U.S. Department of labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 2001-8002

In the Matter Of	:	
	:	
CLYDE BREEDING	:	
	:	
and	:	
	:	Date Issued: October 30, 2000
DELTA BREEDING,	:	
His Surviving Spouse	:	
Claimants	:	
	:	Case No.: 2000-BLA-0386
v.	:	
	:	
COLLEY & COLLEY COAL COMPANY	:	
Employer	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Party In Interest	:	

Appearances:

Gregory R. Herrell. Esquire
Arrington Schelin & Herrell, P.C.
For the Claimant

Lucy Williams, Esquire
Street, Street, Street, Scott & Bowman
For the Employer

Before: STUART A. LEVIN
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim for benefits filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. § 901, *et. seq.*, (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Parts 718 and 725.

Benefits are awarded under the Act to coal miners who are totally disabled due to pneumoconiosis, a dust disease of the lungs arising from coal mine employment, and commonly known as black lung disease. 20 C.F.R. §718.201. Benefits are awarded also to the surviving spouses of such miners who are found entitled to benefits based on a claim filed prior to January 1, 1982, or whose death was due to pneumoconiosis.

Following notice to all interested parties, and in accordance with the provisions of 20 C.F.R. Part 725 and 29 C.F.R. Part 18, a formal hearing was held before me in this matter on June 7, 2000 at Abingdon , Virginia. Each party was afforded the opportunity at such time to present their evidence and the record was left open for thirty (30) days to permit the filing of briefs. This has now been accomplished.

The record in this case consists of Director's exhibits 1-157 ("DX 1-157"); Claimant's exhibits 1- ("CX 1-3"); Employer's exhibits 1-9 ("EX 1-9") and the testimony of the surviving spouse.

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PROCEDURAL HISTORY

The history of this case covers almost 20 years and begins with the miner's filing of a claim for benefits on September 29, 1980 and continues with his widow's filing for survivor benefits in April 1992. It has been assigned to three Administrative Law Judges before me, each of whom have issued Decisions and Orders (D&O) which have been vacated and remanded on appeal to the Benefit Review Board (Board). The Board has also reconsidered the case *en banc* on one occasion in response to the Employer's motion on the issue as to whether it was properly designated the Responsible Operator (RO) in this case.

Details of this history up to June 25, 1999 have been set forth in the Board's D&O of that date and is incorporated herein by reference. I will summarize this history and bring it up to date.

The Claimant was found initially entitled to benefits following the filing of his claim. The Employer controverted the claim and requested a hearing, which was commenced by Judge Charles P. Rippey in February 1985. However, due to a procedural problem, the hearing was adjourned and the case was Remanded for additional processing by the then Deputy Commissioner.

Upon the return of the case to the Office of Administrative Law Judges, it was assigned to Judge John Bedford, who conducted a hearing and issued a D&O awarding benefits. In reaching this decision, Judge Bedford credited the miner with over 25 years of coal mine employment which included the miner's work as a coal mine inspector for the Commonwealth of Virginia. In vacating Judge Bedford's award, the Board held, in part, that the coal mine inspector position did not constitute coal mine employment and that the Employer was the RO in this case rather than the Black Lung Trust Fund or Commonwealth of Virginia. This was the issue which was then reconsidered by the Board, *en banc*, with the result that the original ruling in this regard was left standing. On remand, Judge Bedford was directed to recalculate the length of coal mine employment and to also reconsider the issue of the miner's entitlement to benefits.

As Judge Bedford was no longer with this Office when the case was returned by the Board, it was assigned again to Judge Rippey, who subsequently issued a D&O denying benefits. Judge Rippey found that the miner had only 12.46 years of coal mine employment, that the preponderance of the x-ray evidence did not establish that the miner had pneumoconiosis and that the medical opinion evidence establishes that the miner's disability was due to smoking and not to pneumoconiosis.

The Claimant's appeal of Judge Rippey's D&O resulted in another Remand by the Board. The Board found that Judge Rippey had used a reasonable method of calculating the length of coal mine employment and had not erred in finding that the preponderance of the x-ray evidence did not establish the existence of pneumoconiosis. Nevertheless, the Board held that medical opinion needed to be reconsidered to determine whether the miner had pneumoconiosis and was disabled as the result of the disease.

The case was then assigned to Judge Richard T. Stansell-Gamm as Judge Rippey was no longer available. Judge Stansell-Gamm issued a "Notice of Additional Evidence" advising the parties that the file now contained a copy of the Survivor's claim together with autopsy evidence developed in connection with the same. He forwarded a copy of the same to each party, and allowed 30 days to address the admissibility of this evidence or to seek additional time for further medical evaluation of the results. The Employer responded by moving to remand the miner's claim to the District Director for consolidation with the survivor's claim and for further development of the evidence. Otherwise, the Employer requested a period of 120 days to obtain autopsy slides for development and submission of additional evidence.

