

Chapter 3

General Principles of Weighing Medical Evidence

I. An introduction

The award of benefits in a black lung claim is generally dependent on a claimant's ability to establish each element of the claim by a preponderance of the medical evidence. The primary elements of entitlement in a miner's claim are whether: (1) the miner suffers from pneumoconiosis; (2) his or her pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled; and (4) the total disability is caused by pneumoconiosis. A survivor, on the other hand, must demonstrate that the miner's death was due to coal workers' pneumoconiosis.

As many black lung claims have become a *battle of the experts*, proper application of sound principles of weighing medical evidence is critical to arriving at a well-reasoned decision that is supported by the record. Each case must be reviewed independently and considerable thought must be given to application of these principles. They should never be applied mechanically.

This Chapter is divided into the main types of medical evidence received in a black lung claim with citations to regulatory and/or case law to assist in weighing such evidence.

The admission of medical evidence under the amended regulations at 20 C.F.R. § 725.414 (2008) is addressed in Chapter 4.¹

A. Burdens, generally

The claimant carries the general burden of establishing entitlement and the initial burden of going forward with the evidence. *Young v. Barnes & Tucker Co.*, 11 B.L.R. 1-117 (1988); *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983).

¹ The amended provisions at 20 C.F.R. Part 725 are applicable to claims filed after January 19, 2001. 20 C.F.R. § 725.2 (2008). These provisions do not apply to petitions for modification (§ 725.310) or subsequent claims (§ 725.309) that were pending on January 19, 2001. 20 C.F.R. § 725.2 (2008).

B. Claims adjudicated under Part 727 or § 410.490

If a claim falls under Part 727 or § 410.490, and the claimant has established invocation of an interim presumption by a preponderance of the evidence, then the burden shifts to the party opposing entitlement to establish rebuttal by a preponderance of the evidence. *Gilson v. Price River Coal Co.*, 6 B.L.R. 1-96 (1983) (if party opposing entitlement fails to carry its burden of proof, claimant prevails).

C. Claims adjudicated under Part 718

Under Part 718, a claimant must demonstrate each element of entitlement by a preponderance of the evidence. *Lattimer v. Peabody Coal Co.*, 8 B.L.R. 1-509 (1986) (addressing Part 727); *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986)(en banc) (addressing Part 718); *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986)(en banc) (addressing Part 718).

II. Rules of general application

A. The "true doubt" rule

1. Prior to applicability of 20 C.F.R. Part 718 (2008)

The "true doubt" rule was a judicial creation intended to give benefit of the doubt to claimants in those black lung cases where the evidence was in "equipoise." For example, a claim file contains two x-ray interpretations of the same study, one positive and one negative and the qualifications of the physicians interpreting the study are identical, *i.e.* both readers are Board-certified radiologists and B-readers. For several years, an administrative law judge reviewing this evidence would find that it was in equipoise, apply the "true doubt" rule, and find in the claimant's favor that the evidence supported the existence of pneumoconiosis.

The United States Supreme Court, in *Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251 (1994), *aff'g. sub. nom., Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3rd Cir. 1993), dispensed with the "true doubt" rule to state that it violated Section 556(d) of the Administrative Procedure Act by improperly placing the burden of persuasion on the party opposing entitlement. Consequently, under any of the regulatory schemes, a claimant must establish the requisite elements of his or her claim by a preponderance of the evidence.

As a result of the Court's holding in *Greenwich*, any claim on appeal wherein this rule was applied was remanded for re-evaluation of the evidence.

On remand, some administrative law judges concluded that, because the "true doubt" rule was utilized in the prior decision, then the evidence is necessarily deficient and a claimant could not prevail on remand. However, in *Cole v. East Kentucky Collieries*, 20 B.L.R. 1-50 (1996), the Board concluded otherwise and stated the following:

[A] finding of evidentiary equipoise under the discredited true doubt principle does not automatically require a finding of insufficient evidence under a preponderance of the evidence standard. Rather, the administrative law judge as fact-finder must determine whether, under this standard, claimant has met his burden of proof pursuant to Section 7(c) of the Administrative Procedure Act.

Consequently, the administrative law judge must re-weigh the evidence *de novo* if a claim is remanded for improper application of the "true doubt" rule.

2. After applicability of 20 C.F.R. Part 718 (2008)

There is no regulatory provision under the amended regulations that codifies the "true doubt" rule. In its comments to the final rules, the Department states the following:

The Department has not adopted a 'true doubt' rule in these regulations. The 'true doubt' rule was an evidentiary weighing principle under which an issue was resolved in favor of the claimant if the probative evidence for and against the claimant was in equipoise. The Department believes that evaluation of conflicting medical evidence requires careful consideration of a wide variety of disparate factors affecting the credibility of that evidence. The presence of these factors makes it unlikely that a fact-finder will be able to conclude that conflicting evidence is truly in equipoise. See preamble to § 718.3.

65 Fed. Reg. 79,924 (Dec. 20, 2000).²

² See also 64 Fed. Reg. 54,969 (Oct. 8, 1999) and 62 Fed. Reg. 3,341 (Jan. 22, 1997) (regulatory history to support decision not to promulgate the "true doubt" rule).

B. The "later evidence" rule

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). This rule should not be mechanically applied, however, in situations where the evidence would tend to demonstrate an "improvement" in the miner's condition since the Board and courts agree that pneumoconiosis is progressive and irreversible.

The following are cases involving application of the "later evidence rule" by the Benefits Review Board and circuit courts of appeals:

1. The Benefits Review Board and circuit courts, generally

a. Benefits Review Board

In *Bailey v. U.S. Steel Mining Co.*, 21 B.L.R. 1-152 (1999)(en banc on recon.), the Board held that it was improper to apply the "later evidence" rule where "all the interpretations of the most recent x-rays are negative and the second most recent x-ray taken on June 11, 1991 had conflicting interpretations." The Board concluded that, on remand, the judge must analyze the evidence without reference to "its chronological relationship," but should consider the radiological qualifications of the physicians.

In *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.), the Board held that it was proper for the administrative law judge to give greater weight to the more recent evidence of record as the Sixth Circuit, in which jurisdiction the case arose, has held that pneumoconiosis is a "progressive and degenerative disease." The Board also cited to *Mullins Coal Co. of Virginia v. Director, OWCP*, 483 U.S. 135 (1987), *reh'g. denied*, 484 U.S. 1047 (1988) wherein the Supreme Court stated that pneumoconiosis is a "serious and progressive pulmonary condition" and *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993).

b. Fourth Circuit

Use upheld

The Fourth Circuit upheld use of the "later evidence" rule in the following cases: *Thorn v. Itmann Coal Co.*, 3 F.3d 713 (4th Cir. 1993) (while "recency" by itself is an arbitrary benchmark for weighing evidence, "[t]here may be new or additional evidence developed that discredits an earlier opinion"); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000) (in a case involving complicated pneumoconiosis, the "later is better rule" was not mechanically applied; rather, it was properly used where the later x-rays were not inconsistent with earlier studies given the progressiveness and irreversibility of pneumoconiosis); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4th Cir. 1998) (case arising under Part 727; "later evidence is more likely to show the miner's current condition").

Moreover, court accepted use of the rule where later evidence yielded non-qualifying blood gas study results over earlier qualifying studies. In *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court reviewed the blood gas study evidence and found that "[o]ut of a total of nine tests, the five initial tests produced qualifying results, and the four later tests did not." It noted that, in previous decisions, the "later is better" approach has been rejected where later x-rays were negative and earlier studies were interpreted positively. However, the court found that, in this case, "the parties conceded at oral argument that because pneumoconiosis is a progressive disease, later nonqualifying blood gas studies are inconsistent with coal workers' pneumoconiosis"

Use improper

The Fourth Circuit rejected use of the "later evidence" rule in *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992) and noted the following:

The 'later evidence is better' rationale began as a reasonable way to discount old non-qualifying test results or physical examinations in favor of subsequent results that reveal a deterioration of the miner's condition. In recent years the BRB has applied the concept wholesale, in situations like this one, where it cannot have any logical force.

Specifically, the court rejected application of the rule where the miner has pneumoconiosis, yet "the evidence, taken at face value, shows that the miner

has improved . . ." The court concluded that "[e]ither the earlier or the later result *must* be wrong, and it is just as likely that the later evidence is faulty as the earlier. The reliability of irreconcilable items of evidence must therefore be evaluated without reference to their chronological relationship." (emphasis in original).

c. Sixth Circuit

Citing to the Fourth Circuit's decision in *Adkins* as well as to its own decision in *Conn v. White Deer Coal Co.*, 862 F.2d 591 (6th Cir. 1988), the Sixth Circuit, in *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), rejected wholesale application of the "later evidence" rule where the recent x-ray evidence was negative for the existence of pneumoconiosis, but prior evidence was positive for the disease. The court noted that, because "pneumoconiosis is a progressive and degenerative disease", the administrative law judge is required to specifically resolve the "disharmony in the x-ray evidence." On the other hand, where newer evidence demonstrates a worsening of the miner's condition consistent with the presence of pneumoconiosis, the "later evidence" rule may be applied. See also *Stewart v. Wampler Brothers Coal Co.*, 22 B.L.R. 1-80 (2000) (en banc) (a case arising in the Sixth Circuit; rejection of "later evidence" rule proper where earlier x-ray evidence was positive and later x-ray evidence was negative); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163 (6th Cir. 1997) ("[r]ecent evidence is particularly important in black lung cases, where because of the progressive nature of pneumoconiosis, more recent evidence is often accorded more weight").

d. Seventh Circuit

In *Old Ben Coal Co. v. Scott*, 144 F.3d 1045 (7th Cir. 1998), the Seventh Circuit held that it was proper for the administrative law judge to accord greater weight to the more recent x-ray studies submitted by the survivor with her timely petition for modification. Employer argued that the administrative law judge erred in crediting the more recent x-ray studies of record based on the "mythology" that pneumoconiosis is a progressive disease. In rejecting Employer's position, the court stated the following:

We have held . . . that the etiology of this disease is a question of legislative fact, . . . so that the Department of Labor's view may be upset only by medical evidence of the kind that would invalidate a regulation. Old Ben has not adduced evidence on this issue, so we accept the administrative approach. (citations omitted). Mine operators must put up or shut up on this issue.

Id.

2. Chest x-rays

a. Date of study relevant

In weighing x-rays using the "later evidence" rule, it is the date of the study, and not the date of the interpretation, which is relevant. *Wheatley v. Peabody Coal Co.*, 6 B.L.R. 1-1214 (1984). Generally, it is proper to accord greater weight to the most recent x-ray study of record. *Clark, supra*; *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983).

b. Length of time between studies, qualifications of readers relevant

Even if the most recent x-ray evidence is positive, the administrative law judge is not required to accord it greater weight. Rather, the length of time between the x-ray studies and the qualifications of the interpreting physicians are factors to be considered. *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Pruitt v. Director, OWCP*, 7 B.L.R. 1-544 (1984); *Gleza v. Ohio Mining Co.*, 2 B.L.R. 1-436 (1979). The Board has indicated that a seven month time period between x-ray studies is sufficient to apply the "later evidence" rule, but five and one-half months is too short a time period. *Tokarcik, supra*; *Stanley v. Director, OWCP*, 7 B.L.R. 1-386 (1984). However, in *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985), the Board held that it was proper for the administrative law judge not to apply the "later evidence" rule where eight months separated the dates of the x-ray studies.

3. Ventilatory studies

More weight may be accorded to the results of a recent ventilatory study over the results of an earlier study. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993).

In *Andruscavage v. Director, OWCP*, Case No. 93-3291 (3rd Cir. Feb. 1, 1994) (unpub.), the court held that the judge properly accepted four qualifying studies "as having been conducted in accordance with the quality standards" but found these earlier tests "were not the most reliable indicators of the claimant's respiratory condition." In so holding, the judge noted that the most recent test of record yielded non-qualifying values and he found:

Unexpectedly, here the most recent of the five studies in question resulted in substantially higher values than the others. However, pulmonary function testing is effort-dependent and spurious low volumes can result, but spurious high volumes are not possible.

Based on above, I find the higher results achieved by the claimant in the (latest) testing is the best indicator of the claimant's respiratory or pulmonary condition.

The court determined that the judge acted within his discretion as the trier-of-fact in rendering the foregoing findings.

4. Blood gas studies

More weight may be accorded to the results of a recent blood gas study over a study that was conducted earlier. *Schretroma v. Director, OWCP*, 18 B.L.R. 1-17 (1993).

5. Medical opinions

A medical report containing the most recent physical examination of the miner may be properly accorded greater weight as it is likely to contain a more accurate evaluation of the miner's current condition. *Gillespie v. Badger Coal Co.*, 7 B.L.R. 1-839 (1985). *See also Bates v. Director, OWCP*, 7 B.L.R. 1-113 (1984) (more recent report of record entitled to more weight than reports dated eight years earlier); *Kendrick v. Kentland-Elkhorn Coal Co.*, 5 B.L.R. 1-730 (1983).

C. The "hostile-to-the-Act" rule

The Board has held that the administrative law judge may discredit the opinion of a physician whose medical assumptions are contrary to, or in conflict with, the spirit and purposes of the Act. *Wetherill v. Green Construction Co.*, 5 B.L.R. 1-248, 1-252 (1982). Caution must be used in determining that an opinion is "hostile-to-the-Act", particularly if the physician couches the opinion in language that does not rule out the possibility of alternatives. For example, a physician who states that simple pneumoconiosis cannot be totally disabling has expressed an opinion that is "hostile-to-the-Act." On the other hand, a physician, who states that it is "highly unusual" or "unlikely" that simple pneumoconiosis can be totally disabling, has not expressed an opinion which is "hostile-to-the-Act" because his or her opinion does not foreclose the possibility that the disease can be totally disabling. Some cases involving these concepts are:

1. Coal mine employment preserves lung function

In *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 902 (7th Cir. 2005), the circuit court determined that it was proper to accord less weight to a medical opinion that is "influenced by the physician's 'subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions.'" In particular, the court agreed that Dr. Shelby's view that coal mine employment had "preserved" the miner's lung function and had a "positive effect" on his health was contrary to the provisions at 20 C.F.R. § 718.201(c) that pneumoconiosis can be latent and progressive.

2. Simple pneumoconiosis cannot be totally disabling

Searls v. Southern Ohio Coal Co., 11 B.L.R. 1-161 (1988); *Butela v. U.S. Steel Corp.*, 8 B.L.R. 1-48 (1985). See also *Thorn v. Itmann Coal Co.*, 3 F.3d 713 (4th Cir. 1995) (the physician stated that "simple pneumoconiosis" does not cause total disability "as a rule" was hostile-to-the-Act); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106 (3rd Cir. 1989); *Adams v. Peabody Coal Co.*, 816 F.2d 1116 (6th Cir. 1987); *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987); *Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426 (10th Cir. 1984). However, in *Chester v. Hi-Top Coal Co.*, BRB No. 00-1000 BLA (July 31, 2001) (unpub.), the Board held that it was error for the judge to discredit a physician's opinion as "hostile-to-the-Act" where the physician stated that it "would be highly unusual for simple coal workers' pneumoconiosis of major category I to cause a measurable ventilatory impairment." In so holding, the Board noted that the physician "did not foreclose all possibility that simple pneumoconiosis can be totally disabling."

