

**U.S. Department of Labor**

Office of Administrative Law Judges  
William S. Moorhead Federal Office Building  
1000 Liberty Avenue, Suite 1800  
Pittsburgh, PA 15222



(412) 644-5754  
(412) 644-5005 (FAX)

**Issue Date: 05 August 2013**

CASE NO.: 2011-BLA-6166

In the Matter of:

KENNETH A. DAVIS,  
Claimant

v.

PBS COALS INC.,  
Employer

And

ROCKWOOD CASUALTY INSURANCE COMPANY,  
Carrier

And

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

Appearances:

Heath M. Long, Esq.,  
For the Claimant

Sean Epstein, Esq.,  
For the Employer

Catherine Oliver Murphy, Esq.,  
For the Director

Before: Drew A. Swank  
Administrative Law Judge

## **DECISION AND ORDER AWARDING BENEFITS**

This proceeding arises from a miner's claim for benefits, under the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. § 901 *et seq.* (the "Black Lung Benefits Act" or "Act") and the implementing regulations at 20 C.F.R. Parts 718 and 725 (Regulations). Unless otherwise noted, citations are to the amended regulations at 20 C.F.R. Parts 718 and 725, which became effective on January 19, 2001. The Act and implementing regulations provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal worker's pneumoconiosis" ("CWP")) as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

## **PROCEDURAL HISTORY**

This claim for benefits was filed on April 19, 2010. DX-3. Director issued its initial findings, proposing to grant benefits, on January 10, 2011. DX-18. Director then issued its Proposed Decision and Order, awarding benefits, on June 14, 2011. DX-23. Employer requested a formal hearing on June 17, 2011, and the matter was referred to the Office of Administrative Law Judges for a hearing on July 26, 2011. DX-24, 27. Claimant had filed a previous claim for benefits which was denied by Director on November 12, 2004. DX-1. That decision found that Claimant did not have pneumoconiosis caused by coal dust exposure nor a total respiratory disability. DX-1. There is no indication of that previous decision ever having been appealed.

The present case was originally scheduled for hearing on October 30, 2012. ALJ-1. It was rescheduled and assigned to the undersigned. ALJ-2. A hearing was conducted on November 14, 2012, in Ebensburg, Pennsylvania, at which Claimant and Employer were represented by counsel. The Regional Solicitor, via a letter dated October 16, 2012, entered a written appearance for Director, but did not attend the hearing. The parties were afforded the full opportunity to present evidence and argument. The decision in this claim is based on testimony at the hearing of the claimant, Mr. Davis; evidence admitted into the record; and arguments of the parties. The evidence admitted for consideration in this matter is comprised of Director's Exhibits 1-29, Administrative Law Judge's Exhibits 1-3, Claimant's Exhibits 1-6, and Employer's Exhibits 1-3.

At the hearing, the undersigned set January 14, 2013, as the due date for closing briefs. TR-22. By a letter dated May 15, 2013, counsel for Employer had requested an extension of time so as to submit a post-hearing deposition of Dr. Fino. The undersigned set for July 26, 2013, as the due date for both the deposition transcript of Dr. Fino and the parties' closing briefs. Neither the deposition transcript of Dr. Fino nor closing briefs from either party were received by the date of this decision. Furthermore, prior to the hearing, counsel for Employer had failed to submit a Black Lung Evidence Summary Form as required by the Notice of Hearing. ALJ-1; TR-7. Despite stating at the hearing that he would submit the form, he did not. TR-7.

## ISSUES

Because this claim was filed after April 1, 1980, it is governed by the regulations at 20 C.F.R. Part 718. Under these regulations, Claimant bears the burden of demonstrating each of the following elements by a preponderance of the evidence, except insofar as a presumption may apply:

- (1) the miner suffers from pneumoconiosis;
- (2) the miner's pneumoconiosis arose from coal mine employment;
- (3) the miner has a totally disabling respiratory impairment; and
- (4) the miner's totally disabling respiratory impairment is caused by pneumoconiosis.

20 C.F.R. §§ 718.202-718.204; *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986) (*en banc*); *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986) (*en banc*). See *Dir., OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3d Cir. 1987). Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Dir., OWCP*, 11 B.L.R. 1-26 (1987); *Perry v. Dir., OWCP*, 9 B.L.R. 1-1 (1986); see *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997). Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to meet that burden." *Eastover Mining Co. v. Dir., OWCP [Williams]*, 338 F.3d 501, No. 01-4064 (6th Cir. 2003) (citing *Greenwich Collieries [Ondecko]*, 512 U.S. at 281); see also *Peabody Coal Co. v. Odom*, 342 F.3d 486 (6th Cir. 2003).

In the present case, the issues that Employer contests are whether Claimant suffers from pneumoconiosis, the causation of any pneumoconiosis, whether Claimant has a totally disabling respiratory impairment, whether any totally disabling respiratory impairment is caused by pneumoconiosis, and whether there has been a sufficient change in conditions since Claimant's previously denied application for benefits. TR-6.

