

PART IV

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

A. IN GENERAL

1. APPLICABILITY

20 C.F.R. Part 718 is not retroactive and only applies to claims filed after March 31, 1980. 20 C.F.R. Part 727, however, applies to all claims filed on or before March 31, 1980. See **Tennessee Consolidated Coal Co. v. Crisp**, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); see also **The Youghioghny and Ohio Coal Co. v. Warren**, 841 F.2d 134, 11 BLR 2-73 (6th Cir. 1987); **Saginaw Mining Company v. Ferda**, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989). Part 727 also applies to all M.B.O. claims even if filed after March 30, 1980. **Stallard v. South East Coal Co.**, 14 BLR 1-32 (1990). 20 C.F.R. Part 410 applies if claim is filed on or before March 31, 1980. **Muncy v. Wolfe Creek Collieries Coal Co., Inc.**, 3 BLR 1-627 (1981). The Board applies this case to cases arising in all judicial circuits except the Third, Sixth, Seventh, and Eighth.

To prevail on a claim brought under 20 C.F.R. §§718.1 *et seq.*, the claimant must prove three elements: that the miner has or had pneumoconiosis, that he contracted it through his coal mine employment, and that he died or he is totally disabled due to the disease. **Director, OWCP v. Mangifest**, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); **Strike v. Director, OWCP**, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); **Grant v. Director, OWCP**, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988).

Part 718 also applies if claim is adjudicated after March 31, 1980:

- **Caprini v. Director, OWCP**, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987).
- **Knuckles v. Director, OWCP**, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); **Saginaw Mining Company v. Ferda**, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989).
- **Strike v. Director, OWCP**, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987).
- **Oliver v. Director, OWCP**, 888 F.2d 1239, 13 BLR 2-124 (8th Cir. 1989).
- **Terry v. Director, OWCP**, 956 F.2d 25, 16 BLR 2-67 (11th Cir. 1992).

DIGESTS

Following reversal of the ALJ's finding of entitlement under Part 727 based on a "true doubt" weighing, **Ondecko**, the Court remanded the case for consideration of entitlement under Part 718 based on **Knuckles v. Director, OWCP**, 869 F.2d 996, 999, 12 BLR 2-217 (6th Cir. 1989). The Court noted that the record may be reopened for submission of additional evidence regarding claimant's current medical condition by both parties. **Consolidation Coal Co. v. McMahon**, 77 F.3d 898, 20 BLR 2-152 (6th Cir. 1996).

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A. IN GENERAL

2. VALIDITY

The regulations at Part 718 are valid and may be applied prospectively to any claim adjudicated after March 31, 1980. See *Tennessee Consolidation Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); see also *Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981); *Saginaw Mining Co v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); *Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Oliver v. Director, OWCP*, 888 F.2d 1239, 13 BLR 2-124 (8th Cir. 1989).

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A. IN GENERAL

3. QUALITY STANDARDS

a. Applicability

Part 718 quality standards are applied to Part 727:

- *Plutt v. Benefits Review Board*, 804 F.2d 597, 9 BLR 2-168 (10th Cir. 1986)
- *Prater v. Hite Preparation Co.*, 829 F.2d 1363, 10 BLR 2-297 (6th Cir. 1987); *Wiley v. Consolidation Coal Co.*, 892 F.2d 490, 13 BLR 2-214 (6th Cir. 1989), modified No. 89-3090 (6th Cir., Oct. 10, 1990)
- *Patton v. Director, OWCP*, No. 88-3296 (3d Cir., Nov. 14, 1988) (unpub.)

b. In General

For cases arising in the Third Circuit, the quality standards at 20 C.F.R. §718.102 - 107 are mandatory, but where the objective tests do not strictly conform to the applicable standard, the ALJ may, nevertheless, consider the objective test if the test is found to be in substantial compliance with the quality standard. *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). In all other circuits, the Board applies *Orek v. Director, OWCP*, 10 BLR 1-51 (1987) which encourages the ALJ to use the Part 718 quality standards as guides and encourages that the ALJ explain why non-conforming studies are nonetheless reliable. The Board, however, rejects the theory that the standards are mandatory.

DIGESTS

Quality standards listed in Section 718.103 are not exclusive. *Bowlin v. Director, OWCP*, 825 F.2d 410 (6th Cir. 1987) (Table).

A "conforming" pulmonary function study complies with the quality standards set forth in 20 C.F.R. §718.103, Part 718, Appendix B. A "non-conforming" study does not comply with these standards. A "qualifying" pulmonary function study yields values that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, appendices B and C. Such a study is evidence of a totally disabling respiratory condition. A "non-qualifying" study exceeds those values in the tables and thus is insufficient to establish total disability. See 20 C.F.R. §718.204(c)(1)(2). **Director, OWCP v. Siwiec**, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).

The Fourth Circuit rejected claimant's argument that the administrative law judge improperly relied on contrary probative blood gas evidence where the physicians failed to conduct both at rest and exercise blood gas studies. The Court noted that under Section 718.105(b), exercise studies do not need to be conducted where it is deemed "medically contraindicated," as it was here due to both physicians' indication that claimant's hypertension contraindicated an exercise test. **Lane v. Union Carbide Corp.**, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

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B. EXISTENCE OF PNEUMOCONIOSIS

DIGESTS

The Third Circuit agreed with the Director and held that Section 718.202 requires that all types of relevant evidence of record must be weighed together in determining whether claimant has met his burden of establishing pneumoconiosis. The Court cited to 30 U.S.C. §923(b) [“in determining the validity of claims under this part, all relevant evidence shall be considered”], as well as *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-6 (3d Cir. 1986) [the ALJ should review all medical evidence presented in determining the presence of pneumoconiosis]. 1997 U.S. App. Lexis 12806, at 7, 8. The Court concluded that the Board erred in affirming the ALJ’s finding of pneumoconiosis under Section 718.202(a)(1) thereafter noting that employer’s arguments regarding subsections (a)(2) and (a)(3) need not be reached as Section 718.202(a) provided “alternative methods” of establishing pneumoconiosis. The Court went on to review the ALJ’s findings at Section 718.202(a)(2), (3), affirming the ALJ’s finding of pneumoconiosis as based on substantial evidence and thereby affirming the Board’s decision on other grounds. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

In this Fourth Circuit case, the majority held that a remand of the case was required because the administrative law judge did not weigh together all of the evidence regarding the existence of pneumoconiosis as required under *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The majority held that the administrative law judge must consider the weight of the x-ray evidence, which he properly determined to be negative, against the weight of the medical opinion evidence upon which he relied to find the existence of pneumoconiosis established in this case. The majority also held that the administrative law judge accorded undue weight to a treating physician’s opinion by erroneously finding that “generally [a treating physician’s] opinion would ordinarily be entitled to more weight.” The majority determined that substantial evidence did not support the administrative law judge’s finding that this physician, who had treated the miner for ten years, possessed comparable credentials to the other physicians of record. A dissenting judge would have held that although the administrative law judge erred, substantial evidence supports the administrative law judge’s factual findings and decision to accord greater weight to the opinion of the miner’s treating physician. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002).

The United States Court of Appeals for the Eleventh Circuit declined to adopt the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), which requires an administrative law judge to weigh the evidence relevant to the existence of pneumoconiosis together. *United States Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004).

The Tenth Circuit held that, under the plain language of the revised regulation at 20 C.F.R. §718.201(a)(2), proving that one suffers from a “chronic obstructive pulmonary disease” does not establish legal pneumoconiosis unless one is able to show that the condition arose out of coal mine employment. Thus, a claimant establishes the existence of legal pneumoconiosis only if he is able to prove, without the benefit of the rebuttable presumption at 20 C.F.R. §718.203, that his chronic pulmonary disease or respiratory or pulmonary impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

1. Section 718.202(a)(1): X-ray Evidence

DIGESTS

In considering whether the administrative law judge acted rationally in crediting a physician’s opinion regarding the existence of pneumoconiosis, the Third Circuit held that the physician’s autopsy report contained sufficient microscopic description to comply with the Section 718.106(a) quality standard for autopsy reports and that the administrative law judge was not required to discount the pathologist’s entire opinion merely because he employed standardized language in his microscopic description. *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002).

2. Section 718.202(a)(2): Biopsy or Autopsy Evidence

DIGESTS

The Eleventh Circuit held that substantial compliance with Section 718.106(b) is sufficient for admissibility of a biopsy report where, although it did not contain a surgical note, it did contain a macroscopic description of the lungs and a copy of the pathology report of the microscopic and gross examination of the specimen. The Court held the admissible biopsy sufficient to establish pneumoconiosis when considered with the weight of the evidence. *Dagnan v. Black Diamond Coal Mining Co.*, 994 F.3d 1536, 18 BLR 2-203 (11th Cir. 1993).

