PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

A. THE CLAIMS PROCESS

1. FILING OF CLAIMS/APPEALS, SERVICE, SUFFICIENCY OF PLEADINGS

DIGESTS

Actual Knowledge of Service

If a party's attorney has actual knowledge of a claim being filed, the attorney may not argue that he did not receive proper service. Any other rule would place form above substance. ***Pothering v. Parkson Coal Co.***, 861, 1321, 12 BLR 2-60 (3d Cir. 1988).

Sufficiency of Pleadings (Cross-appeals)

A party challenging an ALJ's decision must do more than recite evidence favorable to its case, the party must demonstrate with some degree of specificity the manner in which substantial evidence does not exist or why the decision is contrary to law. ***Cox v. Benefits Review Board,*** 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

A party may not attack a decision with a view toward enlarging his or her own rights or lessening the rights of an adversary absent a cross-appeal. However, a cross-appeal is unnecessary when a prevailing party merely advances an argument that would provide another avenue by which the fact finder could reach the same favorable judgment. ***Hansen v. Director, OWCP***, 984 F.2d 364, 17 BLR 2-48 (10th Cir. 1993).

An appellee need not cross-appeal in order to make an argument that supports the decision reached by the administrative law judge but attacks the reasoning used by the administrative law judge in reaching his decision. ***Malcomb v. Island Creek Coal Co.***, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994).

Timely Filing of Appeals

The doctrine of equitable tolling does not apply to suspend the running of the 60-day filing period. ***Brown v. Director, OWCP,*** 864 F.2d 120, 12 BLR 2-147 (11th Cir. 1989); *see also* ***Shendock v. Director, OWCP***, 893 F.2d 9458 (3d Cir. 1990); ***Bolling v.***

Director, OWCP, 823 F.2d 165 (6th Cir. 1987); ***Butcher v. Big Mountain Coal, Inc.***, 802 F.2d 1056 (4th Cir. 1986); ***Clay v. Mountain Coal, Inc.***, 748 F.2d 501 (8th Cir. 1984); ***Pittston Stevedoring v. Dellaventura***, 544 F.2d 35 (2d Cir. 1976), *aff'd on other grounds sub nom.,* ***Northeast Marine Terminal Co. v. Caputo***, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). It is consistent with decisions rejecting arguments that equitable tolling principles should be applied to the 30-day filing period under 33 U.S.C. §921(a) (1986). ***See Wellman v. Director, OWCP***, 706 F.2d 191 (6th Cir. 1983); ***Insurance Company of North America v. Gee***, 702 F.2d 411 (2d Cir. 1983). Note, however, that Section 725.478 requires that proper service on counsel is a prerequisite to the running of the 30 day appeal period. ***Patton v. Director, OWCP***, 763 F.2d 553, 7 BLR 2-216 (3d Cir. 1985); ***Youghiogheny & Ohio Coal Co. v. Benefits Review Board***, 745 F.2d 380 (6th Cir. 1984); ***Jewell Smokeless Coal Co. v. Looney***, 892 F.2d 366, 13 BLR 2-177 (4th Cir. 1989); ***Old Ben Coal Co. v. Jones***, 897 F.2d 900, 13 BLR 2-360 (7th Cir. 1990). Note also that the filing regulations implementing Section 921 of the LHCA differ in Longshore cases, 20 C.F.R. §702.349. *See* ***Jeffboat Inc., v. Mann***, 875 F.2d 660 (7th Cir. 1989); ***Jones****, supra.*

The Fourth Circuit reversed the Board and held that the ALJ's failure to serve claimant's attorney by registered or certified mail does not undermine service where the record establishes actual notice was accomplished. In stressing that service by registered or certified mail is mandatory, the Court recognized that this requirement is met where the record establishes actual notice. Thus, if registered or certified mail is not used, the 30-day appeal time period begins with the date when both actual notice is accomplished and the ALJ's decision is filed with the district director. Service on claimant's attorney is tantamount to service on claimant and thus, since claimant filed his notice of appeal more than 30 days after actual notice to his attorney, his filing was untimely and the Board did not have jurisdiction to review the merits of the appeal. ***Dominion Coal Corp. v. Honaker***, 33 F.3d 401, 18 BLR 2-342 (4th Cir. 1994).

The Tenth Circuit held that the Board had jurisdiction to consider employer's appeal because employer had filed its notice of appeal with the Board within 30 days of receiving the ALJ's order by certified mail. 33 U.S.C. §921. The Court held that the mere filing of the order with the District Director is insufficient to toll the 30-day appeal period. Rather, the statutory language plainly requires the service of an order by certified mail for the 30-day appeal period to begin. The Court also refused to adopt the Director's position that, even if notice is not received by certified mail, the 30-day period commences once a party receives actual notice of the ALJ's decision. ***Big Horn Coal Co. v. Director, OWCP*** **[*Madia*]**, 55 F.3d 545, 19 BLR 2-209 (10th Cir. 1995).

Reiterating its holding in ***Butcher v. Big Mountain Coal, Inc.***, 802 F.2d 1506, 9 BLR 2-121 (4th Cir. 1986), the United States Court of Appeals for the Fourth Circuit held that the sixty-day filing period established by Congress pursuant to 33 U.S.C. §921(c) is jurisdictional. "Issuance" of a decision under the Longshore and Harbor Workers' Compensation Act by the Board means filing with the clerk of the Board, and thus the

60-day limitations period for seeking judicial review of a decision granting benefits commenced running on the day of filing regardless of when employer received actual notice. Longshore and Harbor Workers' Compensation Act, §21(c), 33 U.S.C.A. §921(c); 20 C.F.R. §§802.403(b), 802.410. ***Mining Energy, Inc. v. Director, Office of Workers Compensation Programs* [*Powers*]**, 391 F.3d 571, 23 BLR 2-202 (4th Cir. 2004).

Interlocutory Appeals

The Fourth Circuit adopts a case-by-case approach in addressing whether, when two cases are consolidated before the Board, judgement in one is appealable, following similar holdings in the Third, Fifth, and Seventh Circuits. Here, the miner's claim, remanded to the ALJ by the Board, and the widow's claim, finally denied by the Board, are both dismissed as interlocutory. ***Eggers v. Clinchfield Coal Co.***, 11 F.3d 35, 18 BLR 2-67 (4th Cir. 1993).

Validity of Section 802.206(e)

Section 802.205(A)(e)(now Section 802.206(e), dealing with filing of appeal time when the case involves a motion for reconsideration) is a valid and enforceable regulation. ***Jones v. Illinois Central Gulf R.R.***, 846 F.2d 1099, 11 BLR 2-150 (7th Cir. 1988).

PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

A. THE CLAIMS PROCESS

2. THE DISTRICT DIRECTOR'S ROLE AND REPRESENTATIVE

DIGESTS

Deference to the Director in Interpreting Regulations

Several Circuit Courts have addressed the issues regarding whether the Director's interpretation is entitled to special deference. In ***Director, OWCP v. General Dynamics Corp. and Krotsis,*** 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1989), the court stated:

> Neither the Supreme Court nor this Circuit has had occasion to address this question, but several of our sister circuits have ruled on it. Four have assumed that the Director's interpretations of statutes are entitled to special deference. *See* ***Director, Office of Workers' Compensation Programs v. Palmer Coking Coal Co.,*** 867 F.2d 552, 555 (9th Cir. 1989); ***Saginaw Mining Co. v. Mazzulli,*** 818 F.2d 1278, 1283 (6th Cir. 1987); ***Peabody Coal Co. v. Director, Office of Workers' Compensation Programs,*** 773 F.2d 173, 175 (7th Cir. 1985); ***Boudreaux v. American Workover, Inc.,*** 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982)(*en banc*), *cert. denied,* 459 U.S. 1170 (1983). Another circuit has held that neither the Director's nor the Board's interpretations of the Act, are entitled to deference. ***Director, Office of Workers' Compensation Programs v. O'Keefe***, 545 F.2d 337, 343 (3d Cir. 1976). Considerable doubt is cast on ***Saginaw Mining*** because two more recent Sixth Circuit cases held that neither the Benefits Review Board nor the Director is entitled to special deference. *See* ***Director, Office of Workers' Compensation Programs v. Detroit Harbor Terminals,*** 850 F.2d 283, 287 (6th Cir. 1988); ***American Ship Bldg. Co. v. Director, Office of Workers' Compensation Programs***, 865 F.2d 727, 730 (6th Cir. 1989). ***Detroit Harbor*** relied on the Third Circuit's rationale set forth in ***O'Keefe,*** which we also find persuasive. ***O'Keefe*** noted the different functions discharged by the Director and the Board and observed that Congress had divided responsibility for administering the Act into two separate offices of the Department of Labor. *See* 545 F.2d at 343.

> Further, when the Director appears as a litigant in an adversarial proceeding before the Board it is inappropriate to grant special deference to the Director's litigating position, particularly when that position has not been articulated in a more objective context through the promulgation of regulations. If deference were accorded under such circumstances, claimants would be effectively deprived of the right to impartial review. ***See Williams Bros., Inc. v. Pate***, 833 F.2d 261, 265 (11th Cir. 1987); ***see also Director, Office of Workers' Compensation Programs v. Mangifest***, 826 F.2d 1318, 1324 (3d Cir. 1987)(reviewing courts need not defer to agency's interpretation of statute which arose only during adversary proceeding). Moreover, in light of the relationship between the roles of the Board and the Director in resolving questions of law, and the Director's adversarial position in this litigation, the Director's interpretation of the Act here is not entitled to any special deference.

Id. at 46-48.

Noting that neither the BLBA nor the DOL regulations expressly set forth a method for determining how attorney's fees are to be apportioned over a state benefits award in calculating the offset of Federal black lung benefits pursuant to 20 C.F.R. §725.535(d), the court determined that such a decision is a pure policy decision to be made by the Director, not by the Board, as only the former is authorized to make Black Lung policy decisions. The court held that the Board had, therefore, exceeded its statutory authority when interposing its own method of excluding legal fees from the offset calculation under Section 725.535(d). Moreover, the court held that the Director's interpretation of Section 725.535(d) was entitled to deference as this interpretation was not clearly erroneous or inconsistent with the regulation but, to the contrary, more reasonable and better suited to meet the remedial purposes of the BLBA. ***Director, OWCP v. Barnes and Tucker Co.***, 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992).

Relationship Between District Director and the Director

The Director, in his role as principal, has the authority to require the District Director, his agent, to properly perform his obligations under the regulations. In this case, the failure of the District Director to forward the hearing record to the Benefits Review Board justified the dismissal of the Director's appeal. The Court distinguishes ***Director, OWCP v. Brodka***, 643 F.2d 159, 3 BLR 2-1 (3d Cir. 1981); ***Director, OWCP v. Hileman***, 897 F.2d 1277, 13 BLR 2-382 (4th Cir. 1980).

Validity of DOL Denial Letter

The court held that the Department of Labor form denial letter (CM-100) sent to claimants seeking black lung benefits met the minimum due process standards of notice and opportunity for hearing, assuming that due process considerations applied. ***Jordan***

v. Benefits Review Board, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989); *see also* ***Jordan v. Director, OWCP***, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989).

Pre-Hearing Conferences

The Fourth Circuit held that the regulations at Section 725.416 confers discretion on the District Director "and he alone" to set an informal conference and to cancel or reschedule it upon motion by any party showing reasonable cause. The Court stressed that once set, an informal conference is mandatory and part of the processing and adjudication of the claim by the District Director that must be completed before the parties have a right to request a hearing. *See* 20 C.F.R. §§725.450, 725.451. Here, claimant's counsel "waived" the informal conference and the Court strongly held that such a conference may not "be waived unilaterally by a party." The Court noted the legislative history, provided extensive rationale regarding placing authority on this "neutral third party," and rejected the argument that the goals of the informal conference could be achieved with just one party in attendance. ***Wellmore Coal Corp. v. Stiltner***, 81 F.3d 490, 20 BLR 2-211 (4th Cir. 1996).

