U.S. Department of Labor

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Issue Date: 12 April 2007

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In the Matter of:

B.C., widow of
P.C., deceased,
Claimant,

v. **Case No. 2004-BLA-6732**

KENTUCKY CARBON CORP./
OLD REPUBLIC INSURANCE CO.,
Employer/Carrier, and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

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Appearances:

Thomas W. Moak, Esq., Moak & Nunnery, PSC, Prestonsburg, KY
For the Claimant

Lois A. Kitts, Esq., Baird & Baird, PSC, Pikeville, KY
For the Employer/Carrier

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by B.C. ("Claimant") on June 17, 2003, based upon the death of her husband, deceased miner P.C. ("Miner"). The putative responsible operator is Kentucky Carbon Corp. ("Employer") which is insured through Old Republic Insurance Co. ("Carrier").[1]

[1] The term "Employer" will encompass both the Insurance Carrier and the Employer.

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also applicable, as this claim was filed after January 19, 2001.[2] 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[3] The Department of Labor amended the regulations on December 15, 2003 for the purpose of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments submitted by the parties. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant filed this survivor's claim for benefits on June 17, 2003, after Miner died on March 18, 2003. (DX 2). Initially, Employer and Jones Oil Company ("Jones Oil") were identified as responsible operators by the Director. *See, e.g.,* (DX 21, 23a). The Director dismissed Employer as the responsible operator, and proceeded against Jones Oil. (DX 36). The Director issued a Schedule for the Submission of Additional Evidence on December 22, 2003. (DX 38). In it, Director stated Jones Oil was the responsible operator and could be liable for benefits. (DX 38-3). However, the Schedule also stated Claimant did not establish that Miner had pneumoconiosis, which meant she could not prove entitlement to Black Lung survivor's benefits. (DX 38-11).

Employer was subsequently informed by letter of January 15, 2004, from the Director that it would be retained in the action as a potential responsible operator. (DX 40). By way of letter dated April 20, 2004, the Director dismissed Jones Oil as a responsible operator. (DX 45). On May 10, 2004, the Director issued a Proposed Decision and Order denying benefits. (DX 46). The Decision stated that Employer was the responsible operator and would be liable for any payment of benefits. (DX 46-5, 6). The Director concluded that Claimant did not establish that Miner was suffering from pneumoconiosis at the time of his death. (DX 46-6). Consequentially, Claimant also did not establish that Miner had pneumoconiosis arising from his coal mine employment or that it caused his death. *Id*. Employer agreed with the decision, but continued to contest its designation as responsible operator by way of letter dated May 27, 2004. (DX 47). Claimant filed a notice of appeal on June 8, 2004. (DX 48).

After this matter was assigned to me, I issued a Notice of Hearing on August 11, 2005, stating that a hearing for this matter would be held on October 13, 2005, before me in Pikeville, Kentucky. On September 20, 2005, Claimant filed a Motion to Waive Hearing and Submit the Case on the Record. By way of letter dated September 22, 2005, Employer stated that it had no objection to this motion, but requested time to submit evidence. I issued an Order Cancelling Hearing and Providing for Hearing on the Record on October 6, 2005, stating that the record

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[2] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[3] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

consisted of Director's Exhibits 1 through 54 ("DX 1" through "DX 54"), but I would allow the parties 30 days to submit additional evidence. They would then be granted 30 days after the submission of evidence to submit written briefs. Order Cancelling Hearing.

On October 25, 2005, Claimant filed the "medical report" of Dr. Mansoor Mahmood, M.D., (Claimant's Exhibit 1) as part of its case-in-chief. On November 7, 2005, Employer filed a Motion for Extension of Time to file evidence. Specifically, Employer requested an additional 10 days from the November 5, 2006, deadline established in my previous Order so that it could have this report reviewed by Dr. David Rosenberg, M.D. Mtn. at 2. Employer submitted this addendum on November 22, 2005, by way of cover letter dated November 10, 2005. By way of cover letter dated November 15, 2005, Employer filed with this tribunal Employer's Exhibits 1 through 5 ("EX 1" through "EX 5") on November 21, 2005.[4]

In an Order issued by me on December 15, 2005,[5] I accepted all of Employer's exhibits as timely. Because the record was unclear as to whether or not this evidence had been submitted before, I allowed the admission of the evidence with the caveat that Claimant would have 30 days to submit any rebuttal evidence. Order at 2. Employer would then have 30 days to submit any rehabilitative evidence. *Id*. Finally, I stated that after this 60 day period had elapsed, the record would automatically close and briefs or written closing arguments would be due in 30 days. *Id*. I also stated that Directors Exhibits 1 through 54, Claimant's Exhibit 1, and Employer's Exhibits 1 through 5 would be made part of the record. *Id*.

By way of cover letter dated January 5, 2006, and filed January 10, 2006, Claimant stated that after reviewing my Order and Employer's Exhibits, she did not intend on filing any additional evidence and would submit her brief on or before March 15, 2006. The timeframe set forth in the above Order has now elapsed. Employer filed its brief on December 13, 2005; Claimant filed her brief on March 21, 2006. The briefs are accepted as timely and the record is now officially closed. **SO ORDERED.**

Issues/Stipulations

The contested issues before me are whether the claim was timely filed, whether the deceased was a Miner, whether the Miner had coal mine employment post 1969, whether Miner worked at least 15 years in or around coal mines, whether Miner had pneumoconiosis, whether his pneumoconiosis arose from coal mine employment, whether Miner's death was due to pneumoconiosis, whether Miner had 1 dependent for purposes of augmentation, whether Employer is the proper responsible operator, and other issues listed for appellate purposes. (DX 52). No stipulations have been submitted to this tribunal.