In considering whether the administrative law judge acted rationally in crediting a physician's opinion regarding the existence of pneumoconiosis, the Third Circuit held that the physician's autopsy report contained sufficient microscopic description to comply with the Section 718.106(a) quality standard for autopsy reports and that the administrative law judge was not required to discount the pathologist's entire opinion merely because he employed standardized language in his microscopic description. **Consolidation Coal Co. v. Kramer**, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002).

3. Section 718.202(a)(3): Presumptions

a. Section 718.304: Complicated Pneumoconiosis

[NOTE: for digests and discussion of Sections 718.304, 718.305 and 718.306 please refer to Parts V and VII of this outline]

4. Section 718.202(a)(4): Medical Reports

DIGESTS

"In part" sufficient to establish pneumoconiosis (718.202(a)(4)) and cause of pneumoconiosis (718.203):

- **Stomps v. Director, OWCP**, 816 F.2d 1533, 10 BLR 2-107 (11th Cir. 1987).
- **Southard v. Director, OWCP**, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984)(718.203(c) only).
- **McClendon v. Drummond Coal Co.**, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988).

The Fourth Circuit held that the administrative law judge erred in crediting two medical opinions based on erroneous assumptions concluding that claimant did not have pneumoconiosis, over a reasoned medical opinion that coal mine dust exposure resulting in pneumoconiosis was at least a major contributing factor to claimant's totally disabling respiratory insufficiency. These opinions were based on the erroneous assumptions that obstructive disorders could not be caused by coal mine employment and that a diagnosis of pneumoconiosis could not be made without x-ray evidence of a nodular or linear infiltrate, an autopsy or a tissue examination. The Court noted that this conclusion conflicted with 20 C.F.R. §718.202(a)(4), which does not require x-ray evidence or a tissue examination. **Warth v. Southern Ohio Coal Co.**, 60 F.3d 173, 19

BLR 2-265 (4th Cir. 1995).

The Sixth Circuit held that the Director, as a respondent, has authority to file a pro-petitioner brief, and thus denied employer's motion to strike the Director's brief. At 20 C.F.R. §718.202(a)(4), the court held that substantial evidence did not support the administrative law judge's finding that two physicians' opinions diagnosing pneumoconiosis were merely restatements of positive x-rays. The court also held that the administrative law judge erred in discounting these reports because the physicians opined that claimant's obstructive defect could have been caused by either smoking or coal dust exposure. The court reasoned that both physicians were nevertheless unequivocal that coal dust exposure aggravated claimant's pulmonary problems, thus expressing opinions supportive of a finding of legal pneumoconiosis. The court further held that the administrative law judge did not consider whether employer's physicians were using the more restrictive medical definition of pneumoconiosis when they opined that claimant's respiratory problems were related to his smoking only. In this regard, the court noted that only Dr. Fino discussed his rationale for excluding coal dust exposure as an aggravating factor; the court noted that Dr. Fino's apparent requirement that fibrosis be present for a diagnosis of simple coal workers' pneumoconiosis, is not a requirement for a finding of legal pneumoconiosis. At 20 C.F.R. §718.204(c)(4), the court held that the administrative law judge erred when he gave little weight to Dr. Vaezy's finding of total disability because the physician relied, in part, on a non-qualifying pulmonary function study. The court also held that the administrative law judge erred in failing to compare Dr. Baker's diagnosis of a mild impairment with the exertional requirements of claimant's usual coal mine employment. The court added that the administrative law judge improperly credited medical opinions that claimant is not totally disabled, without considering whether the rendering physicians had any knowledge of the exertional requirements of claimant's usual coal mine work. The court vacated the Board's decision affirming the administrative law judge's denial of benefits, and remanded the case to the administrative law judge. **Cornett v. Benham Coal, Inc.**, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Based on the statutory language at 30 U.S.C. §923(b), the Fourth Circuit held that all relevant evidence is to be considered together rather than merely within discrete subsections of 20 C.F.R. §718.202(a)(1)-(4) in determining whether claimant has met his burden of establishing the existence of pneumoconiosis by a preponderance of all of the evidence. While noting that legal pneumoconiosis is a much broader category of diseases than medical pneumoconiosis, and that evidence which does not establish medical pneumoconiosis should not necessarily be treated as evidence weighing against a finding of legal pneumoconiosis, the court rejected the Director's position, that evidence of medical pneumoconiosis should not be weighed with evidence of legal pneumoconiosis, as not being a reasonable interpretation of the Act or the regulation. **Island Creek Coal Co. v. Compton**, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(a)(2), which

expands the definition of pneumoconiosis to include both chronic restrictive or obstructive pulmonary disease arising out of coal mine employment, is not “impermissibly retroactive,” and, therefore, may be applied to all claims pending on January 19, 2001. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 862, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), stating that pneumoconiosis is recognized as a latent and progressive disease, is not “impermissibly retroactive,” and, therefore, may be applied to all claims pending on January 19, 2001. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 863, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), setting forth the definition of pneumoconiosis, should be narrowly construed to state that pneumoconiosis *can* be a progressive and latent disease, not that it is always, or typically, a latent or progressive disease. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 869, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The Sixth Circuit held that the administrative law judge's explanations for crediting the opinions of Drs. Broudy and Fino and discounting the contrary opinion of Dr. Rasmussen, to find the medical opinions insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), were not supported by substantial evidence. The administrative law judge credited the opinions of Drs. Broudy and Fino over the contrary opinion of Dr. Rasmussen because he found that Dr. Rasmussen relied on an incomplete medical record in that he diagnosed only clinical pneumoconiosis by x-ray, whereas Drs. Broudy and Fino relied on comprehensive documentation in reaching their conclusions that claimant did not have pneumoconiosis. The administrative law judge also found that Dr. Fino had excellent professional qualifications. The Sixth Circuit held that the administrative law judge did not adequately explain his finding that Dr. Rasmussen's report did not support a finding of legal pneumoconiosis, where the record showed that Dr. Rasmussen relied on the results of his exercise blood gas study and diffusing capacity test to determine that claimant was suffering from a pulmonary disability. The Sixth Circuit also held that the Board's explanation that Dr. Rasmussen diagnosed clinical but not legal pneumoconiosis, was inaccurate as a matter of law because (1) Dr. Rasmussen's consideration of evidence, other than the x-ray, including a physical exam, diffusing capacity test, arterial blood gas studies, and claimant's personal and occupational histories, would have been sufficient alone to support a finding of legal pneumoconiosis; and because (2) even if Dr. Rasmussen diagnosed only clinical pneumoconiosis, as the Board concluded, such a diagnosis was necessarily legal pneumoconiosis where legal pneumoconiosis includes clinical pneumoconiosis. **Martin v. Ligon Preparation Co.**,

400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

The Sixth Circuit held that the administrative law judge did not adequately explain his reasons for crediting the opinions of Drs. Broudy and Fino. The Sixth Circuit found “no rational explanation” for the administrative law judge’s determination that Dr. Broudy’s opinion was more credible than Dr. Rasmussen’s opinion regarding the existence of pneumoconiosis, especially after the administrative law judge found that Dr. Broudy’s report contained little rationale or explanation and that Dr. Rasmussen’s report was well-reasoned. The Sixth Circuit noted, moreover, that what explanation Dr. Broudy did provide for his opinion that claimant did not have pneumoconiosis, directly supported Dr. Rasmussen’s finding of pneumoconiosis based on the blood gas study results. With regard to Dr. Fino, the Sixth Circuit held that Dr. Fino’s credentials were not necessarily superior to those of Dr. Rasmussen, where Dr. Fino was Board-certified in Internal Medicine and Pulmonary Disease and Dr. Rasmussen was Board-certified in Internal Medicine only but had extensive experience in pulmonary medicine and in the specific area of coal workers’ pneumoconiosis. The Sixth Circuit also determined that the record refuted the administrative law judge’s finding that Dr. Fino reviewed Dr. Rasmussen’s exercise blood gas study and diffusing capacity test results and had determined that they were not indicative of pneumoconiosis. The Sixth Circuit thus vacated the Board’s decision affirming the administrative law judge’s finding at 20 C.F.R. §718.202(a)(4) and the denial of benefits, and remanded the case to the administrative law judge for further consideration. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

The Seventh Circuit, on the merits of the claim, held that the administrative law judge did not err in relying of the weight of the medical opinion evidence at 20 C.F.R. §718.202(a)(4) to find the existence of pneumoconiosis established, where the weight of the x-ray evidence at 20 C.F.R. §718.202(a)(1) was negative. The Seventh Circuit also held, at 20 C.F.R. §718.202(a)(4), that the administrative law judge permissibly gave less weight to Dr. Selby’s opinion, that claimant’s worsening lung function could not be due to coal dust exposure because he was no longer working in or around coal mines, based on the court’s holding that it conflicted with the regulatory provision at 20 C.F.R. §718.201(c) that pneumoconiosis can be latent and progressive. The Seventh Circuit also determined that Dr. Selby’s statements, that coal mine employment “helped preserve [claimant’s] lung function” and had a “positive effect on his health,” were “contrary to the congressional findings and purpose central to the [Act].” ***Roberts & Schaefer Co. v. Director, OWCP [Williams]***, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005).