The Director reasonably interpreted the Act and regulations to provide for the payment of full benefits to both the miner's widow and his surviving divorced wife. Although the Director previously held a contrary view of the Act and regulations, his current interpretation is entitled to deference because the Director thoroughly reviewed the statute and legislative history and carefully explained why the agency changed its position. ***Piney Mountain Coal Co. v. Mays***, 176 F.3d 753, 21 BLR 2-588 (4th Cir. 1999).

A Sixth Circuit held that the Director, as a respondent, has authority to file a pro-petitioner brief, and thus denied employer's motion to strike the Director's brief. ***Cornett v. Benham Coal, Inc.***, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

In a case involving a duplicate survivor's claim, the Eleventh Circuit held that the district director provided the claimant with adequate notice of the grounds upon which her third claim for benefits was denied, including the fact that her claim was barred under the terms of 20 C.F.R. §725.309(d)(1999), as the district director's denial letter was reasonably calculated to inform claimant of her rights. ***Coleman v. Director, OWCP***, 345 F.3d 861, 23 BLR 2-1 (11th Cir. 2003), citing ***Jordan v. Benefits Review Board***, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989).

Reply Briefs

The Eleventh Circuit affirmed the Board's determination that error, if any, in the administrative law judge's admission of the Director's "Reply to the Claimant's Response to Acting Director's Motion for Summary Judgment," without giving the claimant an opportunity to respond, was harmless, as the claimant's duplicate survivor's

claim was clearly time barred under 20 C.F.R. §725.309(d)(1999). The court also held that even if the claimant had a protected property interest in obtaining survivor's benefits, the administrative law judge gave her notice and an opportunity to rebut the Director's argument that her claim was legally barred and she took advantage of this opportunity when she responded to the motion for summary judgment. ***Coleman v. Director, OWCP***, 345 F.3d 861, 23 BLR 2-1 (11th Cir. 2003).

The United States Court of Appeals for the Eleventh Circuit held that the Black Lung Benefits Act has "produced a complex and highly technical regulatory program" and thus the "significant expertise" present within the Department of Labor justifies deference to that agency's position that the existence of complicated pneumoconiosis is will be determined by the unique facts of each case. ***Pittsburg & Midway Coal Co.* [*Cornelius*]**, 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007).

Notification of Claim/Initial Finding

The United States Court of Appeals for the Sixth Circuit rejected employer's challenge to the validity of 20 C.F.R. §725.413(b) (2000) (now found at 20 C.F.R. §725.412(a)(2)), which provided that a responsible operator waived its right to contest a claim if it did not respond to the district director's notice of initial finding within thirty days. The court held that because the regulation provided for notice and an opportunity to be heard, and permitted an employer to file an untimely controversion if it established good cause for the delay, the requirements of federal due process and the Administrative Procedure Act were satisfied. The court also ruled that the notice of initial finding was properly served and was adequately detailed, even though it did not specify the basis for the determination that claimant had established a material change in conditions since the denial of a prior claim. In addition, the court held that employer's failure to timely respond to the notice of initial finding precluded it from challenging the merits of the claim in a request for modification filed pursuant to 20 C.F.R. §725.310. ***Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*]**, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009).

Maintenance of the Record

The Tenth Circuit rejected employer's argument that liability for benefits awarded in a subsequent claim should be transferred to the Trust Fund because records from the prior claim were destroyed. The court held that employer was not prejudiced by the destruction of the records, 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).

PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

A. THE CLAIMS PROCESS

3. CLAIMANT'S RIGHT TO COMPLETE PULMONARY EVALUATION

Under 20 C.F.R. §718.101, the Director must provide the claimant with the opportunity to have a "complete pulmonary evaluation including, but not limited to, a test roentgenogram (x-ray), physical examination, pulmonary function tests and a blood-gas study." If the tests are not performed in compliance with Part 718, the Director must allow the claimant the opportunity to undergo further testing. 20 C.F.R. §725.406(b). This duty is not discharged if the record contains no opinion as to the miner's respiratory disability, or only an opinion that is not credible. ***See Newman v. Director, OWCP,*** 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); ***Cline v. Director, OWCP,*** 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); ***Hall v. Director, OWCP,*** 14 BLR 1-51 (1990); ***Pettry v. Director, OWCP,*** 14 BLR 1-98 (1990).

DIGESTS

The Director's attack of the report of one of its own physicians did not undermine its discharge of its duty to provide a complete pulmonary exam where the Director continued to regard the report of another physician, whom it had requested, as credible. ***Oliver v. Director, OWCP,*** 993 F.2d 1353, 17 BLR 2-88 (8th Cir. 1993).

The administrative law judge did not abuse his discretion in ordering a second exam where 3 years had elapsed since employer's earlier exam of the miner. ***Skukan v. Consolidation Coal Co.***, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, ***Consolidated Coal Co. v. Skukan***, 114 S.Ct. 2732 (1994), *rev'd on other grounds*, ***Skukan v. Consolidated Coal Co.***, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

The Sixth Circuit held that DOL's duty under 30 U.S.C. §923(b) to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him, but rather, is met when DOL pays for an examining physician who: (1) performs all of the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a); and (2) specifically links each conclusion in his or her medical opinion to those medical tests. In this case, while the administrative law judge declined to credit Dr. Baker's opinion, the court held that DOL met its statutory obligation because Dr. Baker performed all the required diagnostic tests and linked his conclusions to those tests, albeit briefly, in addressing all of the elements a claimant must prove to obtain benefits under the Act.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009).

PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

B. FULL AND FAIR HEARING

1. RIGHT TO A HEARING; WAIVER

DIGESTS

Right to a Hearing

Under the Act and regulations, the parties to a case have a right to a de novo hearing before an ALJ on all questions in respect to a claim. ***Pyro Mining Co. v. Slaton,*** 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989); *see also* ***Lukman v. Director, OWCP,*** 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); ***Pruitt v. USX Corp.,*** 14 BLR 1-129 (1990).

Under 5 U.S.C. §556(d) all parties to a hearing must have the opportunity to fully present their case by way of argument, proof, and cross-examination. This principle may not be circumvented by a restrictive application of Section 725.456(b)(the twenty day rule), so as to preclude rebuttal evidence. The ALJ, however, may exclude evidence which is irrelevant, immaterial or unduly repetitious. ***North American Coal Co. v. Miller,*** 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *see* 5 U.S.C. §556(d); *see also* ***Harlan Bell Coal Co. v. Lemar,*** 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); ***Owens v. Jewell Smokeless Coal Corp.,*** 14 BLR 1-47 (1990).

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).

Waiver

The Fourth Circuit rejects employer's argument that claimant waived his causation argument before the Court as he only discussed the disability holding of the Board. The Board, in affirming the ALJ's finding of no respiratory disability under Section 718.204(c) did not reach the Section 718.204(b) arguments below. The Court held, citing ***Thorn***, that "the policy reasons behind administrative waiver - preserving the requirement of exhaustion of remedies and respect for the agency's expertise - are simply not present." As claimant had properly raised and briefed the causation issue before the Board, the Court held that he had not waived this argument, therefore preserving the appeal on the merits. ***Toler v. Eastern Asso. Coal Co.***, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

The Seventh Circuit reversed the order of the Board awarding benefits and instructing the Board to dismiss the claim. The court held that claimant waived any argument based on intervening law since the general premise at issue was clearly established prior to the issuance of the intervening case cited by claimant and claimant had failed to raise this issue before the Board. Nevertheless, while claimant had waived its right to request a remand based upon intervening law, employer had also failed to oppose a remand and thus had waived its right to raise the issue of claimant's waiver. However, due to the failure of claimant's supplemental brief to relate the general proposition to the facts of the present case, the court concluded that reversal rather than remand was appropriate. ***Freeman United Coal Mining Co. v. Director, OWCP* [*Shelton*]**, 957 F.2d 302, 16 BLR 2-40 (7th Cir. 1992).

The Seventh Circuit held that employer did not waive its arguments under Section 727.203 (a)(1), (b)(2) as it sought to rely on later issued precedence in ***Mullins***. Here the Court relied on its prior precedence in ***Freeman United Coal Mining Co. v. Director, OWCP***, 957 F.2d 302, 304 (7th Cir. 1992), quoting this decision and noting that waiver "is a flexible doctrine, too, so that when all the claimant asks for is a remand to permit the agency to consider an intervening decision--a decision the agency couldn't have considered earlier--the doctrine does not stand in the way." ***Old Ben Coal Co. v. Director, OWCP* [*Mitchell*]**, 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995).

The Tenth Circuit agreed with the Board that employer had waived its right to contest both the responsible operator issue and the liability of the Trust Fund where employer stated at the 1984 hearing before the ALJ that it was not contesting its position as the responsible operator. The Court held that once employer withdrew its argument that it was not the responsible operator, it waived its right to contest liability once claimant was shown to be eligible for benefits. ***Big Horn Coal Co. v. Director, OWCP* [*Madia*]**, 55 F.3d 545, 19 BLR 2-209 (10th Cir. 1995).

The Seventh Circuit remanded this case for reconsideration of the evidence under Section 718.202(a) wherein the Board had rejected employer's argument that the ALJ had erred in applying the true doubt rule to the x-ray evidence, affirming the finding of

pneumoconiosis at Section 718.202(a)(4). As the Court noted, employer's failure to also raise true doubt arguments at (a)(4) should have been waived because "if ever there was a case for a 'plain error' doctrine in civil cases, it would be one in which a decision by the Supreme Court had completely demolished the basis for an agency's ruling." ***Freeman United Coal Mining Co. v. Hilliard***, 65 F.3d 667, 19 BLR 2-282 (7th Cir. 1995).

The Sixth Circuit held that waiver applied to employer's argument, first advanced on appeal, that the ALJ erred in applying true doubt to find pn and the interim presumption established at Section 727.203(a)(1) prior to issuance of ***Ondecko***. "Therefore, we conclude that it would have been futile for employer to have challenged the ALJ's use of the "true Doubt rule" at any time while this case was pending before the BRB….In this case, were we not to apply the intervening case law...manifest injustice would result." Therefore, the Court reversed invocation as a matter of law after reviewing the evidence, and remanded for review of entitlement at Part 718. ***Consolidation Coal Co. v. McMahon***, 77 F.3d 898, 20 BLR 2-152 (6th Cir. 1996).

Employer lacks standing to argue that the ALJ should have allowed claimant to withdraw his claim. ***Jonida Trucking, Inc. v. Hunt,*** 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997).

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).

The Sixth Circuit upheld the Board's rejection of employer's argument that claimant waived the issue of DOL's failure to provide claimant with a complete pulmonary evaluation by failing to raise it before the district director or the administrative law judge. The Board took the position that the Director had standing as a party-in-interest to raise the issue, and that the Director's failure to raise it earlier did not bar consideration of the issue for the first time on appeal. To the extent that it was claimant's responsibility to preserve the argument, the court held that the Board did not abuse its discretion to excuse his failure. ***Greene v. King James Coal Mining, Inc.***, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009).

PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

B. FULL AND FAIR HEARING

2. DUE PROCESS

DIGESTS

The Fourth Circuit held that the long delay in processing the claim and a lost hearing transcript did not constitute a violation of claimant's due process rights in this case. ***Grigg v. Director, OWCP***, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).

The Third Circuit rejected employer's assertion that due process required that it be afforded an opportunity to develop evidence to address new standards of proof regarding rebuttal under Section 727.203(b)(2), (3) where the Court affirmed the Board's reversal of a denial of benefits. The Court held that employer had an opportunity to develop the evidence under the ***Kertesz*** standard because that case had been decided before the initial hearing in the present case. ***BethEnergy Mines, Inc. v. Director, OWCP* [*Vrobel*]**, 39 F.3d 458, 19 BLR 2-95 (3d Cir. 1994).

