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Office of Administrative Law Judges
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Issue Date: 19 October 2015

Case No.: **2012-BLA-05015**

In the Matter of:

ELBERT G. PENNINGTON,
Claimant,

v.

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,**
Respondent.

Appearances:

James D. Holliday, *Esq.*
Hazard, Kentucky
For the Claimant

Matthew Shepherd, *Esq.*
U.S. Department of Labor
Office of the Solicitor
Nashville, Tennessee
For the Director

Before: Peter B. Silvain, Jr.
Administrative Law Judge

**DECISION AND ORDER GRANTING THE
CLAIMANT'S REQUEST FOR MODIFICATION**

This proceeding arises from a claim for benefits under the Black Lung Benefits Act.¹ The Act and implementing regulations² provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and to surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and regulations define pneumoconiosis, commonly known as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.³

I conducted a hearing on this claim on June 16, 2015, in Ashland, Kentucky. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges.⁴ The Claimant was the

¹ 30 U.S.C. § 901, *et seq.*

² 20 C.F.R. Parts 410, 718, 725, and 727.

³ 30 U.S.C. § 902(b); 20 C.F.R. § 718.201 (2010).

⁴ 29 C.F.R. Part 18A (2011).

only witness. At the hearing, Director's Exhibits ("DX") 1-101 and Claimant's Exhibits ("CX") 1-5 were admitted into evidence without objection. (Tr. 8-10). The record was held open to allow both parties time to prepare closing briefs. (Tr. at 42). The Director submitted its closing arguments on August 13, 2015. The Claimant's closing brief was received on September 3, 2015, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits admitted into evidence, the testimony at hearing, and the arguments of the parties.

PROCEDURAL HISTORY

This is Elbert G. Pennington's ("the Claimant") first claim for benefits. The Claimant initially filed for benefits on May 16, 2006. (DX 2). The claim was denied by the District Director on January 22, 2007, who found the Claimant could not prove he had pneumoconiosis caused by his coal mine employment or a totally disabling respiratory impairment. (DX 52). The Claimant appealed on January 31, 2007, and requested a hearing before the Office of Administrative Law Judges ("OALJ"). (DX 53). Administrative Law Judge Mosser denied benefits in a Decision and Order issued on August 28, 2008, finding that the Claimant had approximately one year of coal mine employment and failed to prove the existence of pneumoconiosis or that he was totally disabled due to his coal mine employment. (DX 74). The Claimant timely appealed (DX 75) and the Benefits Review Board ("the Board" or "BRB") issued a Decision and Order affirming Judge Mosser's findings and denial of benefits on July 20, 2009.⁵ (DX 80).

Following the Board's decision, the Claimant submitted additional medical evidence which the District Director construed as a request for modification on September 24, 2009. (DX 87). The District Director issued a Proposed Decision and Order Denying Request for Modification on August 3, 2011, holding that the newly submitted evidence failed to establish a material change in condition or a mistake in a determination of fact. (DX 95). The Claimant appealed on August 9, 2011, requesting a hearing before the OALJ. (DX 96). The claim was referred to the OALJ on September 27, 2011. (DX 100).

APPLICABLE STANDARDS

This case is a request for modification of an adverse decision rendered on a claim filed on May 16, 2006, after the effective date of the current regulations. For this reason, the current regulations at 20 C.F.R. Parts 718 and 725 apply.⁶ In order to establish that he is entitled to benefits, the Claimant must demonstrate that there has been a change in an applicable condition of entitlement or a mistake in determination of fact such that he meets the requirements for entitlement to benefits under 20 C.F.R. Part 718.⁷ In order to establish entitlement to benefits

⁵ The Board noted that the only issue the Claimant appealed was Judge Mosser's finding on total disability and did not challenge Judge Mosser's finding regarding the nature and length of the Claimant's coal mine employment.

⁶ 20 C.F.R. §§ 718.2 and 725.2.

⁷ 20 C.F.R. § 725.310.

under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling.⁸ When a claimant seeks modification based on an alleged change in conditions, new evidence must be submitted and the judge must conduct an independent assessment of the newly submitted evidence, in conjunction with the evidence previously submitted, to determine whether the weight of the evidence is sufficient to establish the element or elements that defeated entitlement in the prior decision.⁹ When a claimant seeks modification based upon a mistake of fact, new evidence is not required, and the judge may resolve the issue based upon “wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.”¹⁰ If I find a change in conditions or a mistake of fact, I must also address whether granting the request for modification would render justice under the Act.¹¹

ISSUES

The issues contested by the Director are:

1. Whether the Claimant had one or more years of coal mine employment;
2. Whether the Claimant’s pneumoconiosis arose out of coal mine employment;
3. Whether the Claimant’s total disability is due to pneumoconiosis; and
4. Whether the evidence establishes a change in conditions and/or a mistake in a determination of fact in a prior denial of the current claim under 20 C.F.R. § 725.310.

(Tr. at 10; DX 98). At the hearing, the Director withdrew the issue of total disability. (Tr. at 10).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Testimony

The Claimant testified at the hearing conducted on June 16, 2015. The majority of his most recent testimony concerned his employment history. The Claimant stated that he began working in 1964 but that his first jobs did not expose him to coal. He testified that he worked at a service center for Ousley & Crosthwaite, where he was not exposed to coal. (Tr. at 14). He stated over the next couple of years he worked for Wade Tobacco, Saber Golf Course, Stone Pontiac Buick, Homer Gregory Jack Brown and Billy Pete B&B Land Contractors, Shivel Inc., J.P. Neill, American Tobacco Co., Rowan Motor Sales, Douglas Forman and H.K. Taylor,

⁸ 20 C.F.R. §§ 718.1, 718.202, 718.203, 718.204, and 725.103.

⁹ *Napier v. Director, OWCP*, 17 BLR 1-111, 1-113 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156, 1-158 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

¹⁰ *O’Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Kovac v. BCNR Mining Shipyards, Inc.*, 16 BLR 1-71, 1-73 (1992), *modifying* 14 BLR 1-156 (1990).

¹¹ *See O’Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-132 (4th Cir. 2007).

Columbia Gulf Transmission Co., Leggett & Platt Inc., EarthGrains, and Flemming Motors and indicated he was not exposed to coal while working at any of these jobs. (Tr. at 14-16).

The Claimant testified that his first coal mine employment was with R.C. Durr Holdings. (Tr. at 16). He stated that company did road construction and coal mines “all together.” (Tr. at 16-17). He explained that he worked as a driller and would go back and forth between drilling sites. (Tr. at 17). He testified that he worked on the surface. When asked about his job as a driller he replied it was “just like strip mining . . . if you got a mountain out there, and coal seams in here, you drill down to the coal.” (*Id.*). He stated when he performed road construction he was “making a big cut through these mountains, you’re taking that down, and you’re drilling to the coal.” (*Id.*). When asked if there was any difference between operating a drill at a strip mine and operating it at a road construction site he replied “it’s the same thing.” (*Id.*) He testified that when he was working on the road construction sites they drilled into coal. (Tr. at 18). He stated that when he was drilling he was “constantly hitting coal seams” and that the coal dust, rock dust, and shale dust was “flashing up” and he would breathe the dust in. (*Id.*).

He testified that when he worked on road construction sites, the companies he worked for would sell the coal. (*Id.*) He stated many of the companies that he worked for had permits to sell the coal they excavated. (Tr. at 18-19). When asked how he knew the companies were selling the coal he stated “because they hauled it out in trucks.” (Tr. at 19).

The Claimant testified he worked for R.C. Durr for two years in 1968 and 1969. (Tr. at 20). He testified his next job was with A.L. Smith, which was a factory job where he was not exposed to coal. (*Id.*). He also testified that he was not exposed to coal when he worked for Raymond Construction. (Tr. at 21). He testified his next job with Watts & Caldwell did expose him to coal, stating he worked in Hindman, Kentucky and that he “stripped big veins of coal.” (*Id.*). When asked if he was exposed to coal on a daily basis, he replied that he stripped coal every day. (Tr. at 21-22). He testified that he worked the entire year of 1979 for Watts & Caldwell. (Tr. at 24).

He testified that he did not remember working for companies listed in his social security records named Curtis Brothers or Raytheon Ebasco. (Tr. at 24-25). However, he did remember working at Emerson Electric, which he testified was not a coal company. (Tr. at 25). He stated that his next job was with Wilputte Corporation and he worked building a power plant where he was not exposed to coal. (*Id.*). Additionally, he stated his work with a company named “Tucker Lufder” did not involve exposure to coal. (*Id.*).

The Claimant testified the next job that exposed him to coal dust was with Kentucky Road Oiling. (*Id.*). He stated he worked there in 1978, drilling and stripping coal. (Tr. at 26). He stated that he was also contemporaneously performing coal mining for Shannon & Hurd, which was also a dual coal removal and road construction company. (*Id.*). He stated he would work for both companies and would go back and forth between them. (*Id.*). He testified when he worked at the road construction sites he would drill coal 65-70 percent of the time and that the company would sell the coal. (Tr. at 27). He stated in 1979, Shannon & Hurd changed their name to James A. Hurd & JB Shannon Partnership (H&S Equipment) but that he continued to do the same work despite the name change in 1980 and 1982. (Tr. at 27-28).

He testified that in 1980, he also worked for East Kentucky Paving in the same capacity where he was exposed to coal dust. (Tr. at 28). He further testified that in 1980, he additionally worked for Holloway Construction where he was not exposed to coal dust. (Tr. at 29). Finally, he stated he worked for the Shaker Coal Co. in 1980, which was a “coal mining operation.” (*Id.*). When asked about the time spent on each job, he replied he would go back and forth between coal mining jobs and construction jobs. (*Id.*) He stated in the winter the road construction projects would not operate, so his employers would take him to their coal mines and he would drill there. (*Id.*).

He testified he next worked for Raytheon Engineers & Constructors in 1981 and 1982 on road construction jobs and that the company would mine and sell the coal. (Tr. at 30). He testified that he could not recall working for H.G. Mays Corp. in 1981. (*Id.*) However, he remembered working for Walker Co., and testified that he was not exposed to coal on that job. (Tr. at 31). He further testified that he worked for Mor-Coal in 1982 and that the company was a coal mine. (*Id.*).