The Fourth Circuit upheld the administrative law judge’s reliance on Dr. Parker’s well-reasoned medical report to support a finding of totally disabling pneumoconiosis, despite the physician’s failure to apportion the miner’s lung impairment between smoking and coal dust exposure. ***Consolidation Coal Co. v. Williams***, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

The United States Court of Appeals for the Seventh Circuit held that the ALJ did not properly resolve the conflict in the medical opinion evidence relevant to the existence of pneumoconiosis. The ALJ found, pursuant to 20 C.F.R. §718.202(a)(4), that because the five physicians who offered opinions as to the existence of pneumoconiosis were equally qualified, claimant did not establish that he has the disease. The court stated that the ALJ improperly “counted noses,” as he did not provide any explanation, other than numerical preponderance, for why he found that the three opinions ruling out the presence of pneumoconiosis were more persuasive than the two contrary opinions. The court also found a similar error in the ALJ’s consideration of the evidence relevant to total disability and, therefore, vacated the Board’s Decision and Order affirming the denial of benefits and remanded the case for further proceedings. ***Stalcup v. Peabody Coal Co.***, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007).

The Seventh Circuit held that in weighing the evidence at 718.202(a)(4), the ALJ permissibly accorded less weight to Dr. Tuteur’s opinion that, “on rare occasions the inhalation of coal mine dust in the absence of cigarette smoke can produce a clinical situation similar to the picture of [COPD],” as inconsistent with the prevailing view of the medical community, cited by DOL when it adopted the revised regulations. The court noted that in promulgating the revised regulations, DOL had reviewed the medical literature on this issue and found that there was a consensus among scientists and researchers that coal dust-induced COPD is clinically significant, and that the DOL report does not indicate that the causal relationship between coal dust and COPD is merely rare. The court also rejected employer’s argument that Dr. Tuteur’s opinion could be interpreted as being consistent with the proposition that coal dust exposure *can* cause COPD in rare cases. The court held that Dr. Tuteur’s statement led to the logical conclusion that he categorically excludes obstruction from coal-dust-induced lung disease and would not attribute any miner’s obstruction, no matter how severe, to coal dust. ***Consolidation Coal Co. v. Director, OWCP [Beeler]***, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

The United States Court of Appeals for the Tenth Circuit vacated a denial of benefits, holding that the administrative law judge’s mere statement that the evidence was “evenly balanced and should receive equal weight” failed to discharge his duty under the Administrative Procedure Act to explain, on scientific grounds, why a conclusion could not be reached as to the existence of legal pneumoconiosis. The court noted that with regard to disputes concerning the existence of legal pneumoconiosis and causes of pneumoconiosis, the administrative law judge has the benefit of a substantial inquiry by the Department of Labor to help resolve the conflict in the evidence. ***Gunderson v. United States Department of Labor***, 601 F.3d 1013, BLR (10th Cir. 2010) (O’Brien, J., dissenting), *citing Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007).

5. Under the 2000 Revisions to the Regulations

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(a)(2), which expands the definition of pneumoconiosis to include both chronic restrictive or obstructive pulmonary disease arising out of coal mine employment, is not “impermissibly retroactive,” and, therefore, may be applied to all claims pending on January 19, 2001. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 862, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), stating that pneumoconiosis is recognized as a latent and progressive disease, is not “impermissibly retroactive,” and, therefore, may be applied to all claims pending on January 19, 2001. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 863, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), setting forth the definition of pneumoconiosis, should be narrowly construed to state that pneumoconiosis *can* be a progressive and latent disease, not that it is always, or typically, a latent or progressive disease. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 869, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

PART IV

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

C. PNEUMOCONIOSIS ARISING OUT OF COAL MINE EMPLOYMENT

DIGESTS

"In part" sufficient to establish pneumoconiosis (718.202(a)(4)) and cause of pneumoconiosis (718.203):

- ***Stomps v. Director, OWCP***, 816 F.2d 1533, 10 BLR 2-107 (11th Cir. 1987)
- ***Southard v. Director, OWCP***, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984)(718.203(c) only)
- ***McClendon v. Drummond Coal Co.***, 861 F.2d 1512, 12 BLR 2-108 (11th Cir.1988)

The presumption at Section 718.203(b) is rebuttable, and the regulation specifically requires that the miner be suffering from pneumoconiosis before its provisions are available. ***Adams v. Director, OWCP***, 886 F.2d 818, 13 BLR 2-25 (6th Cir. 1989).

Citing ***Maxey v. Califano***, 598 F.2d 874 (4th Cir. 1979), the court held that, at Section 718.203(c), if the record does not suggest any employment that could be the cause of the miner's acknowledged black lung disease, claimant is entitled to a finding that the pneumoconiosis in question was connected to his coal mine employment. ***Blevins v. Director, OWCP***, No. 89-2393 (4th Cir., Nov. 13, 1990)(unpub.).

The Seventh Circuit held that the administrative law judge properly determined claimant's testimony about his coal mine employment to be credible, finding that claimant was regularly exposed to coal mine dust for thirteen and one-quarter years and thus was entitled to the presumption provided at 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of coal mine employment. The Seventh Circuit rejected employer's argument that claimant's testimony that he could distinguish between coal and concrete dust, was incredible and unscientific, as employer cited to "no authority for the proposition that only scientific evidence is admissible to prove exposure to coal dust." ***Roberts & Schaefer Co. v. Director, OWCP [Williams]***, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005).

In light of the regulatory definition of legal pneumoconiosis and the historical evolution of the Act, the Tenth Circuit held that the rebuttable presumption at 20 C.F.R. §718.203 does not extend to claims of legal pneumoconiosis. The Court noted that, as originally defined in the Act, the term “pneumoconiosis” referred only to clinical pneumoconiosis, which encompasses diseases recognized by the medical community as being closely linked to coal dust exposure, in contrast to other chronic respiratory and pulmonary impairments which can be caused by factors unrelated to coal dust exposure. As the plain language of the revised regulation at 20 C.F.R. §718.201(a)(2) requires a claimant to prove that his chronic respiratory or pulmonary impairment arose out of coal mine employment in order to establish legal pneumoconiosis, the Court concluded that Congress’s use of the generic term “pneumoconiosis” in the presumption provision can be harmonized with the statutory scheme if construed to refer only to clinical pneumoconiosis; any other construction would lead to an absurd result. **Andersen v. Director, OWCP**, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

The Fourth Circuit held that the presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 does not subsume a 20 C.F.R. §718.203 “arising out of” causation finding. Thus, a miner who is found totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304 is not automatically entitled to benefits. The miner must independently establish, and the administrative law judge must specifically find, that the miner’s pneumoconiosis arose at least in part out of coal mine employment pursuant to 20 C.F.R. §718.203, either through the ten-years presumption, or through medical evidence. **Daniels Co. v. Mitchell**, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

PART IV

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

D. TOTAL DISABILITY: SECTION 718.204

1. GENERALLY

Section 718.204 embodies two essential elements which a claimant must establish in order to qualify for benefits under the Act: (1) The claimant must establish that he has a total pulmonary disability according to the criteria of Section 718.204(c); and (2) the claimant must establish that his total pulmonary disability is in some sense caused by or "due to" his pneumoconiosis. *See Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 566 (6th Cir. 1989). Each of these elements must be established by a preponderance of the evidence. See 20 C.F.R. §718.403. Once a total pulmonary disability is established, such unrelated disabilities are irrelevant to the causation of the pulmonary disability. So long as total pulmonary disability is properly established, a claimant is not disqualified simply because he also suffers from other debilitating or disabling conditions. *Lollar, supra*.

DIGESTS

An ALJ may find total disability established on the basis of criteria not specified in Section 718.204(c). See *Mangifest, supra*.

In a living miner's claim, where there is no medical evidence in support of a claim for total disability, lay testimony and non-medical evidence is insufficient to establish Section 718.204(c). *Daugherty v. Director, OWCP*, 843 F.2d 1390 (6th Cir. 1988) (Table).

The Fourth Circuit held that the ALJ had inappropriately melded his total disability and contributing cause inquiries into one, thereby necessitating remand. Here, the miner died of lung cancer that the Court finds was a totally disabling respiratory condition. The Court also notes that claimant's entitlement is measured by his physical condition at the time of the hearing or one week prior to his death, citing *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147 (6th Cir. 1988) and *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982). *Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996).