The Third Circuit lamented the DOL's 14 year delay in the processing of this survivor's claim. Noting that claimant had filed her claim in the week following her husband's death in August 1982, the claim was never forwarded for a hearing before an administrative law judge until she filed another claim in January 1994. Following a January 1995 hearing, survivor's benefits were denied in May 1995, a decision that was affirmed by the Board and appealed to the Court. The Court detailed lengthy histories in four other black lung cases to illustrate their suggestion that "this dismaying inefficiency is not unusual; in fact, the problem appears to be common...." Although the Director offered an apology in his brief, the Court stated that "[H]opefully, the publication of our concern will come to the attention of authorities who can do something about it." ***Lango v. Director, OWCP***, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

The Fourth Circuit vacated the designation of employer as the party responsible for payment in this case and substituted the Trust Fund, holding that employer's due process rights had been violated when the Department of Labor (Department) failed to timely notify employer of its potential liability within a reasonable time following an initial award of benefits and prior to the miner's death herein. Employer had not been notified until 17 years following the filing of the initial claim and 11 years following the miner's request for a hearing, at which time the Department was required by regulation to notify employer of its potential liability. The miner died within this second time frame. The Court agreed that "government's grossly inefficient handling of the matter--and not the

random timing of death--denied [employer] the opportunity to examine [the miner]," thereby hampering employer's opportunity to have the miner examined and to mount an adequate rebuttal argument at Section 727.203(b)(3). In a thorough discussion of due process, the Court noted that, "in this core due process context, we require a showing that the notice was received too late to provide a fair opportunity to mount a meaningful defense; we do not require a showing of "actual prejudice"... the Due Process Clause does not create a right to win litigation; it creates a right not to lose without a fair opportunity to defend oneself." ***Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*]**, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

Where C&K purchased the assets of Lamp Coal Co. and after the sale a twenty-seven year employee of Lamp continued to work in the same mine as an employee of C&K for only three months before retiring, C&K, as successor operator under 30 U.S.C. §932(i)(1) and 20 C.F.R. §725.493(a)(2)(i), was properly designated as the responsible operator even though the miner worked for C&K for less than one year. The one-year minimum employment rule of 20 C.F.R. §725.493(a)(1) is subject to the special rule for successor operators at 20 C.F.R. §725.493(a)(2)(i) making the successor liable for payment of all benefits which would have been payable by the prior operator to its former employees. Once the miners previously employed by the prior operator are hired by the successor operator following the change of ownership, the successor operator becomes primarily liable for benefits payable to those miners, and the prior operator need not be shown to have ceased all business activity for the successor operator to be held primarily liable. 20 C.F.R. §725.493(a)(2)(ii). ***C&K Coal Co. v. Taylor***, 165 F.3d 254, 21 BLR 2-523 (3d Cir. 1999).

Despite twenty-three year delay in resolving responsible operator issue, under the facts and circumstances of the case employer suffered no prejudice other than mere delay and thus, was not denied due process. Therefore, the Black Lung Disability Trust Fund was not ordered to pay benefits. ***C&K Coal Co. v. Taylor***, 165 F.3d 254, 21 BLR 2-523 (3d Cir. 1999).

Fourth Circuit holds that employer adequately presented due process argument by asserting before administrative law judge that liability for benefits should transfer to Trust Fund due to OWCP's failure to provide timely notice of 1978 claim. Fourth Circuit holds that employer's failure to articulate before lower tribunals all forms of prejudice that might have result the lack of notice is not tantamount to a failure to present a claim that lack of notice actually caused a violation of due process. ***Consolidation Coal Company v. Borda***, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

Fourth Circuit holds that OWCP's protracted delay in processing 1978 claim, consideration of 1981 request for modification, and failure to timely notify employer of earlier pending claim, were direct causes of employer's inability to gather rebuttal evidence and mount a meaningful defense. Touchstone for finding of due process violation is prejudice and remedy for resulting due process violation is transfer of liability

to Black Lung Disability Trust Fund. ***Consolidation Coal Company v. Borda***, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

The Fourth Circuit rejected employer's assertion that it had a due process right to reopen the record to develop evidence in light of the Board's holding that the interim regulations under 20 C.F.R. §727.203 applied to the claim. The Court held that by failing to ask the ALJ to reopen the record and failing to assert that remand was required by due process for the development of new evidence under the interim regulations until nearly seven years after the Board ruled that the interim regulations applied in this claim, employer was not deprived of due process to present new evidence on an issue it could have and should have anticipated originally. The Court stated that it was reluctant to compel reopening as a matter of constitutional law any time debatable questions of law are resolved by the Board, noting that when such open questions are answered, the law has been declared, not changed, and that a court does not deprive a party of due process by correcting that party's mis-apprehension of the law. ***Betty B Coal Co. v. Director, OWCP* [*Stanley*]**, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999).

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).

The Fourth Circuit held that the administrative law judge's decision to reserve ruling on a motion to compel discovery was within his discretion and did not deprive employer of a meaningful hearing. The Court noted that 20 C.F.R. §725.455 affords the administrative law judge considerable discretion in conducting hearings, and that no statute or regulation requires an administrative law judge to rule on discovery motions prior to the merits hearing. ***Consolidation Coal Co. v. Williams***, 453 F.3d 609, 23

BLR 2-345 (4th Cir. 2006).

The Fourth Circuit held that the administrative law judge properly exercised his discretion in granting a motion to compel discovery where the discovery request related to bias was appropriate, employer's allegations that the discovery requests sought irrelevant information and imposed burdensome costs were unsupported, and employer's own recalcitrance in refusing to disclose the requested discovery created any untimeliness issue under 20 C.F.R. §725.456(b). ***Consolidation Coal Co. v. Williams***, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

The Fourth Circuit held that an administrative law judge's remarks at the hearing and within his order allowing discovery concerning the potential bias of expert witnesses did not demonstrate judicial bias against employer or its witnesses. Rather, in the Court's view, the administrative law judge's comments expressed "the unremarkable proposition that experts can be biased, and that doctors in coal mine cases are no less subject to bias than other experts;" further, the tone and tenor of frustration expressed in the administrative law judge's comments did not, in and of themselves, establish bias against employer. The Court noted that judicial rulings alone almost never constitute a valid basis for a finding of bias or partiality, and that the administrative law judge herein properly determined that the frequency with which employer's experts testified on behalf of coal mine companies justified discovery concerning potential bias. ***Consolidation Coal Co. v. Williams***, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

The Fourth Circuit held that, under the facts of this case, draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine. The court emphasized that employer had sought discovery of the draft reports and attorney-expert communications for the legitimate purpose of exploring the trustworthiness and reliability of the opposing party's physicians. The court also stated, in footnote twenty-five of its opinion, that any such draft reports or attorney communications made or provided to non-testifying or consulting experts should be entitled to protection under the work product doctrine. ***Elm Grove Coal Co. v. Director, OWCP* [*Blake*]**, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007).

PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

B. FULL AND FAIR HEARING

3. RIGHT TO COUNSEL

a. Role of Government Attorney

In discussing the role of a government attorney in disability cases, the court ruled that "In the performance of ... his duty ... he is not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and legal obligations." Furthermore, the court said:

> We cannot lose sight of the fact that claimants in these disability cases are generally poor. Obtaining counsel for them, even with the generous assistance of the pro bono panel of this district, is quite difficult. The ponderous machinery of the federal bureaucracy and United States Attorney's Office should not be turned implacably against them unless the government has first stopped to ask itself, "Is opposing this claim just, is it fair, is there a reasonable basis for believing that the government can prevail on both the law and facts?"

Zimmerman v. Schweiker, 575 F.Supp. 1436, 1440 (E.D. N.Y. 1983).

DIGESTS

Absence of Counsel

Mere absence of counsel in black lung proceeding before ALJ is not alone ground for a remand. A remand for reconsideration on decision on black lung claim may be warranted where there is a clear showing of prejudice or unfairness which may be attributed to lack of counsel at administrative hearing. However, the change of counsel may place greater responsibility on ALJ to develop the facts. ***Hunt v. Califano,*** 445 F.Supp. 624 (D. Md 1977).

Acts of Counsel Binding on Party

A party generally is bound by the acts of his attorney and is considered to have "notice of all facts, notice of which can be charged upon the attorney." ***Link v. Wabash,*** 370 U.S. 630, 634 (1962); *see* ***Consolidation Coal Co. v. Gooding,*** 703 F.2d 230, 233 (6th Cir. 1983); ***Howell v. Director, OWCP,*** 7 BLR 1-259 (1984).

PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

B. FULL AND FAIR HEARING

4. ADMISSION OF EVIDENCE

DIGESTS

The Fourth Circuit affirmed the Board's decision affirming the ALJ's denial of benefits, holding that the ALJ properly refused to admit a report by the West Virginia Occupational Pneumoconiosis Board into evidence pursuant to 20 C.F.R. §725.456. The Court held that claimant possessed the report at the time his claim was pending before the district director but withheld it until his claim was forwarded to the OALJ and that claimant failed to introduce evidence of extraordinary circumstances to justify his failure to timely submit the report. Further, as admission of the report was not requested by the district director or employer, and claimant did not submit the report to the parties at least 20 days before the hearing, the 20 day requirement was not waived and claimant did not show good cause to justify its admission. The Court further found that the ALJ's conclusion that claimant is not totally disabled due to pneumoconiosis is supported by substantial evidence. ***Doss v. Director, OWCP***, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995).

Administrative law judge erred in discrediting a medical expert's disability causation opinion merely because the expert based his opinion upon materials not admitted into evidence. Under FRE 703, even lay jurors may consider expert opinions based upon materials outside the record, and therefore professional administrative adjudicators should not consider themselves barred by formal rules of evidence from considering such opinions. ***Peabody Coal Co. v. Director, OWCP* [*Durbin*]**, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999).

The D.C. Circuit held that the evidentiary limitations set forth in the revised regulations at 20 C.F.R. §§725.310(b), 725.414, 725.456, 725.457(d) and 725.458, are consistent with the Administrative Procedure Act, which empowers agencies to exclude irrelevant, immaterial or unduly repetitious evidence, *see* 5 U.S.C. §556(d), and with the Black Lung Act, *see* 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a). These rules are not arbitrary, capricious, artificial, or inflexible, but rather enable the administrative law judge to focus on the quality of the medical evidence in the record. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 873-874, 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. §725.701(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 Fourth Circuit held that, in applying the evidentiary limitations set forth in the revised regulations at 20 C.F.R. §§725.414, the administrative law judge did not abuse his discretion in permitting claimant to select which two medical reports out of three he wished to submit in support of his affirmative case. ***Consolidation Coal Co. v. Williams***, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

The Fourth Circuit held that the administrative law judge properly exercised his discretion in granting a motion to compel discovery where the discovery request related to bias was appropriate, employer's allegations that the discovery requests sought irrelevant information and imposed burdensome costs were unsupported, and employer's own recalcitrance in refusing to disclose the requested discovery created any untimeliness issue under 20 C.F.R. §725.456(b). ***Consolidation Coal Co. v. Williams***, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

The Fourth Circuit held that, under the facts of this case, draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine. The court emphasized that employer had sought discovery of the draft reports and attorney-expert communications for the legitimate purpose of exploring the trustworthiness and reliability of the opposing party's physicians. The court also stated, in footnote twenty-five of its opinion, that any such draft reports or attorney communications made or provided to non-testifying or consulting experts should be entitled to protection under the work product doctrine. ***Elm Grove Coal Co. v. Director, OWCP* [*Blake*]**, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007).

The Fourth Circuit held that the "Evidence-Limiting Rules" set forth at 20 C.F.R. Part 725 (the evidentiary limitations provisions of the revised regulations) are a reasonable and valid exercise of the Secretary's authority to regulate evidentiary development in Black Lung Act proceedings, that they are based on a permissible construction of the Act, and they are

neither arbitrary, capricious, nor manifestly contrary to the statute. ***Elm Grove Coal Co. v. Director, OWCP* [*Blake*]**, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007).

The Fourth Circuit held that, pursuant to the rebuttal provisions at 20 C.F.R. §725.414(a)(2)(ii) and (a)(3)(ii), where a party has submitted two interpretations of the same x-ray in support of its affirmative case, the opposing party is entitled to submit two interpretations of that x-ray in rebuttal. In other words, a party may submit one piece of rebuttal evidence for each piece of affirmative evidence submitted by the opposing party. ***Elm Grove Coal Co. v. Director, OWCP* [*Blake*]**, 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007).

PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

B. FULL AND FAIR HEARING

5. COSTS

DIGESTS

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.459, which grants to administrative law judges the discretion to shift to employer costs incurred by claimants' production of witnesses, regardless of which party prevails, lacks the specific statutory authorization for fee-shifting required by ***W. Va. Univ. Hosp. v. Casey***, 499 U.S. 83, 97-100 (1991), and, therefore, is invalid on its face. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 875, 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). [Subsequently, the Department of Labor revised the regulation at Section 725.459 to provide that a proponent of a witness called for cross-examination shall pay the witness' fee].

C. EVALUATION AND WEIGHING OF EVIDENCE

1. ELEMENTS OF ENTITLEMENT

a. Generally; Interpretation of Medical Data

DIGESTS

The crediting of medical opinion is the province of the administrative law judge, and the administrative law judge need not accept the conclusion of any particular physician but may examine all the medical evidence and draw appropriate inferences. ***Peabody Coal Co. v. Shonk,*** 906 F.2d 264 (7th Cir. 1990); *see also* ***Migliorini v. Director, OWCP,*** 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990); ***Smith v. Director, OWCP,*** 843 F.2d 1053, 11 BLR 2-125 (7th Cir. 1988).

An administrative law judge may not, at the invocation stage, conclude that a medical opinion of no impairment is outweighed by opinions establishing total disability and then, at rebuttal, rely on the same opinion of no impairment to disprove total disability. The administrative law judge may, however, rely on the opinion of lack of impairment to rebut one of the presumed elements, such as causation, that are not proved during invocation. ***Drummond Coal Co. v. Freeman,*** 17 F.3d 361 (11th Cir. 1994).

The Fourth Circuit rejected claimant's contentions and held that an "administrative law judge may reject a medical opinion based on an invalid study" (here an invalidated blood gas study). *See* ***Director, OWCP v. Siwiec***, 894 F.2d 635, 639, 13 BLR 2-259 (3d Cir. 1990). The Court, citing ***White v. Newport News Shipbuilding & Dry Dock Co.***, 633 F.2d 1070, 1075 (4th Cir. 1980), also held that "an ALJ does not have to accept the opinion or theory of any given medical witness" but has to weigh them "with the medical evidence and draw his own conclusions." ***Lane v. Union Carbide Corp.***, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

The Seventh Circuit held that in a case with conflicting expert opinions, an administrative law judge, after a thorough and careful consideration of all of the evidence, can conclude that the opinion of certain experts are more authoritative than other experts. The administrative law judge, however, must articulate a reason and provide support for favoring one opinion over another. The administrative law judge accorded more weight to the employer's physicians, finding that they had superior

qualifications and that their opinions were more specific and well supported. The administrative law judge found that the contrary medical opinions were not entirely reliable based on all the evidence and conflicting opinions. The Seventh Circuit held that the administrative law judge's "careful weighing of the evidence" demonstrated that his finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis was supported by substantial evidence. ***Livermore v. Amax Coal Co.***, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002).

The Seventh Circuit held that substantial evidence, that a rational mind might accept as adequate, supported the administrative law judge's decision to credit a physician's diagnosis of pneumoconiosis over two contrary opinions that the miner suffered only from simple asthma. The administrative law judge determined that the physician did a better job of integrating all of the available evidence - particularly blood-gas test results showing significant diffusion impairment as well as test results showing little reversibility, both of which tend to disprove bronchial asthma - and also had the advantage of reviewing, commenting on, and specifically refuting the alternate diagnoses. ***Midland Coal Co. v. Director, OWCP* [*Shores*]**, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

b. Disability

Date at Which Disability Is Judged

The date of hearing is the date upon which disability is assessed by the ALJ in a living miner's case. ***Cooley v. Island Creek Coal Co.,*** 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *see also* ***Zettler v. Director, OWCP,*** 886 F.2d 831 (7th Cir. 1988); ***Freeman United Coal Co. v. Benefits Review Board,*** 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990).

Inferring Total Disability

The Seventh Circuit, citing ***Parsons v. Black Diamond Coal Co.,*** 7 BLR 1-236, 1-239 (1984) and ***Turner v. Director, OWCP,*** 7 BLR 1-419, 1-421 (1984) held that in order to infer disability, the ALJ must first determine the nature of the claimant's usual coal mine work and then compare evidence of the exertional requirements of the work with medical opinions regarding the claimant's work capability. The court also held, citing ***Hvizdzak v. North American Coal Corp.,*** 7 BLR 1-469, 1-471 (1984), that the ALJ is to make the ultimate finding of total disability, which is a legal determination. ***Poole v. Freeman United Coal Mining Co.,*** 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *see also* ***Wilson v. Benefits Review Board,*** 748 F.2d 198, 7 BLR 2-38 (4th Cir. 1984).

The Fourth Circuit, noting its agreement with the Director as well as the Third and Eleventh Circuits, held that an ALJ may not reject limitations noted in a doctor's report as being nothing more than mere recitations of the patient's symptoms unless there is

specific evidence for doing so in the report. [The Third and Eleventh Circuits have previously held that an ALJ must identify the basis for a finding that the listed limitations are the patient's descriptions rather than the physician's conclusions. ***Kowalchick v. Director, OWCP***, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990) and ***Jordan v. BRB***, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989)]. ***Scott v. Mason Coal Co.***, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grds*, 14 BLR 1-37 (1990)(*en banc*).

The United States Court of Appeals for the Seventh Circuit held that, pursuant to 20 C.F.R. §718.204(b)(2), the ALJ offered no explanation for his determination that the medical opinion finding no total disability, when considered with the other contrary probative evidence, was ultimately more persuasive than the opinions in which the physicians stated that claimant is totally disabled. The court indicated that the ALJ was required to go beyond noting that the qualifications and expertise of the physicians are equal. The court also found a similar error in the ALJ's consideration of the medical opinion evidence relevant to the existence of pneumoconiosis and, therefore, vacated the Board's Decision and Order affirming the denial of benefits and remanded the case for further proceedings. ***Stalcup v. Peabody Coal Co.***, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007).

c. Existence of Pneumoconiosis

A claimant need not prove the existence of an impairment in order to prove he has pneumoconiosis. The Board has held that the absence of an impairment does not establish the absence of pneumoconiosis. ***Sainz v. Kaiser Steel Corp.***, 5 BLR 1-758 (1983), *aff'd sub nom*. ***Kaiser Steel Corp. v. Director, OWCP***, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984).

DIGESTS

In a footnote, responding to employer's reliance on the Surgeon General's report, *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace* (1985), the Board noted that employer has submitted no evidence to support its argument that simple pneumoconiosis is not a progressive disease and because the miner had no further coal dust exposure, his disease could not have progressed since the prior denial; *see* ***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); ***Consolidation Coal Co. v. Chubb***, 741 F.2d 968 (7th Cir. 1984); ***Cosalter v. Mathies Coal Co.***, 6 BLR 1-1182 (1984). ***Spese v. Peabody Coal Co.***, 19 BLR 1-45 (1995).

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 (7th Cir. 1995).

The Fourth Circuit, in a short opinion, rejects claimant's assertion that the administrative law judge and the physicians he relied on, primarily based their opinions of the negative x-ray evidence of record under Section 718.202(a). The Court notes that while Section 718.202(b) prohibits denial of a claim based "solely" on "a" negative x-ray, it does not speak to the weight which a physician may or may not give to either negative or positive x-ray evidence. "..[W]e will not encroach upon the expertise of physicians by reading any such requirement into the regulation." The Court affirms the administrative law judge's credibility determination, crediting these reports. ***Ellison v. Ranger Fuel Corp.***, 73 F.3d 357, 20 BLR 2-125 (4th Cir. 1995).

The Sixth Circuit held that the administrative law judge's explanations for crediting the opinions of Drs. Broudy and Fino and discounting the contrary opinion of Dr. Rasmussen, to find the medical opinions insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), were not supported by substantial evidence. The administrative law judge credited the opinions of Drs. Broudy and Fino over the contrary opinion of Dr. Rasmussen because he found that Dr. Rasmussen relied on an incomplete medical record in that he diagnosed only clinical pneumoconiosis by x-ray, whereas Drs. Broudy and Fino relied on comprehensive documentation in reaching their conclusions that claimant did not have pneumoconiosis. The administrative law judge also found that Dr. Fino had excellent professional qualifications. The Sixth Circuit held that the administrative law judge did not adequately explain his finding that Dr. Rasmussen's report did not support a finding of legal pneumoconiosis, where the record showed that Dr. Rasmussen relied on the results of his exercise blood gas study and diffusing capacity test to determine that claimant was suffering from a pulmonary disability. The Sixth Circuit also held that the Board's explanation that Dr. Rasmussen diagnosed clinical but not legal pneumoconiosis, was inaccurate as a matter of law because (1) Dr. Rasmussen's consideration of evidence, other than the x-ray, including a physical exam, diffusing capacity test, arterial blood gas studies, and claimant's personal and occupational histories, would have been sufficient alone to support a finding of legal pneumoconiosis; and because (2) even if Dr. Rasmussen diagnosed only clinical pneumoconiosis, as the Board concluded, such a diagnosis was necessarily legal pneumoconiosis where legal pneumoconiosis includes clinical pneumoconiosis. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

The Sixth Circuit held that the administrative law judge did not adequately explain his reasons for crediting the opinions of Drs. Broudy and Fino. The Sixth Circuit found "no rational explanation" for the administrative law judge's determination that Dr. Broudy's

opinion was more credible than Dr. Rasmussen's opinion regarding the existence of pneumoconiosis, especially after the administrative law judge found that Dr. Broudy's report contained little rationale or explanation and that Dr. Rasmussen's report was well-reasoned. The Sixth Circuit noted, moreover, that what explanation Dr. Broudy did provide for his opinion that claimant did not have pneumoconiosis, directly supported Dr. Rasmussen's finding of pneumoconiosis based on the blood gas study results. With regard to Dr. Fino, the Sixth Circuit held that Dr. Fino's credentials were not necessarily superior to those of Dr. Rasmussen, where Dr. Fino was Board-certified in Internal Medicine and Pulmonary Disease and Dr. Rasmussen was Board-certified in Internal Medicine only but had extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis. The Sixth Circuit also determined that the record refuted the administrative law judge's finding that Dr. Fino reviewed Dr. Rasmussen's exercise blood gas study and diffusing capacity test results and had determined that they were not indicative of pneumoconiosis. The Sixth Circuit thus vacated the Board's decision affirming the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and the denial of benefits, and remanded the case to the administrative law judge for further consideration. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

The United States Court of Appeals for the Seventh Circuit held that the ALJ did not properly resolve the conflict in the medical opinion evidence relevant to the existence of pneumoconiosis. The ALJ found, pursuant to 20 C.F.R. §718.202(a)(4), that because the five physicians who offered opinions as to the existence of pneumoconiosis were equally qualified, claimant did not establish that he has the disease. The court stated that the ALJ improperly "counted noses," as he did not provide any explanation, other than numerical preponderance, for why he found that the three opinions ruling out the presence of pneumoconiosis were more persuasive than the two contrary opinions. The court also found a similar error in the ALJ's consideration of the evidence relevant to total disability and, therefore, vacated the Board's Decision and Order affirming the denial of benefits and remanded the case for further proceedings. ***Stalcup v. Peabody Coal Co.***, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007).