Employment History/Background

Although there was no hearing, Claimant testified by deposition on November 11, 2003. (DX 20). At the time of Miner's death, Claimant had been married to him for 14 years. (DX 20-5). She testified that she had two children from a previous marriage, and Miner had two children

[4] This also included Dr. Rosenberg's addendum. *See* (EX 4).
[5] The Order was initially issued (but not served) on December 2, 2005 and was reissued to correct the service sheet.

from a previous marriage, but Miner and Claimant did not have any children of their own. *Id*. At the time of the deposition, one of Claimant's daughters was 20 and lived with her. (DX 20-6). This daughter was enrolled in college at the time of the deposition, and Claimant testified that she was still dependent on her. *Id*. Claimant was also employed full time at a video store as an hourly employee. (DX 20-7, 9).

Miner worked for Employer from February 4, 1974, until June 21, 1979. (DX 46-5, DX 9-2). In the Description of Coal Mine Work and Other Employment Form, Claimant wrote that Miner was a beltman, electrician, and mechanic while he worked for Employer. (DX 4-1). In the section asking for a description of Miner's job duties, Claimant wrote the following:

> Shovel belts, make splices, belt moves, rock dust belt. Remove bad coal from belt. Do mechanic work on [a]nything that needed repairs on shift. Maintained and [repaired] all electrical problems. Build brudishes [sic], clean section rock dusting scoop hang curtains.

Id. Although the above statement is not the clearest form of information, it does establish that Miner performed coal mining duties while he worked for Employer.

Miner quit working for Employer in 1979, and went to work for Jones Oil the same year. (DX 20-9; DX 9). Miner worked for Jones Oil until 1990. (DX 20-8). While working for Jones Oil, Miner drove a truck and delivered oil. (DX 20-9). He also performed mechanical repairs on the truck and did other maintenance work for Jones Oil. *Id*. Miner would deliver fuel to various customers, some of which included mines. (DX 20-11). Miner would drive up to fuel tanks at the coal mines, get out of the truck, attach a hose from the truck to the tank and unload the fuel. (DX 7B-7). Roughly 60% to 70% of Jones Oil's business involved deliveries to coal mines. (DX 7B-8). However, Jones Oil was not involved in the preparation, extraction or transportation of coal. (DX 7B-6). Furthermore, the mechanic work Miner did was not performed at any mines. (DX 44-2). Additionally, according to a work break down provided by Jones Oil, Miner only delivered fuel to coal mines 20.88 days. (DX 44-3).

Miner quit Jones Oil in 1990 after he suffered a back injury. (DX 20-18). Claimant testified that Miner was not very active after his back injury. (DX 20-21, 22). She also stated that he was having breathing problems when they married in 1989 due to nose surgeries that he had as a result of a car accident. (DX 20-23). She testified that sometimes he had trouble breathing while he slept. (DX 20-26). She was unaware of him using any inhalers or medication during their marriage or receiving treatment from physicians for breathing problems. (DX 20-27). While married, Miner usually smoked a pack of Swisher Sweet cigars a day, or cigarettes if he could not find the cigars. (DX 20-33, 34). He started complaining of chest pain in October 2002. (DX 20-35).

On October 2, 2002, Miner was admitted to Appalachian Regional Hospital, complaining of epigastric pain which had lasted for two weeks, a weight loss of 20 pounds in two months and nausea. (DX 17-22). He was diagnosed with a pancreatic tumor and was operated on. (DX 17-21). Despite the operation, he still had the cancer, and received treatment for it over the course of several months. However, he eventually died as a result of the cancer on March 18, 2003.

(DX 17-60, DX 11). The sole cause of death listed on his death certificate was pancreatic cancer. (DX 11).

Medical Evidence

The medical evidence of record is discussed in greater detail *infra* where appropriate. Briefly summarized, the medical evidence is as follows. Director submitted the autopsy report of Dr. James Dennis, M.D., for the autopsy performed on March 19, 2003; Claimant also relied upon the report. (DX 14). Director also submitted Miner's treatment records from Pikeville Methodist Hospital ("Pikeville") and Appalachian Regional Hospital ("ARH"). (DX 15, DX 17). Claimant submitted the discharge statement from ARH prepared by Dr. Mansoor Mahmood, M.D. (CX 1). Employer submitted the autopsy report and deposition of Dr. Everett Oesterling, Jr., M.D. (EX 1, EX 2). Employer also submitted a report, an addendum report, and the deposition of Dr. David Rosenberg, M.D. (EX 3-EX 5). The evidence is in compliance with the evidentiary limitations.

DISCUSSION AND ANALYSIS

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004) (en banc), BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3), citing 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id.*, citing 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id.*, citing 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id.,* citing 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id.,* citing 20 C.F.R. §725.456(b)(1).