The D.C. Circuit held that the second sentence of the revised regulation at 20 C.F.R. §718.204(a), providing that “any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner’s pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis,” while rational and consistent with the Administrative Procedure Act, is impermissibly retroactive as applied to pending claims. Therefore, the revised regulation at Section 718.204(a) may only be applied to new claims filed after January 19, 2001, the regulations’ effective date. **Nat’l Mining Ass’n v. Department of Labor**, 292 F.3d 849, 864-865, 873, 23 BLR 2-124 (D.C. Cir. 2002), *aff’g in part and rev’g in part Nat’l Mining Ass’n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). [Note: The Department of Labor subsequently incorporated the D.C. Circuit’s holding at Section 718.2, which states that the second sentence of Section 718.204(a) may not be applied to claims pending on January 19, 2001, but may be applied to claims filed after that date.]

The D.C. Circuit held that the Black Lung Act, 30 U.S.C. §902(f)(1)(D), grants the Secretary of Labor the authority to establish the medical criteria for adequate proof of total disability. **Nat’l Mining Ass’n v. Department of Labor**, 292 F.3d 849, 873, 23 BLR 2-124 (D.C. Cir. 2002), *aff’g in part and rev’g in part Nat’l Mining Ass’n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The United States Court of Appeals held that while “[t]here is no hard and fast requirement that an ALJ make an explicit finding about the claimant’s exertional requirements,” the ALJ...an may not reasonably rely on medical opinions that are predicated on a misunderstanding of those job requirements. Whether a particular physician’s’ opinions relied upon by an ALJ administrative law judge constitutes substantial evidence depends on whether that physician understood the work requirements that they presumed a claimant could fulfill. **Killman v. Director, OWCP**, 415 F.3d 716, 23 BLR 2-250 (7th Cir. 2005).

The United States Court of Appeals for the Seventh Circuit held that, pursuant to 20 C.F.R. §718.204(b)(2), the ALJ offered no explanation for his determination that the medical opinion finding no total disability, when considered with the other contrary probative evidence, was ultimately more persuasive than the opinions in which the physicians stated that claimant is totally disabled. The court indicated that the ALJ was required to go beyond noting that the qualifications and expertise of the physicians are equal. The court also found a similar error in the ALJ’s consideration of the medical opinion evidence relevant to the existence of pneumoconiosis and, therefore, vacated the Board’s Decision and Order affirming the denial of benefits and remanded the case for further proceedings. **Stalcup v. Peabody Coal Co.**, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007).

2. SECTION 718.204(c)(1)

DIGESTS

The Fourth Circuit observed in a footnote that the Director reasonably and "probably correctly" argued that the current DOL Bulletin No. 84-6 should be applied. This Bulletin recommends that if the height reported for a miner in a pulmonary function study falls between the heights listed in the applicable regulations, the miner's height should be considered as the next higher height for purposes of evaluation under these standards. **Scott v. Mason Coal Co.**, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grds*, 14 BLR 1-37 (1990)(*en banc*).

The Fourth Circuit vacated a finding by the administrative law judge that claimant had failed to establish total respiratory disability under Section 718.204(c)(1) as he failed to make a finding as to claimant's correct height. Here, the two heights reported, 71" and 69.25" would yield different results. **Toler v. Eastern Asso. Coal Co.**, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *see also Toler*, fn.6; **Scott v. Mason Coal Co.**, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grds*, 14 BLR 1-37 (1990)(*en banc*).

The Fourth Circuit rejected the administrative law judge's finding that the PFS of record were insufficient to support claimant's burden at Section 718.204(c)(1) and the Board's holding that any error was harmless based on the administrative law judge's crediting of the "contrary probative evidence." The Court noted that the administrative law judge failed to resolve whether the PFS were valid as he noted that greater weight should be given to the post-bronchodilator results based on the progressive nature of pneumoconiosis. The Court reasoned that this impermissibly interjected cause into the determination of disability and that further, the ALJ erred by mechanically crediting the most recent PFS that was only five months more recent. Finally, the Court rejected the Board's holding that there was contrary probative evidence as the BGS measure different forms of impairment and the medical reports were generally in line with the comments by the PFS physicians. Rather, on remand, if the ALJ again finds the PFS inadequate to meet claimant's burden, he must weigh the BGS and compare the medical diagnoses to the exertional requirements of claimant's UCME. **Allen v. Director, OWCP**, 69 F.3d 532, 20 BLR 2-97 (4th Cir. 1995).

3. SECTION 718.204(c)(2)

The Fourth Circuit held that the administrative law judge properly found that substantial contrary probative evidence of record outweighed claimant's qualifying blood gas studies under Section 718.204(c)(2). Here, while claimant met his burden of producing

blood gas tests along with a report affirming the validity of the latter study which adequately demonstrated total disability under Section 718.204(c)(2), the administrative law judge acted within his discretion in crediting subsequent studies showing values that failed to establish total disability along with reports questioning the validity of the qualifying test results. The Court noted that the report validating the qualifying study did not give any rationale but only checked a box on the medical form report. The contrary invalidations detailed the medical reasons why the qualifying test was inaccurate and there was also testimony by this physician in the record. **Lane v. Union Carbide Corp.**, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

4. SECTION 718.204(c)(3)

DIGESTS

Pulmonary function tests and arterial blood gas test measure different types of impairments, thus non-qualifying arterial blood gas results cannot be seen as being a direct offset or "contrary" to qualifying pulmonary function results. **Tussey v. Island Creek Coal Co.**, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

5. SECTION 718.204(c)(4)

A medical opinion need not be phrased in terms of "total disability" before total disability can be established. Instead, it is sufficient to list the impairment which prohibits the claimant from performing his usual coal mine work. **Shelton v. Old Ben Coal Co.**, 933 F.2d 504, 15 BLR 2-116 (7th Cir. 1991); **Black Diamond Coal Mining Co. v. Benefits Review Board**, 758 F.2d 1532, 7 BLR 2-209, *reh'g denied*, 768 F.2d 1353 (11th Cir. 1985). At the very least, however, the evidence must be sufficient to allow a proper comparison between a miner's usual employment and his impairment. *Cf. Hillibush v. United States Department of Labor*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988). It is the claimant's responsibility to establish the exertional requirements that his job entails. **Cregger v. United States Steel Corp.**, 6 BLR 1-1219 (1984); as cited for authority in **Patridge v. Director, OWCP**, No. 88-3965 (6th Cir., July 5, 1989) (unpub).

DIGESTS

A medical conclusion that the miner "should not return to underground coal mining" because of pneumoconiosis is not equivalent to a finding of total disability. **Zimmerman v. Director, OWCP**, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

The Fourth Circuit followed the Director's position and the Sixth Circuit in **Tussey**, holding that the total disability described in Section 718.204(c)(4) must be entirely respiratory or pulmonary in nature. Under Section 718.204(b), claimant then must prove that this respiratory disability is due at least in part to his pneumoconiosis. Here the case was remanded for the administrative law judge to make this finding. **Jewell Smokeless Coal Corp. v. Street**, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994).

The Fourth Circuit rejected the application of **Grigg**, affirming the administrative law judge's crediting of reports stating only that claimant did not suffer from coal workers' pneumoconiosis, but "presumed that any respiratory impairment that was present...was attributable to coal dust." The Court noted the inclusive legal definition of pneumoconiosis in Section 718.201 and that coal workers' pneumoconiosis is only one of those disorders. Therefore the Court affirmed the administrative law judge's reliance on these reports and his denial of benefits. **Hobbs v. Clinchfield Coal Co.**, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

The Third Circuit, noting its completion of the discussion regarding total disability under the Act began in **Bonessa v. United States Steel Corp.**, 884 F.2d 725 (3d Cir. 1989) and in agreement with the Fourth Circuit in **Jewell Smokeless Coal Corp. v. Street**, 42 F.3d 241 (4th Cir. 1994), rejected claimant's argument and held that pneumoconiosis may not be combined with other unrelated non-respiratory and non-pulmonary conditions in proving whether the miner is totally disabled under the Act. The Court, in a lengthy discussion of the Act at 30 U.S.C. §§902(f)(1)(A), (C), 931(b)(2)(C) and the regulations at 20 C.F.R. §§718.204(c)(4), (5), 718.3(c), agreed with the Director that a limited contribution standard was appropriate under the Act. **Beatty v. Danri Corp.**, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995).