The Claimant testified he next worked for Melco-Greer for “four or five years” from 1982 through 1987. (Tr. at 31-32). He stated he was working on Route 23 near Pikeville and that every cut had coal in it and he would drill down and take the coal out. (Tr. at 32). He stated he would drill into coal seams every day. (*Id.*) He also testified that work got “really slow” in 1986, slowing down “to nothing,” so he did not work for the full year. (*Id.*).

Finally, he testified that he finished his career with Elmo Greer and that he worked there from 1991 to 1995, a “little bit” in 1996, and again in 1997. (Tr. at 33). He stated that he stopped working in May 1997 because of his heart problems. (*Id.*) He testified that the work was “pretty steady” from 1991 through 1995 and slow in 1996 because Elmo Greer went to Arkansas, but that it picked up again. (*Id.*) He testified that all of his work was “drilling through road jobs and coal seams.” (Tr. at 34). He stated that on every road job he mined coal that the company sold and that they all had permits to sell the coal they excavated. (*Id.*).

On cross-examination he stated that most of his work was for companies who were building roads but that the companies were “going under the hill taking the coal out, shaft mining.” (Tr. at 35-36). He stated that he always worked as a driller and that he would “drill down to the coal” and then “kick about a foot of dirt over top” to “keep from tearing the coal up” when they shot the ANPO. (Tr. at 36-37). He further explained that “we drill out there, they shoot that off, and they come behind, clean the coal right out behind.” (Tr. at 37).

When asked if he ever drilled holes where he did not hit coal, he replied “very seldom . . . I always stayed up in those areas that had coal. That’s where I done my work.” (*Id.*) When asked if there was ever a seam of coal that they would just haul off with the rock he stated “[n]o. They saved every bit of that coal.” (Tr. at 38). When asked if there were ever road jobs he worked where there was not coal, he replied “most of it was all coal. We took coal off of them.” (*Id.*) He testified that usually he would go through a cut and there would be a coal seam there. (Tr. at 39). He stated he would run the drill and there was always coal dust, shale dust, and rock dust coming out that he was breathing in. (*Id.*).

He stated he knew the companies were stripping the coal because he would see them clean the cuts and pile the coal up, which was then hauled away by a tractor and trailer. (Tr. at 39-40). When asked about the rock that was drilled out, he stated it was separated from the coal and then the companies would take the rock and use it for the fill to make the roads. (Tr. at 41).

Based on the Claimant's detailed accounts of his employment, and his demeanor at the hearing, I find the Claimant's testimony credible and therefore afford it substantial weight in my decision.

Smoking History

The nature and extent of a coal miner's smoking history is relevant to issues such as the existence of pneumoconiosis and the cause of a miner's disability. In determining the Claimant's smoking history, I must consider all relevant evidence and resolve any discrepancies in the record.¹² Dr. Glen R. Baker reported that the Claimant smoked one-half to one pack of cigarettes per day from when he was in his mid-twenties until he quit at age 38. Later, Dr. Baker reported that the Claimant smoked one pack of cigarettes per day for 10-12 years and that he quit smoking at age 38.

Based on the above, I find that the Claimant smoked for approximately 10-12 years, having begun in his mid-twenties and quitting at age 38. With regard to his rate of smoking, I have based my finding on an average of the reported rates of one-half to one pack and one pack of cigarettes per day. Thus, I find that the Claimant smoked, on average, approximately eight-tenths of a pack per day. Taking all of this into consideration, I find that the Claimant smoked for approximately 10-12 years at the rate of eight-tenths of a pack per day, or 8-10 pack years.

Controlling Law

The record reflects that the location of the Claimant's last coal mine employment was in Kentucky, thus this claim is within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.¹³

Qualifying Coal Mine Employment

The length of a coal miner's employment is relevant to the applicability of various statutory and regulatory presumptions. In determining the length of the miner's coal mine employment, the administrative law judge may apply any reasonable method of calculation.¹⁴ The parties dispute the length of the Claimant's coal mine employment. On his application for benefits, the Claimant alleged 25 years of coal mine employment. (DX 2). The Claimant testified at the hearing that he had at least 20 years of coal mine employment. (Tr. at 34). In the Decision and Order Denying Modification, the District Director found the Claimant had 1.97 years of coal

¹² See *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123, 1-137 (2006).

¹³ *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (en banc) (holding that the law of the Circuit in which the miner most recently worked applies).

¹⁴ *Clark v. Barnwell Coal Co.*, 22 B.L.R. 1-275, 1-280, 1-281, BRB Nos. 01-0876 BLA and 02-0280 BLA (Apr. 30, 2003); *Muncy v. Elkay Mining Co.*, BRB No. 11-0187 BLA (Nov. 30, 2011).

mine employment. (DX 95). In the prior adjudication, Judge Mosser found the Claimant had “approximately one year of qualifying employment.” (DX 80-2). Since reconsideration of all evidence is warranted under a request for modification, I will review the record to determine if the Claimant accrued the additional years of coal mine employment he has alleged.

Status as a “Miner”

The Claimant testified that he was exposed to coal dust every day during his employment as a driller working on road construction sites. Before determining the length of the Claimant’s coal mine employment, I must first consider if the Claimant’s road construction work would qualify him as a “miner” under the Regulations.

The Board has established a three part test to determine whether a worker is a “miner” within the meaning of the Act. To qualify as a miner, a 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**).¹⁵ The Court of Appeals for the Sixth Circuit, where this matter arose, has subsumed the status requirement into the function requirement. In the Sixth Circuit, a worker must prove that (a) he or she performed a function integral to the coal production process, and (b) the work performed occurred in or around a coal mine or coal preparation facility.¹⁶

The Claimant has met the function requirement of the test. The function prong requires that the work done by an individual be an integral or necessary part of the overall extraction process.¹⁷ The Claimant testified that the drilling work he did for the road construction was “just like strip mining . . . [i]f you got a mountain out there, and you got coal seams in here, you drill down to the coal . . . it’s the same thing.” (Tr. at 17). The Claimant’s employment as a drill operator to remove land and other materials to expose the underlying coal and allow for its extraction was an integral and necessary part of the removal process. Thus, the function prong is satisfied.

Turning to the “situs” requirement, this requires that an individual’s work occur “in or around a coal mine.”¹⁸ The regulations broadly define a “coal mine” as “an area of land and all structures . . . used in . . . the work of extracting . . . coal.”¹⁹ In *McKee v. Director, OWCP*,²⁰ the Board discussed the situs requirement. In *McKee*, the claimant worked at a cement company crushing coal purchased from a nearby strip-mining operation for use in making cement. The

¹⁵ *Whisman v. Director, OWCP*, 8 B.L.R. 1-96 (1985).

¹⁶ *Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 926, 929-30 (6th Cir. 1989) (employing two-part test).

¹⁷ *Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989); *Canonico v. Director, OWCP*, 7 B.L.R. 1-547 (1984).

¹⁸ *Petracca*, 884 F.2d at 929; *Sizemore v. Shamrock Coal Co., Inc.*, BRB No. 10-0263 BLA, slip-op at 5 (Feb. 16, 2011) (unpub.).

¹⁹ 20 C.F.R. § 725.101(a)(13).

²⁰ 2 B.L.R. 1-804(1980).

Board noted that Congressional intent indicated benefits be confined to “individuals . . . directly related to the production of coal.”²¹ The Board further noted that the “claimant’s employer, a cement manufacturer, did not own or operate a coal extraction site.”²² Thus, the Board held:

A cement manufacturing company which does not engage in the extraction of coal, but which processes coal for its own personalized use . . . is not engaging in the ‘preparation of coal’ under the Act, and therefore, cannot possibly constitute a coal mine as that term is defined by the Act. It naturally follows from this holding that the claimant has not fulfilled the basic requirements of the definition of ‘miner.’ The claimant was not employed by a ‘coal mine’

McKee is often cited for the proposition that “[t]he focus of the situs inquiry is whether the intended use of the land on which the claimant worked was for the extraction or preparation of coal.”²³

The Board further discussed the situs prong in *Smith v. Director, OWCP*.²⁴ In that case, the Board considered the issue of whether a clay mine that sold coal that it extracted during the course of its operations could be considered a coal mine under the Black Lung Benefits Act. The Board determined that, even though a clay mine might not engage in coal mining as its primary activity, it could qualify as a coal mine for purposes of the situs element of the coal miner test. The Board framed the issue as whether the employer had a sufficient economic interest in the coal generated in clay mining so that coal mining was a substantial part of the clay miner’s work. Thus, even though the mine was a clay mine, it could be considered a coal mine to the extent that it was used for the extraction of coal.

Based on the record, I find that the Claimant’s road construction sites meet the definition of a “coal mine” under the Act and thus satisfy the situs prong. Although the work performed on the sites was ultimately intended to turn the areas into roads, it is clear that the employers devoted substantial time to extracting coal from the sites and separating it from the other excavated rock and had a significant economic interest in the coal generated. Documents from the West Virginia Department of Transportation and the Kentucky Transportation Cabinet state that when highway construction contractors encounter coal reserves, the contractors are permitted to remove the coal and sell it. (DX 90). Further, documents from the Kentucky Energy and Environment Cabinet indicate that Elmo Greer & Sons and Bizzack Inc. (which merged with Addington Contracting) both held mining permits issued by the Kentucky Division of Mine Permits. (DX 82). The record reflects that these companies have also been cited in the past for improper excessive mining activities associated with their road construction projects. (DX 81; DX 83).

²¹ *Id.* at 1-809.

²² *Id.* at 1-8013.

²³ *Milam v. Brazier Mine Constr., Inc.*, BRB No. 06-0792 BLA, slip-op at 3 n.1 (July 31, 2007) (unpub.).

²⁴ BRB No. 83-2768 BLA (Apr. 16, 1986).

The Claimant testified on multiple occasions that the contractors he worked for would sell the coal that was excavated from the sites. (Tr. at 18-19, 38-39; DX 18 dep. at 5-8; DX 68 at 15). The Claimant specified that these companies saved all the coal they excavated. On cross-examination by the Director's Counsel, the Claimant elaborated:

Q: Well, I guess my question is, were there ever some seams of coal that they just hauled off with the rock?