The Seventh Circuit held that in weighing the evidence at 718.202(a)(4), the ALJ permissibly accorded less weight to Dr. Tuteur's opinion that, "on rare occasions the inhalation of coal mine dust in the absence of cigarette smoke can produce a clinical situation similar to the picture of [COPD]," as inconsistent with the prevailing view of the medical community, cited by DOL when it adopted the revised regulations. The court noted that in promulgating the revised regulations, DOL had reviewed the medical literature on this issue and found that there was a consensus among scientists and researchers that coal dust-induced COPD is clinically significant, and that the DOL report does not indicate that the causal relationship between coal dust and COPD is merely rare. The court also rejected employer's argument that Dr. Tuteur's opinion could be interpreted as being consistent with the proposition that coal dust exposure *can* cause COPD in rare cases. The court held that Dr. Tuteur's statement led to the

logical conclusion that he categorically excludes obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust. ***Consolidation Coal Co. v. Director, OWCP* [*Beeler*]**, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

The United States Court of Appeals for the Tenth Circuit vacated a denial of benefits, holding that the administrative law judge's mere statement that the evidence was "evenly balanced and should receive equal weight" failed to discharge his duty under the Administrative Procedure Act to explain, on scientific grounds, why a conclusion could not be reached as to the existence of legal pneumoconiosis. The court noted that with regard to disputes concerning the existence of legal pneumoconiosis and causes of pneumoconiosis, the administrative law judge has the benefit of a substantial inquiry by the Department of Labor to help resolve the conflict in the evidence. ***Gunderson v. United States Department of Labor***, 601 F.3d 1013, BLR (10th Cir. 2010) (O'Brien, J., dissenting), *citing* ***Stalcup v. Peabody Coal Co.***, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007).

d. Cause of Disability and Pneumoconiosis

Concurrent Causes of Disability

The concurrence of two sufficient disabling medical causes, one within the ambit of the Act, and the other not, will not prevent a miner from entitlement under the Act. ***Old Ben Coal Co. v. Prewitt,*** 755 F.2d 588 (7th Cir. 1985); ***Peabody Coal Co.****, supra.*

Notwithstanding the miner's cardiac condition, if pneumoconiosis contributes, at least in part, to his total disability, the miner is entitled to benefits. ***Jonida Trucking, Inc. v. Hunt,*** 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997).

As substantial evidence supported the administrative law judge's finding that the miner's pneumoconiosis was by itself totally disabling, the Seventh Circuit held that this was enough to meet the requirements of 20 C.F.R. §718.204, even if the miner also suffered from non-pulmonary and non-respiratory disabilities that would independently be sufficient to render him unable to work. ***Midland Coal Co. v. Director, OWCP* [*Shores*]**, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

Silent Evidence

Silence in the record as to causation will not defeat the presumption favoring the claimant. ***Amax Coal Co. v. Burns,*** 855 F.2d 499, 502 (7th Cir. 1988)(citing ***Old Ben Coal Co. v. Prewitt,*** 755 F.2d 588 (7th Cir. 1985); ***Freeman United Coal Co. v. Benefits Review Board,*** 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990).

Erroneous Premise

The Fourth Circuit held that the administrative law judge erred in crediting two medical opinions based on erroneous assumptions concluding that claimant did not have pneumoconiosis, over a reasoned medical opinion that coal mine dust exposure resulting in pneumoconiosis was at least a major contributing factor to claimant's totally disabling respiratory insufficiency. These opinion were based on the erroneous assumptions that obstructive disorders could not be caused by coal mine employment and that a diagnosis of pneumoconiosis could not be made without x-ray evidence of a nodular or linear infiltrate, an autopsy or a tissue examination. The Court noted that this conclusion conflicted with 20 C.F.R. §718.202(a)(4), which does not require x-ray evidence or a tissue examination. ***Warth v. Southern Ohio Coal Co.***, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

The Fourth Circuit distinguishes its prior holding in ***Warth v. Southern Ohio Coal Co.***, 60 F.3d 173, 174, 19 BLR 2-265 (4th Cir. 1995), "caution[ing] ALJs not to rely on medical opinions that rule out coal mine employment as a causal factor based on the erroneous assumption that pneumoconiosis causes a purely restrictive form of impairment, thereby eliminating the possibility that coal dust exposure also can cause COPD." The Court upheld the crediting of reports under Section 727.203(b)(3) that "merely opined that Stiltner *likely* would have exhibited a restrictive impairment in addition to COPD if coal dust exposure were a factor," noting that the diagnosis was based on a thorough review of all medical evidence rather than an erroneous assumption. The dissent contends that the majority has so narrowly construed ***Warth*** that it in effect overrules the case. ***Stiltner v. Island Creek Coal Co.***, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996)(Williams, J., dissenting).

Proof of Coal Dust Exposure

The Seventh Circuit held that the administrative law judge properly determined claimant's testimony about his coal mine employment to be credible, finding that claimant was regularly exposed to coal mine dust for thirteen and one-quarter years and thus was entitled to the presumption provided at 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of coal mine employment. The Seventh Circuit rejected employer's argument that claimant's testimony that he could distinguish between coal and concrete dust, was incredible and unscientific, as employer cited to "no authority for the proposition that only scientific evidence is admissible to prove exposure to coal dust." ***Roberts & Schaefer Co. v. Director, OWCP* [*Williams*]**, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005).

PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

C. EVALUATION AND WEIGHING OF EVIDENCE

2. SPECIFIC EVIDENTIARY PRINCIPLES

a. *Blevins* Test for Admissibility

In ***Blevins v. Peabody Coal Co.,*** 6 BLR 1-750 (1983), the Board established guidelines for assessing the weight of a physician's opinion attributing a miner's lung disease to smoking rather than to coal mine employment. The medical expert shall:

(1) explain whether it is possible to distinguish between pulmonary disability caused by smoking and that caused by coal dust exposure with any degree of medical certainty;

(2) explain whether there are sufficient facts to permit a distinction to be made in a particular case;

(3) state an opinion as to the origin of claimant's pulmonary disability;

(4) explain how the evidence of record supports his conclusion.

Id. at 1-755, *citing* ***Blevins v. Peabody Coal Co.,*** 1 BLR 1-1023, 1-1029 (1979) ("***Blevins*** II"). In addition, the Board rejected the "reasonable degree of medical certainty" standard enunciated in ***Blevins*** II in favor of a "reasonable medical judgment" standard pronounced in ***Underhill v. Peabody Coal Co.,*** 687 F.2d 217, 4 BLR 2-142 (7th Cir. 1982) and reiterated in ***Peabody Coal Co. v. Lowis,*** 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983). *But see* ***Peabody Coal Co. v. Helms,*** 859 F.2d 486, 13 BLR 2-449 (7th Cir. 1988) and ***Cosalter v. Mathies Coal Co.,*** 6 BLR 1-1182 (1984), for further pronouncements by both the Board and the court on this issue.

b. Later Evidence

DIGESTS

Where the evidence on its face shows that the miner's condition has worsened, the evidence can be reconciled and thus application of the "later evidence is better" theory is permissible. However, where the evidence taken at face value shows that the miner has improved, it is impossible to reconcile the evidence and application of the "later

evidence is better" theory is inappropriate. ***Adkins v. Director, OWCP,*** 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also* ***Woodward v. Director, OWCP,*** 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

In ***Thorn v. Itmann Coal Co.,*** 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993), the Fourth Circuit held that "recency" in and of itself was not a sufficient reason to credit one medical opinion over another. The court held that a "bare appeal to 'recency' [was] an abdication of rational decision making.

c. True Doubt

As applied by the Board and the courts, the true doubt rule was as follows:

> Where there is conflicting, but equally probative evidence, both for and against the existence of a particular fact in the benefits inquiry, or ultimately, when the evidence for and against entitlement is equiponderate, the true doubt rule requires that the benefit of the doubt be given to the claimant.

See ***Grizzle v. Pickands Mather and Co./Chisolm Mines,*** 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); ***Skukan v. Consolidation Coal Co.,*** 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); ***Hansen v. Director, OWCP,*** 984 F.2d 364, 17 BLR 2-48 (10th Cir. 1993) and ***Freeman United Coal Mining Co. v. Director, OWCP* [*Jones*]**, 988 F.2d 706 (7th Cir. 1993).

In ***Director, OWCP v. Greenwich Collieries* [*Ondecko*]**, 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), however, the Supreme Court held that the true doubt rule violated §7(c) of the Administrative Procedures Act.

DIGESTS

On remand from the Supreme Court following ***Ondecko***, the Sixth Circuit affirmed the Board's decision below and reinstated the denial of benefits as claimant had not met his burden of showing by a preponderance of the evidence that he had pneumoconiosis. True doubt, as applied by the ALJ, was invalid as conflicting with Section 7(c) of the APA. ***Skukan v. Consolidation Coal Co.***, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

The Seventh Circuit, following the holding of the Supreme Court in ***Ondecko***, held that as benefits were awarded in the instant case based on application of the true doubt rule, and the true doubt rule is no longer viable as it violates Section 7(c) of the Administrative Procedure Act, the award of benefits must be vacated and the case remanded for reevaluation of the medical evidence without benefit of the true doubt rule. Further, the Court held that the ALJ improperly accorded greater weight to the opinion

of claimant's treating physician without properly discussing his rational, again holding that it is error to automatically accord greater weight to the opinion of a treating physician. ***Consolidation Coal Co. v. Director, OWCP* [*Sisson*]**, 54 F.3d 434, 19 BLR 2-155 (7th Cir. 1995).

The Fourth Circuit remanded this case to the ALJ for a reweighing of the evidence at Section 727.203(a)(1) "because the ALJ's opinion does not reveal whether he thought the evidence to be equally probative, or, for his purposes, *at least* equally probative" when he applied the true doubt rule. Under ***Ondecko***, therefore, the ALJ must determine if the evidence is equally probative, and therefore insufficient to meet claimant's burden. ***LeMaster v. Imperial Colliery Co.***, 73 F.3d 358, 20 BLR 2-20 (4th Cir. 1995).

d. Adverse and Negative Inferences

Use of Negative Inferences

While the court declined to decide whether negative inferences by themselves gathered from the evidence in the record can ever overcome a presumption, the court stated:

> To permit the absence of an explicit diagnosis to constitute rebuttal in a case in which respiratory disability is evident would, in effect, shift back to the claimant the burden of proving that which the regulations, in implementation of the legislative purpose, have instructed the courts to presume.

Kline v. Director, OWCP, 879 F.2d 1175, 1181 n.15, 12 BLR 2-346 (3d Cir. 1989); *see also* ***Black Diamond Coal Mining Co. v. Benefits Review Board,*** 758 F.2d 1532, 7 BLR 2-209 *reh'g denied,* 768 F.2d 1353 (11th Cir. 1985).

PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

C. EVALUATION AND WEIGHING OF EVIDENCE

3. MEDICAL REPORTS

a. Physicians: Qualifications/Treating/Non-Examining

DIGESTS

In vacating the Board's affirmance of the administrative law judge's finding that Section 718.305 rebuttal had been established based on proof that neither the miner's death nor disability arose from coal mine employment, the court applied ***Bethlehem Mines Corp. v. Massey,*** 736 F.2d 120, 125 (4th Cir. 1984) to hold that the administrative law judge erred in relying solely on the opinion of a non-examining physician that the miner's chronic obstructive lung disease was caused by cigarette smoking as no examining physician of record had addressed the cause of the miner's chronic obstructive lung disease. ***Turner v. Director, OWCP,*** 927 F.2d 778, 15 BLR 2-6 (4th Cir. 1991).

It was error to give less weight to a physician simply because he was a reviewing physician (and more weight to another physician simply because he was an examining physician) where the reviewing physician was a qualified expert and his opinion was consistent with the opinion of the examining physician. ***Amax Coal Company v. Beasley,*** 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992).

The administrative law judge's deference to the opinion of the treating physician, over the opinion of a consulting physician who had seen the miner only once, was not affirmable where it had not been established that the ability to observe the claimant over an extended period of time was essential to an understanding of the miner's condition or that the treating physician knew anything about the disease in question. ***Amax Coal Co. v. Franklin,*** 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992).