The Fourth Circuit held that the administrative law judge properly found that substantial contrary probative evidence of record outweighed the medical report submitted by claimant diagnosing total disability. The Court rejected claimant's argument that the contrary reports of record were insufficient because they did not discuss specific exertional requirements of claimant's employment. The Court held that "[A]lthough information regarding the miner's exertional work requirements mandates careful consideration in some cases, such as where the physician must determine whether an impairment of a certain degree prevents the miner from performing his usual coal mine work, such information is not relevant in a case where the physician finds no impairment at all. Thus, we hold that an administrative law judge may rely on a physician's report that does not discuss the exertional requirements of the miner's work if the physician concludes that the miner suffers from no impairment at all." **Lane v. Union Carbide Corp.**, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

The Sixth Circuit held that the Director, as a respondent, has authority to file a pro-petitioner brief, and thus denied employer's motion to strike the Director's brief. At 20 C.F.R. §718.202(a)(4), the court held that substantial evidence did not support the

administrative law judge's finding that two physicians' opinions diagnosing pneumoconiosis were merely restatements of positive x-rays. The court also held that the administrative law judge erred in discounting these reports because the physicians opined that claimant's obstructive defect could have been caused by either smoking or coal dust exposure. The court reasoned that both physicians were nevertheless unequivocal that coal dust exposure aggravated claimant's pulmonary problems, thus expressing opinions supportive of a finding of legal pneumoconiosis. The court further held that the administrative law judge did not consider whether employer's physicians were using the more restrictive medical definition of pneumoconiosis when they opined that claimant's respiratory problems were related to his smoking only. In this regard, the court noted that only Dr. Fino discussed his rationale for excluding coal dust exposure as an aggravating factor; the court noted that Dr. Fino's apparent requirement that fibrosis be present for a diagnosis of simple coal workers' pneumoconiosis, is not a requirement for a finding of legal pneumoconiosis. At 20 C.F.R. §718.204(c)(4), the court held that the administrative law judge erred when he gave little weight to Dr. Vaezy's finding of total disability because the physician relied, in part, on a non-qualifying pulmonary function study. The court also held that the administrative law judge erred in failing to compare Dr. Baker's diagnosis of a mild impairment with the exertional requirements of claimant's usual coal mine employment. The court added that the administrative law judge improperly credited medical opinions that claimant is not totally disabled, without considering whether the rendering physicians had any knowledge of the exertional requirements of claimant's usual coal mine work. The court vacated the Board's decision affirming the administrative law judge's denial of benefits, and remanded the case to the administrative law judge. **Cornett v. Benham Coal, Inc.**, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

The United States Court of Appeals for the Seventh Circuit held that, pursuant to 20 C.F.R. §718.204(b)(2), the ALJ offered no explanation for his determination that the medical opinion finding no total disability, when considered with the other contrary probative evidence, was ultimately more persuasive than the opinions in which the physicians stated that claimant is totally disabled. The court indicated that the ALJ was required to go beyond noting that the qualifications and expertise of the physicians are equal. The court also found a similar error in the ALJ's consideration of the medical opinion evidence relevant to the existence of pneumoconiosis and, therefore, vacated the Board's Decision and Order affirming the denial of benefits and remanded the case for further proceedings. **Stalcup v. Peabody Coal Co.**, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007).

6. SECTION 718.204(C)(5)

DIGESTS

In a survivor's case, the administrative law judge may consider Section 718.204(c)(5)

where the evidence is insufficient to establish subsections (c)(1)-(c)(4). **Hillibush v. U.S. Department of Labor**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988). The Board has construed **Hillibush** and other circuit cases to mean that Section 718.204(c)(5) is not available where the medical evidence of record affirmatively establishes "that no lung disease was present." **Pekala v. Director, OWCP**, 13 BLR 1-1 (1989).

PART IV

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

E. CAUSE OF DISABILITY:

1. SECTION 718.204(b)

DIGESTS

Claimant has the following burdens in establishing "cause of respiratory impairment" at Section 718.204 (without benefit of a presumption):

Pneumoconiosis is a substantial contributor to the disability. ***Bonessa v. United States Steel Corp.***, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Claimant must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. To be a contributing cause, the claimant's coal mining must be a necessary condition of his disability. If the claimant would have been disabled to the same degree and by the same time in his life if he had never been a miner, then claimant has failed to meet his burden. On the other hand, if his mining has contributed to his disability, then the burden is met. ***Robinson v. Pickands Mather & Co.***, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

The miner's totally disabling respiratory impairment (as found at Section 718.204(c)) was due "at least in part" to his pneumoconiosis. Note, in n.9, the court refers to "contributing cause." ***Adams v. Director, OWCP***, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Claimant has the burden to establish that pneumoconiosis is (at least) a contributing cause of a miner's total disability. In order to be a contributing cause, pneumoconiosis must be a necessary, but need not be a sufficient condition of the miner's total disability. Claimant must prove a simple "but for" nexus to be entitled to benefits. ***Shelton v. Director, OWCP***, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990); ***Hawkins v. Director, OWCP***, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990). [Note following digest]

The court applied the ***Shelton/Hawkins*** "necessary cause" standard in these four opinions issued simultaneously: ***Newell v. Director, OWCP***, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991), ***Shelton v. Old Ben Coal Co.***, 933 F.2d 504, 15 BLR 2-116 (7th Cir. 1991), ***Collins v. Director, OWCP***, 932 F.2d 1191, 15 BLR 2-108 (7th Cir. 1991),

and **Compton v. Inland Steel Coal Co.**, 933 F.2d 477, 15 BLR 2-79 (7th Cir. 1991). Circuit Judge Coffey, however, wrote a dissenting opinion in **Shelton v. Old Ben Coal Co.**, and concurring opinions in **Compton** and **Collins** in which he was critical of the **Shelton/Hawkins** standard as ambiguous and in which he urged adoption of a causation standard that would require the claimant to establish that pneumoconiosis was 51% of the cause of the total disability. In a noteworthy statement of *dicta*, the majority opinion in **Collins**, which was authored by Circuit Judge Cummings, states that the majority could "envision" a case in which medical evidence would not be necessary to establish the requisite causal nexus between the claimant's pneumoconiosis and total disability.

Pneumoconiosis is at least a contributing cause of disability. **Mangus v. Director, OWCP**, 882 F.2d 152, 13 BLR 2-9 (10th Cir. 1989).

Pneumoconiosis must be a substantial contributing factor in the causation of the miner's total disability. **Lollar v. Alabama By-Products Corp.**, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

In cases arising in circuits other than the Third, Sixth, Seventh, Tenth, and Eleventh judicial circuits, the Board applies the standard that claimant must establish that pneumoconiosis was a contributing cause of the miner's totally disabling respiratory impairment. **Scott v. Mason Coal Co.**, 14 BLR 1-37 (1990), *rev'd on other grds*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995).

If the miner has the benefit of Section 718.305, the causal relationship is presumed and the burden to disprove this relationship lies with the party opposing entitlement. **Mangus, supra; Tanner v. Freeman United Coal Co.**, 10 BLR 1-85 (1987).

The Fourth Circuit, citing **Grigg**, held that "an administrative law judge who has found...that a claimant suffers from pneumoconiosis and has total pulmonary disability may not credit a medical opinion that the former did not cause the latter unless the administrative law judge can and does identify specific and persuasive reasons for concluding that the doctor's judgement on the question of disability causation does not rest upon her disagreement with the administrative law judge's finding as to either or both of the predicates in the causal chain." **Toler v. Eastern Asso. Coal Co.**, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

The Fourth Circuit held that substantial evidence supported the administrative law judge's finding that claimant had failed to establish that his pneumoconiosis was not a contributing cause of his disability, thereby reversing the Board's decision below. The Court clarified **Grigg v. Director, OWCP**, 28 F.3d 416, 419-20, 18 BLR 2-299 (4th Cir. 1994) and **Hobbs v. Clinchfield Coal Co.**, 45 F.3d 819, 821, 19 BLR 2-86 (4th Cir. 1995), holding that in cases where claimant has does not have the advantage of the interim presumption [as in **Grigg**], a medical opinion that a miner does not suffer from

CWP "is not necessarily inconsistent" with a finding of legal pneumoconiosis, 20 C.F.R. §718.201. The contrary evidence, diagnosing that claimant's pneumonectomy (necessitated by smoking-induced cancer) caused his total disability, was not premised on an "erroneous finding." The administrative law judge's reliance on this evidence was upheld at Section 718.204(b) based on the "necessary condition" analysis that pn played only a de minimis part in the miner's disability. *Citing Robinson v. Pickands Mather & Co.*, 914 F.2d 790, 14 BLR 2-68 (4th Cir. 1990). The dissenting member would have remanded to the administrative law judge for reweighing in light of *Grigg and Hobbs. Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) (Butzner, J., dissenting).

The Fourth Circuit held that the administrative law judge erred in failing to apply the holding in *Robinson v. Pickands Mather & Co.*, 914 F.2d 790, 14 BLR 2-68 (4th Cir. 1990) that if claimant's mining contributed to his disability, then benefits are appropriate. On remand, the Court cautioned that clinical and legal pneumoconiosis are different and that the record may be reopened for additional evidence by both parties. *Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996).