Because this claim for benefits is filed more than one year from the date of denial of a prior claim for benefits, it is governed by the requirements at 20 C.F.R. § 725.309. As a matter of law, all evidence formally admitted in the prior claim is admitted in the subsequent claim. 20 C.F.R. § 725.309(d)(1). Further, any stipulations from, or failure to contest an issue in, the prior claim shall be binding in the subsequent claim. 20 C.F.R. § 725.309(d)(4). Finally, pursuant to

*Stacy v. Cheyenne Coal Co.*, 21 B.L.R. 1-111 (1999), Claimant must meet the filing requirements at 20 C.F.R. §§ 725.304 and 725.305. As an initial matter, evidence admitted in the subsequent claim must demonstrate an element of entitlement adjudicated against the miner in the prior claim. 20 C.F.R. § 725.309(d). Only medical data generated *after* denial of the prior claim may be considered in meeting this threshold standard. 20 C.F.R. § 725.309(d)(3). *See also Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997) (it was proper for the Administrative Law Judge to refuse to consider evidence “in existence at the time the (prior) claim was denied on grounds that such evidence ‘is not applicable in determining whether there has been a change in condition since the denial’”). In the prior claim, Claimant failed to establish the presence of coal workers’ pneumoconiosis. DX-1. If Claimant satisfies this threshold standard with newly generated evidence, then the entire record is reviewed *de novo* to determine entitlement to benefits. 20 C.F.R. § 725.309(d)(4). The regulations also provide that, if the claim is awarded, “no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.” 20 C.F.R. § 725.309(d)(5).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### *I. Preliminary Matters*

#### A. Coal Miner

The parties stipulated that Claimant worked in the above-ground coal mining industry for twenty four (24) years. TR-6.

#### B. Date of Filing

Claimant filed his claim for benefits, under the Act, on April 19, 2010. DX-3. None of the Act’s filing time limitations<sup>1</sup> are applicable; thus, the claim was timely filed.

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<sup>1</sup>Twenty C.F.R. § 725.308 (Black Lung Benefits Act as amended, 30 U.S.C.A. §§ 901-945, § 422(f)) provides in pertinent part:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner . . . .

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed . . . . [T]he time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

### C. Responsible Operator<sup>2</sup>

Employer does not contest that it is not the responsible operator. TR-6.

### D. Dependents

I find that Claimant has one dependent for purposes of augmentation of benefits under the Act, his wife Helen. DX-10.

### E. Personal and Employment History

Claimant was born on June 18, 1937. DX-3. Claimant last worked in the mining industry in 1995. DX-3, 6, 10. All of Claimant's mining work was in above-ground, surface mines. DX-4, TR-14. Claimant's last mining position was as a load operator. DX-3, 4, 18. Since working in the mining industry, Claimant has reported self-employment earnings until 2008. DX-10. Claimant smoked cigarettes for many years. DX-12, 13.

### F. Appellate Jurisdiction

As the evidence indicates that Claimant last engaged in coal mine employment in the Commonwealth of Pennsylvania, appellate jurisdiction of this matter lies with the Third Circuit Court of Appeals. DX-6, 10; *see Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (*en banc*).

## II. Existence of Pneumoconiosis

Under the amended regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

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<sup>2</sup>Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator, or if the responsible operator is unknown or is unable to pay benefits, with the Black Lung Disability Trust Fund. 20 C.F.R. § 725.493(a)(1) defines responsible operator as the claimant's last coal mine employer with whom he had the most recent cumulative employment of not less than one year. *Snedeker v. Island Creek Coal Co.*, 5 B.L.R. 1-91 (1982) (§ 725.495(a) for claims filed on or after Jan. 19, 2001). One year of coal mine employment may be established by accumulating intermittent periods of coal mine employment. 20 C.F.R. § 725.493(c); *see* § 725.101(32) (for adjudications on or after Jan. 19, 2001).

The regulations further provide the following two presumptions to support a finding that the employer is liable for benefits: (1) a presumption that the miner was regularly and continuously exposed to coal dust; and (2) a presumption that the miner's pneumoconiosis arose out of his employment with the operator. 20 C.F.R. § 725.491(d). To rebut the presumption of regular and continuous exposure to coal dust, an employer must establish that there were *no* significant periods of coal dust exposure. *Conley v. Roberts and Schaefer Coal Co.*, 7 B.L.R. 1-309 (1984); *Richard v. C & K Coal Co.*, 7 B.L.R. 1-372 (1984); *Zamski v. Consolidation Coal Co.*, 2 B.L.R. 1-1005 (1980). The frequency of coal dust exposure must be shown to be so slight that employment with the mine operator could not have caused pneumoconiosis. *Richard, supra*; *Harringer v. B & G Construction Co.*, 4 B.L.R. 1-542 (1982).

(a) 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 both medical, or “clinical”, pneumoconiosis and statutory, or “legal”, pneumoconiosis.

(1) Clinical Pneumoconiosis. “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. The definition includes, but is not limited to, coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a 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.

(c) For purposes of this definition, “pneumoconiosis” is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.<sup>3</sup>

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<sup>3</sup>Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Dir.*, *OWCP*, 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Dir.*, 86 F.3d 1358, 1362 (4th Cir. 1996) (*en banc*); *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 314-315 (3d Cir. 1995). In *Henley v. Cowan & Co.*, 21 B.L.R. 1-148 (May 11, 1999), the Board held that aggravation of a pulmonary condition by dust exposure in coal mine employment must be “significant and permanent” in order to qualify as CWP, under the Act. In *Workman v. Eastern Associated Coal Corp.*, 23 B.L.R. 1-22, BRB No. 02-0727 BLA (Aug. 19, 2004) (order on recon) (*en banc*), the Board ruled that because the potential for progressivity and latency is inherent in every case, a miner who proves the presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it was previously not, has demonstrated that the disease from which he suffers is of a progressive nature. In amending § 718.201, DOL concluded chronic dust diseases of the lung and its sequelae arising out of coal mine employment “may be latent and progressive, albeit in a minority of cases.” See 64 Fed. Reg. 54978-79 (Oct. 8, 1999); 65 Fed. Reg. 79937-44, 79968-72 (Dec. 20, 2000); 68 Fed. Reg. 69930-31 (Dec. 15, 2003). “Although every case of pneumoconiosis does not possess these characteristics, the regulation was designed to prevent operators from asserting that pneumoconiosis is never latent and progressive.” 20 C.F.R. § 718.201(c); see *Nat’l Mining Ass’n v. Chao, Sec. of Labor*, 160 F. Supp. 2d 47 (D.D.C. Aug. 9, 2001), *aff’d*, 292 F.3d 849 (D.C. Cir. 2002) (“*NMA*”), 292 F.3d at 863. *Midland Coal Co. v. Dir.*, *OWCP[Shores]*, 358 F.3d 486 (7th Cir. 2004). Seventh Circuit upheld DOL’s 2001 definition of CWP as a latent and progressive disease. DOL’s regulation, on this scientific finding is entitled to deference. It is designed to prevent operators from claiming CWP is never latent and progressive.