The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.*, 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey, supra.* First, the Board found that it was error to exclude CT scan evidence because it was not covered by the evidentiary limitations and instead could be considered "other medical evidence." *Dempsey* at 5; see 20 C.F.R. § 718.107(a) (allowing consideration of medical evidence not specifically addressed by the regulations). Second, the Board found that it was error to exclude pulmonary function tests and arterial blood gases derived from a claimant's medical records simply because they had been proffered for the purpose of exceeding the evidentiary limitations. *Dempsey* at 5. Third, the Board held that state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at § 725.414. In so holding, the Board noted that such records did not fall within the exceptions for hospitalization or treatment records or for evidence from prior federal black lung claims. *Dempsey* at 5.

In *Webber v. Peabody Coal Co,* 23 B.L.R. 1-__, BRB No. 05-0335 BLA (Jan. 27, 2006) (en banc), the Board changed the position that it took in *Dempsey* with respect to CT scan evidence and adopted the Director's position that "the use of singular phrasing in 20 C.F.R. § 718.107" requires "only one reading or interpretation of each CT scan or other medical test or procedure to be submitted as affirmative evidence."

As the Board noted in *Dempsey*, the regulations specifically allow evidence from a prior claim to be considered in connection with a later claim, so that a determination may be made whether there has been a material change in conditions since the time of the prior claim. 20 C.F.R. §725.309(d)(1). However, there is no such provision applicable to survivor's claims that would allow consideration of the evidence developed in the miner's claims, absent a finding of good cause. Consistent with the above limitations and the Board's decision in *Dempsey*, other administrative law judges have generally excluded evidence developed in connection with a miner's claim from consideration in a surviving spouse's claim to the extent that the limitations have been exceeded, unless the case involves a consolidated miner's claim and survivor's claim. However, in *Keener v. Peerless Eagle Co.,* BRB No. 05-1008 BLA (BRB Jan. 30, 2007) (en banc), the Board held that even if the cases are consolidated, there should be separate records for a miner's claim and a survivor's claim.

Timeliness

Employer contested whether the claim was timely filed. Under 20 C.F.R. §725.308(c), a rebuttable presumption exists that all claims filed under the Act are timely. Employer has provided no evidence whatsoever that this claim is untimely. Additionally, there is no time limit at all for the filing of a claim by a survivor. *See* 20 C.F.R. §725.308(a). Therefore, Employer's position is without merit.

Status as a Miner

Employer also contests whether or not the deceased was a miner within the meaning of the Act. Based upon the evidence presented, I find that he was a Miner when he worked for Employer.

The appropriate regulation states:

> Miner or coal miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see §725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. §725.101(a)(19). The new regulations also go on to state:

> (a) . . . . There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:
>
> (1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
>
> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.
>
> (b) *Coal mine construction and transportation workers; special provisions*. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. A transportation worker shall be considered a miner to the extent that his or her work is integral to the extraction or preparation of coal. A construction worker shall be considered a miner to the extent that his or her work is integral to the building of a coal or underground mine…
>
> (1) There shall be a rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of:
>
> (i) Determining whether such individual is or was a miner
>
> …

(iii) Determining the identity of a coal mine operator liable for the payment of benefits in accordance with §725.495.

(2) The presumption may be rebutted by evidence which demonstrates that:

(i) The individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or

(ii) The individual did not work regularly in or around a coal mine or coal preparation facility.

20 C.F.R. §725.202(a)(1)(2) and (b)(1)(i)(iii),(2)(i)(ii).

The Benefits Review Board ("the Board") established a three part test to determine whether a worker is a miner within the meaning of the Act. To qualify as a miner, the claimant must prove: (1) the coal was still in the course of being processed and was not yet a finished product in the stream of commerce (**status**); (2) the worker performed a function integral to the coal production process, *i.e.*, extraction or preparation, and not one merely ancillary to the delivery and commercial use of processed coal (**function**); and (3) the work that was performed, occurred in or around a coal mine or coal preparation facility (**situs**). *Whisman v. Director, OWCP*, 8 B.L.R. 1-96 (1985). The Court of Appeals for the Sixth Circuit, where this matter arose, has subsumed the status requirement into the function requirement. *See generally Director, OWCP v. Consolidation Coal Co. [Petracca],* 884 F.2d 485 (6th Cir. 1988). Thus, a claimant in the Sixth Circuit need only prove the function and situs prongs. *Id*.

Although there is not abundant evidence in the instant claim on what duties Miner performed for Employer, what is present leads me to conclude that he was a miner. Miner shoveled coal off the conveyer belt and performed other duties related to the conveyer belt as well. (DX 4-1). Additionally, he performed various electrical repairs as an electrician. *Id*. Thus, Miner clearly satisfied the second prong in that he helped in the extraction of the coal on the conveyer belt. He satisfied the third prong of the test because his work was performed underground in the coal mine itself. The Board has also noted that an electrician who performed his duties in a mine could be considered a miner within the meaning of the Act. *Ritchey v. Blair Electric Service Co.*, 6 B.L.R. 1-966 (1984); *see also Glem v. McKinney*, 33 F.3d 340 (4th Cir. 1994). Employer has provided no evidence rebutting Miner's involvement in the extraction of coal, therefore the rebuttable presumption under Section 725.202(a) also applies. Thus, I find the deceased was a Miner when he worked for Employer for purposes of adjudicating this claim.

Post 1969 Employment

Employer contests whether Miner worked coal mine employment after 1969. (DX 52). Claimant testified that Miner worked for Employer from 1974 to 1979. (DX 20). Miner's social security earnings statement reflects this as well. (DX 9-2). This argument is therefore without merit.