The Eleventh Circuit, clarifying their previous holding in *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1265, 13 BLR 2-277 (11th Cir. 1990), held that the Board had taken the language "infinitesimal or de minimis part" in *Lollar* out of context and held that the operative words to describe the standard under Section 718.204(b) were "substantial contributing cause." See *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). The Court emphasized that a contributing cause of total disability was not necessarily substantial if it played more than an infinitesimal or de minimis part. *Black Diamond Coal Mining Co. v. Director, OWCP [Marcum]*, 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996).

The Sixth Circuit applied their rationale in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), holding that under 20 C.F.R. §718.204(b), a claimant must prove that his disability arises at least in part from his pneumoconiosis, to affirm the award of benefits herein. The Court rejected employer's argument that the rationale of the Seventh Circuit in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995) and *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990), should apply in lieu of *Adams*. The Court held that substantial evidence supported the administrative law judge's crediting of medical diagnoses and his credibility determinations at the hearing that although claimant had a smoking history and back problems associated with a car accident, his "advanced" coal workers' pneumoconiosis and coal mine employment resulted in pulmonary or respiratory impairment preventing claimant from performing his usual coal mine employment or comparable and gainful work in a dust free environment. Therefore, the Court held that *Foster* did not apply as it was a Part 727 case, the *Shelton* rationale was inapplicable due to the established respiratory disability related to coal mine employment and noted that in its prior holding in *Youghioghney &*

Ohio Coal Co. v. McAngues, 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), employer's argument related to additional disabling back injuries had been rejected. **Cross Mountain Coal, Inc. v. Ward**, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996).

The Sixth Circuit held that evidence that pneumoconiosis has played only an infinitesimal or *de minimus* part in a miner's totally disabling respiratory impairment is insufficient to establish disability causation under **Adams v. Director, OWCP**, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The court held that while the substantial contributing cause standard adopted by the Third and Eleventh Circuits places an inappropriate burden on the miners that is inconsistent with **Adams**, a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling respiratory impairment. **Peabody Coal Co. v. Smith**, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

Court holds that notwithstanding the miner's cardiac condition, if pneumoconiosis contributes, at least in part, to his total disability, the miner is entitled to benefits. **Jonida Trucking, Inc. v. Hunt**, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997).

In applying the *Grigg* rule, the focus should be on the descriptive facts and opinions of a doctor and not upon whether his use of a medical term of art jibes with the administrative law judge's use of a legal term of art. Therefore, where there was no inconsistency between the doctor's description of the miner's lungs and the administrative law judge's finding that complicated pneumoconiosis was absent, the administrative law judge was not required to reject that doctor's death causation opinion under *Grigg*, notwithstanding the doctor's diagnosis of complicated pneumoconiosis. **Piney Mountain Coal Co. v. Mays**, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

The Seventh Circuit held that, because the miner's blindness was the sole cause of his disability, and pneumoconiosis played no role in his inability to work, entitlement to benefits under 20 C.F.R. Part 718 was precluded. **Gulley v. Director, OWCP**, 397 F.3d 535, 23 BLR 2-242 (7th Cir. 2005).

PART IV

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

E. CAUSE OF DISABILITY:

2. Revised SECTION 718.204(c)(1)

DIGESTS

The Sixth Circuit held that substantial evidence supported the administrative law judge's finding of disability causation under both the amended regulation at 20 C.F.R. §718.204(c)(1)(ii) (2001) [which provides that pneumoconiosis is a substantially contributing cause of the miner's disability if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment], and under the standard enunciated in **Peabody Coal Co. v. Smith**, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997)[that a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment]. Although the evidence in 1988 indicated that the miner was totally disabled and that his chronic obstructive lung disease was primarily, if not entirely, a consequence of his cigarette smoking history, a comparison of the miner's pulmonary assessments in 1988 and 1992 showed a substantial decline in his respiratory health which was correlated with a growing number of diagnoses of pneumoconiosis. While pneumoconiosis did not alter the miner's legal status as "totally disabled," the administrative law judge permissibly credited the opinions of the miner's treating physicians that pneumoconiosis was a significant causal contributor to the miner's disability as of 1992. **Tennessee Consolidated Coal Co. v. Kirk**, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

The Fourth Circuit held that substantial evidence did not support the administrative law judge's finding that claimant had failed to establish that his pneumoconiosis was a contributing cause of his disability, thereby reversing the Board's decision below. The administrative law judge credited the opinions of two physicians finding that pneumoconiosis was not a contributing cause of his disability, even though neither doctor diagnosed pneumoconiosis in direct contradiction to the administrative law judge's finding, because both doctors stated that their opinions would not change even if they assumed that the claimant had pneumoconiosis. The Court, however, held that the facts at issue in this case were distinguishable from those in the decisions in **Hobbs v. Clinchfield Coal Co.**, 45 F.3d 819, 821, 19 BLR 2-86 (4th Cir. 1995) and **Dehue Coal Co. v. Ballard**, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995)(Butzner, J., dissenting), but were nearly identical to those in **Toler v. Eastern Asso. Coal Co.**, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Because both of the doctors credited by the

administrative law judge in this case opined that the claimant did not have legal or medical pneumoconiosis, in direct contradiction to the administrative law judge's finding that the claimant suffered from pneumoconiosis arising out of his coal mine employment, the Court held that under *Toler*, the administrative law judge 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 the most. ***Scott v. Mason Coal Co.***, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

Absent proof that the miner's other ailments caused his total disability prior to the onset of his pneumoconiosis, the Seventh Circuit held that the administrative law judge's determination that the miner's pneumoconiosis was the cause of his total disability was supported by substantial evidence. ***Kennellis Energies v. Director, OWCP [Ray]***, 333 F.3d 822, 22 BLR 2-591 (7th Cir. 2003); ***Peabody Coal Co. v. Vigna***, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994).

The Seventh Circuit discussed four different scenarios and noted that a miner who satisfies the other elements of entitlement will receive benefits where: (1) pneumoconiosis is both necessary and sufficient to the miner's disability, *i.e.*, pneumoconiosis is unaccompanied by any other disabling condition; (2) pneumoconiosis is necessary but not sufficient to the miner's disability, *e.g.*, where non-disabling pneumoconiosis combines with another condition that is also not by itself disabling to render the miner totally disabled; and (3) pneumoconiosis is sufficient, but not necessary, to the miner's total disability, *i.e.*, the miner suffers from multiple conditions, including those related to coal dust exposure and those that are not, that are each independently sufficient to render the miner totally disabled. However, a miner who either did not suffer from pneumoconiosis or whose mild pneumoconiosis was accompanied by a totally disabling non-respiratory and non-pulmonary condition would not be entitled to benefits, as pneumoconiosis would neither be necessary nor sufficient to the disability. In the present case, where substantial evidence supported the administrative law judge's finding that the miner's pneumoconiosis was by itself totally disabling, the court held that this was enough to meet the requirements of 20 C.F.R. §718.204, even if the miner suffered from non-pulmonary and non-respiratory disabilities that would also be sufficient to render him unable to work. ***Midland Coal Co. v. Director, OWCP [Shores]***, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

The United States Court of Appeals for the Eleventh Circuit held that the ALJ "applied the proper causation standard" by requiring claimant to prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. ***United States Steel Mining Co. v. Director, OWCP [Jones]***, 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004).

The Fourth Circuit upheld the administrative law judge's reliance on Dr. Parker's well-reasoned medical report to support a finding of totally disabling pneumoconiosis, despite the physician's failure to apportion the miner's lung impairment between

smoking and coal dust exposure. ***Consolidation Coal Co. v. Williams***, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

PART IV

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

- F. **SURVIVORS' CLAIMS WITHOUT BENEFIT OF A PRESUMPTION: SECTION 718.205** [NOTE: for digests and discussion of Section 718.303, please refer to Part VII of this outline]

DIGESTS

In a case involving evidence that the immediate cause of death was pancreatic carcinoma with pulmonary emphysema listed on the death certificate and the autopsy report as a contributing cause of death, the Court construed "substantial contributing cause" under Section 718.205(c)(2) as encompassing situations in which "pneumoconiosis actually hastened the miner's death." ***Lukosevicz v. Director, OWCP***, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); see also ***Shuff v. Cedar Coal Co.***, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); ***Brown v. Rock Creek Mining Co., Inc.***, 996 F.2d 812, 17 BLR 135 (6th Cir. 1993) and ***Peabody Coal Co. v. Director, OWCP***, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

In a deceased miner's case where miner died in a roof collapse, the court ruled that while pneumoconiosis may have slowed miner's escape, that fact does not, as such, make it a cause of death. ***Dellosa v. Weinberger***, 386 F.Supp. 1122 (E.D. Pa. 1974).