20 C.F.R. § 718.201.

Claimant has the burden of proving the existence of pneumoconiosis, absent application of 30 U.S.C. § 921(c)(4). The existence of pneumoconiosis may be established by any one or more of the following methods:

(1) chest X-rays;

(2) autopsy or biopsy;

(3) by operation of presumption described in 20 C.F.R. §§ 718.304-306 ; or

(4) by a physician exercising sound medical judgment based on objective medical evidence.

20 C.F.R. § 718.202(a).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis. In support of its decision, the court cited to the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24-25 (3d Cir. 1997), which requires the same analysis. This is contrary to the Board's view that an administrative law judge may weigh the evidence under each subsection separately, i.e., X-ray evidence at § 718.202(a)(1) is weighed apart from the medical opinion evidence at § 718.202(a)(4).

#### A. Chest X-Rays

A finding of the existence of pneumoconiosis may be made with positive chest x-ray evidence.<sup>4</sup> 20 C.F.R. § 718.202(a)(1). When weighing chest X-ray evidence, the provisions at 20 C.F.R. § 718.202(a)(1) require that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. § 718.202(a)(1). Radiological qualifications of physicians include designations as being a "B-reader" and "Board-certified." A "B-reader" (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH).<sup>5</sup> A designation of "Board-certified" (BCR) denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. The Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist

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<sup>4</sup>"There are twelve levels of profusion classification for the radiographic interpretation of simple pneumoconiosis." *Lisa Lee Mines v. Dir.*, 86 F.3d 1358, 1359 n.1 (4th Cir. 1996) (*en banc*) (quoting N. LeRoy Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W.Va. Law Rev. 721 729-731 (1981)).

<sup>5</sup>*LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 310 n. 3 (3d Cir. 1995). See 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51.

over the interpretation of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983); see *Mullins Coal Co. v. Dir.*, OWCP, 484 U.S. 135, 145 n. 16 (1987); see *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than a B-reader's interpretation. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984); *Cannelton Indus., Inc. v. Dir.*, OWCP[Frye], Case No. 03-1232 (4th Cir. April 5, 2004) (proclaiming it's proper to accord more weight to radiologists' readings over non-radiologists). *Bethenergy Mines, Inc. v. Cunningham*, Case No. 03-1561 (4th Cir. July 20, 2004) (unpublished) (finding it's appropriate to accord greater weight to the X-ray interpretation of a dually-qualified reader over a B-reader).

In weighing X-ray evidence, a judge is not required to defer to the numerical superiority of X-ray evidence, although it is within his or her discretion to do so. *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990) (citing *Edmiston v. F & R Coal*, 14 B.L.R. 1-65 (1990)). This is particularly so where the majority of negative readings are by the most qualified physicians. *Dixon v. N. Camp Coal Co.*, 8 B.L.R. 1-344(1985); *Melnick v. Consolidation Coal Co. & Dir.*, OWCP, 16 B.L.R. 1-31, 1-37 (1991).

There were five readings of four X-rays submitted into evidence.<sup>6</sup> While Employer had submitted an additional reading dated July 7, 2011, of the July 19, 2010, X-ray by Dr. Wolfe (EX-1), as Employer's counsel failed to submit the prerequisite Black Lung Evidence Summary Form which designates the use of such a reading in the adjudicatory scheme the undersigned has not considered it. ALJ-1; TR-7. Four readings, all by Dr. Ahmed, found the presence of pneumoconiosis. 20 C.F.R. § 718.102(b).<sup>7</sup> One reading, by Dr. Wolfe, did not find the presence of pneumoconiosis. Both physicians are both B-readers and Board-certified in radiology. Doctor Wolfe is a B-reader and Board-certified in Radiology. He is in practice at Conemaugh Medical Center. He has made several presentations and co-wrote several articles. DX-12. Doctor Ahmed is a B-reader and Board-certified in Radiology. He is licensed in four states and is currently an attending radiologist at both the Princeton Community Hospital and Bluefield Regional Medical Center in West Virginia. DX-13.

Ex. #	Dates: 1. X-ray 2. Read	Reading Physician	Qualifi- cations*	Film Quality	ILO Classification**	Interpretation or Impression
DX-12	7/19/2010 8/2/2010	Wolfe	B/BCR	#1	0/0	
DX-13	7/19/2010 3/29/2011	Ahmed	B/BCR	#1	2/2	

<sup>6</sup>An additional reading by Dr. Navani of the 7/19/2010 X-ray was made on 10/19/2010 for quality purposes only. DX-12. He found that the X-ray was ranked as quality "#2."

<sup>7</sup>ILO-UICC/Cincinnati classification of Pneumoconiosis is the most widely used system for the classification and interpretation of X-rays for the disease pneumoconiosis. This classification scheme was originally devised by the International Labor Organization (ILO) in 1958 and refined by the International Union Against Cancer (UICQ) in 1964. The scheme identifies six categories of pneumoconiosis based on type, profusion, and extent of opacities in the lungs.