A: No. They saved every bit of that coal.

Q: Okay. There was no seams that they just determined were –

A: If – if there was coal in a seam, Elmo Greer would get it.

Q: What about the other road jobs?

A: They done the same thing.

(Tr. at 38). The Claimant clarified further, stating:

We'd drill the holes and put off the shot, and there was a crew coming in behind, cleaning that coal and hauling it out on every job that I had . . . I seen them cleaning [the cuts] and piling [the coal] up . . . [e]very day where I was, they stripped coal on the road jobs all the time. They saved it all . . . it was hauled out on a tractor and trailer. . . [t]hey stripped the coal, and they took the rock and made a fill, made the roads . . . but they hauled the coal off in the tractors and trailers.

(Tr. at 36-41).

Finally, at least one company has responded stating that the Claimant's exposure to coal dust would have been "minimal, sporadic, infrequent, and incidental to his duties associated with highway construction." (DX 27). However, the Claimant has credibly testified he was exposed to coal dust as well as rock dust every day he worked. (Tr. at 39). He stated only "very seldom" would he drill a hole that did not hit coal. (Tr. at 37). When asked if he worked on cuts where there was no coal he replied "[n]o usually, we'd go through the cuts and there would be a coal seam down there . . . we was all the time hitting . . . black coal dust." (Tr. at 39).

I have found the Claimant's testimony to be very credible. It is clear that the companies the Claimant worked for frequently encountered coal seams in the course of their work as he testified he would encounter coal every day when he drilled. The record reflects that the discovery of coal seams was not incidental or happenstance to the road construction but rather a situation that was planned for and anticipated by these companies; as reflected by the permits to allow them to sell the coal that they excavated. Thus, the intended use of the land was partly for the extraction and preparation of coal. While engaging in their road operations these companies

treated coal different from the rock they cleared and would behave as mine operators: drilling, blasting, striping, cleaning, and loading the coal. Further, it is clear that the companies had a substantial economic interest in excavating the coal and selling it commercially. Accordingly, I find that the road construction sites the Claimant worked on were “coal mines” under the Act such that they satisfy the situs prong.

Therefore, I find that since the Claimant’s job as a driller was an integral part of the coal extraction process and the road construction sites meet the definition of “coal mines” under the Act, the Claimant was a “miner” pursuant to the Act while he was employed by road construction companies and such time should be counted toward his coal mine employment. I will next determine the length of the Claimant’s coal mine employment, including the time he worked road construction.

Length of Coal Mine Employment

In determining the length of a miner’s coal mine employment, the administrative law judge must discuss all relevant evidence in the record, including lay testimony, work records, Social Security earnings records, official documents, affidavits, and other evidence in the record.²⁵ The Board has stated that it will not interfere with an administrative law judge’s determinations of credibility unless they are inherently incredible or patently unreasonable.²⁶ An administrative law judge may properly find credible a claimant’s uncorroborated statement regarding length of coal mine employment.²⁷ Social Security earnings records need not be credited over other evidence in the record.²⁸ However, an administrative law judge may properly credit Social Security earnings records over a miner’s testimony.²⁹

1968-1977

The Board has held that counting quarters in which a miner earned \$50.00 or more, while not counting the quarters in which he earned less, for years prior to 1978, is a reasonable method of computing the length of coal mine employment.³⁰ The Claimant’s Social Security earnings record prior to 1978 includes quarterly earnings as well as an annual total. (DX 6).

²⁵ *Dawson v. Old Ben Coal Co.*, 11 B.L.R. 1-58 fn. 1 (1984) (citing *Mullins v. Director, OWCP*, 6 B.L.R. 7-508 (1983); *Williams v. Black Diamond Coal Mining Co.*, 6 B.L.R. 1-188 (1983)).

²⁶ *Tackett v. Cargo Mining Co.*, 12 B.L.R. 1-11 (1988) (en banc).

²⁷ *Tackett*, 12 B.L.R. 1-11 at 1-14 (citing *Harkey v. Alabama By-Products Corp.* 7 B.L.R. 1-26 (1984)); see also *Marcum v. Director, OWCP*, BRB No. 10-0341 BLA slip op. at 4 (Feb. 23, 2011) (unpub.) (finding the administrative law judge acted within his discretion in crediting claimant’s testimony regarding his coal mine employment where it did not conflict with claimant’s Social Security earnings records).

²⁸ *Tackett*, 12 B.L.R. 1-11 at 1-14 (citing *Calfee v. Director, OWCP*, 8 B.L.R. 1-7 (1985)).

²⁹ *Marcum*, BRB No. 10-0341 slip op. at 4 (finding rational the administrative law judge’s reliance on claimant’s Social Security earnings record to credit claimant with a year of coal mine employment despite claimant’s testimony that he did not recall working for the companies listed in the Social Security record).

³⁰ *Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984).

Year	# of Qtrs > \$50	Years of CME
1968	3	.75
1969	4	1.00
1975	2	.50
1976	3	.75
1977	1	.25
CME 1968-1977:		3.25

In examining the Claimant’s pre-1978 Social Security earnings record, he earned over \$50.00 per quarter for 13 quarters. (*Id.*) The Claimant also testified that from 1968-1969, he worked for R.C. Durr Holdings, a road construction and coal mining company for which he drilled and mined coal every day. (Tr. at 16, 20). He also testified that from 1975-1977, he was employed by Watts & Call Construction Co., which also stripped coal during road construction work. (Tr. at 21). Accordingly, I credit the Claimant with 3.25 years of coal mine employment prior to 1978.

Post-1977 Employment

Post-1977 Social Security Earnings are recorded annually and the administrative law judge must determine if a miner has a year of coal mine employment. The regulations define a year of coal mine employment as “a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 ‘working days.’”³¹ A “working day” is defined as “any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave.”³²

When determining the length of a miner’s coal mine employment, the administrative law judge should first determine, if possible, the beginning and ending dates of the miner’s period or periods of coal mine employment.³³ The dates and length of a miner’s coal mine employment “may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony.”³⁴

If the evidence is insufficient to establish the beginning and ending dates of a miner’s employment, an administrative law judge may use any reasonable means of calculating the length of a miner’s coal mine employment.³⁵ Once the length of any periods of the miner’s coal mine employment has been determined, the administrative law judge should then determine whether the miner worked in or around coal mines at least 125 working days during each

³¹ § 725.101(a)(32).

³² *Id.*

³³ § 725.101(a)(32)(ii); *Dawson v. Old Ben Coal Co.*, 11 B.L.R. 1-58 fn. 1 (1984) (citing *Sisko v. Helen Mining Co.*, 8 B.L.R. 1-272 (1985); *Bungo v. Bethlehem Mines Corp.*, 8 B.L.R. 1-348 (1985)).

³⁴ § 725.101(a)(32)(ii).

³⁵ *Clark v. Barnwell Coal Co.*, 22 B.L.R. 1-275, 1-280, 1-281, BRB Nos. 01-0876 BLA and 02-0280 BLA (Apr. 30, 2003).

calendar year or partial periods totaling one year.³⁶ If the evidence establishes that the miner's coal mine employment spanned a calendar year or partial periods totaling one calendar year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment."³⁷

Thus, where there is sufficient evidence to establish one calendar year of coal mine employment or partial periods totaling one calendar year, the burden then shifts to the party opposing entitlement to demonstrate that the claimant worked for less than 125 working days within that calendar year.³⁸ To determine the number of working days the miner worked in a year, the administrative law judge may divide the miner's yearly income from coal mine employment by "the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics."³⁹ If the miner worked fewer than 125 working days in a year, the miner shall be credited with "a fractional year based on the ratio of the actual number of days worked to 125."⁴⁰

1978

After reviewing the evidence of record, I find that it is insufficient to establish the precise beginning and ending dates of the Claimant's employment during 1978 or whether he worked a complete calendar year. The Claimant testified he worked for two companies that operated coal mines or road construction sites where they excavated coal. (Tr. at 23, 26). The Claimant's Social Security earnings show that he earned \$7,606.25 working for Kentucky Road Oiling Inc. and \$4,273.65 working for Watts & Call Construction Co.

However, the Claimant also testified that he worked for companies (Wilputte Corp. and Tucker Lufder A Partnership) where he was not exposed to coal. (Tr. at 25). Thus, I divide the Claimant's earnings from coal mine employment in 1978 (\$11,879.90) by the yearly wage base in 1978 (\$17,700.00), as reported in Exhibit 609.⁴¹ Accordingly, I credit the Claimant with .67 year of coal mine employment during 1978.

³⁶ 725.101(a)(32); *Dawson v. Old Ben Coal Co.*, 11 B.L.R. 1-58 fn. 1 (1984) (citing *Calfee v. Director, OWCP*, 8 B.L.R. 1-575 (1983); *Hurd v. Director, OWCP*, 5 B.L.R. 1-106 (1982)).

³⁷ § 725.101(a)(32)(ii).

³⁸ *Id.*; *Hayton v. Black Diamond Construction Co.*, BRB No. 10-0347 BLA (Mar. 24, 2011) (unpub.).

³⁹ § 725.101(a)(32)(iii); see Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual, Average Earnings of Employees in Coal Mining* (Apr. 2012) ("Exhibit 610"); *Clark v. Barnwell Co.*, 22 B.L.R. 1-275, 1-280 (2003); see *H.K. v. Kincer/Bentley Coal Co.*, B.R.B. No. 08-0492 BLA (Feb. 13, 2009) (unpub.) slip op. at 3. Section 725.101(a)(32)(iii) refers to a table developed by the Bureau of Labor Statistics as listing the average daily earnings of a coal miner. However, the Department of Labor uses a table identified as Exhibit 610 of the Office of Workers Compensation Programs Coal Mine (BLBA) Procedure Manual. See Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual, Average Earnings of Employees in Coal Mining*, available at <http://www.dol.gov/owcp/dcmwc/blba/indexes/Exhibit610TR.12.07.pdf>. This exhibit provides average earnings of employees in Coal Mining for the years 1961 to 2011.

⁴⁰ § 725.101(a)(32)(i).

⁴¹ Available at <http://www.dol.gov/owcp/dcmwc/exh609.htm>. This exhibit provides the "wage base" from 1937 to 2011.