A majority of this Sixth Circuit panel up-held the denial of benefits, affirming the ALJ's refusal to credit an autopsy finding of lung pigmentation as sufficient to meet claimant's burden to establish death due to pneumoconiosis under Section 718.205(c) and affirming the ALJ's reliance on the autopsy report over the treating physician who was equivocal concerning cause of diagnosed obstructive lung disease. A lengthy dissent agreed with claimant that the Board and ALJ erred by failing to find the evidence supportive of death due to pneumoconiosis. ***Griffith [Myrtle] v. Director, OWCP***, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

The Sixth Circuit held that the inherently subjective nature of psychiatric evaluations, as it relates to causation in suicide cases, is usually after the fact. Therefore, the Court rejected the Director's argument that survivors' benefits should be awarded when a miner suffering from pneumoconiosis commits suicide. ***Johnson v. Peabody Coal Co.***, 26 F.3d 618, 18 BLR 2-244 (6th Cir. 1993).

The Tenth Circuit adopted the holdings of the Third, Fourth, Sixth and Seventh Circuits in following the Director's interpretation that a survivor must demonstrate that pneumoconiosis was a "substantially contributing cause or factor leading to the miner's death" in 20 C.F.R. §718.205(c) "...as meaning hastening death to any degree." See

also **Brown v. Rock Creek Mining Co.**, 996 F.2d 812, 816, 17 BLR 2-135 (6th Cir. 1993); **Peabody Coal Co. v. Director, OWCP**, 972 F.2d 178, 183, 16 BLR 2-121 (7th Cir. 1992); **Shuff v. Cedar Coal Co.**, 967 F.2d 977, 980, 16 BLR 2-90 (4th Cir. 1992); **Lukosevicz v. Director, OWCP**, 888 F.2d 1001, 1006, 13 BLR 2-100 (3d Cir. 1989). The Court agreed with the Board that the administrative law judge's crediting of medical reports that diagnosed pneumoconiosis as a co-equal cause, along with other conditions, in the miner's death met this standard. **Northern Coal Co. v. Director, OWCP [Pickup]**, 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996).

The Fourth Circuit affirmed the administrative law judge's denial of survivor's benefits where the miner died of complications of bronchopneumonia. The majority held that claimant survivor did not meet the **Shuff v. Cedar Coal Co.**, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992) standard that pneumoconiosis hastened the miner's death. The concurring judge joined the result but would have affirmed the administrative law judge's finding that pneumoconiosis played no role in the miner's death as supported by "overwhelming evidence," and therefore would not have reached **Shuff**. **Kirk v. Director, OWCP**, 86 F.3d 1151, 20 BLR 2-276 (4th Cir. 1996)(Williams, J., concurring). **[NOTE: Digest following where Fourth Circuit reversed and remanded their original disposition in Shuff.]**

The Fourth Circuit vacated the Board's affirmance of the award of survivor's benefits and remanded for further findings by the administrative law judge. The majority held that the administrative law judge's reliance on the autopsy report was not supported by adequate findings for the conclusion that the autopsy prosector was in the best position to make a judgement regarding cause of death. See **Freeman United Coal Mining Co. v. Stone**, 957 F.2d 360, 362, 16 BLR 2-57 (7th Cir. 1992); **Urgolites v. BethEnergy Mines, Inc.**, 17 BLR 1-20, 1-23 (1992). The dissent, however, would have affirmed the rationale presented by the administrative law judge and the Board, noting that remand will unlikely result in a different outcome. **BethEnergy Mines, Inc. v. Director, OWCP [Rowan]**, 92 F.3d 1176, 20 BLR 2-289 (4th Cir. 1996)(Hall, J., dissenting).

The Fourth Circuit held in this survivor's case that the Director's stipulation and concession at the hearing and his response brief before the Court, stipulating to the "contents" of the award of benefits in the living miner's claim, provided the causal link between the diagnosis of COPD on the death certificate and in two reports of record with legal pneumoconiosis. In reversing and remanding this case, the Court held that since legal pneumoconiosis has been established, the administrative law judge must reevaluate the two reports of record and the death certificate to determine whether pneumoconiosis hastened the miner's death under 20 C.F.R. §§718.201, 718.205(c)(2); **Shuff v. Cedar Coal Co.**, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). **Richardson v. Director, OWCP**, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996).

The Third Circuit held that the Board properly affirmed the ALJ's denial of benefits in this survivor's case under 20 C.F.R. §718.205(c)(2), as the only opinion of record offered by claimant to meet her burden to prove that pneumoconiosis hastened the miner's death, prepared by the miner's treating physician, was properly rejected by the ALJ as conclusory. Although the Court had noted their grave concern that this claim was delayed by DOL for over 14 years, they "regretfully" agreed that the ALJ properly found that the hospital records did not provide the causal link for the treating physician's conclusory statement that pneumoconiosis contributed to the miner's death. Relying on **Director, OWCP v. Siwiec**, 894 F.2d 635, 639, 13 BLR 2-259 (3d Cir. 1990) and **Risher v. Director, OWCP**, 940 F.2d 327, 331, 15 BLR 2-186 (8th Cir. 1991), the Court agreed that a fact-finder may disregard a medical opinion that does not adequately explain the basis for its conclusion. The mere fact the death certificate referred to pneumoconiosis can not serve as a reasoned medical finding, especially here where no autopsy was performed. The Court also noted that the ALJ rejected the only other report of record as inconclusive as that physician did not review any of the positive x-ray evidence showing the miner's pneumoconiosis. The Court urged claimant to "take advantage" of the Director's suggestion that a modification request may be filed to amend the record with an additional medical opinion by the miner's treating physician. **Lango v. Director, OWCP**, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

The Eleventh Circuit adopted the holdings of the Third, Fourth, Sixth, Seventh and Tenth Circuits in following the Director's interpretation that a survivor must demonstrate that pneumoconiosis was a "substantially contributing cause or factor leading to the miner's death" in 20 C.F.R. §718.205(c) "...if it hastens the miner's death." See also **Northern Coal Co. v. Director, OWCP [Pickup]**, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); **Brown v. Rock Creek Mining Co.**, 996 F.2d 812, 816, 17 BLR 2-135 (6th Cir. 1993); **Peabody Coal Co. v. Director, OWCP**, 972 F.2d 178, 183, 16 BLR 2-121 (7th Cir. 1992); **Shuff v. Cedar Coal Co.**, 967 F.2d 977, 980, 16 BLR 2-90 (4th Cir. 1992); **Lukosevicz v. Director, OWCP**, 888 F.2d 1001, 1006, 13 BLR 2-100 (3d Cir. 1989). The Court vacated the Board's affirmance of the administrative law judge's denial of benefits and remanded this case for application of the correct standard under Section 718.205(c). **Bradberry v. Director, OWCP**, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).

The Third Circuit, in an extensive review of the evidence of record, directed an award of benefits, reversing the findings of the administrative law judge and the Board and holding "...that the record here supports only one conclusion, *i.e.*, that [claimant] met her burden of establishing that [pneumoconiosis] (sic) contributed to her husband's death." The court acknowledged that this type of review "...will not be appropriate in every case..." and ordered expedited handling of the remand for payment of benefits as claimant is 78 years old and she had pursued this claim for over seven years. **Mancia v. Director, OWCP**, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997).

Under the facts and circumstances of the case, doctor's opinion that pneumoconiosis "could be considered a complicating factor" in the miner's death constituted substantial evidence that pneumoconiosis hastened the miner's death and was therefore a substantially contributing cause of death pursuant to 20 C.F.R. §718.205(c)(2). ***Piney Mountain Coal Co. v. Mays***, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

The Sixth Circuit held that Section 718.205(c)(4) does not preclude an award of benefits to a surviving widow where the miner's death was caused by a traumatic injury, if the deceased miner suffered from complicated pneumoconiosis and, therefore, is entitled to the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. See Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). ***Gray v. SLC Coal Co.***, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

The Fourth Circuit reversed the award of benefits in a survivor's claim, holding that where the record contained no medical evidence showing that the miner's pneumoconiosis had any relationship to the miner's pneumonia or to his death, Dr. Rasmussen's speculative statement, unsupported by the record that he reviewed, that "[i]t is possible that death could have occurred as a consequence of his pneumonia superimposed upon...his occupational pneumoconiosis," and his conclusion that therefore "it can be stated" that pneumoconiosis was a contributing factor to the miner's death, did not meet the evidentiary requirements of §556(d) of the APA, and thus did not satisfy claimant's burden of proof. ***U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]***, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999).