CX-2	3/2/2011 10/11/2011	Ahmed	B/BCR	#1	2/2	
CX-4	9/9/2011 9/11/2012	Ahmed	B/BCR	#1	2/2	
CX-3	10/18/2011 12/13/2011	Ahmed	B/BCR	#2	1/1	

\* A-A-reader; B-B-Reader; BCR - Board Certified Radiologist; BCP - Board-certified pulmonologist; BCI – Board certified internal medicine; BCI(P) - Board-certified internal medicine with pulmonary medicine sub-specialty.

\*\*The existence of pneumoconiosis may be established by chest X-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest X-ray classified as category “0,” including subcategories “0/-, 0/0, 0/1,” does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983) (Under Part 727 of the Regulations); *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997) (*en banc*) (unpublished). If no categories are chosen, in box 2B(c) of the X-ray form, then the X-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

Based upon the overwhelming number of readings indicating the presence of simple, clinical coal workers’ pneumoconiosis, given the equal qualifications of both Drs. Wolfe and Ahmed, the undersigned finds that Claimant has met his burden regarding establishing the existence of coal workers’ pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1).

### *III. Cause of Pneumoconiosis*

If a miner is found to have clinical pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If the miner who is suffering from clinical pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b); *Andersen v. Director, OWCP*, 455 F.3d 1102 (10<sup>th</sup> Cir. 2006). As a result, the burden shifts to the party opposing entitlement to present evidence sufficient to establish that the disease did not stem from employment in the mines. If a miner who is suffering or suffered from clinical pneumoconiosis was employed less than ten years in the nation’s coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).

In the present case, the parties have stipulated that the miner had twenty four (24) years of aboveground coal mining employment, which is sufficient to trigger the rebuttable presumption. 20 C.F.R. § 718.203(b). As Employer has introduced no evidence to suggest that Claimant’s simple, clinical coal workers’ pneumoconiosis did not result from his employment in coal mines, Claimant has therefore met the burden required by 20 C.F.R. § 718.203(a) in proving the cause of pneumoconiosis.

### *IV. Existence of Total Disability*

Benefits are provided under the Act for, or on behalf of, miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a). The claimant must show his total pulmonary or

respiratory disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b).<sup>8</sup> Section 718.204(b)(2)(i) through (b)(2)(iv) and (d) set forth criteria to meet this burden through:

- (i) pulmonary function studies with qualifying values;
- (ii) blood gas studies with qualifying values;
- (iii) evidence that miner has pneumoconiosis and suffers from cor pulmonale with right-side congestive heart failure;
- (iv) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment and gainful employment requiring comparable abilities and skills; and lay testimony.<sup>9</sup>

Total disability may be established by a preponderance of qualifying pulmonary (ventilatory) function studies. 20 C.F.R. § 718.204(b)(2)(i). Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV<sub>1</sub>) and maximum voluntary ventilation (MVV). The quality standards for pulmonary function studies are located at 20 C.F.R. § 718.103 and require, in relevant part, that

- (1) each study be accompanied by three tracings, *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984),
- (2) the reported FEV<sub>1</sub> and FVC or MVV values constitute the best efforts of three trials, and,

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<sup>8</sup>The Board has held it is the claimant's burden to establish total disability due to CWP by a preponderance of the evidence. *Baumgartner v. Dir., OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986) (*en banc*). 20 C.F.R. § 718.204 (Effective Jan. 19, 2001). Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis, states:

- (a) General. Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether a miner is or was totally disabled due to pneumoconiosis.

<sup>9</sup>Under this subsection, the administrative law judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc*, 9 B.L.R. 1-236 (1987). Notably, however, a finding of disability may not be based solely on lay evidence in a living miner's claim. *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994).

(3) testing conducted after January 19, 2001 be accompanied by a flow-volume loop. 20 C.F.R. §§ 718.101(b) and 718.103(a) and (b).

To be qualifying, the regulations provide that the FEV<sub>1</sub> be qualifying *and* either (1) the MVV or FVC values must be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height, or (2) the result of the FEV<sub>1</sub> divided by the FVC is equal to or less than 55 percent. 20 C.F.R. § 718.204(a)(2)(i)(A), (B), and (C). More weight may be accorded to the results of a recent ventilatory study over those of an earlier study. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993).

For example, for a seventy-one year old miner,<sup>10</sup> § 718.204(b)(2)(i) requires an FEV<sub>1</sub> equal to or less than 1.69. If such an FEV<sub>1</sub> is shown, there must be in addition, an FVC equal to or less than 2.20 or a ratio equal to or less than 55% when the results of the FEV<sub>1</sub> tests are divided by the results of the FVC test. Qualifying values are depicted in the table below. The FEV<sub>1</sub>/FVC ratio requirement remains constant.