1979

After reviewing the evidence of record, I find that it is insufficient to establish the precise beginning and ending dates of the Claimant's employment during 1979 or whether he worked a complete calendar year. The Claimant testified that he worked for Watts & Call Construction Co., Shannon & Hurd Construction Inc., and James A. Hurd & J B Shannon Ptr. and that all three companies extracted coal during road construction jobs. (Tr. at 26-27). The Claimant earned \$5,658.89 working for Watts & Call Construction Co., \$3,787.15 working for Shannon & Hurd Construction Inc., and \$7,044.38 working for James A. Hurd & J B Shannon Ptr.

However, the Claimant also testified that he worked for a company (Tucker Lufder A Partnership) where he was not exposed to coal. (Tr. at 25). Thus, I divide the Claimant's earnings from coal mine employment in 1979 (\$16,490.42) by the yearly wage base in 1979 (\$22,900.00), as reported in Exhibit 609. Accordingly, I credit the Claimant with .72 years of coal mine employment during 1979.

1980

After reviewing the evidence of record, I find that it is insufficient to establish the precise beginning and ending dates of the Claimant's employment during 1980 or whether he worked a complete calendar year. The Claimant testified he worked for three companies that operated coal mines or road construction sites where they excavated coal. (Tr. at 28-29). The Claimant earned \$2,887.86 working for James A. Hurd & J B Shannon Ptr., \$12,178.18 working for East Kentucky Paving Co., and \$1,029.38 working for Shaker Coal Co. Inc.

However, the Claimant also testified that he worked for a company (Holloway Construction Co.) where he was not exposed to coal. (Tr. at 29). Thus, I divide the Claimant's earnings from coal mine employment in 1980 (\$16,059.42) by the yearly wage base in 1980 (\$25,900.00), as reported in Exhibit 609. Accordingly, I credit the Claimant with .62 of one year of coal mine employment during 1980.

1981

After reviewing the evidence of record, I find that it is insufficient to establish the precise beginning and ending dates of the Claimant's employment during 1981 or whether he worked a complete calendar year. The Claimant testified he worked for two companies that operated coal mines or road construction sites where they excavated coal. (Tr. at 29-30). The Claimant earned \$14,530.72 working for East Kentucky Paving Co., and \$1,043.28 working for Raytheon Engineers and Constructors Inc.

However, the Claimant also testified that he worked for a company (H G Mays Corp.) where he could not remember what work he did or if he was exposed to coal. (Tr. 30-31). Thus, I divide the Claimant's earnings from coal mine employment in 1981 (\$15,574.00) by the yearly wage base in 1981 (\$29,700.00), as reported in Exhibit 609. Accordingly, I credit the Claimant with .52 years of coal mine employment during 1981.

1982

After reviewing the evidence of record, I find that it is insufficient to establish the precise beginning and ending dates of the Claimant's coal mine employment during 1982 or whether he worked a complete calendar year. The Claimant testified he worked for three companies that operated coal mines or road construction sites where they excavated coal. (Tr. at 30-31). The Claimant earned \$12,004.24 working for James A. Hurd & J B Shannon Ptr., \$1,822.74 working for Raytheon Engineers and Constructors Inc., and \$1,687.68 working for Mor-Coal Inc.

However, the Claimant also testified that he worked for a company (Walker Co. Inc.) where he was not exposed to coal. (Tr. at 31). Thus, I divide the Claimant's earnings from coal mine employment in 1982 (\$15,514.66) by the yearly wage base in 1982 (\$32,400.00), as reported in Exhibit 609. Accordingly, I credit the Claimant with .48 years of coal mine employment during 1982.

1983

After reviewing the evidence of record, I find that it is insufficient to establish the precise beginning and ending dates of the Claimant's coal mine employment during 1983 or whether he worked a complete calendar year. The Claimant testified he worked for one company that operated a road construction site where they excavated coal. (Tr. at 32). The Claimant earned \$8,393.79 working for Melco-Greer LLC.

However, the Claimant also testified that he worked for a company (Walker Co. Inc.) where he was not exposed to coal. (Tr. at 31). Thus, I divide the Claimant's earnings from coal mine employment in 1983 (\$8,393.79) by the yearly wage base in 1983 (\$35,700.00), as reported in Exhibit 609. Accordingly, I credit the Claimant with .24 years of coal mine employment during 1983.

1984

After reviewing the evidence of record, I find that it is insufficient to establish the precise beginning and ending dates of the Claimant's coal mine employment during 1984 or whether he worked a complete calendar year. The Claimant testified he worked for two company that operated coal mines or road construction sites where they excavated coal. (Tr. at 20, 32). The Claimant earned \$16,422.80 working for Melco-Greer LLC, and \$385.84 working for R C Durr Holdings.

However, the record also shows the Claimant worked for the United Steel Workers of America where he was not exposed to coal. (DX 17-27). Thus, I divide the Claimant's earnings from coal mine employment in 1984 (\$16,808.64) by the yearly wage base in 1984 (\$37,800.00), as reported in Exhibit 609. Accordingly, I credit the Claimant with .44 years of coal mine employment during 1984.

1985

Pursuant to his credible testimony, I find that the Claimant worked an entire calendar year in coal mining employment in 1985. The Claimant testified that he worked for Melco-Greer LLC, and that he drilled and stripped coal during the road construction. (Tr. at 32). The Claimant earned \$10,330.16 in 1985. For periods where the record reflects an entire calendar year of coal mining employment, I will, in accordance with the Board's interpretation of the regulations, compare the Claimant's wages with the table of 125 day average earnings for employees in coal mining found at Exhibit 610.

The Average Earnings of Employees in Coal Mining for 125 Days in 1985 was \$15,250.00. Thus, I divide the Claimant's earnings from coal mine employment in 1985 (\$10,330.16) by the yearly wage base in 1985 (\$15,250.00), as reported in Exhibit 610. Accordingly, I credit the Claimant with .68 years of coal mine employment during 1985.

1986

Pursuant to his credible testimony, I find that the Claimant worked an entire calendar year in coal mining employment in 1986. The Claimant testified that he worked for Melco-Greer LLC, and that he drilled and stripped coal during the road construction. (Tr. at 32). The Claimant earned \$4,724.02 in 1986 and testified that "work got really slow." (Tr. at 32). The Average Earnings of Employees in Coal Mining for 125 Days in 1986 was \$15,390.00. Thus, I divide the Claimant's earnings from coal mine employment in 1986 (\$4,724.02) by the yearly wage base in 1986 (\$15,390.00), as reported in Exhibit 610. Accordingly, I credit the Claimant with .31 years of coal mine employment during 1986.

1987

Pursuant to his credible testimony, I find that the Claimant worked an entire calendar year in coal mining employment in 1987. The Claimant testified that he worked for Melco-Greer LLC, and that he drilled and stripped coal during the road construction. (Tr. at 32). The Claimant earned \$39,090.83 in 1987. The Average Earnings of Employees in Coal Mining for 125 Days in 1987 was \$15,750.00. Because the Claimant worked for the entire calendar year and his yearly earnings for 1987 exceed the Average Earnings of Employees in Coal Mining for 125 days, I credit the Claimant with one year of coal mine employment during 1987.

1988

Pursuant to his credible testimony, I find that the Claimant worked an entire calendar year in coal mining employment in 1988. The Claimant testified that he worked for Addington Contracting Inc., and that he drilled and stripped coal during road construction. (Tr. at 19; DX 17). The Claimant earned \$25,121.09 in 1988. The Average Earnings of Employees in Coal Mining for 125 Days in 1988 was \$15,940.00. Because the Claimant worked for the entire calendar year and his yearly earnings for 1988 exceed the Average Earnings of Employees in Coal Mining for 125 days, I credit the Claimant with one year of coal mine employment during 1988.

1989

Pursuant to his credible testimony, I find that the Claimant worked an entire calendar year in coal mining employment in 1989. The Claimant testified that he worked for Addington Contracting Inc., and that he drilled and stripped coal during road construction. (Tr. at 19; DX 17). The Claimant earned \$39,248.84 in 1989. The Average Earnings of Employees in Coal Mining for 125 Days in 1989 was \$16,250.00. Because the Claimant worked for the entire calendar year and his yearly earnings for 1989 exceed the Average Earnings of Employees in Coal Mining for 125 days, I credit the Claimant with one year of coal mine employment during 1989.

1990

After reviewing the evidence of record, I find that it is insufficient to establish the precise beginning and ending dates of the Claimant's coal mine employment during 1990 or whether he worked a complete calendar year. The Claimant testified he worked for one company that operated coal mines or road construction sites where they excavated coal. (Tr. at 19). The Claimant earned \$10,894.70 with Bizzack Inc. in 1990.

However, the Claimant also testified that he worked for companies (Cleveland Consolidated Inc. and Incisa USA Inc.) where he was not exposed to coal or cannot remember what job he performed. (DX 17). Thus, I divide the Claimant's earnings from coal mine employment in 1990 (\$10,894.70) by the yearly wage base in 1990 (\$51,300.00), as reported in Exhibit 609. Accordingly, I credit the Claimant with .21 years of coal mine employment during 1990.

1991

After reviewing the evidence of record, I find that it is insufficient to establish the precise beginning and ending dates of the Claimant's coal mine employment during 1991 or whether he worked a complete calendar year. The Claimant testified he worked for one company that operated coal mines or road construction sites where they excavated coal. (Tr. at 33-34). The Claimant earned \$35,480.14 with Elmo Greer & Sons Inc. in 1991.

However, the Claimant also testified that he worked a company (Incisa USA Inc.) where he was not exposed to coal. (DX 17). Thus, I divide the Claimant's earnings from coal mine employment in 1991 (\$35,480.14) by the yearly wage base in 1991 (\$53,400.00), as reported in Exhibit 609. Accordingly, I credit the Claimant with .66 years of coal mine employment during 1991.

1992

Pursuant to his credible testimony, I find that the Claimant worked an entire calendar year in coal mining employment in 1992. The Claimant testified that he worked for Elmo Greer & Sons Inc. and that he drilled and stripped coal during road construction. (Tr. at 33-34). The Claimant earned \$32,871.76 in 1992. The Average Earnings of Employees in Coal Mining for

125 Days in 1992 was \$17,200.00. Because the Claimant worked for the entire calendar year and his yearly earnings for 1992 exceed the Average Earnings of Employees in Coal Mining for 125 days, I credit the Claimant with one year of coal mine employment during 1992.