Judge Stansell-Gamm denied the Employer's motion in a D&O awarding benefits under the miner's claim commencing September 1, 1980. He concluded that the autopsy evidence, which had been associated with the survivor's claim, established the existence of pneumoconiosis and that the preponderance of the medical evidence showed that the disease contributed to the miner's total disability. Judge Stansell-Gamm left undisturbed the finding of 12.46 years of coal mine employment.

Upon the Employer's appeal to the Board, the award of benefits was vacated as it was based upon

autopsy evidence in an incompletely-developed survivor's claim. Judge Stansell-Gamm was directed to remand the survivor's claim to the District Director for further development and processing. The Board further advised that, inasmuch as evidence in the survivor's claim is relevant to contested issues in the miner's claim, Judge Stansell-Gamm could opt to remand both claims to the District Director for consolidation. Judge Stansell-Gamm proceeded to remand both claims to the District Director on August 30, 1999.

On October 5, 1999, the District Director notified the parties that he was allowing 30 days within which to submit any evidence or comments and at the end of such time he would thoroughly review all evidence currently of record. The Claimant responded by submitting a report from Dr. Buddington and an affidavit from George W. Wright that the miner's employment at Wright's Super Market in 1957 and 1958 was employment in coal mines and not a super market. The District Director then proceeded to recalculate the length of coal mine employment and determined that the miner had worked in coal mines for 16.75 years ending in December 1970.

On December 8, 1999, the District Director issued and served on the parties a "Proposed Decision and Order on Remand, Consolidation and Reconsideration," awarding benefits both under the miner's and survivor's claims. The District Director held that the evidence now of record showed that the miner had pneumoconiosis caused by his coal mine employment, that he was totally disabled and that the 15 year presumption linking the disability to his coal mine employment had not been rebutted. He also found that the survivor's claim could be allowed both on the basis of the miner's entitlement and because the evidence would establish that his death was due to pneumoconiosis. The District Director warned the parties that if no request for a hearing was received within 30 days, the Proposed Decision and Order will be deemed to have been accepted by the parties and the findings set forth therein would become final.

The next item in the record is a copy of a letter from Employer's counsel, dated December 10, 1999, and addressed to the District Director, which acknowledged receipt of and expressed disagreement with his decision and requested a hearing. The copy bears the following imprint at the top, "Jan-19 00 FROM STREET, STREET, STREET, SCOTT & BOWMAN 15409354162 TO: 814 533 4304 PAGE: 02."

The record then contains a letter to the surviving spouse from the District Director dated January 19, 2000 informing her that, as the Employer had declined to begin to make payments to her pursuant to the Proposed Decision and Order, the Black Lung Trust Fund would begin to make temporary payments. Another letter addressed to her on January 21, 2000 informed her that the case was being referred to this Office for a hearing. Copies of these letters were sent to the Employer and the parties' counsel.

The District Director proceeded to refer the case for a hearing on January 21, 2000 with a transmittal memorandum entitled, "Return of Remand." The document makes no mention that a late filing by the

Employer was an issue in this case.

FINDINGS AND CONCLUSIONS

I. Timely Filing of Request for Hearing

At the hearing before me on June 7, 2000, counsel for the Claimant raised the issue as to whether the Employer's request for a hearing was filed within the 30 days allotted as he had first received a copy of the Employer's request by faxed letter on January 19, 2000. Counsel also incorporated this issue in his post-hearing brief.

Employer's counsel has submitted a response to the Claimant's brief stating, in pertinent part:

> "Our file indicates that this office filed a response requesting a hearing under cover of December 10, 1999. At hearing, claimant's counsel indicated his office did not receive this response. While we have no way of knowing whether or not our contest of the Director's award reached claimant's office since it was not forwarded by certified mail, we have gone back to check our computer data base records and verified that the document was created and modified (i.e., corrected) on December 10, 1999, the day of the letter. Further, it certainly should come to no surprise to any party, including claimant, that operator continues to contest the award of benefits in this matter since we have vigorously contested the deceased miner's and, thus, the survivor's entitlement to benefits in this case for more than 20 years. Notably on January 3, 2000, we sent a letter to claimant's counsel regarding his responses to our Motion for Production of autopsy slides and requested additional assistance from his office in securing those slides for review.

Employer's counsel went on to note that Claimant's counsel responded to this letter on January 24, 2000 and subsequently forwarded the slides. Copies of this exchange of correspondence was submitted. Employer contends also that the Claimant was late in raising this issue as she was required to do so while the matter was still pending before the District Director.