Height	Age	FEV <sub>1</sub>	FVC
68	73	1.69	2.20
69	73	1.79	2.31

The results of the pulmonary function testing admitted into evidence in this case are depicted below. There were additional pulmonary function testing results contained in a report appended to Dr. Fino's deposition (EX-2), but counsel for Employer failed to submit a Black Lung Evidence Summary Form indicating if such evidence was to be considered by the undersigned. ALJ-1; TR-7. All of the admitted testing "conformed."\*\*

Physician Date Exhibit #	Age Height	FEV <sub>1</sub> Pre/Post Broncho-dilator	MVV	FVC	FEV <sub>1</sub> /FVC	Compre-hension/ cooper-ation	Qualifying*	Impression
Begley 9/9/2011 CX-1	74 69"	2.12 pre 2.19 post		3.23 pre 3.88 post	65% pre 57% post		Non-qualifying	
Schaaf 9/13/2012 CX-5	75 68"	2.08 pre 2.51 post		3.04 pre 4.38 post	63% pre 58% post	Good effort	Non-qualifying	Moderate pre-obstruction; mild post obstruction
Wolfe 11/10/2010 DX-12	73 68"	2.15 pre 1.79 post	53 49	3.25 pre 2.95 post	66% pre 61% post	Fair/good	Non-qualifying	Submaximal /inconsistent effort
Zlupko 7/19/2010 DX-12	73 69"	1.74 pre 2.35 post	52 62	2.60 pre 3.30 post	67% pre 71% post	Fair/good	Non-qualifying	Poor consistent effort

\*A "qualifying" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table

<sup>10</sup>Although claimant is older than 71, extrapolation of FEV and FVC values for individuals over age 71 are not allowed. *K.J.M. v. Clinchfield Coal Company*, BRB No. 07-0655 BLA (2008).

values set forth in Appendices B and C of Part 718.

\*\* A study “conforms” if it complies to applicable standards (found in 20 C.F.R. § 718.103(b) and (c)). *See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 (7th Cir. 1993). A judge may infer in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Dir., OWCP*, 6 B.L.R. 1-1083 (1984). A study which is not accompanied by three tracings may be discredited. *Estes v. Dir., OWCP*, 7 B.L.R. 1-414 (1984).

Appendix B (Effective Jan. 19, 2001) states “(2) the administration of pulmonary function tests shall conform to the following criteria: (i) Tests shall not be performed during or soon after an acute respiratory illness. . . .”

Appendix B (Effective Jan. 19, 2001), (2)(ii)(G): Effort is deemed “unacceptable” when the subject

[H]as an excessive variability between the three acceptable curves. The variation between the two largest FEV1s of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve the degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test.”

*Id.* (emphasis added).

As none of the admitted pulmonary function studies “qualified”, Claimant has failed to demonstrated the existence of a total pulmonary/respiratory disability pursuant to 20 § 718.204(b)(2)(i).

Total disability may also be established by qualifying blood gas studies under 20 C.F.R. § 718.204(b)(2)(ii).<sup>11</sup> Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O<sub>2</sub>) compared to carbon dioxide (CO<sub>2</sub>) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled. In order to be qualifying, the PO<sub>2</sub> values corresponding to the PCO<sub>2</sub> values must be equal to or less than those found at the tables of Appendix C. 20 C.F.R. § 718.204(b)(2)(ii). Notably, the tables at Appendix C do not permit “rounding up” or “rounding down” of the PCO<sub>2</sub> or PO<sub>2</sub> values; rather, each value must be “equal to or less than” the applicable table value. *Tucker v. Director, OWCP*, 10 B.L.R. 1-35 (1987). More weight may be accorded to the results of a recent blood gas study over one which was conducted earlier. *Schretroma v. Dir., OWCP*, 18 B.L.R. 1-17 (1993). The gas studies admitted into evidence are indicated below. There were additional was blood gas study results contained in a report appended to Dr. Fino’s deposition (EX-2), but counsel for Employer failed to submit a Black Lung Evidence Summary Form indicating if such evidence was to be considered by the undersigned. ALJ-1; TR-7.

Date Exhibit #	Physician	PCO <sub>2</sub> *	PO <sub>2</sub>	Qualifying	Physician Impression
9/9/2011 CX-1	Begley	28 (rest) 22 (exercise)	75 (rest) 90 (exercise)	No No	
7/19/2010 DX-12	Zlupko	34.6 (rest) 32.1 (exercise)	80.1 (rest) 62 (exercise)	No Yes	

\*Results, if any, after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

<sup>11</sup>Twenty C.F.R. § 718.105 sets the quality standards for blood gas studies.

Appendix C to Part 718 (Effective Jan. 19, 2001) states: “Tests shall not be performed during or soon after an acute respiratory or cardiac illness.”

Only one part of the blood gas studies, that of the exercise portion during the July 19, 2010, study, qualified under the regulations. Exercise studies can be more probative of miner’s impairment, as they assess oxygen levels during physical exertion, which was required by claimant’s last coal mine employment. See *Cline v. Cline Brothers Mining Co.*, BRB No. 05-0247 BLA (Oct. 31, 2005) (unpub.) (“The [ALJ] rationally found that the exercise values were more probative of claimant’s ability to perform his last coal mine employment, because they assess oxygen levels during physical exertion”); see also *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989) (the ALJ must weigh arterial blood gas study values yielded at rest and during exercise together, and explain his reason for crediting one study over another). Given the fact that pneumoconiosis is a progressive condition and should not improve over time, the undersigned finds that the more recent results are the most probative.<sup>12</sup> This is especially true since the subsequent testing was performed by Claimant’s own expert, Dr. Begley. Accordingly, as the majority of blood gas studies do not qualify under the regulations, Pursuant to 20 C.F.R. § 718.204(b)(1)(ii) Claimant has failed to demonstrate the presence of a total pulmonary/respiratory disability.

Pursuant to 20 C.F.R. § 718.204(b)(1)(iii), Claimant may demonstrate the presence of a totally disabling respiratory impairment if “[t]he miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure . . .” 20 C.F.R. § 718.204(b)(1)(iii). In the present case, as there is no evidence of cor pulmonale, then a total pulmonary/respiratory disability has not been demonstrated pursuant to 20 C.F.R. § 718.204(b)(1)(iii).

