that makes a distinction between initial and subsequent claims is precluded. ***Sewell Coal Co. v. Director, OWCP* [*Dempsey*]**, 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008), *vac'g and remanding* ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

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