3. No pneumoconiosis based solely on negative x-ray

A physician stated that he would not diagnose pneumoconiosis in the absence of a positive x-ray interpretation is hostile-to-the-Act. *Black Diamond Coal Co. v. BRB [Raines]*, 758 F.2d 1532 (11th Cir. 1985). See also *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992 (7th Cir. 2005) (judge's finding of legal coal workers' pneumoconiosis based on medical opinion evidence upheld despite preponderantly negative chest x-rays of record).

4. Pneumoconiosis does not cause obstructive impairments

In *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995), the Fourth Circuit noted:

Chronic obstructive lung disease . . . is encompassed within the definition of pneumoconiosis for purposes of entitlement to Black Lung benefits. Dr. Mutchler's assumption to the contrary undermines his conclusions because it is undisputed that (the miner) does suffer from some form of obstructive lung disease, and Drs. Mutchler and Donnerberg failed to give legitimate reasons for ruling out dust exposure in coal mine employment as a cause or aggravation of that disease.

Id. But see *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337 (4th Cir. 1996) (a physician's opinion should not be discredited merely because he states that the miner "likely" would have exhibited a restrictive impairment in addition to chronic obstructive pulmonary disease if he had coal workers' pneumoconiosis; rather, the physician must rule out pure obstruction).

In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the administrative law judge discredited four out of five physicians rendering opinions in the case because they found no pneumoconiosis stating that the miner's "impairment was obstructive in nature." The court agreed and noted that the definition of *legal* pneumoconiosis "may consist of an obstructive impairment." After reviewing comments of the physicians who stated, *inter alia*, that pneumoconiosis is associated with restrictive impairments and smoking is associated with obstructive impairments, the court concluded that such comments "supported the ALJ's findings that the employer's physicians were overwhelmingly focused on clinical rather than legal pneumoconiosis."

The amended regulations at 20 C.F.R. § 718.201 (2008) state that pneumoconiosis may be "obstructive" in nature and, in *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), Seventh Circuit concluded that the judge properly gave less weight to the contrary opinions of Dr. Fino "based on a finding that they were not supported by adequate data or sound analysis." Of importance, the court made reference to the comments to the amended regulations and stated the following:

Dr. Fino stated in his written report of August 30, 1998 that 'there

is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.' (citation omitted). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature."

Id. See also *Blakley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995) (pre-amendment claim involving obstruction).

Similarly, in *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723 (7th Cir. 2008), the court affirmed the administrative law judge's award of benefits based on a finding that the miner suffered from totally disabling chronic obstructive pulmonary disease stemming from 13 years of coal mine employment. The court noted:

What complicates this case is that (the miner) was also a smoker. He started smoking cigarettes at age 18 or 19, averaging one to one-half pack per day at varying times. He quit at age 54, after about 35 years of smoking.

The record further revealed that, by 2005, the miner was totally dependent on supplemental oxygen and "was taking three nebulizer treatments a day."

While noting that the regulations recognize the existence of "legal" pneumoconiosis, the court emphasized that the miner carried the burden of demonstrating "that his COPD was caused, at least in part, by his work in the mines, and not simply his smoking habit." In this vein, the court cited to medical opinions in the record supporting a finding that coal dust contributed to the miner's COPD, but it also noted the following:

. . . Dr. Tuteur examined (the miner) . . .; he diagnosed severe COPD solely due to smoking. He concluded that coal dust exposure did not cause or contribute to (the miner's disease), noting that miners with no smoking history rarely have COPD, while smokers have a one in five chance of developing a severe obstruction. Dr. Renn reviewed the medical records and issued a report in 2004 where he diagnosed COPD due solely to smoking.

The administrative law judge accorded little weight to the opinions of Drs. Tuteur and Renn in this claim and the court agreed:

First, the essence of (Dr. Tuteur's) opinion was a three sentence comment that presented a personal view that (the miner's)

condition had to be caused by smoking because miners rarely have clinically significant obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust. However, the Department of Labor reviewed the medical literature on this issue and found that there is consensus among scientists and researchers that coal dust-induced COPD is clinically significant. This medical authority indicates that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners. 65 Fed. Reg. 79,938. Second, Dr. Tuteur did not rely on information particular to (the miner) to conclude that smoking was the only cause of his obstruction. Third, he did not cite a single article in the medical literature to support his propositions.

The court then rejected Employer's argument that Dr. Tuteur merely states that development of coal dust induced COPD is rare in miners:

. . . the Department of Labor report does not indicate that this causality is merely rare. And even if the causation is rare, Dr. Tuteur does not explain why (the miner) could not be one of these 'rare' cases. This flaw is endemic to the entire opinion, because Dr. Tuteur did not appear to analyze any data or observations specific to (the miner).

On the other hand, the court approved of the administrative law judge's crediting of Dr. Cohen's report, which supported the miner's entitlement to benefits:

First, it was based on objective data and a substantial body of peer-reviewed medical literature that confirms the causal link between coal dust and COPD. Second, he reviewed studies that were even more recent than the aforementioned Department of Labor study. Third, he linked these studies with (the miner's) symptoms, physical examination findings, pulmonary function studies, and arterial blood gas studies. Finally, he explained that (the miner's) pulmonary function studies showed 'minimal reversibility after administration of bronchodilator' and that he had an 'abnormal diffusion capacity,' all of which is consistent with a respiratory condition related to coal dust exposure.

Id.

5. Pneumoconiosis "not expected" to cause pulmonary impairment

In *Lane v. Union Carbide Corp.*, 105 F.3d 166 (4th Cir. 1997), the court held that a physician's opinion was not "hostile-to-the-Act" where the physician concluded that simple pneumoconiosis would "not be expected" to cause a pulmonary impairment. In so holding, the court concluded that the physician's opinion was based upon the specific facts of the case unlike the opinion at issue in *Thorn v. Itmann Coal Co.*, 3 F.3d 713 (4th Cir. 1995), where the doctor stated that "simple pneumoconiosis" does not cause total disability "as a rule."

6. Pneumoconiosis does not progress after exposure to dust ceases

In *Blake v. Elm Grove Coal Co.*, BRB Nos. 04-0186 BLA and 04-0186 BLA-S (Dec. 28, 2004) (unpub.), it was proper for the judge to "discredit a medical opinion which is premised upon a view inconsistent with the regulations." In particular, the physician opined that "only clinical pneumoconiosis is progressive," which the Board concluded was inconsistent with 20 C.F.R. § 718.201(c)." As a result, the medical opinion was not well-reasoned based on the following comments to the amended regulations:

[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period. Because the legal definition of pneumoconiosis includes impairments that arise from coal mine employment, regardless of whether a miner shows X-ray evidence of pneumoconiosis, this evidence of deterioration of lung function among miners, including miners who did not smoke, is significant.

65 Fed. Reg. 79971 (Dec. 20, 2000).

Slip op. at 9.

D. Numerical superiority

The issue of numerical superiority most often arises with regard to the x-ray evidence although it is also relevant to other types of medical evidence in a claim. Even in the aftermath of the evidentiary limitations at 20 C.F.R. § 725.414 (2008), a party may submit multiple studies or re-readings of the same study to counter evidence from the opposing party. Consequently, evidential development of a claim is, in some cases, determined by the

financial resources of a party.

1. Chest x-rays

a. Generally

The Board has held that an administrative law judge is not required to defer to the numerical superiority of x-ray evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990). See also *Tokaricik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease).

b. Fourth Circuit

In *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992), the court exhibited disfavor in "counting heads" and, in *Copley v. Arch of West Virginia, Inc.*, Case No. 93-1940 (4th Cir. June 21, 1994)(unpublished), the court held:

[E]ven if a simple 'head counting' approach were acceptable, the ALJ allowed the readings of one x-ray, by virtue of their numerical superiority, to control the question of whether the x-ray evidence established pneumoconiosis. That methodology encourages multiple readings in a quest for numbers and makes x-rays with fewer readings immaterial. It is, therefore, improper. The conflicting interpretations of one x-ray should be evaluated to determine whether the individual x-ray is negative or positive. Conflicts between x-rays should then be weighed in context to determine whether there is pneumoconiosis.

Id.

c. Sixth Circuit

The Sixth Circuit rejected application of the rule in *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), to state that "[a]dministrative fact finders simply cannot consider the quantity of evidence alone, without reference to a difference in the qualifications of the readers or without an examination of the party affiliation of the experts."

d. Seventh Circuit

In *Sahara Coal Co. v. Fitts*, 39 F.3d 781 (7th Cir. 1994), the court remanded the claim for further consideration and concluded that "[t]o base a decision on which side produced more witnesses, and to include in the count of witnesses one whose opinion rested on a premise that was later discredited, is not a rational method of decision-making." On the other hand, in *Zeigler Coal Co. v. Director, OWCP*, 23 F.3d 1235 (7th Cir. 1994), the court held that "while our opinions have been critical of decisions based entirely on 'head counts' of experts," there was no evidence in the record to suggest that the administrative law judge erred in crediting three negative x-ray readings over two positive readings.

2. Blood gas studies

Schetroma v. Director, OWCP, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies).

3. Medical opinions

It is improper to accord greater weight to certain medical opinions of record based solely on numerical superiority. In *Stalcup v. Peabody Coal Co.*, 477 F.3d 482 (7th Cir. 2007), the court vacated the administrative law judge's denial of benefits on grounds that it was not sufficiently reasoned. In particular, the judge concluded that the qualifications and expertise of the physicians offering opinions were equal and held:

Drs. Castle, Tuteur and Dahhan found no pneumoconiosis, while Drs. Cohen and Koenig found the existence of the disease. Because these opinions are entitled to equal weight, I now find that [the miner] has not established the existence of pneumoconiosis.

The court noted that black lung claims "often turn on science and involve conflicting medical opinions" such that a "scientific dispute must be resolved on scientific grounds." In this vein, the court held that "when an ALJ is faced with conflicting evidence from medical experts, he cannot avoid the scientific controversy by basing his decision on which side has more medical opinions in its favor." The court stated that "[t]his unreasoned approach, which amounts to nothing more than a 'mechanical nose count of witnesses,' . . . would promote a quantity-over-quality approach to expert retention, requiring parties to engage in a race to hire experts to insure victory."

E. Quality standards

1. Prior to applicability of 20 C.F.R. Part 718 (2008)

a. Quality standards under Part 718

The Board holds that the quality standards under Part 718 are not mandatory and "an otherwise reliable and probative study must not be rejected simply for failing to satisfy a noncritical quality standard." *Orek v. Director, OWCP*, 10 B.L.R. 1-51, 1-54 (1987)(§ 718.105; blood gas studies); *Gorman v. Hawk Contracting, Inc.*, 9 B.L.R. 1-76, 1-78 (1986) (§ 718.103; pulmonary function studies); *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48 (1986) (§ 718.104; medical reports).

On the other hand, in the Third Circuit, the quality standards under Part 718 are mandatory, but the administrative law judge may consider evidence that is in "substantial compliance" with the standards. *Director, OWCP v. Siwiec*, 894 F.2d 635 (3rd Cir. 1990); *Mangifest v. Director, OWCP*, 826 F.2d 1318 (3rd Cir. 1987). In particular, the court stated as follows in *Mangifest*:

We do not construe the regulations to require the exclusion from an ALJ's consideration of non-complying medical reports. Instead, we hold that a medical judgment contained in a non-complying report may constitute substantial evidence of total disability if, as required by Part 718.204(c), it is 'reasoned' and 'based on medically acceptable clinical and laboratory diagnostic techniques.'

Id. at 1327.

b. Quality standards under Parts 410 and 727

The Board has held that the quality standards under Parts 410 and 727 are mandatory. *Anderson v. Youghioghney & Ohio Coal Co.*, 7 B.L.R. 1-152 (1984).

c. Applicability of Part 718 standards to Part 727 claims

The Board holds that the Part 718 quality standards do not apply to cases adjudicated under Part 727, even where evidence is submitted after the effective date of the Part 718 regulations. *Pezzetti v. Director, OWCP*, 8 B.L.R. 1-464 (1986).

Although 20 C.F.R. § 727.206(a) (2000) indicates that the quality standards set forth at 20 C.F.R. § 718.103 (2000) apply to evidence submitted subsequent to March 31, 1980, the Board held that this language is inconsistent with the purposes of the 1977 Reform Act and concluded that the provisions at 20 C.F.R. § 410.428 (2000) applied. *Sgro v. Rochester & Pittsburgh Coal Co.*, 4 B.L.R. 1-370 (1981). In so holding, the Board determined that § 727.206(a) should be interpreted to mean that the applicable quality standards, regardless of the date on which the evidence is submitted, are "those in effect at the time Part 727 became effective, *i.e.*, those provided by Part 410." *Id.* at 1-375.

However, in the Sixth and Tenth Circuits, the Part 718 quality standards do apply to Part 727. *Plutt v. Benefits Review Board*, 804 F.2d 597 (10th Cir. 1986); *Prater v. Hite Preparation Co.*, 829 F.2d 1363 (6th Cir. 1987). In the Sixth Circuit, however, where a pulmonary function study is at issue, the Part 718 standards apply only to a study that is performed after March 31, 1980. *Wiley v. Consolidated Coal Co.*, 915 F.2d 1076 (6th Cir. 1990).

Additionally, in an unpublished decision, the Third Circuit held that the Part 718 quality standards apply to Part 727, *Patton v. Director, OWCP*, Case No. 88-3296 (3rd Cir. 1988)(unpublished). As previously noted, the Third Circuit holds that satisfying the quality standards at Part 718 requires that the medical evidence be in "substantial compliance" with the mandatory standards. *Director, OWCP v. Siwiec*, 894 F.2d 635 (3rd Cir. 1990).

2. After applicability of 20 C.F.R. Part 718 (2008)³

a. Quality standards, generally

The amended regulations require "substantial compliance" with the quality standards for all evidence developed after the effective date of January 19, 2001. Subsection 718.101(b) requires "substantial compliance" with the quality standards only for evidence developed after the effective date and reads as follows:

The standards for the administration of clinical tests and examinations contained in this subpart shall apply to all evidence developed by any party after January 19, 2001 in connection with

³ The amended regulatory provisions at 20 C.F.R. Part 718 (2008), except for the quality standards discussed above, apply to all claims pending on January 19, 2001, as well as claims filed after that date.

a claim governed by this part These standards shall also apply to claims governed by part 727 . . . , but only for clinical tests or examinations conducted after January 19, 2001. Any clinical test or examination subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. Unless otherwise provided, any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered.