Section 725.419 of the regulations provides that a proposed decision and order of the District Director shall become final and effective unless a party requests a hearing **within 30 days** after its issuance.

I take official notice that the imprint at the top copy of the Employer's request for hearing is that which is commonly used to indicate a facsimile transmission. There is nothing in this record to indicate that an original of this letter had been sent to the District Director at any earlier date. The Employer was required to serve a copy of its request for a hearing on Claimant's counsel and I have no reason to doubt his representation that he did not receive his copy before January 19, 2000. Accordingly, I find that this was the date that the letter was first submitted.

Unlike §725.413(a) which permits extension of the 30 days period for filing an employer's notice of controversion for good cause or in the interest of justice, §725.419 provides for no exceptions to the 30 deadline.

The Proposed Decision and Findings was mailed to the Employer on December 8, 1999. Section 725.311 tacks 7 days onto a mailed document's response date. The first day of the District Director's order, i.e., December 8, 1999 is not included and the period is extended to the next business day if it expires on a Saturday, Sunday, or holiday established by Congress. Accordingly, 37 days beginning with December 9, 1999 would bring the final response date to January 14, 2000 which was a Friday.

Although, the January 19, 2000 response by the Employer did not meet the requirements of § 725.419, I do not find that this disposes of the issue. Thus, the record was returned to this Office by the District Director without noting that the timeliness of the Employer's response to his Proposed Order and Findings was an issue.[1] The regulations otherwise afford District Directors broad discretion in referring cases for a formal hearing even in the absence of a specific request by any party. See, e.g. §725.415 (b). Additionally, the record regarding the survivor's claim shows that Employer was first notified of the same on July 20, 1992 when it was informed that the surviving spouse was being found entitled to benefits based on the District Director's earlier determination that the miner was eligible. The Employer filed a timely controversion and noted that the issue of the miner's entitlement was then pending before the Board. The record thereafter contains a memorandum from the District Director to the Hearing and Appeals Section, dated September 20, 1992, forwarding the survivor's claim for association with the miner's claim. Where and when it became associated with the record is not clear. The Employer has never been afforded a hearing based on this controversion and I consider that it is still viable. This is particularly so because the most recent Proposed Order and Findings of the District Director is merely a restatement of his earlier findings which have been vigorously opposed by the Employer.

Nor is Claimant placed at any disadvantage as counsel was aware on a timely basis that the Employer had no intention of abandoning its objection to the payment of benefits and was embarking on development of its evidence regarding the miner's autopsy. Accordingly, I decline to dismiss this case based on a late filing of a request for hearing.

II. Responsible Operator

The Employer continues to raise the issue as to whether the miner's subsequent employment as a State mine inspector relieves it of responsibility for payment of this claim. This issue, which involves a matter

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[1]I note that the Claimant had no opportunity to raise this issue while it was still pending before the District Director as the case was forwarded here almost simultaneous with the notification to the Claimant that this was happening.

of law, has been previously decided adverse to the Employer by the Board, both in its initial D & O in this case and on reconsideration thereof. The Employer presented essentially the same arguments in its brief filed with the Board on August 14, 1990, as it now presents, including the Black Lung Act's failure to include the Longshore and Harbor Workers' Act provision exempting States from liability. In its most recent D & O in this case, the Board again rejected the Employer's contention that it should be dismissed as the RO, noting that the issue had been previously decided and "no exception to the law of the case doctrine has been demonstrated.

While the employer has preserved this issue for any future appeal, in light of the Board's rulings on the matter, it would serve no useful purpose for me to entertain Employer's motion to be dismissed.

III. Length of Coal Mine Employment.

In finding that the miner only had only 12.46 years of coal mine employment, Judge Rippey started with the proposition that the Employer had conceded in its brief that the miner worked steadily in coal mining from 1963 through 1970 and credited him with 8 years of such employment for this period. Judge Rippey found that the miner's testimony at his November 1987 hearing was not specific as to any dates of coal mine employment and that the Employment History he completed in February 1981 was not corroborated by other evidence. Accordingly, he stated that he was relying solely on the miner's Itemized Statement of Earnings prepared by the Social Security Administration. After noting that these records reflected only sporadic employment as a coal miner from 1941 to 1961, he employed a methodology whereby he adopted the highest quarterly wage earned during specific periods as representing full-time employment for such periods and assigning a percentage of full-time work for quarters where the miner earned less than this amount.