In weighing the autopsy reports, the administrative law judge impermissibly applied a "blanket rule" in giving more weight to the physicians who performed the autopsy over the physician who reviewed the slides. The court noted that the administrative law judge also failed to indicate whether the autopsy reports met the quality standards of 20 C.F.R. §718.106(a). The court stressed that while the weighing of expert opinions is the province of the administrative law judge, there must be some indication that the weighing was conducted in a reasoned manner. ***Peabody Coal Co. v. Director,***

OWCP, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

The opinion of treating physicians are entitled to greater weight than those of non-treating physicians. ***Tussy v. Island Creek Coal Co.,*** 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

The Fourth Circuit, however, has held that there is no rule that a treating or examining physician must be accorded greater weight then the opinions of other physicians. [The court did recognize that as a general matter the opinions of treating and examining physicians deserve special consideration.] ***Grizzle v. Pickands Mather and Co./Chisolm Mines,*** 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

The Seventh Circuit rejected the administrative law judge's reliance on two medical reports to award benefits in this case. Here, the administrative law judge credited one of these two reports, which contained discredited x-ray evidence, over a contrary report based on numerical superiority. The Court rejected this as unreasonable, vacated and remanded for further consideration. ***Sahara Coal Co. v. Fitts***, 39 F.3d 781, 18 BLR 2-385 (7th Cir. 1994).

The Seventh Circuit, in discussing the administrative law judge's crediting the miner's attending physician during his final hospital stay, noted that the administrative law judge may have given undue weight to his diagnosis based solely on his status as the miner's treating physician. Pointing to ***Freeman United Coal Mining Co. v. Stone***, 957 F.2d 360, 362-63, 16 BLR 2-57 (7th Cir. 1992), the Court re-asserted "that absent any indication in the record 'that access to the body enhances the accuracy of diagnoses based on autopsy evidence,' it is improper to disregard the opinions of qualified experts merely because they are in conflict with the findings of the physician who performed the autopsy on the miner and signed his death certificate." *Id*. ***Freeman United Coal Mining Co. v. Hunter***, 82 F.3d 764, 20 BLR 2-199 (7th Cir. 1996).

The Third Circuit held that the Board properly affirmed the administrative law judge's denial of benefits in this survivor's case under 20 C.F.R. §718.205(c)(2), as the only opinion of record offered by claimant to meet her burden to prove that pneumoconiosis hastened the miner's death, prepared by the miner's treating physician, was properly rejected by the administrative law judge as conclusory. Although the Court had noted their grave concern that this claim was delayed by DOL for over 14 years, they "regretfully" agreed that the administrative law judge properly found that the hospital records did not provide the causal link for the treating physician's conclusory statement that pneumoconiosis contributed to the miner's death. Relying on ***Director, OWCP v. Siwiec***, 894 F.2d 635, 639, 13 BLR 2-259 (3d Cir. 1990) and ***Risher v. Director, OWCP***, 940 F.2d 327, 331, 15 BLR 2-186 (8th Cir. 1991), the Court agreed that a fact-finder may disregard a medical opinion that does not adequately explain the basis for its conclusion. The mere fact the death certificate referred to pneumoconiosis can not serve as a reasoned medical finding, especially here where no autopsy was performed.

The Court also noted that the administrative law judge rejected the only other report of record as inconclusive as that physician did not review any of the positive x-ray evidence showing the miner's pneumoconiosis. The Court urged claimant to "take advantage" of the Director's suggestion that a modification request may be filed to amend the record with an additional medical opinion by the miner's treating physician. ***Lango v. Director, OWCP***, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

The Fourth Circuit vacated the Board's affirmance of the administrative law judge's finding of pneumoconiosis and death due to pneumoconiosis in this survivor's claim under 20 C.F.R. §§718.202(a)(4), 718.205(c) based on "the numerical weight of the evidence" and on a mechanical crediting of the opinions prepared by treating or examining physicians. Relying on the prior holdings of ***Adkins v. Director, OWCP***, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992) and ***Grizzle v. Pickands Mather and Co.***, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993), the Court held that the administrative law judge erred by discounting the twenty-one negative x-ray readings by B-readers and board certified radiologists to credit the single positive reading by a physician holding neither qualification. In addition, the administrative law judge erred by "...uncritically accept[ing]..." the medical opinions diagnosing pneumoconiosis... "of dubious or indeterminable value" without ruling on employer's argument that the diagnoses were mere recitations of the miner's own statements of a history of pneumoconiosis. *See* ***Adkins***. Further, the Court held that the administrative law judge "mechanistically credited, to the exclusion of all other testimony" two physicians who had treated and examined the miner for only one month, noting that their holding in ***Grizzle*** had warned against a "head count" of the treating physicians. Holding that the administrative law judge had "...invoked a rule of absolute deference to treating and examining physicians that relieved [him of his] statutory obligation to consider all of the relevant evidence..." a remand was required for consideration of the totality of evidence in this case. ***Sterling Smokeless Coal Co. v. Akers***, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

The Fourth Circuit reversed the award of benefits in a survivor's claim, holding that where the record contained no medical evidence showing that the miner's pneumoconiosis had any relationship to the miner's pneumonia or to his death, Dr. Rasmussen's speculative statement, unsupported by the record that he reviewed, that "[i]t is possible that death could have occurred as a consequence of his pneumonia superimposed upon...his occupational pneumoconiosis," and his conclusion that therefore "it can be stated" that pneumoconiosis was a contributing factor to the miner's death, did not meet the evidentiary requirements of §556(d) of the APA, and thus did not satisfy claimant's burden of proof. ***U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*]**, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999).

Citing ***Sterling Smokeless Coal Co. v. Akers***, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the Fourth Circuit held that an administrative law judge may not discredit a physician's opinion solely because the physician did not examine the claimant. ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

The Fourth Circuit held that administrative law judge's are not to credit the opinions of an autopsy prosector, to the exclusion of all other experts, solely because the autopsy prosector was the only physician to examine the whole body near the time of death. ***Bill Branch Coal Corp. v. Sparks***, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

The Court held that the administrative law judge must have a medical reason for preferring one physician's conclusion over another's and, therefore, reiterated its disapproval of any mechanical rule to prefer the opinion of a treating physician solely because the physician is the treating physician, ***see Consolidation Coal Co. v. Director, OWCP* [*Sisson*]**, 54 F.3d 434, 19 BLR 2-155 (7th Cir. 1995); ***Peabody Coal Co. v. Director, OWCP* [*Railey*]**, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992). The Court held that according greater weight to a treating physician's opinion simply because treating physicians are (by definition) familiar with patients' medical condition during life is circular reasoning that is just a restatement of a mechanical preference for the treating physician's opinion and, instead, held that a treating physician's opinion must be supported by medical reasons if they are to be given legal effect. The Court noted that "[t]reating physicians often succumb to the temptation to accommodate their patients (and their survivors) at the expense of third parties such as insurers, which implies attaching a discount rather than a preference to their views." ***Peabody Coal Co. v. McCandless***, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).

The Court held that the administrative law judge must supply a medical basis for preferring the autopsy prosector's opinion, in reiterating its holding in ***Peabody Coal Co. v. Director, OWCP* [*Rainey*]**, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992) that the administrative law judge may not automatically credit the conclusions of an autopsy prosector, but must supply a valid rationale for adopting them. The Court held that crediting an autopsy prosector's analysis of slides simply because the prosector performed the autopsy is just a restatement of the rule that ***Railey*** disapproved. ***Peabody Coal Co. v. McCandless***, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).

The Sixth Circuit held that administrative law judges are required to examine the medical opinions of treating physicians on their merits and make reasoned judgments as to their credibility. The opinions of treating physicians should be given their proper deference. In determining the level of deference that is proper, the Sixth Circuit turned to 20 C.F.R. §718.104(d)(5), which delineates the criteria for the development of medical evidence in black lung proceedings. ***Peabody Coal Co. v. Groves***, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002).

The Seventh Circuit held that in a case with conflicting expert opinions, an administrative law judge, after a thorough and careful consideration of all of the evidence, can conclude that the opinion of certain experts are more authoritative than other experts. The administrative law judge, however, must articulate a reason and provide support for favoring one opinion over another. The administrative law judge

accorded more weight to the employer's physicians, finding that they had superior qualifications and that their opinions were more specific and well supported. The administrative law judge found that the contrary medical opinions were not entirely reliable based on all the evidence and conflicting opinions. The Seventh Circuit held that the administrative law judge's "careful weighing of the evidence" demonstrated that his finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis was supported by substantial evidence. ***Livermore v. Amax Coal Co.***, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002).

The Sixth Circuit rejected employer's argument that ***Tussey v. Island Creek Coal Co.***, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), requires that administrative law judges presume that the opinions of treating physicians are correct and controlling, in violation of the APA; rather, post-***Tussey*** cases make it clear that, while a treating physician's opinion must be given its proper deference, a "treating physician presumption" does not exist. The Court noted that the provisions at 20 C.F.R. §718.104(d)(5), which delineate the criteria to be evaluated in determining the level of deference that would be proper, only apply to evidence developed after January 19, 2001, but nevertheless are instructive. The Court concluded that the administrative law judge did not rely upon a treating physician presumption in awarding benefits in this case, but instead examined all of the medical opinions and made reasoned judgments as to their credibility. ***Wolf Creek Collieries v. Director, OWCP* [*Stephens*]**, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002).

The Sixth Circuit held the administrative law judge erred in crediting two opinions based on the physicians' treating and examining status. Although the evidence in this case predated the revised regulations, the court referred explicitly to the factors in revised 20 C.F.R. §718.104(d) for assessing a treating and an examining physician's opinion. The court held that the administrative law judge erred by giving greater weight to a treating physician's report because the record was silent as to the factors that are relevant in determining whether the physician's opinion, as treating physician, is entitled to greater weight-considerations such as the nature and duration of the relationship, as well as the frequency and extent of the treatment. Slip op. at 4, citing revised Section 718.104(d). ***Jericol Mining, Inc. v. Napier***, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

The court also held that the administrative law judge erred in according greater weight to one examining physician over another, simply on the basis of the frequency of the examinations, without determining if the record supported the conclusion that the additional examinations gave that physician a more thorough understanding of the miner's condition. ***Jericol Mining, Inc. v. Napier***, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

The Third Circuit held that the administrative law judge acted permissibly in discounting the opinions in which the physicians indicated that the miner did not have pneumoconiosis because his objective tests did not demonstrate any impairment up to

two and one-half years prior to his death, as "if not hostile to the Act, at least premised on a legally untenable presumption" that the miner's pneumoconiosis could not have progressed absent additional dust exposure. Slip op. at 4. ***Consolidation Coal Co. v. Kramer***, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002).

The Seventh Circuit affirmed the administrative law judge's award of survivor's benefits under 20 C.F.R. §718.205(c). The Seventh Circuit determined that the correct application of nonmutual collateral estoppel precluded employer from arguing that the miner did not have pneumoconiosis, a fact established by the award of benefits in the miner's claim. Regarding the cause of the miner's death, the Seventh Circuit rejected employer's argument that the administrative law judge improperly relied on the opinion of Dr. Ridge, the miner's physician. Dr. Ridge was a general practitioner who treated neither the miner's cancer nor his pulmonary disease and referred the miner to specialists for both. Dr. Ridge opined that the acceleration seen in the miner's demise due to cancer was attributable to his weakened state which was due to pneumoconiosis. The court cited the Department of Labor's observation, when promulgating the regulation at 20 C.F.R. §718.205(c)(5), that persons weakened by pneumoconiosis "may expire quicker from other diseases," *see* 65 Fed.Reg. 79,920, 79,950 (Dec. 20, 2000), and referred to Dr. Ridge's advantage of observing whether a pulmonary problem "sapped" the miner's ability to withstand the effects of the cancer. One judge concurred in the opinion, declining to join the portions of the decision wherein the court discussed hypothetical ways in which employer might have prevailed. ***Zeigler Coal Co. v. Director, OWCP* [*Villain*]**, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002).