20 C.F.R. § 718.101(b) (2008).

In its comments, the Department noted that § 718.101(b) was added "to emphasize that the Part 718 quality standards apply to all evidence developed by any party in connection with a claim filed after March 31, 1980, and to claims governed by Part 727 if the evidence was developed after that date." 65 Fed. Reg. 79, 927 (Dec. 20, 2000).

b. Chest x-rays

The amended regulations at 20 C.F.R. § 718.102 (2008) provide that, for chest x-ray studies, compliance with the quality standards is presumed in the absence of evidence to the contrary. However, the regulations further provide that "no chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is conducted and reported in accordance with the requirements of (§ 718.102) and Appendix A." 20 C.F.R. § 718.102(c) (2008).

In its comments to the amended regulations, the Department states that "substantial compliance" with the quality standards for chest x-rays requires compliance with the ILO classification system:

In some circumstances, the adjudicator may determine that the x-ray interpretation provides sufficient information to make a factual finding on the presence or absence of pneumoconiosis. For example, the physician may describe the film findings in terms of 'no pneumoconiosis,' rather than classifying the film as '0/-, 0/0 or 0/1.' Such a reading may be considered sufficiently detailed to be in 'substantial compliance' notwithstanding the lack of classification. Conversely, the physician's description or reporting of x-ray film findings may indicate that (s)he read the film for reasons unrelated to diagnosing the existence of pneumoconiosis, e.g., lung cancer or cardiac surgery. The adjudicator may consider that evidence not in substantial compliance because it does not reliably address the presence or absence of pneumoconiosis.

65 Fed. Reg. 79,929 (Dec. 20, 2000).

c. Pulmonary function studies

The regulations at 20 C.F.R. § 718.103 (2008) provide the following quality standards for pulmonary function studies:

(a) Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop). The instrument shall simultaneously provide records of volume versus time (spirometric tracing). The report shall provide the results of the forced expiratory volume in one second (FEV1) and the forced vital capacity (FVC). The report shall also provide the FEV1/FVC ratio, expressed as a percentage. If the maximum voluntary ventilation (MVV) is reported, the results of such test shall be obtained independently rather than calculated from the results of the FEV1.

. . .

(c) Except as provided in this paragraph, no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part. In the absence of evidence to the contrary, compliance with the requirements of Appendix B shall be presumed. In the case of a decreased miner, where no pulmonary function tests are in substantial compliance with paragraphs (a) and (b) and Appendix B, non-complying tests may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner.

20 C.F.R. § 718.103 (2008). Subsection 718.103(b) continues to require three tracings for each pulmonary function study and the variability of the MVV values may be within 10% and be valid. 20 C.F.R. § 718.103(b) (2008). However, the amended regulations also require that the flow-volume loop for the study be admitted into the record. 20 C.F.R. § 718.103(b) (2008).

d. Blood gas studies

The provisions at § 718.105 related to blood gas studies contain new provisions related to studies conducted during a hospitalization, which results in the miner's death:

(d) If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death.

(e) In the case of a deceased miner, where no blood gas tests are in substantial compliance with paragraphs (a), (b), and (c), non-complying tests may form the basis for a finding if, in the opinion of the adjudication officer, the only available tests demonstrate technically valid results. This provision shall not excuse compliance with the requirements in paragraph (d) for any blood gas study administered during a hospitalization which ends in the miner's death.

20 C.F.R. § 718.105 (2008). In its comments, the Department stated that "the proposed requirement was necessary because the miner's qualifying test results during a terminal hospitalization may be related to an acute non-pulmonary condition rather than a chronic pulmonary impairment. 65 Fed. Reg. 79,935 (Dec. 20, 2000).

e. Autopsy and biopsy evidence

The provisions 20 C.F.R. § 718.106(b) (2008) have been modified to state the following:

In the case of a miner who died prior to March 31, 1980, an autopsy or biopsy report shall be considered even when the report does not substantially comply with the requirements of this section. A non-complying report concerning a miner who died prior to March 31, 1980, shall be accorded the appropriate weight in light of all relevant evidence.

20 C.F.R. § 718.106(b) (2008). This language does not present a departure from the prior provisions at subsection (b), the regulation is merely shortened.

f. Medical opinion evidence

The amended regulations contain specific quality standards for medical opinion evidence at 20 C.F.R. § 718.104 (2008), which were not present under the prior regulations:

(a) A report of any physical examination conducted in connection with a claim shall be prepared on a medical report form supplied by the office or in a manner containing substantially the same information. Any such report shall include the following information and test results:

- (1) The miner's medical and employment history;
- (2) All manifestations of chronic respiratory disease;
- (3) Any pertinent findings not specifically listed on the form;
- (4) If heart disease secondary to lung disease is found, all symptoms and significant findings;
- (5) The results of a chest X-ray conducted and interpreted as required by Sec. 718.102; and
- (6) The results of a pulmonary function test conducted and reported as required by Sec. 718.103. If the miner is physically unable to perform a pulmonary function test or if the test is medically contraindicated, in the absence of evidence establishing total disability pursuant to Sec. 718.304, the report must be based on either medically acceptable clinical and laboratory diagnostic techniques, such as a blood gas study.

(b) In addition to the requirements of paragraph (a), a report of physical examination may be based on any other procedures such as electrocardiogram, blood gas studies conducted and reported as required by Sec. 718.105, and other blood analyses which, in the physician's opinion, aid in his or her evaluation of the miner.

(c) In the case of a deceased miner, where no report is in substantial compliance with paragraphs (a) and (b), a report prepared by a physician who is unavailable may nevertheless form the basis for a finding if, in the opinion of the adjudication officer, it is accompanied by sufficient indicia of reliability in light of all relevant evidence.

20 C.F.R. § 718.104 (2008).

In its comments to the amended regulation requiring that medical opinions comply with certain quality standards, the Department states the following:

With respect to the mandatory x-ray requirement, . . . X-rays are an integral part of any informed and complete pulmonary evaluation of a miner; a general requirement for inclusion of this test is therefore appropriate. The Department also notes, however, that the quality standards require only 'substantial compliance' with the various criteria, not technical compliance with every criterion in every quality standard in every case. A fact-finder may conclude the omission of an x-ray does not undermine the overall credibility of the opinion, but this determination must be made on a case-by-case basis.

65 Fed. Reg. 79932 (Dec. 20, 2000).

g. Hospitalization and treatment records

In its comments to the amended regulations, the Department stated that "there was not need to add an exemption from the quality standards for hospitalization and treatment records because § 718.101 is clear that it applies quality standards only to evidence developed in connection with a claim for black lung benefits." 65 Fed. Reg. 79,927 (Dec. 20, 2000).

3. Challenging quality of evidence, burdens for

A party challenging the admission of objective medical evidence must (1) specify how the evidence fails to conform to the quality standards, and (2) how this defect or omission renders the study unreliable. *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988); *Orek v. Director, OWCP*, 10 B.L.R. 1-51 (1987). The fact-finder may then render a reasoned decision with regard to consideration of the evidence in question.

F. Party affiliation

1. Allegations of bias based on adverse opinion or party affiliation

Allegations of party affiliation, standing alone, do not establish improper bias. In the seminal case of *Richardson v. Perales*, 402 U.S. 387, 404 (1971), the Supreme Court held the fact that certain physicians' reports, including consulting physicians opinions, "were adverse to Perales' claim is not in itself

bias or an indication of non-probative character."

Similarly, in *Brown v. Director, OWCP*, 7 B.L.R. 1-730 (1985), the Board held the following:

Claimant argues that Dr. Altose is biased because he consults for coal companies and the government and spends only five percent of his time seeing patients directly. The determination of a medical witness's credibility is for the trier-of-fact. (citation omitted). We cannot say, on these facts, that claimant's allegations establish that it was irrational to credit Dr. Altose's opinion.

. . .

Claimant also contends that, since the government paid Dr. Altose, his report should be given less weight. Dr. Altose was actually hired by claimant's employer, which had the right to have claimant examined by its chosen physician prior to the hearing. 20 C.F.R. § 725.414(a). Medical reports prepared for litigation are not unusual and, absent evidence to the contrary, should be considered as equally reliable as other reports. (citation omitted).

Id. at 1-732 and 1-733. See also *Urgolites v. Bethenergy Mines, Inc.*, 17 B.L.R. 1-20 (1992); *Chancey v. Consolidation Coal Co.*, 7 B.L.R. 1-240 (1984); *Peabody Coal Co. v. BRB*, 560 F.2d 797 (7th Cir. 1977).

However, the Fourth Circuit, in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946 (4th Cir. 1997), held the following with regard to establishing bias via party affiliation of experts:

To the extent that ALJs determine that a particular expert's opinion is not, in fact, independently based on the facts of a particular claim, but is instead influenced more by the identity of his or her employer, ALJs have clear discretion to disregard such an expert's opinion as being of exceedingly low probative value.

Moreover, while the Sixth Circuit, in *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993), indicated that party affiliation may be considered when weighing numerous x-ray interpretations, the court did not provide any guidance on how to properly accomplish this very difficult task.

2. Department of Labor sponsored examination

The Board has held that the opinions of Department of Labor physicians should not automatically be accorded greater weight absent a foundation in the record that the Department's expert is independent and the opinions offered by the parties are properly held to be biased. *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991)(en banc).

G. Cumulative, repetitious, or immaterial evidence

Prior to applicability of the amended regulations at 20 C.F.R. Part 725 (2008)⁴, evidence was generally admissible in black lung claims without restrictions so long as the due process rights of the parties were protected, *i.e.* the parties had notice and an opportunity to be heard on the evidence presented.

In *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946 (4th Cir. 1997), Claimant argued that "the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. § 556(d), by admitting cumulative or repetitive evidence submitted by Elkay Mining." Initially, the court noted that "[b]ecause the ALJ is presumably competent to disregard that evidence which should be excluded or to discount that evidence which has lesser probative value, it makes little sense, as a practical matter, for an administrative law judge in that position to apply strict exclusionary evidentiary rules."

The court concluded, however, that "the APA grants ALJ's broad discretion to exclude excessive evidence which lacks significant probative value" In this vein, the court noted that, in a case involving voluminous evidence, "[t]here is a point of diminishing returns and a point at which additional evidence provides almost no value." The court then emphasized the importance of considering the "quality" of the evidence when weighing it.

The amended regulations, however, contain specific restrictions on the admission of medical evidence. See *Chapter 4* for a discussion of these amendments.

⁴ The amended regulations at 20 C.F.R. Part 725 (2008) apply to claims pending on January 19, 2001 as well as claims filed after that date. 20 C.F.R. § 725.2 (2008).

III. Chest roentgenogram evidence

The following principles are intended to assist the fact-finder in weighing the x-ray evidence of record.

A. Physicians' qualifications

The following categories provide general principles for weighing x-ray evidence based upon qualifications of the physicians. A physician's qualifications *at the time the interpretation is rendered* should be considered. *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985). However, an administrative law judge may utilize any reasonable method of weighing such evidence. For example, in *Sexton v. Director, OWCP*, 752 F.2d 213 (6th Cir. 1985), the court held that the x-ray interpretation of an examining physician, whose credentials entailed several pages of achievements, was entitled to greater weight than the interpretation of a B-reader.

1. Dually qualified physicians

a. Over a board-certified radiologist

Greater weight may be accorded the x-ray interpretation of a dually-qualified (B-reader and board-certified) physician over the reading of a board-certified radiologist. *Herald v. Director, OWCP*, BRB No. 94-2354 BLA (Mar. 23, 1995)(unpublished). *See also Peranich v. Director, OWCP*, BRB No. 87-3158 BLA (Nov. 27, 1990) (unpub.) (it is proper to accord greater weight to the opinion of a dually-qualified physician over a physician who is a board-certified radiologist, but not a B-reader).

b. Over a B-reader

In *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n. 5 (1985), the Board held that it "takes official notice that the qualifications of a certified radiologist are at least comparable if not superior to a physician certified as a reader pursuant to 42 C.F.R. § 37.51"

The Board and some circuit courts hold that it is proper to credit the interpretation of a dually-qualified physician over the interpretation of a B-reader. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894 (7th Cir. 2003) (complicated pneumoconiosis); *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 842-43 (7th Cir. 1997) (proper to accord greater weight to the interpretation of a dually-qualified physician over the interpretation of a B-reader, who was not board-certified in radiology); *Bethenergy Mines, Inc. v. Cunningham*, Case No. 03-1561 (4th Cir. July 20, 2004)(unpub.); *Cranor v. Peabody Coal Co.*, 22

B.L.R. 1-1 (1999) (en banc on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). See also *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985) (weighing evidence under Part 718).

2. Board-certified and board-eligible radiologists

The interpretation of a board-certified radiologist is entitled to greater weight than that of a radiologist who is board-eligible given the expertise of a certified radiologist given his or her level of expertise. 20 C.F.R. § 718.202(a)(1)(ii) (2008).

3. C-readers and B-readers

It is proper to accord greater weight to the interpretation of a C-reader over that of a B-reader. *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983).

4. B-readers and A-readers

A B-reader's interpretation is entitled to greater weight than the reading of an A-reader. *Pavesi v. Director, OWCP*, 758 F.2d 956 (3rd Cir. 1985). However, the fact-finder may not, without explanation, accord greater weight to one B-reader's interpretation over that of another B-reader as they are presumably equally qualified in the interpretation of x-rays. *York v. Jewell Ridge Coal Corp.*, 7 B.L.R. 1-767 (1985); *Isaacs v. Bailey Mining Co.*, 7 B.L.R. 1-62, 1-63 n. 2 (1984); *Whitman v. Califano*, 617 F.2d 1055 (4th Cir. 1980).

5. Credentials unknown

It is improper to accord greater weight to the interpretation of a physician whose qualifications are unknown (*i.e.* the reader is identified only by initials). *Stanley v. Director, OWCP*, 7 B.L.R. 1-386 (1984). The party seeking to rely on an x-ray interpretation bears the burden of establishing the qualifications of the reader. *Rankin v. Keystone Coal Mining Co.*, 8 B.L.R. 1-54 (1985).

6. Taking official notice of credentials

In *Pruitt v. Amax Coal Co.*, 7 B.L.R. 1-544, 1-546 (1984), the Board held as follows with regard to taking official notice of an interpreter's credentials:

The rules of official notice in administrative proceedings are more relaxed than in common law courts. The mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. (citation omitted). Although the administrative law judge erred in

failing to cite the 'B' reader list as the source of his information regarding Dr. Morgan's qualifications, and the parties should have been afforded a full opportunity to dispute his qualifications, *Casias v. Director, OWCP*, 2 B.L.R. 1-259 (1979), the error is harmless, because Dr. Morgan's name does, in fact, appear on the 'B' reader list and a contrary finding cannot be made on remand. (citations omitted). Claimant has not shown that he was substantially prejudiced by the administrative law judge's action.