The Board affirmed Judge Rippey's findings of 12.46 years of coal mine employment as it considered his calculations to be based on a reasonable method and supported by substantial evidence. However, I do not consider this to be the law of this case as it involves a question of fact and not one of law. The Board has held that any reasonable method of calculating the length of coal mine employment is acceptable. *See, e.g., Clayton v. Pyro Mining Co*, 7 B.L.R 1-551 (1984). It follows that the Board did not mean to imply that Judge Rippey's method was the only one acceptable as a matter of law.

New evidence added to this case since Judge Rippey's D&O shows that his finding was based, at least in part, on a mistake of fact. An affidavit now identifies the employment listed in the Social Security records as Wrights Super Market to actually be work at a coal mine operated by Wright. Additionally, as noted by the District Director's staff , Judge Rippey's calculations did not take into account certain other coal mine employment shown by the Social Security records. My review of the Social Security record in comparison to Judge Rippey's shows the following to be missing from his evaluation:

Quarter/Year	Employer(s)	Earnings

1/1950	Harmon Coal		$ 572.64
2/1950	”		646.97
2/1957	Wright’s Super Market	868.50	
3/1957	“	820.75	
2/1958	“	14.00	
3/1958	“	112.00	
1/1958	Wright & Colley	1050.00	
2/1958	“		1053.75
2/1960	Waldon Deel Coal	510.00	
3/1960	“	220.00	
2/1961	‘	420.00	
3/1961	“	310.50	

Recalculating the period from 1941 to 1961 based on Judge Rippey’s method, I arrive at 6.18 years which, when added to the 8 years of subsequent employment leaves a total of 14.18 years.[2]

Nevertheless, the record now contains a document prepared by the District Director which shows the average daily wages of miner’s for the period beginning in 1920 and ending in 1998. It also shows as an “Earning Standard” a figure for each of these years which is 125 times the daily rate. By assigning a percentage of the year worked based on the Social Security annual earnings for the year and the Earning Standard for the period from 1941 through 1970, the District Director’s staff arrived at a total of 16.75 years of coal mine employment.

Section 718.301 of the regulations provides:

> **§718.301 Establishing length of employment as a miner.**
> (a) The presumption set forth in §§718.302, 718.303, 718.395 and 718.306 apply only if a miner has been employed in one or more coal mines for specified periods. Regular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses, and shall not be contingent upon a finding of a specific number of days of employment within a given period.
> (b) For the purposes of the presumptions described in this subpart, a year of employment means a period of one year, or partial periods totaling one year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. A ‘working day’ means any day or part of a day for which a miner

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[2]I increased the percentage for the second and third quarters of 1961 to reflect the Waldon Deel employment and added percentages for the other missing quarters based on Judge Rippey’s base figures of $844 per quarter in 1950 and $920 per quarter for subsequent years. By doing so I calculated that the miner had worked 66.8% of 37 quarters or 24.72 quarters.

> received pay for work as a miner. If an operator or other employer proves that the miner was not employed for a period of at least 125 working days during a year such operator or other employer shall be determined to have established that the miner was not regularly employed for a year for the purposes of this section. If a miner worked in or around one or more coal mines for fewer than 125 days in a calender year, he or she shall be credited with a fractional year based on the ratio of the actual number of days worked to 125. No period of coal mine employment outside the United States shall be credited toward the use of any presumption contained in this part.

I recognize that the Board has held that the 125 day rule contained in §725.493 does not apply in determining the length of employment but is only applicable in determining a responsible operator issue. *See, e.g., Croucher v. Director, OWCP*, 20 B.L.R. 1-67 (1996) (*en banc*). However, I am not aware of any case which holds that the 125 day provisions set forth at §718.301, which specifically relates to determining the length of employment for the purpose of establishing entitlement to the Part 718 presumptions, is not to be applied in a Part 718 case.

Neither in its most recent expression of disagreement with the District Director's Proposed D&O nor in its post-hearing brief does the Employer challenge the finding of 16.75 years of coal mine employment or the method used by the District Director in arriving at the same. In a discussion at the hearing before me regarding the length of employment, counsel for the Employer announced that they were now only willing to concede that the miner worked for them from September 1969 to December 1970. No evidence was submitted by the Employer to dispute the District Director's calculations. Consequently, I will adopt the District Director's findings of 16.75 years of coal mine employment as it is based on a more accurate review of the Social Security records and a methodology which I consider fairer than that used by Judge Rippey.[3]

IV. Existence of Pneumoconiosis

When this matter was before Judges Bedford and Rippey their findings as to the existence of pneumoconiosis were based, in part, on 49 interpretations of 8 separate x-rays. Judge Bedford concluded that the weight of this evidence established the miner had the disease while Judge Rippey later concluded that it did not. On the other hand Judge Stansell-Gamm had before him the autopsy report prepared by the prosector, Dr. Mario Stefanini, in which he described fibrotic areas where there were collections of black pigment. Citing *Terlip v. Director, OWCP* 8 B.L.R. 1-363 (1985) and *Fetterman v. Director, OWCP* 7 B.L.R. 1-688, Judge Stansell-Gamm noted that the autopsy report was the most reliable evidence and must be given significant probative value.