1993

Pursuant to his credible testimony, I find that the Claimant worked an entire calendar year in coal mining employment in 1993. The Claimant testified that he worked for Elmo Greer & Sons Inc. and that he drilled and stripped coal during road construction. (Tr. at 33-34). The Claimant earned \$35,728.68 in 1993. The Average Earnings of Employees in Coal Mining for 125 Days in 1993 was \$17,260.00. Because the Claimant worked for the entire calendar year and his yearly earnings for 1993 exceed the Average Earnings of Employees in Coal Mining for 125 days, I credit the Claimant with one year of coal mine employment during 1993.

1994

Pursuant to his credible testimony, I find that the Claimant worked an entire calendar year in coal mining employment in 1994. The Claimant testified that he worked for Elmo Greer & Sons Inc. and that he drilled and stripped coal during road construction. (Tr. at 33-34). The Claimant earned \$37,284.59 in 1994. The Average Earnings of Employees in Coal Mining for 125 Days in 1994 was \$17,760.00. Because the Claimant worked for the entire calendar year and his yearly earnings for 1994 exceed the Average Earnings of Employees in Coal Mining for 125 days, I credit the Claimant with one year of coal mine employment during 1994.

1995

Pursuant to his credible testimony, I find that the Claimant worked an entire calendar year in coal mining employment in 1995. The Claimant testified that he worked for Elmo Greer & Sons Inc. and that he drilled and stripped coal during road construction. (Tr. at 33-34). The Claimant earned \$34,223.61 in 1995. The Average Earnings of Employees in Coal Mining for 125 Days in 1995 was \$18,440.00. Because the Claimant worked for the entire calendar year and his yearly earnings for 1995 exceed the Average Earnings of Employees in Coal Mining for 125 days, I credit the Claimant with one year of coal mine employment during 1995.

1996

After reviewing the evidence of record, I find that it is insufficient to establish the precise beginning and ending dates of the Claimant's coal mine employment during 1996 or whether he worked a complete calendar year. The Claimant testified he worked for one company that operated coal mines or road construction sites where they excavated coal. (Tr. at 33-34). The Claimant earned \$5,460.75 with Elmo Greer & Sons Inc. in 1996.

However, the record also reflects that the Claimant worked for companies (J F Allen Coal, Allen Co. Inc., and Central Rock and Mineral Co.) where it is not clear if he was exposed to coal or not. Thus, I divide the Claimant's earnings from coal mine employment in 1996

(\$5,460.75) by the yearly wage base in 1996 (\$62,700.00), as reported in Exhibit 609. Accordingly, I credit the Claimant with .09 years of coal mine employment during 1996.

1997

Pursuant to his credible testimony, I find that the Claimant had five months of coal mine employment in 1997. The Claimant testified that he had heart problems in May of 1997 and did not return to work after that. (Tr. at 34). The Claimant's Social Security earnings show that the Claimant earned \$17,116.75 with Elmo Greer & Sons Inc. in 1997. As the Claimant had substantial earnings for the months he stated he worked, I credit him with .42 years of coal mine employment during 1997.

Total Coal Mining Employment

Based on the Claimant's credible testimony at the hearing and the earning reflected in the Social Security records from 1968 until 1997, I find that the Claimant has demonstrated 16.31 years of qualifying coal mining employment.

NEWLY SUBMITTED MEDICAL EVIDENCE

Medical evidence submitted with a claim for benefits under the Act is subject to the requirements that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence.⁴² The regulations address the criteria for chest x-rays, pulmonary functions tests, physical reports, arterial blood gas studies, autopsies, biopsies, and "other medical evidence."⁴³ "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the submission of medical evidence.⁴⁴ 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."⁴⁵ 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.⁴⁶ 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

⁴² See 20 C.F.R. §§ 718.101 to 718.107.

⁴³ *Id.*

⁴⁴ 20 C.F.R. § 725.414.

⁴⁵ *Id.* § 725.414(a)(2)(i), (a)(3)(i).

⁴⁶ *Id.* § 725.414(a)(2)(ii), (a)(3)(ii).

physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.”⁴⁷ Medical evidence that exceeds the limitations of section 725.414 “shall not be admitted into the hearing record in the absence of good cause.”⁴⁸

The regulations further provide that a party may submit the results of any other medically acceptable test or procedure that tends to demonstrate the presence or absence of any respiratory or pulmonary impairment.⁴⁹ Interpretations of digital x-rays and computed tomography (CT) scans are often submitted pursuant to this provision.⁵⁰ The Board has construed this provision to limit each party to the submission, as part of its affirmative case, to one reading of each separate test or procedure undergone by the miner.⁵¹

Finally, the regulations allow parties to submit additional evidence during a modification proceeding. The claimant and the responsible operator may submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional arterial blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414.⁵² In *Rose v. Buffalo Mining Company*, the Board held that sections 725.414 and 725.310(b) “should be read together to establish combined evidentiary limits on modification, to allow a party to submit for the first time in a modification proceeding all of the evidence permitted by each regulation.”⁵³ The Board determined that on modification, each party may submit its “full complement of medical evidence” allowed under § 725.414, in addition to the evidence allowed under § 725.310(b).⁵⁴

I. Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. Treatment records and records from the prior claim are not subject to the limitations.

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. Small opacities (1, 2, or 3) (in ascending order of profusion) may be classified as round (p, q, r) or irregular (s, t, u), and may be evidence of “simple pneumoconiosis.” Large opacities (greater than one centimeter) may be classified as A, B or C, in ascending order of size, and may be evidence of “complicated pneumoconiosis.” A chest x-ray classified as category “0,” including subcategories 0 / -, 0 / 0, 0 / 1, does not constitute evidence of pneumoconiosis.⁵⁵

⁴⁷ *Id.*

⁴⁸ *Id.* § 725.456(b)(1).

⁴⁹ 20 C.F.R. § 725.107(a).

⁵⁰ See *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc).

⁵¹ *Id.* at 1-134.

⁵² 20 C.F.R. § 725.310(b).

⁵³ *Rose v. Buffalo Mining Co.*, BRB No. 06-0207 BLA, slip op. at 5 (Jan. 31, 2007).

⁵⁴ *Id.* slip op. at 6.

⁵⁵ 20 C.F.R. § 718.102(b).

The previous x-ray evidence was already charted by Judge Mosser in his Decision and Order. (DX 74.) The newly submitted medical evidence includes three readings of two chest x-rays.⁵⁶

The Claimant submitted an interpretation by Dr. Glen Baker, a B-reader, who interpreted an x-ray dated July 31, 2009, as positive for pneumoconiosis, profusion 3/2 with a class A large opacity. (DX 89). Dr. Baker noted the presence of large opacity in the right upper lung that represented progressive massive fibrosis and was consistent with advanced pneumoconiosis. The Director submitted a rebuttal reading by Dr. P.J. Barrett, a Board-certified radiologist and B-reader, who interpreted the July 31, 2009, x-ray as positive for pneumoconiosis and noted small opacities, profusion 2/2. (DX 93). However, Dr. Barrett did not note the presence of a large opacity. Finally, Dr. Barrett noted a coalescence of small opacities and emphysema.

The Claimant also submitted an interpretation by Dr. Thomas Miller, dually-qualified, who interpreted an x-ray dated October 19, 2012, as positive for pneumoconiosis, profusion 2/2 with a class A large opacity. (CX 2). Dr. Miller noted the presence of a 3 x 1 cm opacity in the right upper lung that was compatible with complicated pneumoconiosis. He additionally noted coalesce of small opacities, an atherosclerotic aorta, and hyperexpansion consistent with COPD/Emphysema.

II. Pulmonary Function Studies

The previous pulmonary function study evidence was already charted by Judge Mosser in his Decision and Order. (DX 74.) The Claimant designated two additional PFTs on modification.⁵⁷

The first PFT was performed on July 31, 2009, under the direction of the Dr. Baker. (DX 89). It produced the following values: FEV₁: 1.86; FVC: 2.92; FEV₁/FVC: 64%. Dr. Baker noted a good degree of cooperation and ability to understand instruction and follow directions. He attached tracings with a flow-volume loop.

The second PFT was performed on October 19, 2012, by Dr. Baker. (CX 41). It produced the following values: FEV₁: 2.60; FVC: 3.26; FEV₁/FVC: 80%. Dr. Baker noted the Claimant's good effort, degree of cooperation and ability to understand instruction and follow directions. He attached tracings with a flow-volume loop.

III. Arterial Blood Gas Studies

The previous arterial blood gas study evidence was already charted by Judge Mosser in his Decision and Order. (DX 74.) The Claimant designated two additional ABGs on modification.⁵⁸

⁵⁶ The Claimant has submitted two chest x-ray interpretations on modification. (DX 89 and CX 2). However, as the Claimant submitted only one chest x-ray interpretation prior to the hearing before Judge Mosser (DX 14), both interpretations will now be considered pursuant to the holding in *Rose v. Buffalo Mining Co., supra*.

⁵⁷ As the Claimant submitted only one pulmonary function study prior to the hearing before Judge Mosser (DX 14), both studies will now be considered pursuant to the holding in *Rose v. Buffalo Mining Co., supra*.

The first ABG was performed by Dr. Baker on July 31, 2009. (DX 89). It produced the following values: pO₂: 77/75; pCO₂: 44/45.

The second ABG was performed on October 19, 2012, by Dr. Baker. (CX 1). It produced the following values: pO₂: 83; pCO₂: 42.

