PART III

PROCEDURAL ISSUES

E. APPLICABLE LAW

The issue of entitlement is governed, to a large degree, by the statutory and regulatory provisions that apply to the adjudication of a given claim. The determination of this threshold issue, the applicable law, has often proven to be difficult under the Black Lung Act, which has been described as "not represent[ing] the work of Congress at its most lucid." ***Director, OWCP v. Blevins***, 757 F.2d 781, 7 BLR 2-166 (6th Cir. 1985), and cases cited therein. As a tribunal with nationwide jurisdiction, the Board endeavors to interpret the law in a uniform manner so that it is applied consistently in all geographical areas of its jurisdiction. *See* ***Shupe v. Director, OWCP***, 12 BLR 1-200, 1-201 (1989)(*en banc*); ***Borgeson v. Kaiser Steel Corp.***, 8 BLR 1-313, 1-314 (1985), *rev'd on other grounds*, 12 BLR 1-169 (1989)(*en banc*).

Where a miner's work occurred exclusively within the jurisdiction of a single circuit, the Board will apply the law of that circuit. *See* ***Shupe***, 12 BLR at 1-202; ***Minor v. Alabama By-Products Corp.***, 7 BLR 1-676 (1985). Where the miner has worked within the jurisdiction of more than one circuit and the laws of those circuits are compatible it is unnecessary to determine which law applies. *Id*; *see*, *e.g.*, ***Mahon v. National Coal Mining Co.***, 7 BLR 1-749, 1-751 n.4 (1985). Otherwise, the Board will apply the law of the circuit in whose jurisdiction the miner most recently performed coal mine employment. ***Shupe***, 12 BLR at 1-202. This practice in no way detracts from the right of an affected or aggrieved party to initiate an appeal from the Board's decision to the United States Court of Appeals for any circuit in which the miner was engaged in coal mine employment as provided under 33 U.S.C. §921(c). *See* ***Danko v. Director, OWCP***, 846 F.2d 366, 368, 11 BLR 2-157, 2-159 (6th Cir. 1988); ***Wetherill v. Director, OWCP***, 812 F.2d 376, 379 n.6, 9 BLR 2-239, 2-242 n.6 (7th Cir. 1987); ***Bernardo v. Director, OWCP***, 772 F.2d 576, 578, 9 BLR 2-26 (9th Cir. 1985); ***Consolidation Coal Co. v. Chubb***, 741 F.2d 968, 6 BLR 2-92 (7th Cir. 1984); *see also* ***Hon v. Director, OWCP***, 699 F.2d 441, 5 BLR 2-43 (8th Cir. 1983); ***Hardesty v. Benefits Review Board***, 783 F.2d 138, 8 BLR 2-100 (8th Cir. 1986); ***Shupe***, ***supra***.

Generally, the Board must apply the law in effect at the time of its decision. *See* ***Lynn v. Island Creek Coal Co.***, 12 BLR 1-146 and 13 BLR 1-57 (1989)(*en banc* recon.)(McGranery, J., concurring); ***Rapavi v. The Youghiogheny and Ohio Coal Co.***, 7 BLR 1-435, 1-437 (1984). The Sixth Circuit held, however, that the Board's application of intervening law resulted in "manifest injustice" where claimant did not have an opportunity to present evidence regarding the chronicity of claimant's lung cancer, which was required by intervening law, but had not been required under the superseded law. ***Tackett v.***

Benefits Review Board, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986); *see* ***Harlan Bell Coal Co. v. Lemar***, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *see also* ***Marx v. Director, OWCP***, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989)[where case law changed after the administrative law judge hearing, court held that remand was proper to give widow an opportunity to introduce evidence to satisfy the new legal standard].

CASE LISTINGS

[Section 727.203(d) requires that all claims filed before March 31, 1980 but unsuccessful under Part 727 be considered under permanent criteria of Part 410, Subpart D, as incorporated by 20 C.F.R. §718.2 (1978)] ***Muncy v. Wolfe Creek Collieries Coal Co., Inc.***, 3 BLR 1-627 (1981).

[prior to application of Reform Act criteria, claimant entitled to final adjudication pursuant to Act amended through 1972. ***Gurule v. Director, OWCP***, 2 BLR 1-772 (1979), *aff'd sub nom*. ***Director, OWCP v. Gurule***, 653 F.2d 1368, 3 BLR 2-26 (10th Cir. 1981).

[courts will apply 1972 Act to pending cases initially filed under those provisions, despite passage of Reform Act. *See*, *e.g.*, ***Freeman v. Califano***, 600 F.2d 1057 (5th Cir. 1979); ***Treadway v. Califano***, 584 F.2d 48 (4th Cir. 1978); ***Yakim v. Califano***, 587 F.2d 149 (3d Cir. 1978).

[fact-finder erred in deciding case under Reform Act when hearing held as though Act as amended through 1972 was applicable] ***Webb v. Beth-Elkhorn Corp.***, 4 BLR 1-77 (1981).