See also *Simpson v. Director, OWCP*, 9 B.L.R. 1-99 (1986).

B. Format of the x-ray report

1. Use of ILO form not required

An x-ray interpretation need not be submitted on an official ILO form, but may be contained in the body of a medical report, treatment note, or hospitalization record. *Consolidation Coal Co. v. Chubb*, 741 F.2d 968 (7th Cir. 1984).⁵ All admitted x-ray interpretations must be weighed in determining whether the miner suffers from pneumoconiosis. Moreover, the fact-finder must provide an explanation regarding the crediting or discounting of certain readings. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983) (all interpretations must be weighed prior to invocation under Part 727); *Justice v. Jewell Ridge Coal Corp.*, 3 B.L.R. 1-547 (1981) (Part 727). Failure to consider all admitted x-ray interpretations generally will result in a remand of the claim. *Isaacs v. Bailey Mining Co.*, 7 B.L.R. 1-62 (1984).

2. Use of the official ILO form, generally

The Board holds that an administrative law judge may treat an x-ray reading with a profusion level of 1/0 or greater as positive for pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1, 1-4 (1999) (en banc on recon.). Typically, there are two types of comments that an interpreting physician might make along with a profusion of 1/0 or greater. The fact-finder must determine whether the comments constitute an "alternative diagnosis," or merely an "additional diagnosis."

⁵ For x-ray evidence developed after January 19, 2001, see the discussion of quality standards in this Chapter, *supra*.

a. Alternative diagnosis

A physician diagnosing Category 1 pneumoconiosis or greater may also comment that another disease cannot be ruled out, as in *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991) (en banc) (a case involving complicated pneumoconiosis). In this situation, the Board has held that the physician's comment calls the diagnosis of pneumoconiosis into question. *Id.* at 1-37. Consequently, the comments should be evaluated within an administrative law judge's 20 C.F.R. § 718.202(a)(1) analysis. Notably, where comments suggest an alternative diagnosis, the "internal inconsistencies" may "detract from the credibility of the x-ray interpretation under 20 C.F.R. § 718.202(a)(1)." *Cranor*, 22 B.L.R. at 1-5 (discussing *Melnick*).

b. Additional diagnosis

A physician diagnosing Category 1 pneumoconiosis or greater may comment that the disease is "not CWP etiology unknown," as occurred in *Cranor*. *Id.* at 1-4. The Board held that the physician's comments are directed not to the presence of pneumoconiosis, but to the etiology of the diagnosed pneumoconiosis. *Id.* at 1-5, 1-6. Accordingly, and administrative law judge should consider those comments under 20 C.F.R. § 718.203 regarding the etiology of the claimant's pneumoconiosis.

In *Kiser v. L&J Equipment Co.*, 23 B.L.R. 1-246 (2006), the Board reaffirmed its decision in *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1, 1-5 (1999) (en banc) and held that it was proper for the administrative law judge to conclude that Dr. Halbert's classification of a x-ray as Category 1/1 was positive for the presence of pneumoconiosis under § 718.202(a)(1) of the regulations. In a narrative report accompanying the ILO classification form, Dr. Halbert indicated that he "found opacities consistent with pneumoconiosis of some type (such as asbestosis) but no CWP." The Board agreed with the Director's position that the administrative law judge properly considered Dr. Halbert's comments under § 718.203 as "Section 718.202(a)(1) does not require that claimant prove the cause of the clinical pneumoconiosis diagnosed by chest x-ray."

C. Interpretation that is silent regarding pneumoconiosis

Chest x-rays, which are classified as less than 1/0, do not constitute affirmative evidence of pneumoconiosis. 20 C.F.R. § 718.102(b) (2008). However, in some instances, a physician will not specifically indicate whether the disease is present or not. In *Marra v. Consolidation Coal Co.*, 7 B.L.R. 1-216 (1984), a case arising under Part 727, the Board held that, under some circumstances, it is proper for the administrative law judge to infer that an

interpretation, which does not mention the presence of pneumoconiosis, as negative.

On the other hand, in *Sacolick v. Rushton Mining Co.*, 6 B.L.R. 1-930 (1984), the Board upheld invocation under § 727.203(a)(1) where one x-ray was interpreted as positive for the disease and the remainder of the studies, which were interpreted for purposes of diagnosing cancer, included no diagnosis of pneumoconiosis. See also *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 BLA (June 19, 1997)(en banc)(unpublished) (Board reiterated that "when an x-ray is not classified, and makes no mention of pneumoconiosis, the administrative law judge has discretion to infer whether or not the x-ray is negative for pneumoconiosis").

If a physician has left the "profusion" boxes blank on the official ILO form, then the fact-finder may conclude that the interpretation is negative for the presence of pneumoconiosis if (1) the reader checked the "completely negative" box on the form, or (2) the physician checked the box that s/he found no parenchymal abnormalities consistent with pneumoconiosis. On the other hand, where the physician finds parenchymal abnormalities consistent with the presence of pneumoconiosis, but leaves the "profusion" boxes blank, the fact-finder may conclude that the study is internally inconsistent or that it does not support a finding of the presence or absence of pneumoconiosis.

For a discussion of the effect of the amended regulations on silent x-ray interpretations dated after January 19, 2001, see the discussion on quality standards in this Chapter, *supra*.

D. Film quality

If the quality of the film is not noted on the x-ray report, then it is assumed to be of acceptable quality, absent contrary proof, if the study is read. *Auxier v. Director, OWCP*, 8 B.L.R. 1-109 (1985); *Lambert v. Itmann Coal Co.*, 6 B.L.R. 1-256 (1983). See also *Consolidation Coal Co. v. Director, OWCP [Chubb]*, 741 F.2d 968 (7th Cir. 1984).

E. Digital x-rays and CT-scans considered separately from chest x-ray evidence

In *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring), the Board adopted the Director's position and held that digital x-ray interpretations are not considered "chest x-ray" evidence under 20 C.F.R. §§ 718.101(b), 718.102, 718.202(a)(1), and Appendix A to Part 718 as they do not satisfy the quality standards at Appendix A. Consequently, the Board held that digital chest x-rays are "properly considered under 20 C.F.R. § 718.107, where the administrative law judge must determine, on a case-by-

case basis, pursuant to 20 C.F.R. § 718.107(b), whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement." See also *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-273 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc). Similarly, CT-scans would be considered with "other evidence" and not with the chest x-ray interpretations. See also *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991) (en banc) (CT-scans should be weighed separately from chest x-ray evidence).

IV. Pulmonary function (ventilatory) studies

A. Resolving height discrepancies

The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). See also *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995) (the fact-finder erred in failing to resolve height discrepancies in the record particularly where the discrepancies affected whether the tests were qualifying).

It is prudent to review the file prior to the hearing to ascertain whether total disability is at issue and, if so, whether the record contains discrepancies in the recorded height of the miner. Where there is conflict in the record, testimony may be elicited at the hearing, or the parties may be required to stipulate to the miner's height.

B. Qualifying test results

An administrative law judge may infer, in the absence of evidence to the contrary, that the ventilatory results reported represent the best of three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-1083 (1984).

All ventilatory studies of record, both pre-bronchodilator and post-bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, (1) the FEV1 must qualify, **and** (2) the MVV or FVC values must qualify **or** FEV1/FVC must equal 55% or less. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984).

In addition, the results of a study cannot be "rounded off" to render it qualifying. *Bolyard v. Peabody Coal Co.*, 6 B.L.R. 1-767 (1984); *Sexton v. Peabody Coal Co.*, 7 B.L.R. 1-411, 1-412 n. 2 (1984).

C. Determination of reliability or conformity

The fact-finder must determine the reliability of a study based on its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1-154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986).

In assessing the reliability of a study, an administrative law judge may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). However, the administrative law judge should not invalidate a study based upon the opinion of a reviewing technician. *Bolyard v. Peabody Coal Co.*, 6 B.L.R. 1-767 (1984).

On the other hand, more weight may be given to the observations of technicians who administered the studies than to physicians who reviewed the tracings. *Revnack v. Director, OWCP*, 7 B.L.R. 1-771 (1985). Indeed, if the administrative law judge credits a consultant's opinion over the opinion of the physician/technician who actually observed the test, a rationale must be provided. *Brinkley v. Peabody Coal Co.*, 14 B.L.R. 1-147 (1990).

Further, a consulting physician, who merely places a checkmark in a box indicating "poor or unacceptable technique" without explanation, has not provided sufficient evidence to support his or her rejection of the study. *Gambino v. Director, OWCP*, 6 B.L.R. 1-134 (1983). *See also Chester v. Hi-Top Coal Co.*, BRB No. 00-1000 BLA (July 31, 2001) (unpub.) (the judge properly accorded no weight to a physician's "failure to fully identify the evidence he relied upon in reaching his conclusions regarding the validity of (a) pulmonary function study").

For more information on pulmonary function studies conducted on or after January 19, 2001, see the discussion regarding quality standards in this Chapter, *supra*.

1. Conformity issues

a. "Poor" cooperation or comprehension

Little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension because the study is non-conforming, *i.e.* the study does not "conform" to the quality standards set forth in the regulations. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981).

b. "Fair" cooperation or comprehension

If "fair" effort is noted on the study, the study may be conforming. *Laird v. Freeman United Coal Co.*, 6 B.L.R. 1-883 (1984); *Verdi v. Price River Coal Co.*, 6 B.L.R. 1-1067 (1984); *Whitaker v. Director, OWCP*, 6 B.L.R. 1-983 (1984). However, the Board concluded that a study was non-conforming where "fair" effort was noted and the administering physician stated that the miner was "coughing" during the test. *Clay v. Director, OWCP*, 7 B.L.R. 1-82 (1984).

c. Non-conforming, non-qualifying study probative

In *Crapp v. U.S. Steel Corp.*, 6 B.L.R. 1-476 (1983), the Board held that a non-conforming pulmonary function study may be entitled to probative value where the results exceed the table values, *i.e.*, the test is non-qualifying. In particular, the Board noted that the non-qualifying study was not accompanied by statements of the miner's cooperation and comprehension, thus rendering it non-conforming. However, it stated the following:

[T]he lack of these statements does not lessen the reliability of the study. Despite any deficiency in cooperation and comprehension, the demonstrated ventilatory capacity was still above the table values. Had the claimant understood or cooperated more fully, the test results could only have been higher.

. . .

It should be noted, however, that the only non-conforming pulmonary function tests that may be considered on invocation are those with non-qualifying results and that are non-conforming only

due to a lack of statements of cooperation and/or comprehension.

Id. at 1-479 (emphasis in original).

2. Requirement of three tracings and flow-volume loop

Because tracings are used to determine the reliability of a ventilatory study, a study that is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then the administrative law judge may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984).

For studies conducted after January 19, 2001, the flow-volume loop must also be admitted into the record. 20 C.F.R. § 718.103(b) (2008).

3. Testing conducted during hospitalization

In *Jeffries v. Director, OWCP*, 6 B.L.R. 1-1013 (1984), the Board held as follows regarding probative value of ventilatory studies conducted during the miner's hospitalization for a heart attack:

The Director contends that, because the studies were performed during claimant's hospitalization for a heart attack, they are unreliable and cannot support invocation. Although this argument is very appealing, we decline to accept it in this case. While the studies may have been affected by claimant's heart attack, and may, therefore, actually be unreliable, without qualified medical testimony to that effect, neither the Board nor the administrative law judge has the requisite medical expertise to make that judgment. The Director has produced no such evidence.

Id. at 1-1014.

D. Miners over 71 years of age

In *K.J.M. v. Clinchfield Coal Co.*, 24 B.L.R. 1-___, BRB No. 07-0655 BLA (June 30, 2008), the Board adopted the Director's position and held that, for miners over 71 years of age, the table values of Appendix B for a 71 year old miner should be used to determine whether the study is qualifying. The Board reasoned, "[i]n the absence of a revision to Appendix B to account for older miners, we are persuaded that the Director has presented a reasonable method for resolving the problem of the table values ending at age 71." However, the Board also held that the opposing party must be allowed to submit evidence to

challenge whether the test establishes total disability under the circumstances.

Thus, while the Board remanded the claim and instructed the judge to utilize the values for a 71 year old miner at Appendix B to determine whether the 75 year old Claimant's study was qualifying, the Board also instructed the judge to "reopen the record to allow employer to submit evidence . . . indicating that the ventilatory function tests that yield qualifying values for age 71 are actually normal or otherwise do not demonstrate a totally disabling respiratory impairment."

In this case, Employer proposed on appeal that the "Knudson formula" be used for this miner's testing. According to Employer, the formula provides that the predicted normal FEV₁ is $0.1321 \times \text{height (in inches)} - 0.0270 \times \text{age (in years)} - 4.203$." The threshold FEV₁ is then calculated by multiplying the predicted normal value by 0.60. The Board noted that the tables at Appendix B were derived using a formula contained in the published study by R.J. Knudson and others entitled, "The Maximal Expiratory Flow-volume Curve: Normal Standards, Variability, and Effects of Age," 113 Am. Rev. Resp. Dis. 587-660 (May 1976).

Thus, the Board directed that, on remand, the record be reopened by the administrative law judge to address this evidence from Employer. The Board specified that Employer's evidence "should be considered by the administrative law judge when he or she is making her initial determination as to whether the pulmonary function study supports a finding of total disability at Section 718.204(b)(2)(i)." Moreover, although this claim was not governed by the amended regulations at 20 C.F.R. § 725.414 (2008), even if the amendments applied, the Board noted that Employer's proffered evidence would be admissible under the "rebuttal" provisions at 20 C.F.R. § 725.414(a)(2)(ii) and (a)(3)(ii) (2008).

V. Blood gas studies

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise and an administrative law judge must provide a rationale for according greater probative value to the results of one study over the results of another. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981).

A. Cannot "round-up" or "round-down" values

Blood gas tables at Appendix C of Part 718 do not permit "rounding up" or "rounding down" of PCO₂ or PO₂ values to determine whether the test is qualifying; rather, each value must be "equal to or less than" the applicable table value. *Tucker v. Director, OWCP*, 10 B.L.R. 1-35 (1987).