Responsible Operator

Employer contends that Jones Oil is the most recent responsible operator and is the proper party in this matter. As such, it contends that it should be dismissed and liability should be assessed against the Black Lung Disability Trust Fund since Jones Oil was dismissed and this matter has already been heard.

Twenty C.F.R. §725.495(c)(2) states that the party which has been designated the responsible operator has the burden of proving it was not the most recent responsible operator which employed the miner. This must include proof that the miner "was employed *as a miner* after he or she stopped working for the designated responsible operator and that the person by whom he or she was employed is a potentially liable responsible operator within the meaning of §725.494." *Id*. (emphasis added). The designated responsible operator must also prove that the more recent employer retains sufficient assets to pay an award of benefits. *Id*.

Employer argues that Jones Oil is a proper responsible operator because it contracted with coal mines to deliver fuel to them. Post Hearing Brief at 17. It relies upon the deposition testimony of Jones Oil President Earl Jones, Jr. (DX 7B), wherein he testified that 60 to 70% of his business involved fuel delivery to coal mines, to argue that Jones Oil would qualify as an operator. Post Hearing Brief at 17. Specifically, Employer asserts that 60 to 70% of work over an 11 year period is considerably greater than the 20.88 days subsequently estimated by Jones Oil (DX 44-1). Post Hearing Brief at 17. Employer argues that this, coupled with the fact Miner worked for Jones Oil after his employment with Employer, leads to the conclusion that Jones Oil is the proper responsible operator. However, Employer's argument is premised upon the assumption that Miner worked the same amount of time as a driver as the other drivers did, when Earl Jones testified that Miner was initially hired as a mechanic and that later on in his employment, "he did some driving for us that he would deliver to different job sites whether it be the coal companies or trucking companies or to the retail locations." (DX 7B at p. 4). Mr. Jones did not quantify the amount of time that Miner worked as a driver as opposed to a mechanic during the latter period. Subsequently, Jones Oil provided that information and indicated that he spent 100% of his time between 1979 and 1984 as a mechanic and between 92% and 97% of his time as a mechanic between 1985 and 1986. Thus, he only worked as a driver for the last six years of his employment and only spent a small percentage of his time as a driver. (DX 44-3). The breakdown provided by Jones Oil indicates that the amount of time he spent delivering to a mine site or preparation plan did not exceed 3% of his time during any of those years.[6] *Id.* This estimate is entirely consistent with the testimony of President Jones.

Moreover, Employer's argument ignores whether Miner's work for Jones Oil qualified him as a miner. As the discussion *supra* regarding whether or not a worker could be classified a miner makes clear, the miner's work must be essential to the extraction or preparation of coal and the work must be performed in or around a coal mine. The unrefuted testimony in the instant case is that Miner delivered fuel to the coal mines, and did nothing more. Although Claimant stated that Miner was exposed to coal dust while performing his duties, this does not defeat the requirement that the alleged miner must be involved in a process integral to coal mine

[6] The breakdown is somewhat inconsistent in its listings. (DX 44-3). Regardless, is shows that the bulk of Miner's time was spent as a mechanic and a small amount was spent driving to coal mines to preparation plants.

extraction or preparation. Employer has cited no authority, and I am aware of none, where the type of fuel delivery described in the instant claim was considered integral to the process of extracting coal. Thus, Employer's argument falls flat because it cannot prove that Miner worked as a miner for Jones Oil.[7] I therefore find that Employer is the proper responsible operator for this matter.

Length of Coal Mine Employment

Employer also contests whether Miner had 15 years of coal mine employment. (DX 52). Based on Miner's social security earning statements, Claimant has established that Miner had 6 years of coal mine employment. Since I have concluded that Miner's employment with Jones Oil was not coal mine employment, I do not consider that time in determining the years Miner spent as a coal miner.

Medical Issues

The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. In *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. Thus, in order to prevail in a black lung case, the claimant must establish each element by a preponderance of the evidence.

In order to prevail in a survivor's claim, a claimant must establish that the miner had pneumoconiosis arising out of his coal mine employment which caused, contributed to, or hastened his death. 20 C.F.R. §718.205.

Pneumoconiosis

The regulations (both in their original form and as revised effective January 19, 2001) provide several means of establishing the existence of pneumoconiosis: (1) a chest x-ray meeting criteria set forth in 20 C.F.R. §718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting x-ray reports; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. §718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" set forth in 20 C.F.R. §718.304 (or two other presumptions set forth in §718.305 and §718.306); or (4) a determination of the existence of pneumoconiosis as defined in §718.201 made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. §718.202(a) (1)-(4). Under section 718.107, other medical evidence, and specifically the results of medically acceptable tests and procedures which tend to demonstrate the presence or absence of pneumoconiosis, may be submitted and considered. The United States Court of Appeals for the Sixth Circuit has often approved of the independent application of the subsections of Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis. *See Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (en banc).

[7] I also note that Employer has failed to provide evidence that Jones would be financially capable of paying an award of benefits.

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp*., 9 B.L.R. 1-131 (1986).

In the recent amendments to the regulations, the definition of pneumoconiosis in section 718.201 has been amended to provide for "clinical" and "legal" pneumoconiosis and to acknowledge the latency and progressiveness of the disease. Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, i.e. the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment (such as coal worker's pneumoconiosis or silicosis). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a). The regulation further indicates that a lung disease arising out of coal mine employment includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

X-ray evidence. Neither party has submitted any chest x-ray readings as part of its case-in-chief. However, four chest x-ray readings were contained in the Director's Exhibits as part of Miner's treatment records. (DX 15-16, DX 15-54, DX 17-16, DX 17-26). None of these readings reported anything abnormal. Additionally, the readings do not appear to comply with the requirements under Section 718.102(a).