Finally, where total disability cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner’s respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful employment. 20 C.F.R. § 718.204(b)(2)(iv). Here, the administrative law judge is required to compare the degree of respiratory impairment diagnosed in the medical opinion with the exertional requirements of claimant’s usual coal mine work. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff’d*, 9 BLR 1-104 (1986) (*en banc*). In order to do so, the administrative law judge must make a specific finding as to the nature of claimant’s usual coal mine work and the physical requirements associated with that work. *Stanley v. Eastern Assoc. Coal Corp.*, 6 BLR 1-1157 (1984).

It is claimant’s burden to establish the exertional requirements of his usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment and reach a conclusion regarding total disability. *McMath v. Director*,

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<sup>12</sup>As pneumoconiosis is a progressive disease, it should either stay constant or get worse with time, but not improve. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993). See also *Gillespie v. Badger Coal Co.*, 7 B.L.R. 1-839 (1985); *Stanford v. Dir.*, OWCP, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-166 (1983); *Call v. Dir.*, OWCP, 2 B.L.R. 1-146 (1979).

*OWCP*, 12 BLR 1-6 (1988). Specifically, the exertional requirements from the miner's last coal mining job of one year's duration must be compared to the physical limitations noted by medical experts in this claim. Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Judges may rely on physician reports which do not discuss the exertional requirements of a miner's work if the physician concludes that the miner suffers from no impairment at all. *Lane v. Union Carbide & Dir.*, *OWCP*, 21 B.L.R. 2-34, 2-46, 105 F.3d 166, 172 (4th Cir. 1997). Furthermore, a medical opinion based on an invalid study may be rejected. *See Dir. v. Siwiec*, 894 F.2d 635, 639 (3d Cir. 1990) (cited with approval in *Lane*, 21 B.L.R. 2-34, 2-47, 105 F.3d 166 (4th Cir. 1997)).<sup>13</sup>

In the present case, Claimant's condition has been opined upon by a variety of physicians. Doctor Zlupko examined Claimant on behalf of Director on September 30, 2010. DX-12. Doctor Zlupko, a physician who is board-certified in Internal Medicine with a subspecialty in Pulmonary Medicine, diagnosed Claimant with severe to very severe coronary artery disease (CAD). DX-12. Additionally, Dr. Zlupko stated that Claimant had moderate to severe chronic obstructive pulmonary disease (COPD) due to smoking and occupational exposure to coal dust. DX-12. Doctor Zlupko stated that it was difficult to determine how much of Claimant's disability was due to COPD but that the majority was due to his CAD. DX-12. Doctor Zlupko did not specify what portion or percentage of Claimant's COPD was due to coal dust exposure as opposed to tobacco abuse. In his report, he did not specifically state whether Claimant could perform his past coal mining employment. DX-12.

Doctor Begley, who examined Claimant at his counsel's request on September 9, 2011, stated there was no X-ray evidence of simple or complicated pneumoconiosis. CX-1. Doctor Begley is board-certified in Internal, Critical Care, and Pulmonary Medicine. CX-1. He diagnosed Claimant as having an obstructive pulmonary impairment suggestive of pulmonary emphysema as demonstrated by the pulmonary function studies and a medical history of chronic bronchitis. CX-1. Doctor Begley stated that Claimant's chronic bronchitis was due to previous exposure to coal dust and tobacco use. CX-1. Doctor Begley, like Dr. Zlupko before him, did not specify what portion or percentage of his pulmonary impairment was due to coal dust exposure as opposed to tobacco abuse. While he concluded that Claimant should have no further exposure to coal dust, he did not specifically state whether Claimant could perform his past coal mining employment. CX-1.

Doctor Begley was deposed on February 26, 2013. CX-6. At his deposition, he reiterated that it is impossible to differentiate emphysema or COPD that is caused by cigarette smoking from that which is caused by coal dust inhalation. CX-6/p. 11. He further opined that Claimant's COPD and emphysema was caused by both cigarettes and coal dust inhalation as he was exposed to both; in other words, since he was exposed to both, both must have caused his

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<sup>13</sup>In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, Case No. 99-3469, 22 B.L.R. 2-107 (6th Cir. 2000), the Court held it was inappropriate to reject a physician's opinion which is based upon a non-qualifying pulmonary function study because the regulations permit a doctor to find a miner totally disabled even where PFS and/or AGS are medically contra-indicated.

pulmonary impairments. CX-6/p. 11. Doctor Begley did not opine regarding susceptibility to either agent impacting causation. On cross examination, Dr. Begley stated that coal workers' pneumoconiosis can be a progressive disorder that does not improve over time. CX-6/p. 19. He also admitted on cross examination that his and Dr. Schaaf's pulmonary function studies of Claimant showed reversibility (CX-6/p. 20), but maintained while not common, such reversibility could occur with obstruction caused by coal dust exposure. CX-6/p. 21. Doctor Begley's conclusion is that as long as a miner has a significant coal mine dust exposure history, that any pulmonary/respiratory condition the miner has will be due in part to such coal dust exposure. CX-6/p. 24. This seems to be his conclusion regardless of other factors such as susceptibility, cigarette smoking, etc. He did testify, however, as to the past coal mining jobs Claimant performed (CX-6/p. 8) and that Claimant would be unable to resume his past coal mining jobs due to Claimant's "significant" pulmonary impairment shown by his pulmonary function studies and resting blood gases. CX-6/pp. 14-15.