In this Fourth Circuit case, the majority held that a remand of the case was required because the administrative law judge did not weigh together all of the evidence regarding the existence of pneumoconiosis as required under ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The majority held that the administrative law judge must consider the weight of the x-ray evidence, which he properly determined to be negative, against the weight of the medical opinion evidence upon which he relied to find the existence of pneumoconiosis established in this case. The majority also held that the administrative law judge accorded undue weight to a treating physician's opinion by erroneously finding that "generally [a treating physician's] opinion would ordinarily be entitled to more weight." The majority determined that substantial evidence did not support the administrative law judge's finding that this physician, who had treated the miner for ten years, possessed comparable credentials to the other physicians of record. A dissenting judge would have held that although the administrative law judge erred, substantial evidence supports the administrative law judge's factual findings and decision to accord greater weight to the opinion of the miner's treating physician. ***Consolidation Coal Co. v. Held***, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002).

The Sixth Circuit reversed the Board's Decision and Order in which the Board affirmed the administrative law judge's award of survivor's benefits. The Sixth Circuit held that the Board erred in affirming the administrative law judge's reliance on the opinion of the miner's treating physician to find that claimant established death due to pneumoconiosis under 20 C.F.R. §718.205(c), because the administrative law judge improperly gave preference to the treating physician's opinion based on his status. The Sixth Circuit determined that the miner's treating physician's opinion, that pneumoconiosis hastened the miner's demise because the miner's lack of oxygen and retention of carbon dioxide had an effect on all parts of his body, "suffers from several serious problems that render his opinion an inadequate basis for the ALJ's conclusion," slip op. at 12, and "[even] if [the opinion] is an accurate medical conclusion, it is legally inadequate," slip op. at 13. The Sixth Circuit indicated that under the treating physician's interpretation, pneumoconiosis would virtually always "hasten' death at least some minimal degree. The Sixth Circuit held, "Legal pneumoconiosis only hastens death if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Id.* The Sixth Circuit thus concluded that the miner's treating physician's opinion is conclusory and inadequate. The Sixth Circuit also reviewed its cases and those of other circuit courts of appeal, as well as the regulation at 20 C.F.R. §718.104(d). The Sixth Circuit concluded that there is no rule requiring deference to the opinion of a treating physician in black lung claims, and indicated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." Slip op. at 9. ***Eastover Mining Co. v. Williams****,* 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

The Sixth Circuit held that, consistent with ***Eastover Mining Co. v. Williams***, 338 F.3d 501 (6th Cir. 2003), the administrative law judge appropriately gave deference to the "probative and persuasive" reports of a highly qualified physician who had treated the miner for many years. Contrary to employer's arguments, the administrative law judge did not resolve the conflict in the record solely based on the doctor's status as the miner's treating physician; rather, the administrative law judge analyzed all of the relevant evidence, the respective qualifications of the physicians and laboratory test results, and permissibly concluded that the treating physician's opinion was entitled to greater weight than the contrary opinions because it was well reasoned and supported by documentation in the record, and was the most persuasive. ***Peabody Coal Co. v. Odom***, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003).

The administrative law judge failed to give a treating physician's report "the additional deference it was due as the opinion of a treating physician." Although the treating physician had only seen the miner three times over a six-month period, that was "three more times and six months more than [the consulting physician] saw him." Despite the fact that "treating physicians' opinions are assumed to be more valuable than those of non-treating physicians," the administrative law judge ignored the treating physician's clinical expertise. ***Soubik v. Director, OWCP***, 366 F.3d 226, 23 BLR 2-82, at *8 (3d Cir. 2004) (Roth, J., dissenting).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.104(d) 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, 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).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.104(d) does not mandate that the opinion of a treating physician be given controlling weight, but merely permits an administrative law judge to accord controlling weight to a treating physician's opinion based on the credibility of the opinion in light of its reasoning and documentation. Claimant retains the burden of proving both the existence of pneumoconiosis and the credibility of the treating physician's opinion. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 870-871, 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 Sixth Circuit held that the administrative law judge did not adequately explain his reasons for crediting the opinions of Drs. Broudy and Fino. The Sixth Circuit found "no rational explanation" for the administrative law judge's determination that Dr. Broudy's opinion was more credible than Dr. Rasmussen's opinion regarding the existence of pneumoconiosis, especially after the administrative law judge found that Dr. Broudy's report contained little rationale or explanation and that Dr. Rasmussen's report was well-reasoned. The Sixth Circuit noted, moreover, that what explanation Dr. Broudy did provide for his opinion that claimant did not have pneumoconiosis, directly supported Dr. Rasmussen's finding of pneumoconiosis based on the blood gas study results. With regard to Dr. Fino, the Sixth Circuit held that Dr. Fino's credentials were not necessarily superior to those of Dr. Rasmussen, where Dr. Fino was Board-certified in Internal Medicine and Pulmonary Disease and Dr. Rasmussen was Board-certified in Internal Medicine only but had extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis. The Sixth Circuit also determined that the record refuted the administrative law judge's finding that Dr. Fino reviewed Dr. Rasmussen's exercise blood gas study and diffusing capacity test results and had determined that they were not indicative of pneumoconiosis. The Sixth Circuit thus vacated the Board's decision affirming the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and the denial of benefits, and remanded the case to the administrative law judge for further consideration. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

In ***Perry v. MYNU Coals Inc.***, the United States Court of Appeals for the Fourth Circuit stated that, read in context, a physician's statement that he is not "one-hundred percent sure" of his conclusion enhances rather than undermines that physician's credibility because "read in the context" of the opinion the physician's "qualification was at most an acknowledgement that uncertainty is part of medicine" and that "[a] refusal to express a diagnosis in categorical terms is candor, not equivocation." ***Perry v. MYNU Coals Inc.***,

469 F.3d 360, 23 BLR 2-274 (4th Cir. 2006).

The Seventh Circuit acknowledged that the views of a treating physician may be accepted when they are accurate and supported by medical evidence. As substantial evidence supported the administrative law judge's finding that the opinion of the miner's treating physician was credible and well-reasoned, and that the physician's reports reflected a careful examination of the miner and a thoughtful evaluation of diagnostic tests, the court concluded that the administrative law judge properly weighed the conflicting medical opinions and permissibly accorded greater weight to the opinion of the miner's treating physician, enhanced by his Board-certification in internal medicine. ***Zeigler Coal Co. v. Director, OWCP* [*Griskell*]**, 490 F.3d 609, 24 BLR 2-38 (7th Cir. June 19, 2007).

The Tenth Circuit held that the administrative law judge properly applied 20 C.F.R. §718.104(d) to find that the opinion of the miner's treating physician was entitled to great, but not controlling, weight. ***Energy West Mining Co. v. Oliver***, 555 F.3d 1211, 24 BLR 2-155 (10th Cir. 2009).

The United States Court of Appeals for the Third Circuit reversed the administrative law judge's denial of survivor's benefits pursuant to 20 C.F.R. §718.205(c). The court held that the administrative law judge erred in finding the statements of the miner's treating physician, that the miner's chronic lung disease compromised and contributed to his death from heart disease, was insufficient to satisfy claimant's burden of proof under ***Lukosevicz v. Director, OWCP***, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989) because the doctor did not specifically state that the miner's chronic lung disease was due to coal dust exposure. According to the court, in analyzing the evidence, the administrative law judge erred in focusing on the cause of the miner's respiratory disease as opposed to the cause of his death. The court noted that there was no dispute in the record that the miner had a chronic lung disease satisfying the legal definition of pneumoconiosis since the parties stipulated to the existence of pneumoconiosis, and the administrative law judge found that the miner's pneumoconiosis arose from his nine and one-half years of coal mine employment. The court further noted that the record was uncontradicted that the miner suffered from respiratory problems up until two days prior to his death. Thus, under the facts of the case, the court concluded that it was irrational for the administrative law judge to find that pneumoconiosis did not hasten the miner's death. The court therefore awarded benefits as a matter of law. ***Hill v. Director, OWCP***, 562 F.3d 264, 24 BLR 2-177 (3d Cir. 2009).

b. Hostility: Opinions in Conflict with the Act

DIGESTS

The Third Circuit, adopting the Board's holdings in ***Stephens v. Bethlehem Mines Corp.,*** 8 BLR 1-350, 1-352 (1985) and ***Hoffman v. B & G Construction Co.,*** 8 BLR 1-65 (1985), held that a physician's belief that simple pneumoconiosis is never disabling may constitute grounds for rejecting the medical opinion as inconsistent with congressional intent and the spirit of the Act. ***Penn Allegheny Coal Co. v. Mercatell,*** 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989); *see also* ***Adams v. Peabody Coal Co.,*** 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); ***Wetherill v. Director, OWCP,*** 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987); ***Black Diamond Coal Mining Co. v. Benefits Review Board,*** 758 F.2d 1532, 7 BLR 2-209, *reh'g denied,* 768 F.2d 1353 (11th Cir. 1985); ***Kaiser Steel Corp. v. Director, OWCP,*** 748 F.2d 1426 (10th Cir. 1984); ***Consolidation Coal Co. v. Hage,*** 908 F.2d 393, 14 BLR 2-46 (8th Cir. 1990).

The Eleventh Circuit, citing ***Stephens v. Bethlehem Mines Corp.,*** 8 BLR 1-350 (1985), held that an administrative law judge may properly reject the opinions of doctors whose beliefs are in conflict with the Act. ***Black Diamond Coal Mining Co. v. Benefits Review Board,*** 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985); *see also* ***Penn Allegheny Coal Co. v. Mercatell,*** 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989); ***Robbins v. Jim Walter Resources, Inc.,*** 898 F.2d 1478, 13 BLR 2-400 (11th Cir. 1990).

The Seventh Circuit concluded that Dr. Tuteur's opinion, that coal dust exposure does not cause obstructive impairment and therefore smoking must have caused the miner's condition, was not hostile to the Act as it did not fall into a traditionally hostile category and did not contravene the Act's definition of pneumoconiosis. ***Blakley v. Amax Coal Co.***, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995).

The Fourth Circuit rejected claimant's contention that the administrative law judge erred in crediting a medical diagnosis of no total disability where the physician noted that early simple coal workers' pneumoconiosis would "not be expected" to cause pulmonary impairment. The Court noted that this statement demonstrated that he based his opinion on the evidence in the instant case and not upon any "hostile" assumptions. This diagnosis was unlike the report in ***Thorn v. Itmann Coal Co.***, 3 F.3d 713, 719, 18 BLR 2-216 (4th Cir. 1993) where the Court noted that they rejected a physician's opinion stating that "simple pneumoconiosis does not 'as a rule' cause total disability" as "antithetical" to the Act. ***Lane v. Union Carbide Corp.***, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

The Seventh Circuit agreed with the Board and held that the administrative law judge's finding that Dr. Renn's report was hostile to the Act was harmless error under Section

727.203(a)(1). Here, Dr. Renn only opined that he thought simple pneumoconiosis could not progress once exposure ceased, not that he thought it could not disable the miner. As the administrative law judge provided two independent rationales for rejecting Dr. Renn's analysis, however, the Court held that remand was unnecessary. ***Ziegler Coal Co. v. Kelley***, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997).

The Third Circuit held that the administrative law judge acted permissibly in discounting the opinions in which the physicians indicated that the miner did not have pneumoconiosis because his objective tests did not demonstrate any impairment up to two and one-half years prior to his death, as "if not hostile to the Act, at least premised on a legally untenable presumption" that the miner's pneumoconiosis could not have progressed absent additional dust exposure. Slip op. at 4. ***Consolidation Coal Co. v. Kramer***, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002).