Autopsy and Biopsy Evidence. A claimant may prove the existence of pneumoconiosis through autopsy or biopsy evidence. 20 C.F.R. §718.202(a)(2). The regulation makes clear that the mere presence of anthracotic pigmentation in itself is not enough to establish pneumoconiosis. *Id*.; *see also Hapney v. Peabody Coal Co.*, 22 B.L.R. 1-106 (2001) (en banc).

The Director's Exhibits contained the autopsy report of Dr. James A. Dennis, M.D., a pathologist, who performed the autopsy of Miner on March 19, 2003. (DX 14).[8] He printed the report on April 25, 2003. (DX 14-2). Dr. Dennis' autopsy consisted solely of a gross and microscopic description of Miner's cardiovascular and respiratory systems. (DX 14).

The only items of note in Dr. Dennis' gross description of Miner's cardiovascular system were some arteries which appeared slightly calcified. *Id*.

Dr. Dennis provided a gross description for Miner's right and left lung. On Miner's left lung, Dr. Dennis noted that the pleural surface was grey and enhanced by black pigment deposition. (DX 14-1). He also saw green-gray parenchyma with marked congestion. *Id*. Dr. Dennis also found antemortem clots in the upper portion of the lower lobe. *Id.* Finally, he found little black pigment deposition in the hilar region. *Id*. With respect to the gross description of

[8] Dr. Dennis' report stated Miner died on March 19, 2003. (DX 14-1). The death certificate states Miner died on March 18, 2003, however. (DX 11).

Miner's right lung, Dr. Dennis found "similar surface characteristics" and fibrotic adhesions. (DX 14-1). He also noted emphysematous changes in the apex as well as black pigment splotching in deeper sections of this lung. *Id*. Additionally, Dr. Dennis noted several areas of infarction throughout. *Id*.

Dr. Dennis stated his microscopic findings for 13 sections, four cardiovascular and nine respiratory, which he labeled 1A through 1M. (DX 14-1, 2). Dr. Dennis' respiratory findings began with slide 1E and were as follows:

> Section 1E shows pulmonary architecture remarkably intact with some prominence of vessels, congestion, minimal, some minimal plaque formation noted on the pleural surface. Section 1E [sic][9] shows **marked congestion of the alveolar spaces by pulmonary macrophages ladened with black granular pigment**. Section 1G shows **black pigment deposition near the hilum** with bronchial airways satisfactorily maintained. Antemortem embolus is present. Section 1H shows pulmonary congestion and edema with **emphysematous changes, black pigment deposition and macrophages**. Section 1I shows pulmonary congestion and edema, bronchial pneumonia, acute organizing with extensive congestion surrounding the area. Section 1J shows bronchopneumonia moderate degrees with abscess formation, extensive change, pneumonic process adjacent to pulmonary congested lobes. Section 1K shows bronchopneumonia, **black pigment deposition adjacent to the organizing pneumonia**, pulmonary congestion moderate to severe, abscess formation appreciated. Section 1L shows infarction, abscess formation, bronchopneumonia moderate to severe, pulmonary embolus present. Section 1M shows more of the organizing bronchopneumonia moderate to severe with acute inflammation associated with the abscess formation and destruction of the pulmonary architecture. [Emphasis added.]

(DX 14-2).

In conclusion, Dr. Dennis made the following pathological diagnosis:

1. Pulmonary congestion and edema.
2. Bronchopneumonia, moderate, extensive, lower lobar type with abscess formation.
3. Pulmonary embolus.
4. Minimal coal workers' pneumoconiosis with black pigment deposition, pleural surface.
5. Coronary artery disease moderate.
6. Satisfactory coronary muscle with no evidence of recent myocardial infarction.
7. Hypertensive cardiovascular disease.

Id. Dr. Dennis concluded that Miner died "as a result of an extensive bronchopneumonia secondary to pulmonary embolus and organization and abscess formation." *Id*. He also said that

[9] Apparently a reference to Section 1F was intended.

Miner's coal workers' pneumoconiosis contributed to his death and that "minimal fibrosis" was present. *Id*.

Dr. Dennis' results were reviewed on behalf of the Employer by Dr. Everett F. Oesterling, Jr., M.D., who prepared a report on September 2, 2005, and also gave a deposition on September 29, 2005. (EX 1, EX 2). Dr. Oesterling is board-certified in clinical and anatomical pathology and a physician practicing pathology and nuclear medicine. (EX 2 at 3). Dr. Oesterling reviewed the autopsy slides, Dr. Dennis' report, and a copy of Miner's death certificate. (EX 2 at 5). He explained that he examined each slide through a microscope and then photographed areas of importance. (EX 2 at 10). Dr. Oesterling limited his findings to Miner's chest region, because he was not presented with more information. (EX 2 at 16).