B. Determination of reliability or conformity

The following list contains a few of the principles which may be utilized in assigning probative value to the blood gas studies of record:⁶

1. Validation by medical opinion

a. Factors to consider, generally

In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated). Similarly, in *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1045 (10th Cir. 1990) and *Twin Pines Coal Co. v. U.S. DOL*, 854 F.2d 1212 (10th Cir. 1988), the court held that the administrative law judge must consider a physician's report which addresses the reliability and probative value of testing wherein he or she attributes qualifying results to non-respiratory factors such as age, altitude, or obesity.

b. Technical validation of study, value of

Technical validation of a study, without explanation, does not automatically entitle the study to greater weight. In *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998), the court reviewed the blood gas study of evidence and found that "[o]ut of a total of nine tests, the five initial tests produced qualifying results, and the four later tests did not." The court concluded that it was error for the administrative law judge to credit an earlier qualifying study solely on the grounds that it was "validated" by a Department of Labor physician. Specifically, the court stated that the physician "merely checked a box verifying that the test was technically

⁶ For blood gas studies conducted after January 19, 2001, see the discussion regarding quality standards in this *Chapter, supra*.

acceptable" and "provided no reasons for his opinion" such that "his validation lent little additional persuasive authority to (the earlier study)." In addition, the court concluded that the administrative law judge "failed to consider . . . testimony that obesity could affect the blood gas studies, causing the studies to be more likely to qualify; nor did the ALJ address the potential effect of (Claimant's) heart disease and intervening coronary artery surgery on the tests."

2. Test conducted during hospitalization

a. Prior to applicability of 20 C.F.R. Part 718 (2008)

In *Jeffries v. Director, OWCP*, 6 B.L.R. 1-1013 (1984), the Board held as follows regarding probative value of blood gas studies conducted during the miner's hospitalization for a heart attack:

The Director contends that, because the studies were performed during claimant's hospitalization for a heart attack, they are unreliable and cannot support invocation. Although this argument is very appealing, we decline to accept it in this case. While the studies may have been affected by claimant's heart attack, and may, therefore, actually be unreliable, without qualified medical testimony to that effect, neither the Board nor the administrative law judge has the requisite medical expertise to make that judgment. The Director has produced no such evidence.

Id. at 1-1014. *But see Hess v. Director, OWCP*, 21 B.L.R. 1-141 (1998) (it was proper for the administrative law judge to question the reliability of a blood gas study where a physician stated that it was taken while Claimant was in the hospital and "may not be representative of [claimant's] true lung function").

b. After applicability of 20 C.F.R. Part 718 (2008)

At 20 C.F.R. § 718.105(d) (2008), the amended regulations provide the following with regard to blood gas studies conducted during a miner's terminal hospitalization:

If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent

reliance on the blood-gas study as evidence that the miner was totally disabled at death.

20 C.F.R. § 718.105(d) (2008).

VI. Medical reports⁷

There are several basic principles of weighing evidence, which are relevant to medical reports and opinions. This subsection of Chapter 3 sets forth a variety of techniques for weighing medical opinions.

A. Well-documented, well-reasoned opinion defined

A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). As one example, a treating physician's opinion based on a positive x-ray interpretation, physical examination, and the miner's symptoms was deemed sufficiently documented. *Adamson v. Director, OWCP*, 7 B.L.R. 1-229 (1984).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields, supra*. Whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

B. Undocumented and unreasoned opinion, little or no probative value

1. Generally

An unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). See also *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986) (a report which is internally inconsistent and inadequately reasoned may be entitled to little probative value).

⁷ For medical reports generated after January 19, 2001, the amended regulations provide that such reports must be in "substantial compliance" with certain quality standards. See the discussion of those quality standards in this Chapter, *supra*.

2. Separation of probative, non-probative components of report

In *Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994), the Eleventh Circuit held that an administrative law judge "need not . . . find that a medical opinion is either wholly reliable or wholly unreliable"; rather, the opinion may be divided into the relevant issues of entitlement to determine whether it is reasoned and documented with regard to any particular issue. However, in applying this holding to cases arising under Part 727, the court held that "when the weight of evidence in one of the medical evidence categories invokes the presumption, then the same evidence cannot be considered during rebuttal to challenge the existence of the fact proved, but it may be considered if relevant to rebut one of the presumed elements of a valid claim for benefits."

See also *Keener v. Peerless Eagle Coal Co.*, 23 B.L.R. 1-229 (2007) (en banc) (separation of admissible and inadmissible portions of physician's opinion under the amended regulations); *Martin v. Ligon Preparation Co.*, 400 F.3d 302 (6th Cir. 2005) (physician's finding of clinical pneumoconiosis not probative, but finding of legal pneumoconiosis supported by the record and probative).

3. Unsupported medical conclusion

An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). See also *Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982); *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.) (proper to give less weight to the report of Dr. Fino because his opinion was based upon a CT-scan that was not in the record and he did not have the benefit of reviewing the two most recent qualifying pulmonary function studies).

4. Basis for opinion unclear

A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies Coal Co.*, 6 B.L.R. 1-1182 (1984).

5. Opinion based on generalities

A medical opinion based on generalities, rather than specifically focusing upon the miner's condition, may be rejected. *Knizer v. Bethlehem Mines Corp.*, 8 B.L.R. 1-5 (1985). See also *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723 (7th Cir. 2008) (general reference to medical literature, and not the miner's specific condition, not probative).

6. Reliance on unreliable study, subjective complaints

A report that is flawed may be discredited. *Goss v. Eastern Assoc. Coal Corp.*, 7 B.L.R. 1-400 (1984). As an example, an administrative law judge properly discredited a physician's opinion as undocumented where it was based only on the claimant's work history, subjective complaints, and an unreliable blood gas study. *Mahan v. Kerr-McGee*, 7 B.L.R. 1-159 (1984).

7. Inaccurate coal mine employment or smoking history

It is proper for a judge to discredit a medical opinion based on an inaccurate length of coal mine employment or an inaccurate smoking history. *Worhach v. Director, OWCP*, 17 B.L.R. 1-105 (1993)(per curiam) (physicians reported an eight year coal mine employment history, but the judge only found four years of such employment); *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993) (physician's opinion less probative where based on inaccurate smoking history).

8. Inadequate reasoning

a. Reliance on negative x-ray alone

In *Cannelton Industries, Inc. v. Director, OWCP [Frye]*, Case No. 03-1232 (4th Cir. Apr. 5, 2004) (unpub.), the court concluded that the judge properly accorded less weight to the opinion of Dr. Forehand, who found that the miner was totally disabled due to smoking-induced bronchitis, but failed to explain "how he eliminated (the miner's) nearly thirty years of exposure to coal mine dust as a possible cause" of the bronchitis. In affirming the judge, the court noted that "Dr. Forehand erred by assuming that the negative x-rays (underlying his opinion) necessarily ruled out that (the miner's) bronchitis was caused by coal mine dust"

b. Reversibility on pulmonary function

testing with residual disability

In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the court upheld the administrative law judge's finding that reversibility of pulmonary function values after use of a bronchodilator does not preclude the presence of disabling coal workers' pneumoconiosis. In particular, the court noted the following:

All the experts agree that pneumoconiosis is a fixed condition and therefore any lung impairment caused by coal dust would not be susceptible to bronchodilator therapy. In this case, although Swiger's condition improved when given a bronchodilator, the fact that he experienced a disabling residual impairment suggested that a combination of factors was causing his pulmonary condition.

As a trier of fact, the ALJ 'must evaluate the evidence, weigh it, and draw his own conclusions.' (citation omitted). Therefore, the ALJ could rightfully conclude that the presence of the residual fully disabling impairment suggested that coal mine dust was a contributing cause of Swiger's condition. (citation omitted).

Slip op. at 8.

9. Medical opinion cannot be based on chest x-ray alone

A medical opinion submitted for consideration under 20 C.F.R. § 718.204(a)(4) (2008) is entitled to little weight if the diagnosis regarding the presence or absence of pneumoconiosis is based on a chest x-ray alone. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the circuit court held that, if a physician bases his or her finding of coal workers' pneumoconiosis only on the miner's history of coal dust exposure and a positive chest x-ray, then the opinion "should not count as a reasoned medical judgment under § 718.202(a)(4)." However, the court found that the opinions of Drs. Veazy and Baker were not, as characterized by the administrative law judge, based only on the miner's exposure to coal dust. Rather, in addition to consideration of coal mine employment and chest x-rays, the physicians "considered their examinations of Cornett, his history in the mines, his history as a smoker and pulmonary functions studies."

In *S.P.W. v. Peabody Coal Co.*, BRB No. 07-0278 BLA (Dec. 27, 2007)(unpub.), the Board held that the irrebuttable presumption at 20 C.F.R. § 718.304 cannot be invoked under subsection (c) using medical opinions that are based solely on chest x-ray interpretations. Specifically, the Board noted that § 718.304(c) permits invocation of the presumption "by means other

than" interpretations of chest x-rays at § 718.304(a) of the regulations. Therefore, while medical opinions may be considered under § 718.304(c) to invoke the irrebuttable presumption, such opinions cannot be based solely on x-ray interpretations.

C. Physicians' qualifications

The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

1. Treating physician

Proper consideration of treating physicians' opinions has been, and continues to be, a point of contention. On the one hand, treating physicians may have the benefit of observing the miner over time and may be more familiar with his or her condition. On the other hand, episodic treatment or an opinion by the treating physician that is not well-reasoned or well-documented does not compel the fact-finder to accord greater weight to the opinion solely because of the status of the authoring physician.

The amended regulations at 20 C.F.R. § 718.104(d) (2008) set forth specific considerations when weighing treating physicians' opinions against other medical opinions of record. Although these provisions do not apply to opinions submitted in claims filed on or before January 19, 2001, there is case law prior to the amendments that set forth many of the same considerations.

a. Prior to applicability of 20 C.F.R. Part 718 (2008)

More weight may be accorded to the reasoned and documented conclusions of a treating physician as s/he is more likely to be familiar with the miner's condition than a physician who examines the miner once or episodically. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989). However, in *Collins v. J & L Steel (LTV Steel)*, 21 B.L.R. 1-182 (1999), the Board held that it was error for the administrative law judge to give greater weight to a treating physician's opinion without addressing its "flaws," *i.e.*, whether the doctor's failure to discuss the miner's lung cancer and heavy smoking history rendered his report less probative.

Status as "treating physician" not controlling

An administrative law judge "is not required to accord greater weight to the opinion of a physician based solely on his status as claimant's treating physician. Rather, this is one factor which may be taken into consideration" *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). See also *Consolidation Coal Co. v. Director, OWCP [Held]*, 314 F.3d 184 (4th Cir. 2002).

In *Eastover Mining Co. v. Williams*, 338 F.3d 501 (6th Cir. 2003), a case filed prior to promulgation of the amended regulations at 20 C.F.R. § 718.104(d) (2008), the court held that the opinion of a treating physician is not automatically entitled to greater weight simply because of the physician's status and, as a result, the court retreated from its holding in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993) that a treating physician's opinion should be accorded controlling weight. The court cited with approval the amended regulatory provisions at 20 C.F.R. § 718.204(d) (2008), stating that "[a] simple principle is evident: in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade." In this case, the court found that, while the treating physician had an "almost-certainly benevolent intent" towards the miner's family, the fact that he did not diagnose pneumoconiosis during 14 years of treatment, but only after the miner allegedly died from it, rendered the physician's conclusion "dubious."

The Seventh Circuit has held that a treating physician may not be entitled to greater weight because of his or her status. In *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001)⁸, the circuit court found that it was "irrational" to accord greater weight to the opinion of a treating physician, who may not be a specialist. The court stated:

Treating physicians often succumb to the temptation to accommodate their patients (and their survivors) at the expense of third parties such as insurers, which implies attaching a discount rather than a preference to their views.

Id.

Report must be well-reasoned, well-documented

Other factors to be considered in weighing a treating physician's report

⁸ It is noted that the Seventh Circuit does not mention the amended regulations in its decision.

include whether the report is well-reasoned and well-documented. *McClendon v. Drummond Coal Co.*, 12 B.L.R. 2-108 (11th Cir. 1988) (a well-reasoned, well-documented treating physician's report may be given greater weight); *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992) (a treating physician's report that is not well-reasoned or well-documented should not be given greater weight); *Amax Coal Co. v. Beasley*, 957 F.2d 324 (7th Cir. 1992). Similarly, in *Lango v. Director, OWCP*, 104 F.3d 573 (3rd Cir. 1997), the court held that a treating physician's opinion may be accorded greater weight than the opinions of other physicians of record but "the ALJ may permissibly require the treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to the miner's death."

Length of time of treatment is relevant

The length of time during which the physician treated the miner is relevant to the weight given the physician's opinion. *Revnack v. Director, OWCP*, 7 B.L.R. 1-771 (1985). It is logical that a physician who recently began "treating" the miner will not necessarily have a more thorough understanding of the miner's condition than other examining physicians of record. *Gomola v. Manor Mining & Contracting Corp.*, 2 B.L.R. 1-130, 1-135 (1979) (the length of time a particular physician treats a claimant is a valid factor to be considered in the weighing process). See also *Peabody Coal Co. v. Odom*, 342 F.3d 486 (6th Cir. 2003) (treating physician for 16 years with "extensive" treatment notes and reasoned opinions); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511 (6th Cir. 2002) (the judge properly accorded greater weight to the opinion of the miner's treating physician, who examined the miner on numerous occasions from 1981 through 1989, as opposed to the opinions of employer's physicians who never examined the miner or who only examined the miner once in 1981); *Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002).

The Fourth Circuit noted the importance of conducting multiple examinations over time in *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992) stating that "a comparison of medical reports and tests over a long period of time may conceivably provide a physician with a better perspective than the pioneer physician." In *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994), the court further held that, although the claimant's treating physician was "not as highly qualified as the other physicians whose opinions appear in this record, his status as the treating physician entitles his opinion to great, though not necessarily dispositive, weight."

Treating physician's qualifications relevant

In *Peabody Coal Co. v. Odom*, 342 F.3d 486 (6th Cir. 2003), the court held that a treating physician's opinion that the miner suffered from coal

workers' pneumoconiosis was entitled to "additional weight" because: (1) the treating physician was a "highly qualified" board-certified pulmonary specialist; (2) he treated the miner for 16 years and wrote "probative and persuasive medical reports"; and (3) he had "extensive" treatment notes from 1980 through 1996. The court noted that the judge properly considered the other medical reports of record, but determined that the treating physician's report was well-documented and well-reasoned.

**b. After applicability of
20 C.F.R. Part 718 (2008)**

At 20 C.F.R. § 718.104(d) (2008), the amended regulations set forth specific considerations in weighing a treating physician's opinion:

(d) Treating physician. In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

(1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

(2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition;

(4) Extent of treatment. The types of testing and examinations conducted during the treatment

relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition;

(5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

In its comments to the amended regulations, the Department states the following:

The Department emphasizes that the 'treating physician' rule guides the adjudicator in determining whether the physician's doctor-patient relationship warrants special consideration of the doctor's conclusions. The rule does not require the adjudicator to defer to those conclusions regardless of the other evidence in the record. The adjudicator must have the latitude to determine which, among the conflicting opinions, presents the most comprehensive and credible assessment of the miner's pulmonary health. For the same reasons, the Department does not consider subsection (d) to be an evidentiary presumption which shifts the burden of production or persuasion to the party opposing entitlement upon the submission of an opinion from the miner's treating physician. Accordingly, the Department declines to eliminate the requirement in subsection (d)(5) that a treating physician's opinion must be considered in light of all relevant evidence in the record.