The Fourth Circuit held that a death certificate signed by the autopsy prosector which listed simple coal workers' pneumoconiosis in the blank for "other significant conditions contributing to death," combined with a notation in the autopsy report that pneumoconiosis was present at the time of death, without additional support or explanation, was insufficient to establish that pneumoconiosis hastened the miner's death. The Court also held that administrative law judge's are not to credit the opinion of an autopsy prosector, to the exclusion of all other experts, solely because the autopsy prosector was the only physician to examine the whole body near the time of death. ***Bill Branch Coal Corp. v. Sparks***, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

The Seventh Circuit held that the administrative law judge's finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis was supported by substantial evidence. The Court recognized that the employer's experts' opinions were in partial conflict with the administrative law judge's finding that the miner did have clinical pneumoconiosis. The Court further acknowledged that the employer's experts' initial conclusions, that the miner did not have pneumoconiosis, probably influenced their later conclusions that the miner's death was not due to pneumoconiosis. The Court, however, noted that several of the experts did assume, for part of their opinions, that the miner did have pneumoconiosis and still concluded that it did not cause his death. The Court also noted that the miner suffered from numerous other

substantial health problems, many of which were not related to asthma, breathing or pneumoconiosis. The Court held that the administrative law judge reviewed all the opinions and qualifications of the experts, and resolved the conflicting reports in a thorough and logical manner. **Livermore v. Amax Coal Co.**, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002).

The Third Circuit held that even assuming that employers' physicians were correct in maintaining that pneumoconiosis is not progressive, the administrative law judge rationally considered that the absence of impairment in objective tests taken years prior to the miner's death was not dispositive of whether pneumoconiosis hastened death. The court further held that the physicians who opined that there was a connection between pneumoconiosis and the miner's death from colon cancer clearly explained how pneumoconiosis hastened the miner's death and that the administrative law judge carefully considered the physicians' qualifications and the quality of their reasoning. Consequently, the court affirmed the award of survivor's benefits. **Consolidation Coal Co. v. Kramer**, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002).

The Seventh Circuit affirmed the administrative law judge's award of survivor's benefits under 20 C.F.R. §718.205(c). The Seventh Circuit determined that the correct application of nonmutual collateral estoppel precluded employer from arguing that the miner did not have pneumoconiosis, a fact established by the award of benefits in the miner's claim. Regarding the cause of the miner's death, the Seventh Circuit rejected employer's argument that the administrative law judge improperly relied on the opinion of Dr. Ridge, the miner's physician. Dr. Ridge was a general practitioner who treated neither the miner's cancer nor his pulmonary disease and referred the miner to specialists for both. Dr. Ridge opined that the acceleration seen in the miner's demise due to cancer was attributable to his weakened state which was due to pneumoconiosis. The court cited the Department of Labor's observation, when promulgating the regulation at 20 C.F.R. §718.205(c)(5), that persons weakened by pneumoconiosis "may expire quicker from other diseases," see 65 Fed.Reg. 79,920, 79,950 (Dec. 20, 2000), and referred to Dr. Ridge's advantage of observing whether a pulmonary problem "sapped" the miner's ability to withstand the effects of the cancer. One judge concurred in the opinion, declining to join the portions of the decision wherein the court discussed hypothetical ways in which employer might have prevailed. **Zeigler Coal Co. v. Director, OWCP [Villain]**, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002).

The Sixth Circuit reversed the Board's Decision and Order in which the Board affirmed the administrative law judge's award of survivor's benefits. The Sixth Circuit held that the Board erred in affirming the administrative law judge's reliance on the opinion of the miner's treating physician to find that claimant established death due to pneumoconiosis under 20 C.F.R. §718.205(c), because the administrative law judge improperly gave preference to the treating physician's opinion based on his status. The Sixth Circuit determined that the miner's treating physician's opinion, that pneumoconiosis hastened

the miner's demise because the miner's lack of oxygen and retention of carbon dioxide had an effect on all parts of his body, "suffers from several serious problems that render his opinion an inadequate basis for the ALJ's conclusion," slip op. at 12, and "[even] if [the opinion] is an accurate medical conclusion, it is legally inadequate," slip op. at 13. The Sixth Circuit indicated that under the treating physician's interpretation, pneumoconiosis would virtually always "hasten' death at least some minimal degree. The Sixth Circuit held, "Legal pneumoconiosis only hastens death if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Id.* The Sixth Circuit thus concluded that the miner's treating physician's opinion is conclusory and inadequate. The Sixth Circuit also reviewed its cases and those of other circuit courts of appeal, as well as the regulation at 20 C.F.R. §718.104(d). The Sixth Circuit concluded that there is no rule requiring deference to the opinion of a treating physician in black lung claims, and indicated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." Slip op. at 9. ***Eastover Mining Co. v. Williams***, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Reiterating the holding in ***Brown v. Rock Creek Mining Co.***, 996 F.2d 812 (6th Cir. 1993), the United States Court of Appeals for the Sixth Circuit held that in order to be entitled to benefits on a survivor's claim, a claimant must show that the miner's death was caused or hastened by pneumoconiosis. ***Mills v. Director, Office of Workers Compensation Programs***, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003).

Where a physician stated that the deceased miner did not have pneumoconiosis, contrary to the parties' stipulation that the miner had pneumoconiosis, the administrative law judge failed to state "specific and persuasive reasons" why he relied on the physician's opinion that the miner's death was unrelated to pneumoconiosis. ***Soubik v. Director, OWCP***, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004)(Roth, J., dissenting).

The D.C. Circuit held that the revised regulation at 20 C.F.R. 718.205(c)(5) does not mandate the conclusion that pneumoconiosis be regarded as a hastening cause of death, but only describes circumstances under which pneumoconiosis may be found to have hastened death. Claimant retains the burden of proving that pneumoconiosis hastened the miner's death. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 871, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

Although the Fourth Circuit in ***Island Creek Coal Co. v. Compton*** invalidated the practice of allowing administrative law judges to find the existence of pneumoconiosis established by looking exclusively at evidence within one of the four subsections at 20 C.F.R. §718.202(a), while ignoring contrary evidence belonging to one of the other three subsections, the court noted that in so ruling, it left unaltered the legal definition of pneumoconiosis, the methods by which a claimant may establish the existence of pneumoconiosis, and the burden of proving the existence of pneumoconiosis by a preponderance of the evidence. The court thus concluded that the issue sought to be

precluded in the survivor's claim was identical to that previously adjudicated in the successful miner's claim decided prior to **Compton**, and that the doctrine of offensive nonmutual collateral estoppel was applicable to preclude relitigation of the issue under the facts of this case. Consequently, the Court overruled the Board's holding in **Collins v. Pond Creek Mining Co.**, 22 BLR 1-229 (2003), that collateral estoppel was inapplicable, and remanded the case for the Board to assess whether the administrative law judge's weighing of the evidence on the issue of death causation met the "rigorous standards" outlined in **Scott v. Mason Coal Co.**, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002). **Collins v. Pond Creek Mining Co.**, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006) (Shedd, C.J., dissenting).

The United States Court of Appeals for the Third Circuit reversed the administrative law judge's denial of survivor's benefits pursuant to 20 C.F.R. §718.205(c). The court held that the administrative law judge erred in finding the statements of the miner's treating physician, that the miner's chronic lung disease compromised and contributed to his death from heart disease, was insufficient to satisfy claimant's burden of proof under **Lukosevicz v. Director, OWCP**, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989) because the doctor did not specifically state that the miner's chronic lung disease was due to coal dust exposure. According to the court, in analyzing the evidence, the administrative law judge erred in focusing on the cause of the miner's respiratory disease as opposed to the cause of his death. The court noted that there was no dispute in the record that the miner had a chronic lung disease satisfying the legal definition of pneumoconiosis since the parties stipulated to the existence of pneumoconiosis, and the administrative law judge found that the miner's pneumoconiosis arose from his nine and one-half years of coal mine employment. The court further noted that the record was uncontradicted that the miner suffered from respiratory problems up until two days prior to his death. Thus, under the facts of the case, the court concluded that it was irrational for the administrative law judge to find that pneumoconiosis did not hasten the miner's death. The court therefore awarded benefits as a matter of law. **Hill v. Director, OWCP**, 562 F.3d 264, 24 BLR 2-177 (3d Cir. 2009).

The Sixth Circuit, citing **Eastover Mining Co. v. Williams**, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), held that "[l]egal pneumoconiosis only 'hastens' a death if it does so through a specifically defined process that reduces the miner's life by an estimable time." Because the physician's opinion in the case did not specifically define the process by which legal pneumoconiosis hastened the miner's death, the Sixth Circuit did not decide whether a medical opinion may suffice under **Williams** without making some range-of-time estimate in describing the "specifically defined process" by which legal pneumoconiosis hastened the death of a miner already suffering from a terminal illness. **Conley v. National Mines Corp.**, 595 F.3d 297, BLR 2- (6th Cir. 2010).

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