[provisions of Federal Rules of Civil Procedure incorporated into adjudications under Act by 20 C.F.R. §725.458] ***Bibb v. Clinchfield Coal Co.***, 7 BLR 1-134 (1984); ***Brown v. Island Creek Coal Co.***, 4 BLR 1-620 (1982); *see also* ***Lopes v. George Hyman Construction Co.***, 12 BRBS 314 (1981)[application of Federal Rules to adjudication under the LHWCA pursuant to 20 C.F.R. §707.341].

[fact-finder erred in considering evidence under Part 718 when only hearing occurred after effective date of regulations] ***Hurd v. Director, OWCP***, 5 BLR 1-106 (1982).

[claimant entitled to full adjudication of his July 17, 1973 claim: no waiver of rights under 1972 Act and therefore not bound by January 1, 1974 onset restriction that follows Reform Act review] ***Mismash v. Director, OWCP***, 6 BLR 1-1240 (1984).

[Board will not follow ***Echo v. Director, OWCP***, 744 F.2d 327 (3d Cir. 1984), regarding comparability between current work and usual coal mine work, except in Third Circuit] ***Francis v. Slab Fork Coal Co.***, 7 BLR 1-666 (1985); *but see* ***Ratliff v. Benefits Review Board***, 816 F.2d 1121, 10 BLR 2-76 (6th Cir. 1987)[Sixth Circuit standard]; ***Big Horn Coal***

***Co. v. Director, OWCP* [*Alley*]**, 897 F.2d 1045, 13 BLR 2-372 (10th Cir. 1990)[Tenth Circuit standard].

DIGESTS

In a claim filed prior to the effective date of the Part 718 regulations, the Board rejected Director's argument that clinical tests administered after the effective date should be governed by the Part 718 quality standards. To do so would not advance the congressional intent of the Act, as determined by the Board in ***Muncy***, that all claims filed prior to the effective date of Part 718 be adjudicated according to a uniform standard. ***Pezzetti v. Director, OWCP***, 8 BLR 1-464 (1986).

The Board applies ***Muncy*** to cases arising in all judicial circuits except the Third, Sixth, Seventh and Eighth which have specifically held that Part 718 applies if the claim is adjudicated, at least in part after March 30, 1980, *see* ***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. 1989); ***Oliver v. Director, OWCP***, 888 F.2d 1239, 13 BLR 2-124 (8th Cir. 1989). *See generally* ***Saris v. Director, OWCP***, 11 BLR 1-65 (1988).

In ***Pittston Coal Group v. Sebben***, 109 S.Ct. 414, 12 BLR 2-89 (1988), the Supreme Court held that Section 727.203(a) violates Section 402(f) of the Act in that it disqualifies a class of claimants who were eligible for consideration under the Section 410.490 presumption. In its remand Order in ***Director, OWCP v. Broyles***, No. 87-1095 (a companion case), the Supreme Court ordered the Board to apply a criteria no more restrictive than Section 410.490 regarding the affirmative factors for invoking the presumption. The Supreme Court declined to address the validity of the rebuttal methods contained in Section 727.203(b) based upon the respondent's concession that the methods are valid. For circuit cases interpreting ***Sebben***, *see* ***The Youghiogheny and Ohio Coal Co. v. Milliken***, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989); ***Griffith v. Director, OWCP***, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989). For the Benefits Review Board's interpretation of ***Sebben*** and ***Milliken***, *see* ***Prater v. Clinchfield Coal Co.***, 12 BLR 1-121 (1989); ***Hall v. Director, OWCP***, 12 BLR 1-133 (1989), *modified on recon.*, 14 BLR 1-1 (1989); and ***Lynn v. Island Creek Coal Co.***, 12 BLR 1-146 and 13 BLR 1-57 (1989)(*en banc* recon.)(McGranery, J., concurring).

Subsequent to its decision in ***Pittston***, the court upheld the challenged rebuttal provisions found at §727.203(b)(3) and (6)(4). ***Pauley v. Bethenergy Mines, Inc.***, 111 S.Ct. 2524, 15 BLR 2-155 (1991) [Pauley], *aff'g*, ***Bethenergy Mines, Inc. v. Director, OWCP and Pauley***, 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989), *rev'g*, ***Taylor v. Clinchfield Coal Co.***, 875 F.2d 178, 13 BLR 2-294 (4th Cir. 1990) and ***Taylor v. Peabody Coal Co.***, 892 F.2d 503, 14 BLR 2-79 (7th Cir. 1989). The Board cites ***Pauley*** for the proposition that a claim which

has been properly adjudicated pursuant to Part 727 is not subject to further adjudication under Section 410.490. ***Pauley***, ***supra***; *see also* ***Whiteman v. Boyle Land and Fuel Co.***, 15 BLR 1-11 (1991)(*en banc*).

In all circuits, the Board applies Section 410.490 to all claims where the miner has established less than ten years of coal mine employment and filed a claim prior to March 31, 1980. *See* ***Bean v. Director, OWCP***, 14 BLR 1-7 (1989).