Dr. Oesterling reached several conclusions based on the slides he reviewed. Like Dr. Dennis, he also saw the black pigment depositions in Miner's lungs and agreed that this was anthracotic pigment. (EX 2 at 13, 17). However, he testified that the amount of pigment he found did not demonstrate enough of a structural change to warrant a diagnosis of coal workers' pneumoconiosis. (EX 2 at 18). He also said that the location of the pigment at the pleural surface, and its small amount, demonstrated that no impairing disease was present because the pleura had no function in terms of breathing. (EX 2 at 24). After reiterating that anthracotic pigment was not coal workers' pneumoconiosis, Dr. Oesterling testified that this pigment could be caused by other things besides coal dust (e.g., pollutants, cigarette smoke). (EX 2 at 25, 26).

Aside from the pigment, Dr. Oesterling also stated that he found extensive pneumonia in Miner's lungs. (EX 2 at 13-14, 20; EX 1). This disease caused some clots in his vessels due to the presence of inflammatory cells. (EX 2 at 14). Pneumonia was totally involved in many areas of Miner's lungs. *Id*. Dr. Oesterling also believed that the pneumonia was not in any way related to coal dust inhalation. (EX 2 at 21). Dr. Oesterling opined that Miner's cancer may have weakened Miner's immune system to the point where he was more susceptible to infection, i.e., pneumonia. (EX 2 at 21-22). He also testified that Miner's pneumonia would not have been the result of the anthracotic pigment. (EX 2 at 23).

Dr. Oesterling also found "significant panlobular emphysema" in Miner's lungs. (EX 1, EX 2 at 15). He did not find any mine dust in the areas of emphysema that he photographed, so he concluded that it was not the result of coal dust exposure. (EX 2 at 15; *see also* EX 2 at 19). He believed Miner's emphysema was so severe that it would have caused Miner respiratory distress during his lifetime. (EX 2 at 17). Dr. Oesterling also categorized this as chronic obstructive pulmonary disease. *Id*. He stated that cigarette smoke, bronchospastic disease, and congenital disease are the most common causes of panlobular emphysema. (EX 2 at 19, 20). Aging was also another cause cited by Dr. Oesterling. (EX 2 at 20). Dr. Oesterling also attached a page to his report from a British text which stated panacinar (i.e., panlobular) emphysema is unrelated to centriacinar emphysema, which was a type of emphysema associated with coal dust exposure. (EX 1) (*citing* Phillip Hasleton, *Spencer's Pathology of the Lung* at 482 (5th ed. 1996)).

Finally, Dr. Oesterling noted ischemic changes in Miner's heart, resulting in some passive chronic lung congestion which may have helped cause the pneumonia, but he stated that

this did not explain the opportunistic infection leading to the pneumonia. (EX 2 at 16, 21). Rather, as noted above, he commented that the pancreatic cancer may have compromised the immune system, but he did not have the benefit of reviewing sections of the pancreas or other abdominal organs. *Id.*

Because the two above opinions conflict on whether or not Miner was suffering from pneumoconiosis, I must determine whose findings I attribute greater weight to. At the outset, I note that both Drs. Dennis and Oesterling are pathologists. However, based on the record, only Dr. Oesterling is board-certified in anatomical and clinical pathology. Thus, his qualifications entitle him to greater weight. I also note that both physicians' findings were limited solely to Miner's respiratory and cardiovascular systems. The record is unclear as to whether Dr. Dennis was aware of Miner's cancer, as his report makes no mention of it. *See* (DX 14). By contrast, I note that Dr. Oesterling appears to have taken it into some consideration. *See, e.g.,* (EX 2 at 21). Finally, I find the credibility of Dr. Dennis' findings is called into question by his lack of response to a query made by the Director. By way of letter dated October 30, 2003, the Director's office asked Dr. Dennis to clarify whether his macroscopic and microscopic findings could be the result of something besides pneumoconiosis. (DX 16).[10] Dr. Dennis did not respond, and no elaboration on this issue was set forth in his autopsy report.

With respect to the actual findings made by the physicians, both physicians agreed that Miner had anthracotic pigment present in his lungs. However, Dr. Dennis appeared to use this as a basis for concluding that Miner had pneumoconiosis, whereas Dr. Oesterling believed it insufficient to establish pneumoconiosis. As stated above, anthracotic pigment alone cannot serve as a basis for diagnosing pneumoconiosis. 20 C.F.R. §718.202(a)(2); *Hapney, supra*. Dr. Dennis' description of pigment makes no mention of associated coal macules. Indeed, Dr. Dennis does not describe the presence of coal macules anywhere in his autopsy report. Thus, Dr. Dennis' claim that anthracotic pigment alone led to Miner suffering from pneumoconiosis is unpersuasive.

Additionally, Dr. Dennis found minimal fibrosis but failed to provide any statements linking Miner's fibrosis to his coal dust exposure or anthracotic pigment. (DX 14-2). Dr. Oesterling made no mention of fibrosis in his report. Thus, by definition, this evidence is insufficient to establish the existence of clinical pneumoconiosis, which requires a showing that there was permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition. *See* 20 C.F.R. §718.201(a)(1). Claimant has the burden of proving the existence of pneumoconiosis, and this evidence does not do that.

Finally, I address the presence of pneumonia and emphysema, which both doctors described. No evidence was presented linking either of these to Miner's coal dust exposure. Such evidence could have conceivably led to a diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). The only evidence on this issue (by Drs. Oesterling and Rosenberg)[11]

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[10] The letter also asked Dr. Dennis to elaborate on his determination that pneumoconiosis contributed to Miner's death. (DX 16). He failed to respond.