65 Fed. Reg. 79,334 (Dec. 20, 2000).

In the preamble to the final rules, the Department notes that the new treating physician regulation does not apply retroactively:

None of these changes, however, apply retroactively. Section 718.101(b) provides that the 'standards for the administration of

clinical tests and examinations' will govern all evidence developed in connection with benefits claims after the effective date of the final rule. Section 718.104 contains the quality standards for any '[r]eport of physical examinations,' including reports prepared by the miner's treating physician. Physicians' medical reports are expressly included in the terms of § 718.101(b). Consequently, the changes to § 718.104 apply only to evidence developed after the effective date of the final rule. With respect to treating physicians' opinions developed and submitted before the effective date of the final rule, the judicial precedent summarized in the Department's initial notice of proposed rule-making continues to apply. See 62 Fed. Reg. 3342 (Jan. 22, 1997). These decisions recognize that special weight may be afforded the opinion of a miner's treating physician based on the physician's opportunity to observe the miner over a period of time.

65 Fed. Reg. 79,334 (Dec. 20, 2000).

Some examples

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004), the judge improperly accorded less weight to the treating physician's conclusion that coal workers' pneumoconiosis was present. The court reasoned as follows:

The ALJ stated that he did not credit Dr. Karlavage's opinion as that of a treating physician because Dr. Karlavage had only seen Soubik three times over six months. That was, of course, three more times and six months more than Dr. Spagnolo saw him. So easily minimizing a treating physician's opinion in favor of a physician who has never laid eyes on the patient is not only indefensible on this record, it suggests an inappropriate predisposition to deny benefits. It is well-established in this circuit that treating physicians' opinions are assumed to be more valuable than those of non-treating physicians. *Mancia v. Director, OWCP*, 130 F.3d 579, 590-91 (3rd Cir. 1997). The ALJ nevertheless ignored Dr. Karlavage's clinical expertise; an expertise derived from many years of diagnosing and treating coal miners' pulmonary problems. The ALJ did so without making any effort to explain why Dr. Spagnolo's board certification in pulmonary medicine was a more compelling credential than Dr. Karlavage's many years of 'hands on' clinical training.

On the other hand, in *Parsons v. Wolf Creek Collieries*, 23 B.L.R. 1-29 (2004) (en banc on recon.), the Board held that the administrative law judge improperly accorded less weight to the opinion of Dr. Tuteur solely because of

his status as a consulting physician and "mechanically" accorded greater weight to the opinion of Claimant's treating physician. The Board noted that "[w]hile a treating physician's opinion may be entitled to special consideration, there is neither a requirement nor a presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians."

2. Examining physicians

In *Jericol Mining, Inc. v. Director, OWCP [Napier]*, 301 F.3d 703 (6th Cir. 2002), the court cited to its decision in *Stephens* to hold that the factors set forth at 20 C.F.R. § 718.104(d)(5) (2008) "are appropriate considerations in determining the weight to be given an examining physician's views." The court concluded that the administrative law judge did not provide sufficient reasoning to accord greater weight to the opinion of Dr. Baker, who examined the miner four times over a four year period of time, as opposed to the opinion of Dr. Dahhan, who examined the miner twice over the same time period. The court noted that the "problem with the ALJ's analysis is that he did not specifically consider whether the four annual examinations by Dr. Baker were materially different from the two examinations that Dr. Dahhan performed during the same time frame." The court reasoned that claimants could "'stack the deck' by frequently visiting a physician who provided a favorable diagnosis, and then arguing that the opinion of that examining physician should automatically be accorded greater weight." See also *Sewell Coal Co. v. O'Dell*, Case No. 00-2253 (4th Cir. July 26, 2001) (unpub.) (citing to *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440 (4th Cir. 1997) to hold that opinions of examining physicians, "although not necessarily dispositive, deserve special consideration").

3. Non-examining or consultative physician

In earlier case law, the Board held that an administrative law judge may accord less weight to a consulting or non-examining physician's opinion on grounds that s/he does not have first-hand knowledge of the miner's condition. *Bogan v. Consolidation Coal Co.*, 6 B.L.R. 1-1000 (1984). See also *Cole v. East Kentucky Collieries*, 20 B.L.R. 1-51 (1996) (the administrative law judge acted within his discretion in according less weight to the opinions of the non-examining physicians; he gave their opinions less weight, but did not completely discredit them). However, with regard to rebuttal under Part 727, the opinion of such a physician is relevant. *Szafraniec v. Director, OWCP*, 7 B.L.R. 1-397 (1984).

In subsequent years, the case law evolved. Presently, a non-examining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a

whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984); *Easthom v. Consolidation Coal Co.*, 7 B.L.R. 1-582 (1984). Indeed, in *Collins v. J & L Steel (LTV Steel)*, 21 B.L.R. 1-182 (1999), the Board cited to the Fourth Circuit's decision in *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438 (4th Cir. 1997) and held that it was error for the administrative law judge to discredit a physician's opinion solely because he was a "non-examining physician." Also, in *Chester v. Hi-Top Coal Co.*, BRB No. 00-1000 BLA (July 31, 2001) (unpub.), the Board cited to *Millburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998) to hold that an administrative law judge may not discredit a medical opinion solely because the physician did not examine the claimant. *But see Consolidation Coal Co. v. Director, OWCP [Wasson]*, Case No. 98-1533 (4th Cir., Nov. 13, 2001) (a consulting physician's opinion was entitled to less weight because it was not well-reasoned or well-documented).

4. Criminal conviction of the physician

In *Boyd v. Clinchfield Coal Co.*, 46 F.3d 1122, 1995 WL 10226 (4th Cir. 1995) (table), the Fourth Circuit held that it was proper for the administrative law judge to take judicial notice of Dr. Vinod Modi's criminal conviction. Moreover, citing to *Adams v. Canada Coal Co.*, Case No. 91-3706 (6th Cir. July 13, 1992)(unpublished) (the administrative law judge "was obviously justified" in not crediting the testimony of Dr. Modi because of his conviction), the court upheld the administrative law judge's decision to accord no weight to Dr. Modi's medical opinion in light of his conviction for tax evasion. *See also Middlecreek Coal Co. v. Director, OWCP*, 91 F.3d 132 (4th Cir. 1996); *Matney v. Lynn Coal Co.*, 995 F.2d 1063 (4th Cir. 1993).

D. Equivocal or vague conclusions

1. Generally

An opinion may be given little weight if it is equivocal or vague. *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995) (treating physician's opinion entitled to little weight where he concluded that the miner "probably" had black lung disease); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988) (an equivocal opinion regarding etiology may be given less weight); *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236 (1984) (equivocal regarding disability); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002) (under Part 727, the physician's opinion was too equivocal because he found that the miner suffered from a "significant limitation" that "appeared more cardiac than pulmonary").

2. Inadvisability of return to coal mine employment

An opinion of the inadvisability of returning to coal mine employment because of pneumoconiosis is not equivalent to a finding of total disability. *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-____, BRB Nos. 07-0649 BLA and 07-0649 BLA-A (Apr. 30, 2008) (should avoid further exposure to coal dust does not constitute a finding of total disability); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988); *Bentley v. Director, OWCP*, 7 B.L.R. 1-612 (1984); *Brusetto v. Kaiser Steel Corp.*, 7 B.L.R. 1-422 (1984).

3. Unable to assess impairment

In *Kentland Elkhorn Coal Corp. v. Director, OWCP [Hall]*, 287 F.3d 555 (6th Cir. 2002), the physician stated that he could not measure the level of the miner's impairment and concluded that the miner could perform his last coal mining job. The court found the report too vague and equivocal and concluded that it was proper for the judge to accord it less weight.

4. Should work in "dust-free environment" too vague

See *White v. New White Coal Co.*, 23 B.L.R. 1-1 (2004).

5. Finding of "Class II" impairment too vague

In *Jeffrey v. Mingo Logan Coal Co.*, BRB Nos. 05-0107 BLA and 05-0107 BLA-A (Sept. 22, 2005) (unpub.), Dr. Baker examined Claimant and concluded that he suffered from a "Class II impairment" under the *Guides to the Evaluation of Permanent Impairment* and had "a second impairment, based on Section 5.8, Page 106, Chapter Five, *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent." As a result, Dr. Baker stated that "[t]his would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations."

In view of the foregoing, the Board determined that the judge properly rejected the opinion:

Because Dr. Baker did not explain the severity of such a diagnosis or address whether such an impairment would prevent claimant from performing his usual coal mine employment, his diagnosis of a Class II impairment is insufficient to support a finding of total disability. (citation omitted). Moreover, since a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment,. . . the administrative law judge permissibly found that this portion of Dr. Baker's opinion is insufficient to support a finding of total disability.

In addition, the Board stated:

[I]n view of our holding that the administrative law judge properly found Dr. Baker's opinion insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred by not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.

Id.

6. Presumption at 20 C.F.R. § 718.203, effect of

In *Crockett Collieries, Inc. v. Director, OWCP [Barrett]*, 478 F.3d 350 (6th Cir. 2007) (J. Rogers, concurring), the administrative law judge's award of black lung benefits was affirmed. In the case, both Drs. Baker and Dahhan concluded that the miner suffered from a respiratory impairment. They disagreed, however, on whether the impairment "could all be due to cigarette smoking or could be due to a combination of cigarette smoking and coal dust exposure." Dr. Baker concluded that coal dust exposure "probably contributes to some extent in an undefinable portion" to the miner's pulmonary impairment. After invoking the rebuttable presumption that the miner's legal pneumoconiosis arose out of coal dust exposure at 20 C.F.R. § 718.203(b), the court held that Dr. Baker's opinion was sufficient to support a finding that the miner suffered from the disease and was not too equivocal. The court further noted:

In rejecting Dr. Dahhan's opinion, the ALJ found that Dahhan had not adequately explained why Barrett's responsiveness to

treatment with bronchodilators necessarily eliminated a finding of legal pneumoconiosis, and had not adequately explained 'why he believes that coal dust exposure did not exacerbate (the miner's) allegedly smoking-related impairments.'

The court agreed with the judge's analysis and affirmed the award of benefits.

E. Physician's opinion based on premises contrary to judge's findings

It is proper for the administrative law judge to accord less weight to a physician's opinion that is based on premises contrary to the judge's findings. Some examples are as follows:

1. Benefits Review Board

In *Abshire v. D&L Coal Co.*, 22 B.L.R. 1-202 (2002)(en banc), although Dr. Broudy based his opinion regarding the etiology of the miner's total disability on a finding that the miner did not suffer from coal workers' pneumoconiosis, it was error for the judge to accord the opinion less probative value where Dr. Broudy also "opined that even if claimant suffered from coal workers' pneumoconiosis, his opinion with respect to claimant's pulmonary difficulties would not change." See also *Osborne v. Clinchfield Coal Co.*, BRB No. 96-1523 BLA (Apr. 30, 1998) (*en banc on recon.*)(unpub.) (proper to accord less weight to physicians' opinions, which found that pneumoconiosis did not contribute to the miner's disability, on grounds that the physicians did not diagnose pneumoconiosis contrary to the judge's findings on the record as a whole).

In *Ferguson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002)(en banc), the administrative law judge "did not reconcile (a) physician's diagnosis of pneumoconiosis, based upon the positive x-ray and the miner's significant duration of coal dust exposure, with the fact that Dr. Baker's positive interpretation was reread as negative by a physician with superior qualifications." Consequently, the Board directed that the judge "address whether this rereading impacts the physician's opinion and his diagnosis of pneumoconiosis."

See also *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.) (it was proper for the administrative law judge to discredit the opinions of Drs. Crisalli and Zaldivar with regard to disability causation where these physicians concluded that the miner did not suffer from either legal or clinical pneumoconiosis contrary to the judge's findings).

2. Third Circuit

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004)⁹, the court held that a physician's failure to diagnose the presence of coal workers' pneumoconiosis would have an adverse effect on his or her ability to assess whether a miner's death was due to the disease. The administrative law judge found that the evidence established the presence of pneumoconiosis. Dr. Spagnolo concluded that the disease was not present and that, even if the miner suffered from pneumoconiosis, it would not have hastened his death. The court rejected the opinion:

Common sense suggests that it is usually exceedingly difficult for a doctor to properly assess the contribution, if any, of pneumoconiosis to a miner's death if he/she does not believe it was present. The ALJ did not explain why Dr. Spagnolo's opinion was entitled to such controlling weight despite Dr. Spagnolo's conclusion that Soubik did not have the disease that both parties agreed was present.

Id.

3. Fourth Circuit

In *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002), the judge erroneously accorded greater weight to the opinions of Drs. Castle and Dahhan, who found that the miner's disability was not caused by coal workers' pneumoconiosis, because the physicians concluded that the miner did not suffer from the disease contrary to the judge's findings. Citing to *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995) and *Grigg v. Director, OWCP*, 28 F.3d 416 (4th Cir. 1994), the court stated the following:

[A]n ALJ who has found (or has assumed *arguendo*) that a claimant suffers from pneumoconiosis and has total respiratory disability may not credit a medical opinion that the former did not cause the latter unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the questions of disability causation does not rest upon her disagreement with the ALJ's finding as to either or both of the predicates in the causal chain.

⁹ While the case was pending on appeal, the court noted that the widow died and the executor of her estate, John Soubik, was substituted as the appellant.

The fact that Drs. Dahhan and Castle stated that their opinions would not change even if the miner suffered from pneumoconiosis did not alter the court's position that the opinions could carry little weight pursuant to its holding in *Toler*:

Both Dr. Dahhan and Dr. Castle opined that Scott did not have legal or medical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal dust exposure. Thus, their opinions are in direct contradiction to the ALJ's finding that Scott suffers from pneumoconiosis arising out of his coal mine employment, bringing our requirements in *Toler* into play. Under *Toler*, the ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at most.

Indeed, the court found that the opinions of Drs. Dahhan and Castle could not outweigh a contrary "poorly documented" opinion linking the miner's disability to his pneumoconiosis, because the contrary opinion was based on a finding of coal workers' pneumoconiosis consistent with the judge's findings. See also *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995) (the court carefully circumscribed the *Toler* holding to require the fact-finder to distinguish between clinical and legal pneumoconiosis); *Dehue Coal Co. v. Director, OWCP [Ballard]*, 65 F.3d 1189 (4th Cir. 1995) (physicians concluded that smoking-induced lung cancer caused the miner's respiratory impairment and miner did not suffer from coal workers' pneumoconiosis; this was not contrary to the judge's finding that the miner suffered from simple pneumoconiosis within the meaning of § 718.201 such that physicians' opinions entitled to consideration).

4. Seventh Circuit

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), the administrative law judge properly discounted Dr. Tuteur's opinion that pneumoconiosis did not contribute to the miner's total disability because Dr. Tuteur's opinion was based on a finding that the miner did not suffer from the disease, contrary to the judge's findings which were supported by substantial evidence.