IV. Narrative Medical Evidence

Treatment Records

The regulations allow the parties to submit treatment and hospital records relating to the miner's hospitalization or treatment for "*a respiratory or pulmonary or related disease*" without limitation.⁵⁹ Accordingly, the parties submitted treatment records into evidence at DX 94 and CX 4. Although the regulations allow for the admission of such records, only specific types of medical evidence may be used to establish pneumoconiosis⁶⁰ and total disability.⁶¹ Therefore, although duly considered, for the sake of judicial economy, the treatment records are not summarized as such. Rather, any objective studies of the type necessary to establish pneumoconiosis (including, *e.g.*, autopsy and biopsy reports, chest x-rays employing an ILO classification, CT scans and medical reports as defined in §718.104) have been previously summarized. Furthermore, any objective studies of the type necessary to establish total disability (including, *e.g.*, pulmonary function studies, arterial blood gas studies containing both a PO₂ and a PCO₂, diagnoses of cor pulmonale, and medical reports as defined in §718.104) have been previously summarized. The remaining treatment records, though examined in their entirety, have only been summarized if relevant to the specific legal issues before me, or specifically identified and relied upon by the parties.

Medical Opinions⁶²

Examination Performed by Dr. Glen Baker on July 31, 2009 (DX 89)

Dr. Baker, Board-certified in Internal Medicine and Pulmonology, and a B-reader, examined the Claimant and provided a report dated July 31, 2009. He took pertinent medical, social, family, and work histories. He noted the Claimant worked for 25 years in road construction as a driller where he was exposed to rock dust. He also noted the Claimant worked for 1.5 years at a strip mine. Additionally, he reported that the Claimant smoked one-half to one pack of cigarettes per day from when he was in his mid-twenties until he quit at age 38.

Dr. Baker noted that the Claimant had a history of childhood pneumonia, attacks of wheezing, chronic bronchitis, asthma, arthritis, heart disease since 1997, and high blood

⁵⁸ As the Claimant submitted only one arterial blood gas study prior to the hearing before Judge Mosser (DX 14), both studies will now be considered pursuant to the holding in *Rose v. Buffalo Mining Co.*, *supra*.

⁵⁹ §714.404(a)(4).

⁶⁰ *See* §718.202.

⁶¹ *See* §718.204(b)(2).

⁶² The Claimant submitted two medical reports on modification. (DX 89 and CX 1). However, as the Claimant submitted only one medical report prior to the hearing before Judge Mosser (DX 14), both reports will now be considered pursuant to the holding in *Rose v. Buffalo Mining Co.*, *supra*.

pressure. He noted the Claimant's complaints as: daily cough with sputum production, wheezing, dyspnea upon exertion, hemoptysis (the Claimant reported frequent streaks of blood everyday), 1-2 pillow orthopnea, and ankle edema. He interpreted the Claimant's chest x-ray as positive for pneumoconiosis profusion 3/2, with a large opacity, category A. On physical examination he noted scattered inspiratory and expiratory wheezing. He noted the PFT values revealed a mild obstructive ventilatory defect. He interpreted that the ABG showed mild hypoxemia at rest and with exercise.

Dr. Baker diagnosed the Claimant with pneumoconiosis, COPD based on the PFT, chronic bronchitis based on the symptoms and history, and hypoxemia based on the ABG. He noted the Claimant had x-ray evidence of occupational pneumoconiosis. He noted the Claimant worked for 25 years as a driller exposed to rock dust and that he had no other condition to account for the radiographic changes. He concluded the changes were due to the Claimant's occupational exposure and represented silicosis and clinical pneumoconiosis.

He also diagnosed the Claimant with legal pneumoconiosis based on his chronic obstructive airway disease, chronic bronchitis, and hypoxemia. He attributed these conditions to a dual etiology of occupational coal dust exposure and tobacco exposure from past smoking which "act synergistically in their effects on the lungs." He concluded that the Claimant's condition was "significantly contributed to and substantially aggravated by dust exposure in his coal mine employment."

He noted that the PFT and ABG studies only revealed a mild impairment but that the Claimant was totally impaired based on his x-ray changes which showed advanced pneumoconiosis which he considered a "totally and permanently disabling condition." He stated the Claimant would not have the "ability to work in rock dust as his condition may worsen." He concluded that the Claimant's condition was due to a "combination of his rock dust exposure and his cigarette smoking history."

Examination Performed by Dr. Glen Baker on October 19, 2012 (CX 1)

Dr. Baker examined the Claimant again and provided a report dated October 19, 2012. He took pertinent medical, social, family, and work histories. He noted the Claimant worked for 28 years in the mining industry primarily as a rock driller but noted he also worked at strip mines. Additionally, he reported that the Claimant smoked one pack of cigarettes per day for 10-12 years and that he quit smoking at age 38.

Dr. Baker noted that the Claimant had a history of childhood pneumonia and heart disease. He noted the Claimant's complaints as: shortness of breath, daily cough with sputum production, wheezing, hemoptysis, and 2-pillow orthopnea. He noted the Claimant's symptoms were aggravated by exertion, hot and humid weather, and exposure to dust, odor, or fumes. He also noted the Claimant could walk 100 yards on level ground before he became short of breath and needed to stop. He interpreted the Claimant's chest x-ray as positive for pneumoconiosis profusion 3/2, with a large opacity, category A. On physical examination he noted the Claimant's lungs were clear. He noted the PFT values revealed a mild obstructive ventilatory defect and that the ABG revealed normal oxygenation.

Dr. Baker diagnosed the Claimant with clinical and legal pneumoconiosis, progressive massive fibrosis, COPD, and chronic bronchitis. He noted the Claimant had “advanced pneumoconiosis with both progressive massive fibrosis and AX present on his chest x-ray.” He noted that the Claimant had legal pneumoconiosis based on the clinical signs and symptoms that can be due to coal dust exposure.

He also noted that the Claimant was disabled due to his “complicated pneumoconiosis with progressive massive fibrosis and AX and reduction in his FEV₁ in association with legal pneumoconiosis which is significantly contributed to and aggravated by dust exposure in his coal mine employment.” He stated the Claimant’s condition was caused by a long history of coal dust exposure. Finally, he concluded that the Claimant was restricted because of his obstructive airway disease and would have difficulty performing manual labor. He stated that Claimant could only do sedentary occupations comfortably and would have difficulty doing anything that required more than “mild physical exertion.”

Deposition of Dr. Glen Baker Taken May 21, 2015 (CX 5)

Dr. Baker was deposed on May 21, 2015. Upon direct examination, he discussed his October 19, 2012, examination and testified that it is hard to differentiate between rock dust and coal dust exposure. He noted the Claimant worked for strip mines and as a rock driller but even then “he would be in coal dust at times” as he drilled through the coal seams. He noted the Claimant was a past smoker, which he also considered when making his diagnoses.

He discussed the Claimant’s x-rays and noted the changes were due to a combination of silica and coal dust exposure as a rock driller. He testified that one cannot look at an x-ray and determine which opacities were caused by rock dust and which opacities were caused by coal dust. He stated that combined exposure to rock and coal dust both contributed to the Claimant’s pneumoconiosis and that the Claimant’s coal dust exposure was a substantial contributing factor. He also testified that the Claimant had legal pneumoconiosis due to his COPD and chronic bronchitis, which could be attributed to his coal dust exposure. He finally stated that the Claimant would not meet the disability standards but he would have trouble performing heavy work, such as lifting 50-100 lbs., on a regular basis.

Upon cross examination, Dr. Baker reviewed Dr. Forehand’s report. When asked if assuming the Claimant only had two years of coal mine employment if he agreed with Dr. Forehand’s conclusions, he replied that the Claimant’s lung condition was due to a combination of his total exposures. He further explained that the time of exposure would be important and assuming the Claimant only had two years of coal mine employment, his rock dust exposure would be “significant” and “part of the etiology of his condition.” He did note that hard rock silicosis is a type of pneumoconiosis. Finally, he stated that he had performed “at least a thousand” pulmonary examinations and he had never seen a patient with complicated pneumoconiosis and only two years of coal mine employment.

Upon redirect examination when asked if the Claimant was exposed to coal dust during the twenty-five years he spent as a rock driller and if that exposure to coal dust would impact his condition, Dr. Baker replied “[h]is condition was caused by whatever coal dust exposure he had and whatever rock dust exposure he had.”

Consultative Report by Dr. J. R. Forehand dated May 13, 2015 (DX 101)

Dr. J. Randolph Forehand, Board-certified in Pediatrics, Allergy, and Immunology, reviewed medical records and provided a consultative report dated May 13, 2015. He noted that Claimant could prove 1.97 years of coal mine employment as a driller at a surface mine. He noted that the Claimant also worked for 25 years as a driller on road construction jobs where he drilled through seams of coal, shale rock, and hard rock incidental to the construction work.

Dr. Forehand reviewed interpretations of an October 19, 2012, x-ray by Dr. Miller who reported r/t opacities, 2/2 profusion with a large opacity, category A, and by Dr. Kathleen DePonte who reported r/q opacities, profusion 2/2 with a large opacity, category A.⁶³

Dr. Forehand concluded: “[t]aking into account [the Claimant’s] 1.97 years of coal mine employment and the appearance of his chest x-ray showing ‘r’ size rounded opacities, he has hard rock silicosis related to his 25 years as a driller on road construction jobs but not substantially related to or caused by his 1.97 years of coal mine employment.” He also noted that 1.97 years of coal mine employment is not a sufficient length of time to develop a coal mine-dust related lung disease.

DISCUSSION AND APPLICABLE LAW

The Claimant’s claim was denied on August 28, 2008, by Judge Mosser who found finding that the Claimant had approximately one year of coal mine employment and failed to prove the existence of pneumoconiosis caused by his coal mine employment, or that he was totally disabled due to his coal mine employment. I will review the evidence submitted by the parties in this request for modification, to determine if the Claimant has established any element of entitlement previously decided him. If the Claimant establishes a change in an applicable condition of entitlement, the entire record must be reviewed *de novo* to determine if the Claimant is entitled to benefits.

⁶³ No chest interpretation from Dr. DePonte is of record. In *Keener v. Peerless Eagle Coal Corp.*, 23 B.L.R. 1-229 (en banc), the Board held that when a physician bases his report on evidence that is not properly admitted, the administrative law judge must assess the impact of the improperly admitted evidence. Further, the Board held that the administrative law judge has several options in handling the report: 1) exclude the report, 2) redact the objectionable content, 3) ask the physician to submit a new report, or 4) factor in the physician’s reliance on the improper evidence in determining what weight to assign to the report. Applying *Keener*, I chose the second option provided by the Board, which is to not take into account any of the doctor’s testimony when that testimony considers, refers to, or specifically mentions Dr. DePonte’s chest x-ray interpretation.