[11] Dr. Rosenberg's testimony is discussed below. Dr. Rosenberg opined that the Miner's emphysema or COPD was not related to coal dust exposure and that the Miner had no respiratory impairment due to coal mine dust exposure. He concluded that the Miner's death was due to pancreatic cancer with infectious complications.

maintains that both were *not* the result of coal dust exposure. *See generally* (EX 1, EX 2, EX 3, EX 4). Dr. Dennis did not discuss the etiology of these conditions in his autopsy report. Extended discussion of this evidence is not necessary because, as I stated above, the burden of proof lies with the Claimant. Since Claimant has provided no evidence linking either condition to coal dust exposure, it follows that she has not met her burden.

Based on the above, I conclude that the autopsy evidence presented fails to establish that Miner was suffering from pneumoconiosis.

Complicated Pneumoconiosis and Other Presumptions. Claimant has not produced any evidence that Miner suffered from complicated pneumoconiosis or a condition that would produce x-ray opacities of the size that would qualify as complicated pneumoconiosis; therefore, none of the associated irrebuttable presumptions regarding complicated pneumoconiosis apply. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306, are also inapplicable, inter alia, because they do not apply to claims filed after January 1, 1982, or June 30, 1982, respectively. Therefore, Claimant has not established pneumoconiosis through section 718.202(a)(3).

Medical opinions. As part of its case-in-chief, Employer submitted the report of Dr. David Rosenberg, M.D., dated September 20, 2005. (EX 3). Employer also provided an addendum report from Dr. Rosenberg dated November 8, 2005. (EX 4). A deposition of Dr. Rosenberg concerning these reports was also taken by Employer on October 13, 2005. (EX 5). As part of her case-in-chief, Claimant submitted Miner's discharge summary from ARH transcribed March 26, 2003, and prepared by Dr. Mahmood, M.D. (CX 1).

Dr. Rosenberg is board-certified in pulmonary disease and internal and occupational medicine, and is also a B-reader. (EX 5, Exhibit 1). However, he is not a pathologist. To prepare his opinion, he reviewed Miner's treatment records from ARH, Pikeville, Dr. Oesterling's findings, and Dr. Mahmood's discharge summary. (EX 3, EX 4).

Dr. Rosenberg concluded that Miner was not suffering from medical or legal pneumoconiosis at the time of his death. (EX 3, EX 5 at 23). Examining Miner's treatment records, Dr. Rosenberg placed great emphasis on the fact that the few chest x-ray readings present in his files indicated that Miner's lungs were healthy and normal. (EX 3, EX 5 at 20). Specifically, he focused on four readings:

1. A "normal" reading of a September 4, 1980, x-ray [apparently a reference to an interpretation by Dr. K. Peat, M.D., stating Miner's lung fields were clear and that his chest looked normal (DX 15-54)];
2. A reading of a July 10, 1984 (sic) x-ray, interpreted as "normal" [which may relate to a 1994 x-ray read by Dr. A. Poulos, M.D. (DX 15-16)];[12]

[12] Dr. Rosenberg's report identifies a reading by an unspecified reader of an x-ray from Pikeville dated July 10, 1984. (EX 3). There is no reference to an x-ray in the Pikeville records with this exact date; however, Dr. Poulos' is from July 10, 1994. (DX 15-16). It is unclear what x-ray reading Dr. Rosenberg considered.

3. A reading of an October 2, 2002, x-ray revealing normal lungs [apparently a reference to the interpretation by Dr. Marsha Anderson, M.D., stating that Miner's lungs and chest appeared within normal limits (DX 17-16)]; and
4. A reading of a January 13, 2003, x-ray which revealed a catheter in place [apparently a reference to the reading by Dr. Torin Walters, M.D., discussing placement of a catheter and also stating there was no pneumothorax (DX 17-26)].

Dr. Rosenberg discussed how none of these readings demonstrated the presence of micronodularities. (EX 3, EX 5 at 21, 23). Reviewing Dr. Oesterling's findings, Dr. Rosenberg agreed that the amount of anthracotic pigment present would not have led to a diagnosis of coal workers' pneumoconiosis. (EX 3). Specifically, Dr. Rosenberg stated there was no mention of structural abnormalities in his lung parenchyma with fibrosis formation. *Id*. This also led Dr. Rosenberg to conclude there were no abnormal pulmonary functions. (EX 3, 5 at 22).

Dr. Rosenberg also agreed with Dr. Oesterling's conclusions that Miner had panlobular emphysema and bronchopneumonia. (EX 3, EX 5 at 21, 22). He stated that since there was only black pigment in Miner's lungs with no descriptions of coal macules, the emphysema present could not have been caused by coal dust exposure. (EX 3, EX 5 at 22-23). Dr. Rosenberg also found that Miner's lungs demonstrated "marked bronchopneumonia and abscess formations", which demonstrated severe infection in Miner's lungs. (EX 5 at 21). In support of his conclusions, Dr. Rosenberg attached various articles to his deposition.

As part of her case-in-chief, Claimant submitted the "medical report" of Dr. Mahmood. (CX 1).[13] This was a one-page discharge summary prepared by his attending physician after Miner's death listing the following final diagnoses:

1. Pancreatic Cancer.
2. Liver failure.
3. Renal failure.
4. Respiratory failure.
5. Jaundice.
6. History of chronic back pain.
7. History of depression.
8. History of black lung.