F. Silent opinion

A physician's report, which is silent as to a particular issue, is not probative of that issue. However, under some circumstances, the report should not be discredited if the physician has provided documented and reasoned opinions relevant to the resolution of other entitlement issues in the

claim. See *Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994) (an administrative law judge "need not . . . find that a medical opinion is either wholly reliable or wholly unreliable"; rather, the opinion may be divided into the relevant issues of entitlement to determine whether it is reasoned and documented with regard to any particular issue).

G. Inconsistent reports

A report may be given little weight where it is internally inconsistent and inadequately reasoned. *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986).

Further, it is proper to accord little probative value to a physician's opinion that is inconsistent with his or her earlier report or testimony. *Hopton v. U.S. Steel Corp.*, 7 B.L.R. 1-12 (1984) (a failure to explain inconsistencies between two reports which were eight months apart rendered the physician's conclusions of little probative value); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 B.L.R. 1-799 (1984) (physician's report discredited where he found total disability in a earlier report and then, without explanation, found no total disability in a report issued five years later). See also *Brazzale v. Director, OWCP*, 803 F.2d 934 (8th Cir. 1986) (a physician's opinion may be found unreasoned given inconsistencies in the physician's testimony and other conflicting opinions of record).

H. Better supported by objective medical data

1. In general

Although a report cannot be discredited simply because a physician did not consider all medical data of record, it is proper to accord greater weight to an opinion which is better supported by the objective medical data of record, *i.e.*, x-ray, blood gas, and ventilatory studies. *Minnich v. Pagnotti Enterprises, Inc.*, 9 B.L.R. 1-89, 1-90 n. 1 (1986); *Wetzel v. Director, OWCP*, 8 B.L.R. 1-139 (1985).

2. Premise contrary to regulations, report not probative

In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court concluded that the administrative law judge properly gave less weight to the opinions of Dr. Fino "based on a finding that they were not supported by adequate data or sound analysis." Of importance, the court made reference to the comments to the amended regulations and stated the following:

Dr. Fino stated in his written report of August 30, 1998 that 'there

is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.' (citation omitted). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions 'are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.'

Id.

Similarly, in *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723 (7th Cir. 2008), the court affirmed the administrative law judge's award of benefits based on a finding that the miner suffered from totally disabling chronic obstructive pulmonary disease stemming from 13 years of coal mine employment. The court noted:

What complicates this case is that (the miner) was also a smoker. He started smoking cigarettes at age 18 or 19, averaging one to one-half pack per day at varying times. He quit at age 54, after about 35 years of smoking.

The record further revealed that, by 2005, the miner was totally dependent on supplemental oxygen and "was taking three nebulizer treatments a day."

While noting that the regulations recognize the existence of "legal" pneumoconiosis, the court emphasized that the miner carried the burden of demonstrating "that his COPD was caused, at least in part, by his work in the mines, and not simply his smoking habit." In this vein, the court cited to medical opinions in the record supporting a finding that coal dust contributed to the miner's COPD, but it also noted the following:

. . . Dr. Tuteur examined (the miner) . . .; he diagnosed severe COPD solely due to smoking. He concluded that coal dust exposure did not cause or contribute to (the miner's disease), noting that miners with no smoking history rarely have COPD, while smokers have a one in five chance of developing a severe obstruction. Dr. Renn reviewed the medical records and issued a report in 2004 where he diagnosed COPD due solely to smoking.

The administrative law judge accorded little weight to the opinions of Drs. Tuteur and Renn in this claim and the court agreed:

First, the essence of (Dr. Tuteur's) opinion was a three sentence comment that presented a personal view that (the miner's) condition had to be caused by smoking because miners rarely have

clinically significant obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust. However, the Department of Labor reviewed the medical literature on this issue and found that there is consensus among scientists and researchers that coal dust-induced COPD is clinically significant. This medical authority indicates that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners. 65 Fed. Reg. 79,938. Second, Dr. Tuteur did not rely on information particular to (the miner) to conclude that smoking was the only cause of his obstruction. Third, he did not cite a single article in the medical literature to support his propositions.

The court then rejected Employer's argument that Dr. Tuteur merely states that development of coal dust induced COPD is rare in miners:

. . . the Department of Labor report does not indicate that this causality is merely rare. And even if the causation is rare, Dr. Tuteur does not explain why (the miner) could not be one of these 'rare' cases. This flaw is endemic to the entire opinion, because Dr. Tuteur did not appear to analyze any data or observations specific to (the miner).

On the other hand, the court approved of the administrative law judge's crediting of Dr. Cohen's report, which supported the miner's entitlement to benefits:

First, it was based on objective data and a substantial body of peer-reviewed medical literature that confirms the causal link between coal dust and COPD. Second, he reviewed studies that were even more recent than the aforementioned Department of Labor study. Third, he linked these studies with (the miner's) symptoms, physical examination findings, pulmonary function studies, and arterial blood gas studies. Finally, he explained that (the miner's) pulmonary function studies showed 'minimal reversibility after administration of bronchodilator' and that he had an 'abnormal diffusion capacity,' all of which is consistent with a respiratory condition related to coal dust exposure.

Id.

Additional case law may be found under the "hostile-to-the-Act" subsection of this Chapter.

I. Reliance on non-qualifying or non-conforming testing

1. Generally

It is error to discredit a physician's finding regarding disability solely because of his or her reliance upon non-qualifying testing where the physician also relied on other factors such as a physical examination, work and medical histories, and symptoms of the miner. *Baize v. Director, OWCP*, 6 B.L.R. 1-730 (1984); *Wike v. Bethlehem Mines Corp.*, 7 B.L.R. 1-593 (1984); *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Sabett v. Director, OWCP*, 7 B.L.R. 1-299 (1984).

2. Benefits Review Board

The Board, in *Arnoni v. Director, OWCP*, 6 B.L.R. 1-423 (1983), held that an administrative law judge properly discredited a physician's opinion, which was based on an x-ray study later interpreted as negative for existence of the disease by a B-reader as well as a ventilatory study that was later found to be nonconforming. However, in *Winters v. Director, OWCP*, 6 B.L.R. 1-877 (1984), the Board held that it was improper to discredit a physician's opinion merely because the underlying x-ray and pulmonary function studies are determined to be outweighed by other studies of record. *See also Fitch v. Director, OWCP*, 9 B.L.R. 1-45, 1-47 n. 2 (1986) (physician's report may not be discredited as undocumented and unreasoned only on grounds that it was based on an x-ray interpretation, which was outweighed by the other interpretations of record).

In *Church v. Eastern Assoc. Coal Corp.*, 21 B.L.R. 1-51 (1997), *rev'g in part and aff'g in part on recon.*, 20 B.L.R. 1-8 (1996), the administrative law judge properly analyzed the medical evidence under § 718.202(a)(4) in crediting physicians' opinions that were better supported by the objective testing. However, the Board cautioned that "an administrative law judge may not discredit an opinion solely on the ground that it is based, in part, upon an x-ray reading which is at odds with the administrative law judge's finding with respect to the x-ray evidence of record." In so holding, the Board noted that the physician also based his finding on observations gathered during the time he physically examined Claimant.

3. Fourth Circuit

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the administrative law judge concluded that the miner did not establish pneumoconiosis through chest x-ray evidence under § 718.202(a)(1), but he did find pneumoconiosis established via medical opinion evidence at § 718.202(a)(4). The Fourth Circuit held that the administrative law judge erred in crediting a physician's finding of pneumoconiosis that was based *solely* on the positive interpretation of an x-ray study where the administrative law judge found the x-ray evidence of record did not establish pneumoconiosis. On the other hand, the circuit court held that the administrative law judge properly credited another physician's report, which was based upon the miner's medical history, a physical examination, and a pulmonary function test.

4. Sixth Circuit

In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the court held that it "is clearly an inappropriate reason to reject a physician's opinion" based on non-qualifying pulmonary function study values "as the regulations explicitly provide (that) a doctor can make a reasoned medical judgment that a miner is totally disabled even 'where pulmonary function tests and/or blood-gas studies are medically contraindicated.' 20 C.F.R. § 718.204(c)(4)." See also *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th Cir. 1997) ("[a]lthough DelVecchio and Garson relied on pulmonary tests exhibiting levels of impairment below that required to establish total disability under section 718.204(c)(1), these tests did demonstrate some impairment and can form a basis, along with other evidence, for a reasoned medical decision establishing total disability under Section 718.204(c)(1)").

In *Clonch v. Southern Ohio Coal Co.*, 2006 WL 3409880, Case No. 05-3133 (6th Cir. Nov. 27, 2006) (unpub.), a physician's opinion that the miner suffered from a moderately severe respiratory impairment under § 718.204(b)(2)(iv) could not be discredited on grounds that the pulmonary function study underlying the opinion yielded non-qualifying results. The court reasoned that the purpose of subsection (b)(2)(iv) (addressing medical opinions) is "clear" and is designed "to provide a more flexible approach than is otherwise allowed under paragraphs (b)(2)(i)-(iii)" (addressing blood gas and pulmonary function studies).

5. Seventh Circuit

In *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994), the court held that it was improper for the administrative law judge to discredit a physician's finding of total disability where the miner's ventilatory and blood

gas studies produced non-qualifying results because the physician also relied on the miner's medical history and "significant physical symptoms and limitations."

J. Extensive medical data versus limited data

Greater weight may be accorded an opinion that is supported by more extensive documentation over an opinion that is supported by limited medical data. *Sabett v. Director, OWCP*, 7 B.L.R. 1-299 (1984). See also *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004) (proper to accord greater weight to a physician who "integrated all of the objective evidence").

1. Extensive data considered, report probative

In *Church v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-8 (1996), *aff'd in relevant part on recon.*, 21 B.L.R. 1-51 (1997), the administrative law judge correctly assigned greater weight to a treating physician's opinion whose diagnosis was based upon "extensive medical information gathered over a period of many years." As a result, the Board rejected Employer's argument that an administrative law judge is compelled to discredit a physician's opinion that the miner suffered from pneumoconiosis where the physician based his findings, in part, upon x-ray evidence that the administrative law judge ultimately concluded did not support a finding of the disease. In so holding, the Board noted that the physician also based his finding upon observations gathered during the time he physically examined Claimant.

2. Incomplete data considered, report less probative

An opinion may be given less weight where the physician did not have a complete picture of the miner's condition. *Stark v. Director, OWCP*, 9 B.L.R. 1-36 (1986). See also *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.) (proper to give less weight to a physician's report based on a CT-scan that was not in the record and where the physician did not have the benefit of reviewing the two most recent qualifying pulmonary function studies).

K. Physical limitations contained in medical report

The Board, in *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990)(en banc) and *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988), held that it is for the fact-finder to determine whether statements made in a physician's report constitute his or her assessment of physical limitations, which must be compared to the exertional requirements of the claimant's last coal mine employment, or whether such statements are merely a narrative of the miner's

assertions and are insufficient to demonstrate total disability. *See also Parsons v. Director, OWCP*, 6 B.L.R. 1-273, 1-276 and 1-277 (1983).

In *DeFelice v. Consolidation Coal Co.*, 5 B.L.R. 1-275 (1982), the administrative law judge relied on a physician's discussion, which set forth a medical assessment of the claimant's limited abilities to walk, climb, lift, and carry. The Board held that, on the basis of the exertional limits, it was proper for an administrative law judge to conclude that the claimant's physical abilities were severely limited and would effectively rule out all types of work.

This case is distinguishable from Board decisions holding that a narrative of symptoms in the "Medical Assessment" section of the Department of Labor examination form is not the equivalent of a diagnosis of total disability. *Heaton v. Director, OWCP*, 6 B.L.R. 1-2222 (1984); *Parsons v. Director, OWCP*, 6 B.L.R. 1-212 (1983). Similarly, a physician's opinion that a claimant's respiratory or pulmonary disease prevents him from engaging in gainful activity because of one block dyspnea does not establish that the claimant is totally disabled. *Parino v. Old Ben Coal Co.*, 6 B.L.R. 1-104 (1983).

The Third, Fourth, and Eleventh Circuit Courts have held that an administrative law judge cannot conclude, without specific evidence in support thereof, that notations in a physician's report of limitations as to walking, climbing, carrying, and lifting, constitute a mere recitation of a miner's subjective complaints as opposed to an assessment of the physician. *Scott v. Mason Coal Co.*, 60 F.3d 1138 (4th Cir. 1995); *Kowalchick v. Director, OWCP*, 893 F.2d 615, 623 (3rd Cir. 1990); *Jordan v. Benefits Review Bd.*, 876 F.2d 1455, 1460 (11th Cir. 1989).

L. Death certificates

A death certificate, in and of itself, is an unreliable report of the miner's condition and it is error for an administrative law judge to accept conclusions contained in such a certificate where the record provides no indication that the individual signing the death certificate possessed any relevant qualifications or personal knowledge of the miner upon which to assess the cause of death. *Smith v. Camco Mining, Inc.*, 13 B.L.R. 1-17 (1989); *Addison v. Director, OWCP*, 11 B.L.R. 1-68 (1988). However, the Board has held that a physician's opinion expressed on a death certificate in addition to his testimony may be sufficient to establish the cause of the miner's death. *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113 (1988).

Similarly, in *Lango v. Director, OWCP*, 104 F.3d 573 (3d Cir. 1997), the Third Circuit adopted the Eighth Circuit's holding in *Risher v. Office of Workers' Compensation Programs*, 940 F.2d 327, 331 (8th Cir. 1991), to state that "the mere fact that a death certificate refers to pneumoconiosis cannot be viewed as a reasoned medical finding, particularly if no autopsy has been performed."

See also *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186 (4th Cir. 2000) (a death certificate stating that pneumoconiosis contributed to the miner's death, without some further explanation, is insufficient); *Hill v. Peabody Coal Co.*, Case No. 03-3321 (6th Cir. Apr. 7, 2004) (unpub.) (a physician's conclusory statement on a death certificate, without further elaboration, is insufficient to meet Claimant's burden as to the cause of death).

M. Determinations by other agencies

A general disability determination by the Social Security Administration is not binding on the Department of Labor with regard to a claim filed under Part C; rather, the determination may be used as some evidence of disability or rejected as irrelevant at the discretion of the fact-finder. The only exception to this rule is a final determination where the miner is found totally disabled under Section 223 of the Social Security Act, 42 U.S.C. § 423, as the result of coal workers' pneumoconiosis. 20 C.F.R. § 410.470; *Tackett v. Director, OWCP*, 7 B.L.R. 1-703 (1985); *Reightnouer v. Director, OWCP*, 2 B.L.R. 1-334 (1979).