The Board rejected employer's contention that the administrative law judge improperly applied the definition of an operator contained in the 1977 amendments to the Act instead of the original definition of an operator as it appeared in the 1969 Act. The Board noted that a court must apply the law in effect at the time it orders its decision unless doing so would result in manifest injustice or would be contrary to a specific legislative directive. ***Bradley v. School Board of City of Richmond***, 416 U.S. 696, 712, 94 S.Ct. 2006, 2016 (1974). The Board held that employer failed to show that the destruction of its employment records was so prejudicial as to rise to the level of manifest injustice. Inasmuch as there was no legislative directive to the contrary, the Board found no error in the administrative law judge's application of the 1977 amendment to the Act. ***Etzweiler v. Cleveland Brothers Equipment Co.***, 16 BLR 1-38 (1992)(*en banc*).

The Part 718 quality standards are inapplicable in this Fourth Circuit case filed in 1979, inasmuch as entitlement is not being considered under the Part 718 regulations, *see* ***Pezzetti v. Director, OWCP***, 8 BLR 1-464 (1986); ***Sgro v. Rochester & Pittsburgh Coal Co.***, 4 BLR 1-370 (1981); *contra* ***Prater v. Hite Preparation Co.***, 829 F.2d 1363, 10 BLR 2-297 (6th Cir. 1987). ***Coleman v. Ramey Coal Co.***, 18 BLR 1-9 (1993).

Section 725.535(d) provides in pertinent part that amounts paid or incurred by an individual for medical, legal or related expenses in connection with a claim for state benefits for occupational pneumoconiosis are to be excluded in computing the amount by which the duplicative federal benefits must be offset. 20 C.F.R. §725.535(d). The Board held that, in the absence of more specific evidence supplied by claimant, the percentage of the state award due to pneumoconiosis is an acceptable form of "other evidence" pursuant to Section 725.535(d), *i.e.*, if claimant received, as in the instant case, a 15% state disability award for pneumoconiosis, then in the absence of a more specific accounting of claimant's attorney's fee, 15% of claimant's total attorney's fee will be subtracted from the amount claimant is obligated to repay. ***Pickens v. Director, OWCP***, 19 BLR 1-116 (1995).

The Board held that the Black Lung Benefits Act and the Kentucky insurance statutes in question in the instant case are not in conflict since the former concerns federal benefits, while the latter concerns state benefits. Consequently, the Board held that the McCarran-Ferguson Act, which in pertinent part states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by the State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance," 15 U.S.C. §1012(b), is inapplicable to the instant case. ***Bates v. Creek Coal***

Co., Inc., 18 BLR 1-1 (1993), *aff'd on recon.*, 20 BLR 1-36 (1996). [**NOTE**: On appeal, the Sixth Circuit reversed the Board's holding and remanded on the basis that all of the self-employed mine owner's covered employment pre-dated March 1, 1978 and therefore was not yet covered as the 1978 Amendments, which later covered this type of situation, were not yet in force. This argument was not made to the Board. For further caselaw on the issue of insurance coverage/McCarran-Ferguson Act, *see* ***Lovilia Coal Co. v. Williams***, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998).]

Because the Board must apply the law in effect at the time of its decision, *see* ***Lynn v. Island Creek Coal Co.***, 12 BLR 1-146, 1-147 (1989), the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1) and 727.203(b)(4) were vacated as inconsistent with law where the administrative law judge invoked the interim presumption at 20 C.F.R. §727.203(a)(1) by applying the true-doubt rule, subsequently held to be invalid in ***Director, OWCP v. Greenwich Collieries*** **[*Ondecko*]**, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom*. ***Greenwich Collieries v. Director, OWCP***, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and relied on his invocation determination to find rebuttal precluded pursuant to 20 C.F.R. §727.203(b)(4). ***Cole v. East Kentucky Collieries***, 20 BLR 1-50 (1996).

The Board rejected claimant's contention that the equivalency determination standard, adopted by the United States Court of Appeals for the Fourth Circuit in ***Double B Mining, Inc. v. Blankenship***, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999), is an inappropriate legal standard for establishing invocation of the irrebuttable presumption under 20 C.F.R. §718.304. The Board noted that it does not have the authority to overrule the Fourth Circuit's requirement that an equivalency analysis be conducted, as the Board's decisions are subject to review by the United States Courts of Appeals. *See* 33 U.S.C. §921(c), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.410. ***Gollie v. Elkay Mining Co.***, BRB No. 02-0741 BLA (July 31, 2003)(published).

The D.C. Circuit held that the revised regulations at 20 C.F.R. §§718.104(d), 718.201(a)(2), 718.201(c), 718.204(a), 725.101(a)(6), 725.101(a)(31), 725.204, 725.212(b), 725.213(c), 725.214(d), 725.219(d), 725.309(d) and 725.701, promulgated by the Secretary of Labor in 2000, are applicable to all subsequent claims filed pursuant to 20 C.F.R. §725.309(d), as these claims are considered to be new claims. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 861, 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: While the court also referenced Section 725.219(c), this is a typographical error, as no changes were made to Section 725.219(c) from the prior edition of the regulations.]

07/09