Doctor Schaaf, who examined Claimant at his counsel's request on September 13, 2012, stated that there was no X-ray evidence of any active airway disease. CX-5. Doctor Schaaf is board-certified in Internal Medicine with a sub-specialty in pulmonary medicine. CX-5. On reviewing the various X-rays contained in the record, he states that the majority have been read as negative with regards to clinical pneumoconiosis. CX-5. Doctor Schaaf diagnosed Claimant as having moderate chronic obstructive airways disease and chronic bronchitis. CX-5. Doctor Schaaf stated that with regard to smoking and coal dust exposure, "[b]oth are substantial contributing factors" of the pulmonary impairments. CX-5. Doctor Schaaf, after classifying Claimant's past coal mining jobs, concluded by stating that Claimant is unable to perform significant gainful employment for multiple reasons, including his chronic bronchitis and moderate obstructive airways disease, cardiac disease, and possible depression. CX-5.

Doctor Fino, who examined Claimant at Employer's request on March 22, 2011, stated there was no X-ray evidence of simple or complicated clinical pneumoconiosis. EX-2. Doctor Fino is board-certified in Internal Medicine with a sub-specialty in pulmonary medicine. EX-2. In his report, Dr. Fino reached a variety of conclusions. First, he found that there is insufficient medical evidence to justify a diagnosis of either clinical or legal pneumoconiosis. EX-2. Second, he states the Claimant has "severely reduced diffusing capacity and a moderate-mild obstructive abnormality with some reversibility" and that the reversibility is not consistent with a coal dust-related pulmonary condition. EX-2. Third, that Claimant has emphysema due to smoking. EX-2. Finally, after classifying Claimant's past mining jobs, Dr. Fino concludes that Claimant is disabled and unable to perform his last mining job from a respiratory standpoint caused by his past smoking, but that coal worker's pneumoconiosis did not contribute at all to his disability. EX-2.

Doctor Fino was subsequently deposed on September 19, 2012. EX-2. In his deposition, he reiterated that due to the fact Claimant's breathing improved with bronchodilators during pulmonary function studies rules out that his breathing problems are related to coal-dust and instead due to smoking. EX-2/p.12. He also stated that due to Claimant's breathing improving with exercise during pulmonary function studies was also inconsistent with damage done by coal dust inhalation. EX-2/p. 13. Because of these results, he opined that to a degree of medical certainty that Claimant had neither clinical nor legal pneumoconiosis but rather emphysema due

to smoking. EX-2/p. 15-17. On cross-examination, Dr. Fino stated while coal dust may be responsible for a numerical reduction in Claimant's pulmonary function study results, it is not clinically significant and that he would be just as disabled even if he never worked in the coal mining industry. EX-2/p. 22.

Doctor Kaplan, who examined Claimant at Employer's request on October 18, 2011, stated there was no X-ray evidence of simple or complicated clinical pneumoconiosis. EX-3. Doctor Kaplan is board-certified in Internal Medicine with sub-specialties in pulmonary and critical care medicine. EX-3. Doctor Kaplan, in his report, concluded that Claimant has neither clinical nor legal pneumoconiosis but rather has COPD from cigarette smoking. EX-3. As he stated during his deposition, while Claimant is certainly disabled due to his coronary condition from returning to his mining job, coal dust inhalation plays no role in how disabled Claimant is. EX-3/p. 14. On cross-examination, Dr. Kaplan denied that Claimant was disabled due to a pulmonary condition. EX-3/p. 16. Also on cross-examination, Dr. Kaplan opined that coal dust inhalation contributes approximately ten percent (10%) to Claimant's COPD, emphysema, and chronic bronchitis. EX-3/p. 18. Regardless of the role coal dust inhalation in Claimant's pulmonary conditions, Dr. Kaplan opined that Claimant is not disabled from a pulmonary standpoint, but is disabled solely due to his coronary-related conditions. EX-3/p. 20.

In summation, Dr. Zupklo did not specifically state whether or not Claimant was totally disabled from a pulmonary/respiratory impairment and unable to perform his past mining work. DX-12. While Dr. Begley opined that Claimant would be unable to perform his past coal mining jobs due to his "significant" pulmonary impairment, he based this opinion on Claimant's pulmonary function studies and resting blood gases. CX-6/pp. 14-15. Dr. Begley's opinion is not supported by the objective diagnostic medical testing, as neither Claimant's pulmonary function nor resting blood gas results qualified under the regulations. Section IV, *supra*. Doctor Schaaf gave a litany of impairments that he felt precluded Claimant's ability to perform his past coal mining jobs – chronic bronchitis, moderate obstructive airways disease, cardiac disease, and possible depression – but does not state that from a pulmonary/respiratory standpoint alone that Claimant has totally disabled and unable to perform his past coal mining jobs. Doctor Fino concluded that Claimant is disabled and unable to perform his last mining job from a respiratory standpoint that caused by his past smoking and not coal worker's pneumoconiosis. EX-2, 3. Pursuant to 20 C.F.R. § 718.204(b), however, the causation of the total disability is not relevant at this point in the analysis, rather merely its existence. It is Dr. Kaplan, alone, who states that claimant has no pulmonary disability. EX-3/p. 16.

There is no doubt that Claimant is disabled from a cardiac standpoint. There is also no doubt that a large portion of claimant's pulmonary/respiratory problems are caused by his smoking. Where there is doubt is whether his pulmonary/respiratory impairments are significant enough alone to result in a total disability that would preclude his ability to perform his past coal mining jobs. But for Dr. Fino's opinion, an expert for Employer, that Claimant has a total pulmonary/respiratory disability which precludes his performing his past coal mining jobs, Claimant would have failed in meeting this burden of proof. Based upon a totality of the evidence, the undersigned finds that Claimant has proven the existence of a total pulmonary/respiratory disability pursuant to 20 C.F.R. § 718.204(b)(1)(iv) based upon the

opinions of the various experts as to Claimant's ability, from a pulmonary/respiratory standpoint, to perform his past coal mining jobs.