Likewise, a state or other agency determination may be relevant, but is not binding on the administrative law judge. *Schegan v. Waste Management & Processors, Inc.*, 18 B.L.R. 1-41 (1994); *Miles v. Central Appalachian Coal Co.*, 7 B.L.R. 1-744 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 B.L.R. 1-1157 (1984) (opinion by the West Virginia Occupational Pneumoconiosis Board of a "15% pulmonary functional impairment" is relevant to disability, but not binding).

N. Medical literature and studies

The following cases contain examples of analyzing various studies and medical literature cited by the physicians:

1. Medical opinion supported by literature may be probative

By unpublished decision in *Bethenergy Mines, Inc. v. Director, OWCP [Rowan]*, Case No. 01-2148 (4th Cir. Sept. 4, 2002) (unpub.), the Fourth Circuit held that it was proper for the administrative law judge to accord greater weight to Dr. Rasmussen's opinion that the miner's centrilobular emphysema was caused, or aggravated, by coal dust exposure:

The ALJ explained that he found Dr. Rasmussen's testimony most persuasive because Dr. Rasmussen offered extensive research to support his opinion. Dr. Rasmussen cited seven articles from medical journals and six epidemiologic studies to support his

position. No other doctor offered such extensive research.

In his opinion, ALJ Burke offered concrete reasons for discounting the opinions of other doctors who were critical of Dr. Rasmussen. He noted that Dr. Renn's testimony lacked the 'definitiveness to outweigh the better reasoned and better supported report of Dr. Rasmussen.' Dr. Kleinerman's disagreement with the medical experts Dr. Rasmussen cited, were 'in the most general of terms.' Dr. Kleinerman did not 'critique any particular study or any specific data behind a study.'

Furthermore, the ALJ found that Dr. Fino's criticisms of studies cited by Dr. Rasmussen are 'insufficient to dismiss the studies that support Dr. Rasmussen's opinion,' because while Dr. Fino disputed the 'underlying data' of studies offered by Dr. Rasmussen, he did not specify which studies of Dr. Ruckley had evidentiary problems. Further, the ALJ stated that 'Dr. Fino doesn't contend that Dr. Rasmussen is incorrect in his interpretation of a study . . . supporting the relationship between coal dust exposure and centrilobular emphysema.' While Dr. Fino discussed a more recent study that purported to support his position, he did not 'identify the study by title or author.'

Slip op. at 8 (citations omitted).

2. Articles contrary to regulations, not probative

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the judge properly discredited a physician's report that "referenced parts of the medical literature that deny that coal dust exposure can ever cause pneumoconiosis" and where the physician stressed the absence of chest x-ray evidence of the disease and erroneously relied on "the absence of pulmonary problems at the time of (the miner's) retirement from coal mining." The court held that this was contrary to the regulations that pneumoconiosis may be latent and progressive.

3. Surgeon General's report contrary to regulations, not probative

In *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1996), the court rejected Employer's reliance on the Surgeon General's Report that coal workers' pneumoconiosis does not progress in the absence of continued exposure. While the Third Circuit noted that the report states that "[s]imple (coal workers' pneumoconiosis) does not progress in the absence of further

exposure," it concluded that the report "addressed only the progressive nature of clinical pneumoconiosis." In this vein, the court stated that the legal definition of pneumoconiosis is broader and includes chronic pulmonary diseases such as chronic bronchitis. With regard to chronic bronchitis, the court found "[s]ignificantly, the Surgeon General's Report discusses chronic bronchitis caused by coal dust exposure but at no point suggests that industrial chronic bronchitis cannot progress in the absence of continuing dust exposure." See also *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997) (the Seventh Circuit accepted the Benefits Review Board's rejection of the Surgeon General's report as supportive of the proposition that coal workers' pneumoconiosis does not progress in the absence of continued exposure).

4. Pneumoconiosis does not cause obstruction, not probative

In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001), the court concluded that the judge properly gave less weight to the opinions of Dr. Fino "based on a finding that they were not supported by adequate data or sound analysis." Of importance, the court made reference to the comments to the amended regulations and stated the following:

Dr. Fino stated in his written report of August 30, 1998 that 'there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.' (citation omitted). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions 'are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.'

Slip op. at n. 7. See also *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723 (7th Cir. 2008) (physician's reliance on articles that pneumoconiosis "rarely" causes obstruction not probative).

5. Use of AMA Guidelines upheld

By unpublished decision in *Consolidation Coal Co. v. Director, OWCP [Wasson]*, Case No. 98-1533 (4th Cir., Nov. 13, 2001) (unpub.), the court upheld the administrative law judge's use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* to conclude that a miner's "single breath diffusing capacity (DLCO) study was abnormal." A conflict arose in the interpretation of the test:

Dr. Rasmussen questioned the lower predicted value used by Dr. Bercher's laboratory in the 1991 test, stating that he believed that

the claimant's diffusing capacity on that test would be abnormal if a higher predicted value was used. Thus, a controversy arose as to whether the claimant's actual performance on the 1991 test was within normal or abnormal range, i.e., whether the lower predicted value was in fact the appropriate or correct value against which to measure the claimant's test result.

Id.

The administrative law judge properly notified the parties that the AMA guidelines would be used to determine the proper predicted value for the test. Employer objected to the use of the AMA guides because "inter-laboratory differences" would render the AMA guidelines unreliable. The court disagreed, however, and held that the *Guides* already take such differences into account. Consequently, the court concluded that "the employer had adequate notice yet offered no specific evidence to show that the use of the AMA guide was unfair or inaccurate when applied to the case at hand."

**O. Weighing "other evidence" under
20 C.F.R. § 718.107**

1. CT-scans

**a. Should not be weighed under
20 C.F.R. § 718.202(a)(1) (2008)**

CT-scan evidence should be weighed separately from the chest x-rays. *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991)(en banc).

**b. Not *per se* more probative than chest
x-ray evidence**

In *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885 (7th Cir. 2002), the Seventh Circuit upheld the administrative law judge's award of benefits. In reaching this determination, the court rejected Employer's argument that "[d]espite the fact that two qualified B-readers (including a board certified radiologist) determined that Stein's x-rays were positive, . . . Dr. Bruce's negative reading of Stein's CT scan (is) conclusive because it ostensibly is the most 'sophisticated and sensitive diagnostic test' available." Citing to comments underlying the amended regulations, the court noted that the Department has rejected the view that a CT-scan, by itself, "is sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis." 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000). The judge reasonably accorded less weight to the negative CT-scan interpretation by a physician without any radiological qualifications as compared to the positive

chest x-ray interpretations by physicians who are B-readers, and one physician who his also a board-certified radiologist.

2. Digital x-rays

a. Should not be weighed under 20 C.F.R. § 718.202(a)(1) (2008)

In *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring), the Board adopted the Director's position and held that digital x-ray interpretations are not considered "chest x-ray" evidence under 20 C.F.R. §§ 718.101(b), 718.102, 718.202(a)(1), and Appendix A to Part 718 as they do not satisfy the quality standards at Appendix A. As a result, the Board held that digital chest x-rays are "properly considered under 20 C.F.R. § 718.107, where the administrative law judge must determine, on a case-by-case basis, pursuant to 20 C.F.R. § 718.107(b), whether the proponent of the digital x-ray evidence has established that it is "medically acceptable and relevant to entitlement."

b. Admissibility issues

In *Harris v. Old Ben Coal Co.*, 23 B.L.R. 1-273 (2007) (en banc on recon.) (J. McGranery and J. Hall, concurring and dissenting), *aff'g.*, 23 B.L.R. 1-98 (2006) (en banc), the Board affirmed its prior decision and reiterated certain holdings. First, the Board held that interpretations of digital x-rays must be considered under 20 C.F.R. § 718.107 and "an administrative law judge must consider whether the readings of the digital x-ray that a party seeks to admit are 'medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits' pursuant to Section 718.107(b)." The Board declined to modify this holding despite Claimant's argument that "the digital x-ray was recorded on film." The Board also rejected Employer's argument that "digital film technology is not in dispute" such that a fact-finder need not be required to determine its reliability on a case-by-case basis. The Board found Employer's argument unpersuasive:

. . . in light of the fact that the National Institute of Occupational Safety and Health has not approved the use of digital x-rays to diagnose pneumoconiosis, as quality standards applicable to this technology have not yet been developed by the International Labor Organization.

VII. Autopsy reports

Autopsy evidence is generally the most reliable evidence of the existence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985). *See also Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001). However, with

regard to diagnosing complicated pneumoconiosis under 20 C.F.R. § 718.304, the Fourth Circuit has held that chest x-ray evidence is the most probative. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000). For further discussion of diagnosing simple or complicated pneumoconiosis under 20 C.F.R. Part 718 (2000) or (2008), see Chapter 11.

As with weighing medical opinion evidence, the fact-finder should consider the qualifications of the physicians in reviewing the autopsy evidence of record. For example, in *Livermore v. Amax Coal Co.*, 297 F.3d 668 (7th Cir. 2002), the Seventh Circuit upheld the administrative law judge's finding that coal workers' pneumoconiosis did not hasten the miner's death based on autopsy evidence because "the ALJ reviewed all the opinions, qualifications of the experts, and resolved the conflicting reports in a thorough and logical manner." See also *Energy West Mining Co. v. Director, OWCP [Jones]*, Case No. 03-9575 (10th Cir. July 9, 2004) (unpub.) (harmless error not to weigh lifetime medical opinions as decision was based on more probative autopsy evidence); *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985) (judge's deference to autopsy evidence over x-ray evidence was reasonable because "autopsy evidence is the most reliable evidence of the existence of pneumoconiosis").

A. Principles of weighing autopsy evidence

1. Performing the autopsy versus review of the slides

a. Greater weight to prosector's report, held proper

For many years, the Board held that greater weight may be accorded to a physician who performs the autopsy (the prosector) over a pathologist who reviews the autopsy slides. *Similia v. Bethlehem Mines Corp.*, 7 B.L.R.1-535 (1984); *Cantrell v. U.S. Steel Corp.*, 6 B.L.R. 1-1003 (1984); *Gruller v. Bethenergy Mines, Inc.*, 16 B.L.R. 1-3 (1991) (a case involving complicated pneumoconiosis). Indeed, the Board held that the prosector's report must be accorded significant probative value regarding the existence and degree of pneumoconiosis because s/he sees the entire respiratory system as well as other body systems. *Fetterman v. Director, OWCP*, 7 B.L.R. 1-688, 1-691 (1985).

Some circuit courts also agree with this position. See *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871 (10th Cir. 1996) (it was proper for the administrative law judge to accord greater weight to the opinion of an autopsy prosector over the opinions of reviewing pathologists); *U.S. Steel Corp. v. Oravetz*, 686 F.2d 197 (3rd Cir. 1982).

b. Greater weight to prosector's report,

held improper

In recent years, however, some circuit courts have reassessed this position and have held that it is error to accord greater weight to a prosecutor's opinion over the opinions of pathologists who reviewed the autopsy report and slides solely because the prosecutor examined the whole body at the time of death. Some examples are:

Fourth Circuit

It is error to credit a prosecutor's opinion over those opinions of reviewing pathologists solely on the basis that the prosecutor examined the miner's whole body at the time of death. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186 (4th Cir. 2000). In so holding, the court cited to a decision by the Seventh Circuit in *Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 362-63 (7th Cir. 1992) ("[n]othing in the record suggests that access to the body enhances the accuracy of diagnoses based on autopsy evidence"; it was error to credit the prosecutor's report over the reports of reviewing physicians solely because the prosecutor had access to the whole body).

Seventh Circuit

The Seventh Circuit has held that it is error to accord more weight to a prosecutor's opinion over the opinion of a reviewing pathologist. In *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001), the administrative law judge accorded greater weight to the opinion of an autopsy prosecutor, who found anthracotic pigment with reactive fibrosis and diagnosed the presence of pneumoconiosis, over the contrary opinions of reviewing pathologists. While the Seventh Circuit held that autopsy evidence was the most probative evidence of the presence of pneumoconiosis, it disagreed with the administrative law judge's weighing of such evidence and stated the following:

A scientific dispute must be resolved on scientific grounds, rather than by declaring whoever examines the cadaver dictates the outcome. (citation omitted). If there were a medical reason to believe that visual scrutiny of gross attributes is more reliable than microscopic examination of tissue samples as a way to diagnose pneumoconiosis, then relying on the conclusions of the prosecutor would be sensible. But neither the ALJ nor the BRB made such a finding. The mine operator contends-and on this record we have no reason to doubt-that examining tissue samples under a microscope and testing them for silica, is the best way to diagnose black lung disease. What we have, therefore, is a conflict among physicians based on their analysis of tissue samples. Bockelman's visual examination of the whole lung played little or no role.

The court stated that "[b]ad science is bad science, even if offered by the first expert to express a view" and it is incumbent upon the judge to use his or her expertise to evaluate technical evidence.

2. Opinion of autopsy prosector versus review of findings

It is reasonable to assign greater weight to the opinion of the physician who performs the autopsy over the opinions of others who review his or her findings without reviewing the slides. *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985); *Fetterman v. Director, OWCP*, 7 B.L.R. 1-688 (1985).

B. Quality standards

The quality standards for autopsy evidence at 20 C.F.R. § 718.106(a) (2000) and (2008) require that the prosector's report contain a description of macroscopic (gross) findings as well as microscopic findings. Moreover, an autopsy report should be found in compliance with the quality standards unless there is good cause to believe that the autopsy report is not accurate or that the condition of the miner is being fraudulently represented. *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 B.L.R. 1-103, 1-108 (1979). See 20 C.F.R. § 718.106 (2000).

In *Consolidation Coal Co. v. Director, OWCP [Kramer]*, 305 F.3d 203 (3rd Cir. 2002)¹⁰, the court upheld the administrative law judge's award of benefits based on a preponderance of the autopsy evidence. Employer maintained that the judge improperly considered an autopsy report, which did not contain a microscopic description of the lungs in violation of the quality standards at 20 C.F.R. § 718.106(a). Citing to the Board's decision in *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113, 1-114 and 1-115 (1988), the court concluded that, "[a]lthough the regulations require that the report include a microscopic description of the lungs, they contain no express requirements in the form or nature thereof." The court noted that the autopsy report "stated that the microscopic findings were 'consistent with', *i.e.*, confirmed, the gross autopsy findings, and incorporated by reference the detailed findings contained elsewhere in the report." As a result, the court concluded that the autopsy report was in compliance with § 718.106 of the regulations.

¹⁰ The court noted that the parties stipulated in briefs before the judge that the miner was last employed in the coal mines in West Virginia, which falls within the jurisdiction of the Fourth Circuit. However, Employer appealed in the Third Circuit based on Claimant's previous coal mine employment in Pennsylvania. The Third Circuit considered the appeal on the merits, but cited to Fourth Circuit, as well as its own, case law.

For a discussion of the definitions of "report of autopsy" and "rebuttal" of report of autopsy under the amended regulations at 20 C.F.R. Part 718 (2008), see Chapter 4.