I. Complicated Pneumoconiosis

A living miner is entitled to an irrebuttable presumption of disability due to pneumoconiosis under 20 C.F.R. § 718.304 upon a finding of complicated pneumoconiosis. Specifically, this section requires that the miner have been diagnosed with having a “chronic dust disease of the lung” having certain characteristics. The existence of complicated pneumoconiosis may be established when diagnosed by a chest x-ray which yields one or more large opacities (greater than 1 centimeter) and would be classified in Category A, B, or C.⁶⁴ X-ray evidence is not the exclusive means of establishing complicated pneumoconiosis. Its existence may also be established by biopsy or autopsy,⁶⁵ or by an equivalent diagnostic result reached by other means.⁶⁶ The Board has held that the Administrative Law Judge must first determine whether the relevant evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at each subsection before determining whether invocation of the irrebuttable presumption has been established.⁶⁷ The Sixth Circuit has held that “[x]-ray evidence of opacities larger than one centimeter does not automatically trigger the irrebuttable presumption when conflicting evidence exists.”⁶⁸

The irrebuttable presumption will be invoked if a chest x-ray interpretation shows an opacity greater than one centimeter in diameter.⁶⁹ In weighing competing interpretations, the Board has held that greater weight may be accorded to x-ray interpretations of dually qualified physicians (those who are a B-Reader and a board certified radiologist) over a physician who is only a B-reader.⁷⁰ In the circumstance that two equally qualified radiologists produce contrary findings and neither offered a convincing explanation of why their opinion was superior to the other, the two opinions effectively cancel each other out.

The recently submitted x-ray evidence has been previously summarized.⁷¹ A film dated July 31, 2009, was read by Dr. Baker, a B-Reader, as positive for small opacities with profusion of 3/2, and complicated pneumoconiosis, category A. (DX 89). However, Dr. Barrett, a dually-qualified reader, also interpreted the July 31, 2009, chest x-ray. (DX 93). He identified small opacities with profusion 2/2 but noted the film was negative for complicated pneumoconiosis or large masses. Based on the negative interpretation by a more qualified reader, I find that the weight of this particular film is negative for complicated pneumoconiosis.

The next film dated October 19, 2012, was interpreted by Dr. Miller, a dually-qualified reader, for small opacities with profusion of 2/2, and positive for complicated pneumoconiosis, category A. (CX 2). As no other interpretations of this x-ray appear in the record, I find the weight of this film is positive for complicated pneumoconiosis.

⁶⁴ 20 C.F.R. § 718.304(a).

⁶⁵ 20 C.F.R. § 718.304 (b).

⁶⁶ 20 C.F.R. § 718.304 (c).

⁶⁷ *Melnick v. Consolidated Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*).

⁶⁸ *Gray v. SLC Coal Co.*, 176 F.3d 382, 388 (6th Cir. 1999).

⁶⁹ 20 C.F.R. §718.304(a).

⁷⁰ *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128, 1-131 (1984).

⁷¹ Additionally, none of the prior submitted chest x-rays records contain a finding of A, B, or C opacities or large masses.

Weighing the chest x-ray evidence I find that there is no preponderance of the evidence in favor of a finding of complicated pneumoconiosis. The weight of the July 31, 2009, film was negative for complicated pneumoconiosis and the October 19, 2012, film was positive – thus, they are in equipoise. All the prior interpretations are silent on the issue. Accordingly, based on the fact the films are inconclusive with regard to the presence or absence of complicated pneumoconiosis, I find that the Claimant has not satisfied his burden of proving complicated pneumoconiosis on the basis of the x-ray evidence.

There are no biopsy reports on the record so complicated pneumoconiosis cannot be established under 20 C.F.R. § 718.304 (b). Additionally, no CT scans appear in the record. However, medical opinion evidence can also be used to establish the presence or absence of complicated pneumoconiosis. The Board has held that the language of § 718.304(c) permits the invocation of the rebuttable presumption by other means, including medical-opinion evidence, provided that the medical-opinion evidence is not based solely on x-ray interpretations.⁷²

The medical-opinion evidence has been previously summarized. Dr. Baker examined the Claimant multiple times over a period of six years. He obtained a 25-28 year work history as a rock driller on road construction sites as well as one to two years of employment at strip mines. He also noted the Claimant reported smoking one-half to one pack of cigarettes per day for 10-15 years. He remarked that the Claimant reported symptoms of cough with daily sputum production, wheezing, dyspnea, hemoptysis, ankle edema, and orthopnea. In addition to chest x-rays, which he interpreted as positive for both simple and complicated pneumoconiosis, Dr. Baker performed pulmonary function studies and arterial blood gas studies.

I do note that the Dr. Baker considered his own x-ray interpretations when creating his opinions but that Claimant has submitted an interpretation of the October 19, 2012 chest x-ray by Dr. Miller. By considering his own interpretation instead of Dr. Miller's, Dr. Baker has considered evidence not admitted to the record. In *Keener v. Peerless Eagle Coal Corp.*, 23 B.L.R. 1-229 (en banc), the Board held that when a physician bases his report on evidence that is not properly admitted, the administrative law judge must assess the impact of the improperly admitted evidence. Further, the Board held that the administrative law judge has several options in handling the report: 1) exclude the report, 2) redact the objectionable content, 3) ask the physician to submit a new report, or 4) factor in the physician's reliance on the improper evidence in determining what weight to assign to the report. Applying *Keener*, I chose the last option provided by the Board, which is to take into account Dr. Baker's reliance on non-admitted evidence in determining what weight to give to his opinion. As Dr. Miller's interpretation is essentially the same as that of Dr. Baker, I do not find that his reliance on his own inadmissible reading significantly detracts from the weight to be given to his opinion.

Dr. Baker diagnosed occupational silicosis and clinical pneumoconiosis with progressive massive fibrosis. He stated that the etiology of this diagnosis was the result of a combination of occupational exposure to rock/silica and coal dust. Weighing his opinions, I find them well-documented and well-reasoned. I note that Dr. Baker is a Board-certified internist and pulmonologist. Regarding his diagnosis of complicated pneumoconiosis, it is clear that he based

⁷² See *S.P.W. v. Peabody Coal Co.*, BRB No. 07-0278 BLA (Dec. 23, 2007).

it on the Claimant's employment history of drilling at strip mines and road construction jobs that exposed him to coal and rock dust and the chest x-ray interpretations.

However, he also performed objective studies and physically examined the Claimant multiple times. I find Dr. Baker obtained a thorough understanding of the Claimant's symptomatology and personal medical history. I find it reasonable to infer that all these components factored into his diagnostic impression, and therefore I do not conclude that his diagnoses of complicated pneumoconiosis was merely restatements of the x-rays, but that Dr. Baker relied on all the material and data before him when concluding that the Claimant had complicated pneumoconiosis.

As for the opinion of Dr. Forehand, other than mentioning that he reviewed x-rays interpretations by Drs. Miller and DePonte, which identified category A large opacities, and concluding that the Claimant had "significant lung disease," the opinion did not specifically address the issue of complicated pneumoconiosis. A physician's report, which is silent as to a particular issue, is not probative of that issue.⁷³

The prior submitted medical evidence included reports from Drs. Rasmussen, Baker, Broudy, and Jarboe. (DX 74). All of these reports were also silent as to whether the Claimant had complicated pneumoconiosis. Dr. Baker is the only doctor on record to make a diagnosis of complicated pneumoconiosis or otherwise discuss the issue. For the reasons stated above, I found his opinion to be well-reasoned and well-documented. Thus, I find that the weight of the medical-opinion evidence supports a finding of complicated pneumoconiosis.

Finally, I must weigh all of the evidence together. Pneumoconiosis is a progressive and irreversible disease.⁷⁴ As a general rule, therefore, more weight is given to the most recent evidence.⁷⁵ Upon considering and evaluating the evidence as a whole, I find that the x-ray evidence was in equipoise; however, Dr. Baker made a finding of complicated pneumoconiosis. Dr. Baker found a large opacity in the Claimant's right upper lung. His opinion was supported by the x-ray interpretation of Dr. Miller, who also found a large opacity in the Claimant's right upper lung. No CT scans or biopsy results appear in the record. Accordingly, I find that the totality of the evidence supports a finding of complicated pneumoconiosis.

II. Causal Relationship between Pneumoconiosis and Coal Mine Employment

Once it is determined that a miner suffers from pneumoconiosis or complicated pneumoconiosis, it must be determined whether his pneumoconiosis arose, at least in part, out of coal mine employment. § 718.203(a). The Act and the regulations provide for a rebuttable

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⁷⁴ *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314–315 (3rd Cir. 1995); *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 803 (4th Cir. 1998); *Woodward v. Director, OWCP*, 991 F.2d 314, 320 (6th Cir. 1993); *Ziegler Coal Co. v. Director, OWCP [Griskell]*, 490 F.3d 609, 618–619 (7th Cir. 2007).

⁷⁵ See *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 151–152 (1987); *Eastern Associated Coal Corp. v. Director, OWCP*, 220 F.3d 250, 258–259 (4th Cir. 2000); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1167 (6th Cir. 1997); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 602 (3rd Cir. 1989); *Stanford v. Director, OWCP*, 7 BLR 1-541, 1-543 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 BLR 1-666, 1-668 (1983); *Call v. Director, OWCP*, 2 BLR 1-146, 1-148–1-149 (1979).

presumption that pneumoconiosis arose out of coal mine employment if a miner with pneumoconiosis was employed in the mines for 10 or more years.⁷⁶ As discussed above, I found that the Claimant had 16.31 years of coal mine employment, and therefore is entitled to the presumption.

To rebut the presumption, the Director has offered a report by Dr. Forehand who concluded that the Claimant had occupational silicosis that was not substantially related to or caused by coal mine coal dust exposure as 1.97 years of coal mine employment was not a sufficient length of time to develop a coal mine-dust related lung disease. Weighing Dr. Forehand's opinion, I find it less than persuasive for several reasons.