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[3]The averages used by Judge Rippey are not based on any particular statistical study and may not take into account that the miner's earnings for a particular baseline quarter may have been inflated by overtime, bonuses or other such wage enhancements.

Dr. Stefanini's report is now part of the official record in this case. There have also been added the pathological reports of Drs. Richard. S. Buddington, Echols A. Hansbarger and Joseph F. Tomashefski, who have reviewed autopsy slides and agree that they show simple coal workers' pneumoconiosis. Drs. A. Dahan and James R. Castle have reviewed these reports and now acknowledge that the miner had pneumoconiosis.

In the recent case of *Island Creek Coal Company v. Compton*, --F3d--, No.98-2051 (4th Cir., May 2, 2000), the Court, citing *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995), noted that autopsy evidence is generally accorded greater weight than x-ray evidence. The Employer has not contended that this principle should not be applied in the instant case. I find, therefore, that the existence of pneumoconiosis is established.

V. Causation of Pneumoconiosis

Based on his more than 10 years of coal mine employment. the miner was and his surviving spouse is entitled to the presumption in §718.302 that his pneumoconiosis arose out of his coal mine employment. The Employer has neither contended nor established that the presumption has been rebutted in this case.

VI. Total Disability

The Employer has not disputed the fact that the miner had met the criteria for establishing a totally disabling respiratory or pulmonary impairment in this case, *ab initio*. Indeed, the record includes 5 pulmonary function studies performed from January 8, 1981 through September 20, 1984, each of which qualify under the Part 718 standards. I find, therefore, that total disability is shown to have existed in this case.

VII. Etiology of Total Disability

The question remains as to whether the miner's total disability arose out of his coal mine employment.

Section 718.305 of the regulations provides, in pertinent part:

> (a) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his survivor's claim and it is interpreted as negative with respect to [showing complicated pneumoconiosis], and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis...
> (d) Where the cause of...total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment or the evidence shows that the miner

> does not or did not have pneumoconiosis the presumption will be considered rebutted. However, in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.
>
> (e) This section is not applicable to claims filed on or after January 1, 1982.

In *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995), the Court noted that as the §718.305 presumption was applicable it was improper to place an affirmative duty on the claimant to show that pneumoconiosis contributed to the miner's totally disabling respiratory impairment. In regard to the nature of the proof which an employer is required to present the Court held:

> "Furthermore, there is no evidence in the record from which an ALJ could find that the employer has rebutted the presumption that Barber suffered from 'pneumoconiosis.' We have reminded ALJs and the BRB on several occasions that 'pneumoconiosis' is a <u>legal</u> term defined in the Act and they must bear in mind when considering medical evidence that physicians generally use 'pneumoconiosis' as a <u>medical</u> term that comprises merely a small subset of the afflictions compensable under the Act. If there is any lingering confusion on this point, let us dispel it now. The legal definition of 'pneumoconiosis' is incorporated into every instance the word is used in the statute and regulations."

(Footnotes and citations omitted.) (Emphasis supplied)

The "legal" definition of pneumoconiosis is set forth in §718.201 as follows:

> "For the purpose of the Act, *pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For the purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic respiratory disease or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

In their respective D&Os, my colleagues summarized reports of examinations and/or record evaluations which had been conducted by Drs. Sutherland, Kanwal, Garzon, Buddington, Scmidt, Dahan, O'Neill, and Castle from 1980 to 1987. Drs. Garzon, Dahan, O'Neill and Castle had offered opinions during this era that the miner's disability was not caused by pneumoconiosis. They opined also that he did not suffer from pneumoconiosis. Autopsy evidence now establishes the existence of the

disease.

The record also contains new opinions by Drs. Castle and Dahhan, who are Board certified in Pulmonary Diseases as well as the opinions of Drs. Hansbarger and Tomashefski, who are Board certified in Pathology. Bearing in mind that I am here concerned with whether the miner's total disability, and not his death, was caused by pneumoconiosis, I am setting forth only that portion of their opinions which deal with this subject.

Dr. Hansbarger issued a report, dated February 12, 2000, in which he stated that the autopsy slides that he reviewed showed pulmonary anthracosilicosis of a mild degree just sufficient to warrant the diagnosis of coal workers' pneumoconiosis of the dust reticulation type.[4] Dr Hansbarger noted that he had also reviewed other records pertaining to the miner including the report of Dr. Buddington, dated September 22, 1999 with which he agreed.[5] He then opined that he believed there was no respiratory impairment or pulmonary disability present in the miner due to his pneumoconiosis because of its mild degree. He opined further that there was a severe degree of bullous centrilobular emphysema of the lung present which is not related to coal workers' pneumoconiosis in any way shape or form.