The Seventh Circuit held that, on substantial evidence review, the administrative law judge's inferences of hostility to the Act were permissible. The administrative law judge determined that one physician essentially stated that he would never diagnose the existence of pneumoconiosis in the absence of a positive x-ray; and another physician did not diagnose pneumoconiosis after stressing the absence of chest x-ray evidence, referencing parts of the medical literature that deny that coal dust exposure can ever cause pneumoconiosis, and relying on the absence of pulmonary problems at the time of the miner's retirement from coal mining, which the administrative law judge found to be contrary to the notion that pneumoconiosis is a progressive disease. ***Midland Coal Co. v. Director, OWCP* [*Shores*]**, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

The Seventh Circuit, on the merits of the claim, held that the administrative law judge did not err in relying of the weight of the medical opinion evidence at 20 C.F.R. §718.202(a)(4) to find the existence of pneumoconiosis established, where the weight of the x-ray evidence at 20 C.F.R. §718.202(a)(1) was negative. The Seventh Circuit also held, at 20 C.F.R. §718.202(a)(4), that the administrative law judge permissibly gave less weight to Dr. Selby's opinion, that claimant's worsening lung function could not be due to coal dust exposure because he was no longer working in or around coal mines, based on the court's holding that it conflicted with the regulatory provision at 20 C.F.R. §718.201(c) that pneumoconiosis can be latent and progressive. The Seventh Circuit also determined that Dr. Selby's statements, that coal mine employment "helped preserve [claimant's] lung function" and had a "positive effect on his health," were "contrary to the congressional findings and purpose central to the [Act]." ***Roberts & Schaefer Co. v. Director, OWCP* [*Williams*]**, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005).

c. Opinions Contrary to the Revised Regulations

DIGESTS

The Seventh Circuit held that in weighing the evidence at 718.202(a)(4), the ALJ permissibly accorded less weight to Dr. Tuteur's opinion that, "on rare occasions the inhalation of coal mine dust in the absence of cigarette smoke can produce a clinical situation similar to the picture of [COPD]," as inconsistent with the prevailing view of the medical community, cited by DOL when it adopted the revised regulations. The court noted that in promulgating the revised regulations, DOL had reviewed the medical literature on this issue and found that there was a consensus among scientists and researchers that coal dust-induced COPD is clinically significant, and that the DOL report does not indicate that the causal relationship between coal dust and COPD is merely rare. The court also rejected employer's argument that Dr. Tuteur's opinion could be interpreted as being consistent with the proposition that coal dust exposure *can* cause COPD in rare cases. The court held that Dr. Tuteur's statement led to the logical conclusion that he categorically excludes obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust. ***Consolidation Coal Co. v. Director, OWCP* [*Beeler*]**, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

PART III

ADMINISTRATIVE PROCESSING OF CLAIMS

C. EVALUATION AND WEIGHING OF EVIDENCE

4. MISCELLANEOUS

a. Lay Testimony/Evidence

DIGESTS

In a survivor's case, the court held that lay evidence alone may be sufficient to support finding of total disability due to pneumoconiosis. ***Rapier v. Secretary of Health and Human Services,*** 808 F.2d 456, 9 BLR 2-191 (6th Cir. 1986).

Lay evidence alone can be sufficient to support a finding that the deceased miner was totally disabled due to a respiratory impairment in a survivor's case. ***Dobbins v. Schweiker,*** 641 F.2d 1354, 3 BLR 2-9 (9th Cir. 1981).

Where a treating physician opined that pneumoconiosis hastened the miner's death, but a consulting physician opined that the miner had no impairment from pneumoconiosis at the time of his death, the administrative law judge "improperly minimized" lay testimony that the miner had increasing difficulty breathing, coughed up mucus, and was placed in an oxygen tent during his terminal hospitalization, when the administrative law judge weighed the conflicting opinions and credited the consulting physician's opinion. ***Soubik v. Director, OWCP***, 366 F.3d 226, 23 BLR 2-82, at *6 (3d Cir. 2004)(Roth, J., dissenting).

b. X-rays, Readers and Quality Standards

DIGESTS

Distinguishing "B" Readers

The Fourth Circuit held that in the absence of expert testimony explaining the conflict, there is no rational basis for preferring one "B" reader's interpretation over another "B" reader's findings. Presumably, both "B" readers are equally qualified. ***Whitman v. Califano,*** 617 F.2d 1055 (4th Cir. 1980).

Section 413(b) Prohibition

The Eighth Circuit, citing ***Auxier v. Director, OWCP,*** 4 BLR 1-717 (1982), affirms the Board's holding that the prohibition in Section 413(b) of the Act against x-ray readings "is activated by any significant and measurable level of respiratory or pulmonary impairment." ***Starchevich v. Director, OWCP,*** 873 F.2d 197, 12 BLR 2-284 (8th Cir. 1989).

The Fourth Circuit affirms the Board's holding that Section 413(b) of the Act, 30 U.S.C. §923(b) does not preclude a mine operator from offering conflicting interpretations of x-rays. ***Grey v. Director, OWCP,*** 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991).

The Seventh Circuit held that a medical report based on a physical examination and medical history, which diagnosed chronic bronchitis, probable coal miners' pneumoconiosis, heart disease and probable tuberculosis all resulting in cardio-respiratory impairment and total disability from coal mining is sufficient "other evidence" under 30 U.S.C. §923(b). The Court also found that the ALJ erred in denying claimant a hearing. The Court stated that Congress obviously intended that the weighing of conflicting evidence be conducted following a hearing. The Court reversed the decision of the Board and remanded for a hearing to consider claimant's request for modification and to determine entitlement. ***Arnold v. Peabody Coal Co.***, 41 F.3d 1203, 19 BLR 2-22 (7th Cir. 1994).

The Seventh Circuit held that a medical report based on a physical examination and medical history, which diagnosed chronic bronchitis, probable coal miners' pneumoconiosis, heart disease and probable tuberculosis all resulting in cardio-respiratory impairment and total disability from coal mining is sufficient "other evidence" under 30 U.S.C. §923(b). The Court held that the ALJ erred in concluding that claimant had not submitted "other evidence" sufficient to invoke the re-reading prohibition of 30 U.S.C. Section 923(b) and 20 C.F.R. §727.206(b)(1). ***Arnold v. Peabody Coal Co.***, 41 F.3d 1203, 19 BLR 2-22 (7th Cir. 1994).

Substantial Evidence

The Eighth Circuit affirmed the ALJ's crediting of evidence based on expertise of the physicians, physical examination by the physician and findings of sufficient documentation and reasoning in this substantial evidence affirmance of an award of benefits. ***Associated Electric Cooperative, Inc. v. Hudson***, 73 F.3d 845, 20 BLR 2-103 (8th Cir. 1996).

The Fourth Circuit affirmed the ALJ's rejection of evidence based on equivocal opinions and the sufficiency of the documentation and reasoning in the credited reports of record, substantial evidence supporting the denial of benefits. ***Woody v. Balley Camp Coal Co.***, 73 F.3d 360, 20 BLR 2-113 (4th Cir. 1995).

The Fourth Circuit affirmed the ALJ's rejection of evidence based on unpersuasive opinions and the sufficiency of the documentation and reasoning in the reports of record in this substantial evidence affirmance of a denial of benefits. ***Billips v. Bishop Coal Co.***, 76 F.3d 371, 20 BLR 2-130 (4th Cir. 1996).

The Fourth Circuit affirmed the Board's review of this case and held that it limited itself to the proper standard of review and that substantial evidence supports the ALJ's denial of benefits herein. ***VanDyke v. Missouri Mining, Inc.***, 78 F.3d 362, 20 BLR 2-152 (6th Cir. 1996).

Under the facts and circumstances of the case, doctor's opinion that pneumoconiosis "could be considered a complicating factor" in the miner's death was sufficient to constitute substantial evidence that pneumoconiosis hastened the miner's death. ***Piney Mountain Coal Co. v. Mays***, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

The Fourth Circuit held that Dr. Rasmussen's speculative statement, unsupported by the record that he reviewed, that "[i]t is possible that death could have occurred as a consequence of his pneumonia superimposed upon...his occupational pneumoconiosis," and his conclusion that therefore "it can be stated" that pneumoconiosis was a contributing factor to the miner's death, did not qualify under §556(d) of the APA as "reliable, probative, and substantial" evidence on which the administrative law judge could base a black lung benefits award. ***U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*]**, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999).

c. Autopsy and Biopsy Evidence, Quality Standards

DIGESTS

In the absence of an autopsy, a death certificate may not be used to preclude invocation of a presumption of a totally disabling respiratory or pulmonary impairment. ***Hillibush v. U. S. Department of Labor,*** 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988).

The Court held that the administrative law judge must supply a medical basis for preferring the autopsy prosector's opinion, in reiterating its holding in ***Peabody Coal Co. v. Director, OWCP* [*Railey*]**, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992) that the administrative law judge may not automatically credit the conclusions of an autopsy prosector, but must supply a valid rationale for adopting them. The Court held that crediting an autopsy prosector's analysis of slides simply because the prosector performed the autopsy is just a restatement of the rule that ***Railey*** disapproved. ***Peabody Coal Co. v. McCandless***, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).

d. Ventilatory and Blood Gas Studies, Quality Standards

[See Part IV A.2.]

The Sixth Circuit held that the administrative law judge's explanations for crediting the opinions of Drs. Broudy and Fino and discounting the contrary opinion of Dr. Rasmussen, to find the medical opinions insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), were not supported by substantial evidence. The administrative law judge credited the opinions of Drs. Broudy and Fino over the contrary opinion of Dr. Rasmussen because he found that Dr. Rasmussen relied on an incomplete medical record in that he diagnosed only clinical pneumoconiosis by x-ray, whereas Drs. Broudy and Fino relied on comprehensive documentation in reaching their conclusions that claimant did not have pneumoconiosis. The administrative law judge also found that Dr. Fino had excellent professional qualifications. The Sixth Circuit held that the administrative law judge did not adequately explain his finding that Dr. Rasmussen's report did not support a finding of legal pneumoconiosis, where the record showed that Dr. Rasmussen relied on the results of his exercise blood gas study and diffusing capacity test to determine that claimant was suffering from a pulmonary disability. The Sixth Circuit also held that the Board's explanation that Dr. Rasmussen diagnosed clinical but not legal pneumoconiosis, was inaccurate as a matter of law because (1) Dr. Rasmussen's consideration of evidence, other than the x-ray, including a physical exam, diffusing capacity test, arterial blood gas studies, and claimant's personal and occupational histories, would have been sufficient alone to support a finding of legal pneumoconiosis; and because (2) even if Dr. Rasmussen diagnosed only clinical pneumoconiosis, as the Board concluded, such a diagnosis was necessarily legal pneumoconiosis where legal pneumoconiosis includes clinical pneumoconiosis. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

The Sixth Circuit held that the administrative law judge did not adequately explain his reasons for crediting the opinions of Drs. Broudy and Fino. The Sixth Circuit found "no rational explanation" for the administrative law judge's determination that Dr. Broudy's opinion was more credible than Dr. Rasmussen's opinion regarding the existence of pneumoconiosis, especially after the administrative law judge found that Dr. Broudy's report contained little rationale or explanation and that Dr. Rasmussen's report was well-reasoned. The Sixth Circuit noted, moreover, that what explanation Dr. Broudy did provide for his opinion that claimant did not have pneumoconiosis, directly supported Dr. Rasmussen's finding of pneumoconiosis based on the blood gas study results. With regard to Dr. Fino, the Sixth Circuit held that Dr. Fino's credentials were not necessarily superior to those of Dr. Rasmussen, where Dr. Fino was Board-certified in Internal Medicine and Pulmonary Disease and Dr. Rasmussen was Board-certified in Internal Medicine only but had extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis. The Sixth Circuit also determined that the record refuted the administrative law judge's finding that Dr. Fino reviewed Dr.

Rasmussen's exercise blood gas study and diffusing capacity test results and had determined that they were not indicative of pneumoconiosis. The Sixth Circuit thus vacated the Board's decision affirming the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and the denial of benefits, and remanded the case to the administrative law judge for further consideration. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

e. Vocational Experts and Evidence

DIGESTS

The test for total disability is solely a medical test and not a vocational one. The fact that a miner would not be rehired does not support a finding of total disability. ***Ramey v. Kentland Elkhorn Coal Corp.,*** 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

f. Contraindication of Continued Employment

DIGESTS

A medical conclusion that the miner "should not return to underground mining" because of his pneumoconiosis is not sufficient to establish that the miner is totally disabled. ***Zimmerman v. Director, OWCP,*** 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *see also* ***Neace v. Director, OWCP,*** 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989), *reh'g denied* 877 F.2d 495, 12 BLR 2-303 (6th Cir. 1989); ***Migliorini v. Director, OWCP,*** 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990).

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