Id. The summary essentially discussed Miner's treatment after being diagnosed with pancreatic cancer, and his eventual death shortly thereafter. *Id*. No mention is made of the basis for any of the above diagnoses (apart from history), particularly with respect to black lung.

Dr. Mahmood's discharge summary simply cannot be considered a medical opinion within the meaning of the appropriate regulations. It merely lists conclusory statements concerning Miner's condition at the time of his death. This is more appropriately considered a treatment record. Even were I to consider it a medical opinion, it lacks sufficient support for me to attribute it any weight. In this regard, there is absolutely no basis provided for the diagnosis of

[13] This was also submitted as part of Claimant's treatment records. (DX 17-60).

respiratory failure or a "history of black lung." A medical report must be well-reasoned and supported by fact, *see Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (en banc); Dr. Mahmood's summary is neither. Moreover, the report does not list Dr. Mahmood's credentials (apart from the fact that he is an M.D.) (CX 1).

Dr. Rosenberg's opinion, while better reasoned and supported by facts than Dr. Mahmood's summary, is not without its own flaws. First, Dr. Rosenberg is not a pathologist. Yet a significant portion of Dr. Rosenberg's opinion is based upon his review of a pathologist's findings, i.e., Dr. Oesterling's. Additionally, although Dr. Rosenberg's stated he reviewed Miner's autopsy report, he does not list it in the documents he reviewed in his report or his deposition. (EX 3, EX 5 at 20). Thus, his conclusions involving the pathological findings do not appear to even take into consideration what was actually stated in Dr. Dennis' autopsy report.

Despite the problems with Dr. Rosenberg's opinion, I nevertheless find that Claimant has **not** established the existence of pneumoconiosis through medical opinion evidence. Dr. Mahmood's summary provides no basis for leading to a reasonable conclusion that Miner had legal or clinical pneumoconiosis. Dr. Rosenberg, by contrast, provided a diagnosis and a rationale for his diagnosis. Claimant provided no evidence which would allow for a diagnosis of pneumoconiosis by medical opinion evidence. Once again, she has failed to meet her burden.

Other evidence. The Director submitted Claimant's treatment records from ARH and Pikeville. (DX 15, DX 17). Miner's death certificate was also submitted. (DX 11).

Claimant's ARH records span from October 2, 2002, until Miner's death on March 18, 2003. These records concern Miner's diagnosis of pancreatic cancer and his ultimate demise as a result. They state that he was admitted with abdominal pain on October 2, 2002, and was diagnosed with a pancreatic tumor. (DX 17-21). The records chronicle various treatments he received in an attempt to alleviate Miner's condition. A report transcribed on March 10, 2003, mentions that Miner had "[p]oor respiratory efforts", but did not elaborate further. (DX 17-58). The records also contain Dr. Mahmood's summary discussed *supra*. Again, there is no discussion in the records involving his final diagnoses.

One CT Scan of Miner's abdomen, read by Dr. Anderson on October 2, 2002, is contained in these records. (DX 17-17). The reading mostly discusses what was discovered in Miner's pancreas. However, it also states "[t]here are some linear densities at the left lung base consistent with some discoid atelectasis or fibrosis." *Id*. There is no further discussion regarding these findings in Miner's lungs, either in the CT Scan reading or in the remainder of these set of records. Much like Dr. Dennis' diagnosis of fibrosis, no mention is made as to whether or not these densities were related to coal dust exposure and/or the black pigment found in Miner's lungs.

Claimant's records from Pikeville cover February 9, 1979, through February 25, 2003. (DX 15). These records concern treatment Miner received for various ailments throughout the course of his lifetime (e.g., pancreatic cancer, an elbow injury, and a cyst). *Id*. The records also detail treatment Miner received for an automobile accident in 1987. *See* (DX 15-25 through DX 15-38). They specifically discuss the surgery Miner had on his nose that was mentioned by

Claimant in her deposition. (DX 15-35). These sets of records also contain a CT Scan of Miner. However, the scan is only of Miner's spine. (DX 15-13). These records do not contain any discussion involving Miner's respiratory or pulmonary system.

Miner's death certificate was prepared by Dr. Mahmood on March 24, 2003. (DX 11). It lists Miner's sole cause of death as pancreatic cancer. *Id*. No mention is made of pneumoconiosis or any other respiratory problems.

A review of the treatment records presented in this case does not demonstrate that Miner was suffering from pneumoconiosis at the time of his death. The only items which conceivably could, Dr. Mahmood's summary and Dr. Anderson's CT Scan, are not sufficiently developed enough to lead to a diagnosis of pneumoconiosis.

Section 718.202(a) as a whole. In view of the above, I find that none of the above categories of evidence sufficiently establish that Miner was suffering from pneumoconiosis at the time of his death. Accordingly, I find that Claimant has failed to meet her burden of establishing clinical or legal pneumoconiosis under §718.202(a), or by any other means.

Conclusion

Based on the evidence presented to me, I have determined that Miner was not suffering from pneumoconiosis. As such, Claimant cannot establish a necessary element of her claim and I must deny Claimant's claim for benefits under the Act. Therefore, her claim must fail and it is unnecessary to consider any other issues.

ORDER

IT IS HEREBY ORDERED that the claim of B.C., surviving spouse of deceased miner P.C., for benefits under the Black Lung Benefits Act is **DENIED.**

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§

725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207.

Once an appeal is filed, all inquiries and correspondence should be directed to the Board. After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen H. Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).