At his deposition, taken on June 5, 2000, Dr. Hansbarger was asked to describe the disease process of coal workers' pneumoconiosis and replied as follows:

> "Coal workers' pneumoconiosis is an inhalation disease of the lungs in individuals who have inhaled carbon particles or coal dust into their lungs. When these particles enter the lung most of them are coughed up or gotten rid of in some other way. In a certain percentage of individuals with prolonged exposure, the disease coal workers' pneumoconiosis develops. And primarily its a fibrotic disease of the lung in which scar tissue forms about these particles in many areas in the lung. There is a question of individuals' susceptibility to the disease, dose of the materials, length of time, et cetera, et cetera. It's dependent on many factors."

Dr. Hansbarger repeated his opinion at his deposition that coal workers' pneumoconiosis did not cause

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[4]Dr. Hansbarger indicated that he had previously issued a report in this case on September 22, 1992 in which he reached the same conclusion. The record shows that this report was forwarded to the Board by Employer's counsel on October 7, 1998. I find it disturbing that although the Employer was in receipt of a 1992 report from its consultant showing the existence of pneumoconiosis by autopsy evidence, it continued to argue in a brief filed by its appeal counsel in January 1995 that the x-ray and medical opinion evidence failed to show the existence of pneumoconiosis. The report had not been brought to Judge Rippey's attention prior to the issuance of his D&O.

[5]Dr. Buddington had opined in this report that his review of the autopsy slides showed mild to moderate pneumoconiosis.

any pulmonary impairment in the miner. He deposed further that the centrilobular emphysema found on autopsy was consistent with an individual with a 40 pack year history of cigarette smoking and that this type of emphysema or chronic obstructive pulmonary disease is not caused by exposure to coal dust.

Dr. Tomashefski, who is Professor of Pathology at Case Western Reserve University, School of Medicine, issued an opinion on March 20, 2000, in which he stated, in pertinent part:

> "Based on my review of the medical records, autopsy report, and slides of Mr. Breeding's lung tissue, it is my opinion that Mr. Breeding had severe mixed panacinar and centriancinar emphysema, and chronic bronchitis. It is also my opinion, within a reasonable degree of medical certainty, based on the documentation of sparse coal macules and micronodules in his lung parenchyma that Mr. Breeding had minimal simple coal workers' pneumoconiosis...The extent of simple coal workers' pneumoconiosis is so minimal in Mr. Breeding's lungs that, in my opinion, it would have not caused him any respiratory symptoms, respiratory impairment, or exercise limitation...
>
> "It is also my opinion that neither simple coalworkers' pneumoconiosis, coal dust exposure nor coal mine employment is a cause of Mr. Breeding's diffuse emphysema. Similarly, it is my opinion, within reasonable medical certainty that neither coal mine employment nor simple coal workers' pneumoconiosis is a cause of Mr. Breeding's chronic bronchitis, since he had been retired from coal mine work and had no coal dust exposure for approximately 9 years before his death....In my opinion, within reasonable medical certainty, Mr. Breeding's severe emphysema and chronic bronchitis were caused by longstanding cigarette smoking habit."

Dr. Castle did a record review which included a review of his October 13, 1987 report and the material listed therein as well as the reports of Drs. Stefanni, Hansbarger, and Buddington. He opined "based on a thorough review of all the data, including medical histories, physical examinations, radiographic reports, pulmonary function tests, arterial blood gas studies, and autopsy material" that the miner did have pathologic evidence of minimal simple coal workers' pneumoconiosis. He went on to state that the minimal, simple coal workers' pneumoconiosis could not have caused the miner any impairment but that he was disabled by his severe, tobacco induced emphysema.

At his deposition taken on June 5, 2000, when asked whether the miner's coal dust exposure could not have caused or contributed to his emphysema, Dr. Castle responded:

> "No, not in my opinion, no. The reason that I state that are several. First he had a pure ventilatory impairment that is typical of that seen with tobacco smoke-induced pulmonary emphysema. He did not have sufficient enough amount of dust in his lungs to cause the x-ray to be positive. The pathology showed clearly that this man had tobacco smoke-induced pulmonary emphysema. Once again, that is the gold standard

for the diagnosis as well. It clearly separated the two."