First, Dr. Forehand based his opinion on the Claimant only having 1.97 years of coal mine employment. As stated above, I found that the Claimant has 16.31 years of coal mine employment. Thus, Dr. Forehand's opinion is based on a finding of length of coal mine employment that is materially contrary to my own and I accord it less weight. It is proper to discredit a physician's opinion based on inaccurate coal mine employment history.⁷⁷

Additionally, Dr. Forehand's assertion that 1.97 years of coal mine employment is an insufficient length of time to develop a related lung disease is unsupported and not properly explained. Dr. Forehand points to no objective evidence to support how he determined coal dust exposure was not a cause of the Claimant's radiographic changes, he merely assumed there was insufficient exposure to coal dust to cause any. A physician's report may be rejected where it is unsupported or the basis for the physician's opinion cannot be determined.⁷⁸ In sum, because Dr. Forehand's opinion is premised on an inaccurate history of coal dust exposure and is inadequately reasoned, I accord little weight to his opinion regarding causation.

The other medical opinions from Dr. Baker support the presumption that the Claimant's pneumoconiosis was caused by his coal mine employment. Dr. Baker stated that the combined exposure to rock and coal dust both contributed to the Claimant's pneumoconiosis and that his coal dust exposure was a substantial contributing factor to his disease.

For the reasons stated above, I find that Dr. Forehand's opinion that the Claimant's fibrosis was not caused by his coal mine employment to be not well reasoned and thereby find that it is insufficient to rebut the presumption that the Claimant's complicated pneumoconiosis resulted from his coal mine employment.

III. Total Pulmonary or Respiratory Disability due to Pneumoconiosis

The regulations provide for an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he is suffering from a chronic dust disease of the lung which when diagnosed by x-ray yields one or more opacities greater than 1 cm in diameter, when diagnosed by biopsy or autopsy yields "massive lesions in the lung," or when diagnosed by other acceptable

⁷⁶ 30 U.S.C. § 921(c)(1); 20 C.F.R. § 718.203(b); *W.L.C. v. Westmoreland Coal Co.*, BRB No. 06-0927 BLA (June 26, 2007) (unpublished).

⁷⁷ *Worhach v. Director, OWCP*, 17 B.L.R. 1-85 (1993).

⁷⁸ See e.g. *Smith v. Eastern Coal Co.*, B.L.R. 1-1130 (1984); *Cosalta v. Mathies Coal Co.*, 6 B.L.R. 1-1182 (1984).

medical procedures would be a condition which could reasonably be expected to yield the results of x-ray, biopsy or autopsy described in the rule.⁷⁹ I have found that the Claimant has clinical pneumoconiosis, with large opacities diagnosed by medical opinion, arising from his coal mine employment. I find that the Claimant has established that he is entitled to the irrebuttable presumption of total pulmonary or respiratory disability due to pneumoconiosis since he was diagnosed with complicated pneumoconiosis by well-reasoned medical opinion in July 2009.

I have also reviewed the evidence of disability before July 2009 to determine whether there is any reason to modify Judge Mosser's conclusion in 2008 that the Claimant had not then established that he was totally disabled. The evidence considered by Judge Mosser included three PFT's and three ABG's; none of which produced qualifying results. Of the prior medical opinions, only Dr. Baker believed that the Claimant was totally disabled when he examined him in 2006 due to decreased FEV₁ and pO₂ readings. Alternatively, Drs. Rasmussen, Broudy and Jarboe concluded that Claimant was not disabled and had the pulmonary capacity to return to his previous coal mine employment. I find that the Claimant has failed to establish that he was disabled before he developed complicated pneumoconiosis. Thus, I cannot find that Judge Mosser made a mistake of fact when he found that the Claimant was not disabled in 2008. Instead, I find that the Claimant has established a change in an applicable condition of entitlement since Judge Mosser denied his claim, in that his disease has progressed from simple to complicated pneumoconiosis which was caused by his coal mine employment.

MODIFICATION RENDERS JUSTICE UNDER THE ACT

The regulations provide that an award or denial of benefits *may* be modified because of a change in conditions or a mistake in a determination of fact.⁸⁰ Thus, the administrative law judge has discretion in deciding whether or not to grant a modification request. Modification should only be granted to render justice under the Act.⁸¹ Whether modification renders justice under the Act usually arises in cases in which an employer seeks to overturn a decision to award benefits.⁸² But in some cases, the Benefits Review Board has held that this issue should also be considered before granting a claimant's request to modify a decision denying benefits.⁸³ According to the Board, the factors to be considered in determining whether modification renders justice are: 1) the need for accuracy; 2) the quality of the new evidence; 3) the diligence and motive of the parties seeking modification; and 4) the futility or mootness of a favorable ruling.⁸⁴

⁷⁹ 20 C.F.R. § 718.304.

⁸⁰ 20 C.F.R. § 725.310(a) (2000).

⁸¹ *Shaff v. U.S. Steel Corp.*, BRB Nos. BRB Nos. 11-0388 BLA, 11-0388 BLA-A, 11-0410 BLA and 11-0410 BLA-A (Mar. 27, 2012) (unpub.), slip op. at 6–8); *Clevinger v. Harman Mining Corp.*, BRB No. 09-0842 BLA (Sept. 30, 2010) (unpub.), slip op. at 14.

⁸² See, e.g., *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533 (7th Cir. 2002).

⁸³ *Mounts v. Pikeville Coal Co.*, BRB No. 12-0233 BLA, slip op. at 5 (Feb. 13, 2013) (unpub.) (case arising in the 6th Cir.); *Clevinger, supra*, (case arising in the 4th Cir.). But see *Simpson v. Terco, Inc.*, BRB No. 10-0291 BLA, slip op. at 4 (Jan. 31, 2011) (unpub.) (case arising in the 6th Cir., *Sharpe* is not controlling, employer failed to point to any evidence that claimant failed to pursue his claim with due diligence, and a grant of modification would not prove futile because it resulted in an award of benefits to claimant in contrast to *Sharpe*).

⁸⁴ *Id.*

The first factor, the need for accuracy, clearly weighs in favor of granting the Claimant's request for modification. The purpose of the Act is to "ensure that ... adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis."⁸⁵ The broad modification provision incorporated within the statute allows Congress to accomplish this purpose, in part, by ensuring the accurate distribution of benefits.⁸⁶ Thus, in black lung cases, the accuracy of the outcome of a claim is considered more important than the finality of an earlier decision on it.⁸⁷ Because I conclude that the evidence shows that the Claimant is entitled to benefits, I find the first factor—the need for accuracy—weighs in favor of granting the Claimant's modification request.

The second factor is the quality of the new evidence submitted. I find the newly-submitted evidence persuasive in establishing that the Claimant is entitled to benefits. Accordingly, I find the quality of the evidence weighs in favor of granting the Claimant's modification request.

Next, I must consider the diligence and motive of the Claimant in seeking modification. As to diligence, the regulation requires that a request for modification be filed within a year. Here, the claim was finally denied on July 20, 2009, (DX 80), and the Claimant sought modification on September 24, 2009. (DX 87). Therefore, the Claimant timely followed the procedures set forth in the regulation. Accordingly, I find the Claimant was diligent in pursuing his modification request. Thus, this factor also weighs in favor of granting modification.

The requesting party's motive is also an important consideration, because "if the party's purpose in filing is to thwart a claimant's good faith claim or an employer's good defense, the remedial purpose of the statute is no longer served."⁸⁸ The Director has not offered any evidence that the Claimant's motivation in requesting modification is anything other than to obtain benefits to which he is entitled. Thus, the Director has offered no evidence that the Claimant had an improper motive when he filed this request for modification. Accordingly, I find that the Claimant's good faith motive weighs in favor of granting modification.

After carefully considering the relevant factors and the overall purpose of the Act, I find that granting the Claimant's modification request renders justice under the Act.

CONCLUSION

The Claimant has met his burden of showing a change in an applicable condition of entitlement under the regulations. Upon *de novo* review of the entire record, I find that the Claimant has established that he has been totally disabled due to complicated pneumoconiosis caused by his 16.31 years of coal mine employment. Accordingly, the Claimant is entitled to benefits under the Act.

⁸⁵ 30 U.S.C. § 901(a).

⁸⁶ *Hilliard*, 292 F.3d at 546.

⁸⁷ *Hilliard*, 292 F.3d at 541–542.

⁸⁸ *Sharpe*, 495 F.3d at 133, quoting *Hilliard*, 292 F.3d at 546.

DATE OF ENTITLEMENT

If a miner establishes that he has complicated pneumoconiosis, the onset date is the month during which complicated pneumoconiosis was first diagnosed.⁸⁹ In this case, the Claimant's complicated pneumoconiosis was first diagnosed by Dr. Baker's reasoned medical opinion on July 31, 2009. Therefore, I find that the Claimant is entitled to benefits commencing in July 2009, the month in which he was first diagnosed with complicated pneumoconiosis.

ATTORNEY'S FEES

An attorney's fee may be awarded in cases in which a claimant is found to be entitled to benefits.⁹⁰ The Claimant's attorney has not yet filed an application for attorney's fees. The Claimant's attorney is hereby allowed 30 days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The other parties shall have 10 days following service of the application within which to file any objections, plus 5 days for service by mail, for a total of 15 days. The Act and regulations prohibit the charging of a fee in the absence of an approved application.

ORDER

IT IS ORDERED that the Claimant's request for Modification for benefits under the Black Lung Benefits Act, initially filed on May 16, 2006, is **GRANTED**.

PETER B. SILVAIN, JR.
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

⁸⁹ See *Truitt v. North American Coal Corp.*, 2 B.L.R. 1-199 at 1-203-204 (1979) (holding that the mine operator which employed the miner after an x-ray showed he already had complicated pneumoconiosis could not be held liable for benefits because the miner was already totally disabled as a matter of law when he was hired). See also *Williams v. Director, OWCP*, 13 B.L.R. 1-28, 1-30 (1989) ("If the evidence does not reflect when claimant's simple pneumoconiosis became complicated pneumoconiosis, the onset date for payment of benefits is the month during which the claim was filed...unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing...").

⁹⁰ Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, incorporated into the Black Lung Benefits Act at 30 U.S.C. § 932. For the regulations governing the award of fees, see 20 C.F.R. §§ 725.362-367 (2000).

administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479.

The address of the Board is: Benefits Review Board, U.S. Department of Labor, PO Box 37601, Washington, DC 20013-7601, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

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).