#### *V. Cause of Total Disability*

Pneumoconiosis must be a "substantially contributing cause" to the miner's total disability. 20 C.F.R. § 718.204(c)(1). The regulations define "substantially contributing cause" as follows:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c)(1).

Because this claim was filed after January 1, 2005 and Claimant had 15 or more years of qualifying coal mine employment, the provisions at 20 C.F.R. § 718.305 are applicable.<sup>14</sup> Specifically, § 718.305 provides the following:

(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 or her survivor's claim and it is interpreted as negative with respect to the requirements of Sec. 718.304, 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, that such miner's death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis. In the case of a living miner's claim, a spouse's affidavit or testimony may not be used by itself to establish the applicability of the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where it is determined that conditions of the miner's employment in a coal mine were substantially similar to conditions in an underground mine. The presumption may be rebutted only by establishing that the miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(b) In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall

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<sup>14</sup>Revival of the 15 year presumption through Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010) (PPACA), is constitutional. *Muncy v. Elkay Mining Co.*, 2012 WL 893972, \_\_\_ B.L.R. 1-\_\_\_, BRB No. 11-0187 BLA (Nov. 30, 2011); *Owens v. Mingo Logan Coal Co.*, 24 B.L.R. 1-\_\_\_, BRB No. 11-0154 BLA (Oct. 28, 2011).

be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment for purposes of this section.

(c) The determination of the existence of a totally disabling respiratory or pulmonary impairment, for purposes of applying the presumption described in this section, shall be made in accordance with Sec. 718.204.

(d) Where the cause of death or total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment or the evidence establishes 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.

20 C.F.R. § 718.305.

Of relevance in this claim, as Claimant has 15 years or more of qualifying coal mine employment (as based upon the parties' stipulation of twenty four (24) years; Section I A, *supra*) and the medical evidence supports finding that the miner suffered from a totally disabling respiratory impairment (Section IV, *supra*), then rebuttable presumptions of disability and/or death due to coal workers' pneumoconiosis are invoked. Once invoked, the burden shifts to the party opposing entitlement to demonstrate by a preponderance of the evidence either: (1) the miner's disability does not, or did not, arise out of coal mine employment; or (2) the miner does not, or did not, suffer from pneumoconiosis.

If the party opposing entitlement meets this burden, then the presumptions are rebutted and Claimant is not entitled to benefits under 20 C.F.R. § 718.305. On the other hand, if the burden is not met, then Claimant is awarded benefits. The Board holds that standards for rebuttal under 20 C.F.R. § 718.305(d) are similar to the rebuttal standards at 20 C.F.R. § 727.203(b). *DeFore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). As the issue of whether Claimant has coal workers' pneumoconiosis was determined in section II A, *supra*, the single issue to be determined with whether Claimant's total disability arises from his coal workers' pneumoconiosis due to his past coal mine employment. To determine this issue, it is necessary to consider the documented and reasoned opinions of the experts involved in this matter.

To rebut the presumption that Claimant's total pulmonary or respiratory disability is the result of his past coal mine employment, Employer offers the reports and depositions of two physicians, Drs. Fino and Kaplan. While Dr. Fino admitted on cross-examination at his deposition that coal dust may be responsible for a numerical reduction in Claimant's pulmonary function study results, he maintained that it was not clinically significant and that he would be just as disabled from the damage caused by his smoking even if he had never worked in the coal mining industry. EX-2/p. 22. Doctor Kaplan, likewise on cross-examination at his deposition, opined that coal dust inhalation contributes approximately ten percent (10%) to Claimant's COPD, emphysema, and chronic bronchitis. EX-3/p. 18. It was Dr. Kaplan's opinion that Claimant does not have a pulmonary/respiratory disability. EX-3/p. 20.

Both physicians, therefore, concede that they cannot rule out coal dust as a cause of at least part of Claimant's pulmonary/respiratory impairment – which Dr. Fino stated was disabling and Dr. Kaplan stated was not. Their position, however, is that the contribution of the damage to Claimant's pulmonary/respiratory functioning caused by coal dust inhalation is clinically insignificant compared to the damage caused by Claimant's continued smoking. Unfortunately for Employer, however, 20 C.F.R. § 718.305(d) provides that for the presumption of 20 C.F.R. § 718.305(a) to be rebutted, the cause of total pulmonary/respiratory disability cannot be due to in whole *or in part* to coal dust exposure from the miner's coal mine employment. 20 C.F.R. § 718.305(d). As neither physician can state that coal dust exposure is not responsible for at least a part of Claimant's pulmonary/respiratory impairment, the presumption at 20 C.F.R. § 718.305(a) is not rebutted. While they are undoubtedly correct that from a clinical standpoint Claimant's smoking is primarily responsible for his pulmonary/respiratory demise, the regulation does not provide for that fact alone to rebut the presumption. Claimant has therefore met his burden of proof with regard to establish coal workers' pneumoconiosis as a cause (albeit not sole) of his total disability pursuant to 20 C.F.R. § 718.204(c)(1).

### **ATTORNEY FEES**

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are awarded in this case, the Act allows the charging of a fee to Claimant for the representation services rendered to him in pursuit of the claim.

### **CONCLUSION**

In conclusion, Claimant established he has simple, clinical coal workers' pneumoconiosis, as defined by the Act and Regulations, arising out of his past coal mine employment, resulting in a total pulmonary/respiratory disability that was caused at least in part by his simple clinical coal workers' pneumoconiosis. He is therefore entitled to benefits.

DREW A. SWANK  
Administrative Law Judge

**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. §§ 725.478, 725.479. 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 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).