Dr. Dahhan reported on March 27, 2000 that he had reviewed the pathological reports and concluded that the miner had simple coal worker's pneumoconiosis, chronic bronchitis and emphysema. He opined, in substance, that the miner was totally disabled because of chronic bronchitis and centriacinar and panacinar emphysema which resulted from his 40 pack years of smoking and not from his simple coal workers' pneumoconiosis.

Based on the definition of coal workers' pneumoconiosis given at his deposition, it is obvious that Dr. Hansbarger's opinion, that the miner's coal workers' pneumoconiosis did not cause any pulmonary impairment, is based, contrary to Barber, supra, on the medical and not the legal definition of the disease. The same may be said of Dr. Tomashefski's opinion as he links the minimal extent of pneumoconiosis found in the lungs to his conclusion that the disease did not cause any respiratory symptoms. Dr. Dahhan rules out the miner's simple coal workers' pneumoconiosis as a cause of the miner's disability. Here too, it appears that he has relied on the medical and not the legal definition of pneumoconiosis.

Dr. Castle specifically rules out coal dust exposure as having caused or contributed to the miner's disability because the miner had a "pure ventilatory impairment." However, Dr. Castle's interpretations of the pulmonary function studies have not been shared by other physicians who have reviewed these tests. The January 8, 1981 study was interpreted by Dr. Kanwal as demonstrating good cooperation and as being compatible with obstructive and restrictive pulmonary disease. Dr. O'Neill reviewed this study for the Employer, found it to be acceptable, and opined that it showed severe obstructive disease with a restrictive component.[6] Yet, in his October 1987 report, Dr. Castle stated that the study was not acceptable. The December 16, 1981 study was interpreted for the Employer by Dr. Garzon as showing severe obstructive and moderate restrictive ventilatory defect. Dr. O'Neill rated the study as again showing a severe obstructive defect with a restrictive component. Dr. Castle would concede that the study only showed an obstructive defect as it did not include lung volumes, however the medical evidence of the ventilatory studies were not only conforming but showed both obstruction and restrictive impairments. I find that Dr. Castles opinion is not well reasoned in his interpretation of these ventilatory studies.

The October 1983 study was interpreted by Dr. Buddington as showing severe restrictive and very severe obstructive impairment. Dr. O"Neill again found a severe obstructive defect with a restrictive component. Dr. Castle agreed only to its showing a obstructive impairment. The February 1984 study was interpreted by Dr. Schmidt as showing a severe obstructive and mild restrictive impairment. Dr. O'Neill opined that the test was invalid but was "indicative" of severe obstructive and restrictive impairment. Dr. Castle noted that tracings were missing for the test so its validity could not

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[6]The study had also been validated by a consultant to the Department of Labor.

be verified. The September 1984 test was interpreted by Dr. Dahhan as showing a severe airway obstruction with moderate air trapping, over inflation and a moderately severe diffusion impairment due to parenchymal lung disease. He opined that the miner had a severe ventilatory impairment primarily obstructive in nature. Dr. O"Neill interpreted this study as he had the others, i.e., severe obstructive airways disease with a restrictive component. Dr. Castle noted Dr. Dahhan's interpretation without further comment.

The weight of this evidence, including the opinions of the Employer's own experts, establishes that the miner's pulmonary function studies over the years have shown a restrictive component, albeit of a lesser nature than the obstructive component. Therefore, I reject Dr. Castle's opinion that the miner's impairment has been solely obstructive. Dr. Castle's reference to the miner's not having sufficient dust in his lungs to show up on x-rays again relates to medical rather than legal pneumoconiosis.

I recognize that the miner had a significant cigarette smoking history of at least 40 pack years and this clearly this played a major roll in the severity of his pulmonary impairment. That his smoking caused his emphysema, found on autopsy and variously described as centrilobular, panacinar and centraiancinar, is not disputed by the medical evidence of record. Nevertheless, the miner was shown to be disabled from a pulmonary standpoint for over 11 years prior to his death and autopsy. As I have previously found, the evidence over this entire period has shown a restrictive element to his disease. Accordingly, I conclude, based on the opinions of Drs. Buddington and O'Neill, which I have for the reasons set forth above, accorded greater weight than contrary medical opinions, that Claimant has shown that this disability was caused, in part, by a chronic respiratory disease or pulmonary impairment significantly related to, or substantially aggravated by the miner's dust exposure during his coal mine employment. The causation element of entitlement is established in this case.

VIII. Onset Date of the Miner's Disability Benefits

Section 725.503 (b) of the regulations provides:

> In the case of a miner who is totally disabled due to pneumoconiosis, benefits are payable to such miner beginning with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim is filed., or the month during which the claimant elected review under Part 727 of this subchapter.

The Board has held that the date the medical evidence first shows total disability does not establish the onset date but merely indicates that the miner became totally disabled at some point prior to when such medical tests revealed total disability. *Hall v. Consolidation Coal Co.,* 6 B.L.R. 1-1306 (1984). The miner's total disability was shown by the first pulmonary function test following the filing of his claim and consistently thereafter. It follows that the benefits are payable from the date of claim if one other condition is met.

Section 725.503 (b) must be read in context with §725.503A which, except in the case of complicated pneumoconiosis, prohibits the payment of benefits during any period in which a claimant is employed as a miner or doing comparable and gainful work.

To my knowledge, neither the Act, regulations, Board nor the Courts have defined "comparable and gainful work" for the purpose of §725.503A. However, it has been interpreted for the purpose of §727.203 (b) (1) & (2) and I see no reason to distinguish the use of the term under §725.503A.

The term "usual coal mine work" has been defined as the most recent job a miner performed regularly over a substantial time. *Daft v. Badger Coal Co.*, & B.L.R. 1-124 (1984) In determining whether work a miner has performed is comparable to his usual coal mine work, various factors, such as the miner's age, education, work experience, skill level, compensation, and exertional requirements of the allegedly "comparable" work are for consideration. *See, e.g., Allen v. Alabama By-Products Corp.* 6 B.L.R. 1-1094 (1984). The Board has held that while physical exertion is a factor to consider, identical physical exertion is not required. *Parks v. Director, OWCP*, 9 B.L.R. 1-82 (1986).

In the last full quarter that the miner worked for the Employer, i.e., the third quarter of 1970, he earned $2,352. In the first full quarter that he worked as a State mine inspector, i.e., the first quarter of 1971, he earned $2,100. The last earnings shown on the Social Security earnings report was for the last quarter of 1977 when he received $3,979.14. According to the previously mentioned schedule of average daily earnings of coal miners, which is now part of this record, the miner had the potential of earning as much as $4,673.50 per quarter (65 days x $71.90 per day) during 1977 assuming that he worked a full 5 day week. It appears then that the wages he earned or could have earned as a miner are roughly comparable with what he made as a mine inspector.

It is not shown that there is any substantial difference between the two positions as far as the knowledge and skill requirements.

Nevertheless, there is a significant difference in the exertional requirements between his most recent coal mine employment and his subsequent occupation. As noted by Judge Stansell-Gamm, the miner had testified at the hearing held by Judge Bedford that although he acted as a foreman for the Employer, the job required that he "did all the rock dusting practically and all the bradish building." Any time a man was off, the Claimant would have to fill in for him and do his job. This could be as often as two to three days a week. When asked about the weight of items he would have to lift or carry, he responded:

> "Well, I really don't know what the rocks would weigh, 15 or 20 pounds of rock, I guess. Rock dust is 50 pounds. Timbers could vary, anything from 25 pounds to 150 pounds."

Concerning the physical demands of his job as a State mine inspector, the Claimant testified that he was

required to walk, craw and stoop in underground mines 4 days per week with distances of a tenth of a mile to three miles. He carried or wore a tool belt weighing 10 to 12 pounds.

In a "Description of Coal Mine Work and Other Employment." completed by the miner in September 1981, he noted that although he visited the mine three to four days a week, he did so for no more than four hours at a time and otherwise was engaged in doing paper work.. He described the job as light - "more of a dream job-it is against our policy to do any work."

I find that the difference in the physical requirements of the miner's coal mine work, as opposed to his inspector's job, is significant enough to outweigh the other more comparable features of the two positions. Consequently, I conclude that the miner was entitled to benefits effective from the month in which his claim was filed.

IX. Survivor Benefits

The regulations at §725.212 provide for automatic entitlement to survivor's benefits where the miner is found entitled to benefits as a result of a claim filed prior to January 1, 1982. As such is the case here, the miner's surviving spouse is entitled to benefits irrespective of whether his death was caused or contributed to by pneumoconiosis. It serves no useful purpose to discuss the evidence presented in this regard.

ORDER

The Employer is hereby Ordered to:

1. Reimburse the Black Lung Trust fund with interest for the interim benefits it has paid on behalf of the miner's claim.

2. Reimburse the trust fund with interest for the interim benefits it has paid on behalf of the survivor's claim.

3. Commence payment of survivor benefits to the miner's surviving spouse effective from the date interim benefits are discontinued.

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STUART A. LEVIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may appeal it

to the Benefits Review Board within 30 days from the date of service of this Decision by filing Notice of Appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C., 20013-7601 (20 CFR 725.481). A copy of the Notice of Appeal must also be served on Donald Shire, Esquire, Associate Solicitor, Room N-2605, 200 Constitution Avenue, N.W., Washington, D.C. 20210