PART IV

ADMINISTRATIVE PROCESSING OF CLAIMS, POWERS AND DUTIES OF THE ADMINISTRATIVE LAW JUDGE

D. EVALUATION AND WEIGHING OF EVIDENCE

1. GENERAL PRINCIPLES; BURDEN OF PROOF

Pursuant to 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a), the Board cannot reweigh the evidence but may only inquire into whether there is substantial evidence in the record considered as a whole to support the findings of the adjudication officer. ***O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.***, 380 U.S. 359 (1965); ***Peabody Coal Co. v. Benefits Review Board***, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977); ***Fagg v. Amax Coal Co.***, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); ***Worley v. Blue Diamond Coal Co.***, 12 BLR 1-20 (1988); ***Dockins v. McWane Coal Co.***, 9 BLR 1-57 (1986).

Because the Board's scope of review is limited by the substantial evidence standard, the adjudication officer has great leeway in evaluating the record evidence. ***O'Leary v. Brown-Pacific Maxon, Inc.***, 340 U.S. 504 (1951)[longshore case]; ***Consolidated Edison Co. v. NLRB***, 305 U.S. 197 (1938). Nonetheless, s/he may not reject relevant medical evidence without adequate explanation. *See* ***Ridings v. C & C Coal Co. Inc.***, 6 BLR 1-227, 1-230 (1983); ***Zeigler Coal Co. v. Sieberg***, 839 F.2d 1280, 11 BLR 2-80 (7th Cir. 1988); ***Arnold v. Secretary of HEW***, 567 F.2d 258, 259 (4th Cir. 1977); *see also* ***Peabody Coal Co. v. Helms***, 859 F.2d 486 (7th Cir. 1988). In such cases, the Board will remand for reconsideration of the relevant medical evidence. ***Brewster v. Director, OWCP***, 7 BLR 1-120 (1984). The administrative law judge may refuse to credit even an uncontradicted medical opinion if there is a legitimate reason. ***Knizner v. Bethlehem Mines Corp.***, 8 BLR 1-296 (1985), *recon. denied*, 8 BLR 1-5 (1985); ***Miller v. Director, OWCP***, 7 BLR 1-693 (1985); ***Blackledge v. Director, OWCP***, 6 BLR 1-1060 (1984).

The administrative law judge need not accept the opinion of any particular medical witness or expert, but must weigh all the evidence and draw his/her own conclusions and inferences. ***Lafferty v. Cannelton Industries, Inc.***, 12 BLR 1-190 (1989); ***Stark v. Director, OWCP***, 9 BLR 1-36 (1986); ***Todd Shipyards Corp. v. Donovan***, 300 F.2d 741 (5th Cir. 1962). The adjudicator's function is to resolve the conflicts in the medical evidence; those findings will not be disturbed on appeal if supported by substantial evidence. ***Lafferty***, ***supra***; ***Fagg v. Amax Coal Co.***, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); ***Short v. Westmoreland Coal Co.***, 10

BLR 1-127 (1987); ***Piccin v. Director, OWCP***, 6 BLR 1-616 (1983). ***Peabody Coal Co. v. Lowis***, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983).

In considering the medical evidence of record, an administrative law judge must not selectively analyze the evidence. *See* ***Wright v. Director, OWCP***, 7 BLR 1-475 (1984); ***Hess v. Clinchfield Coal Co.***, 7 BLR 1-295 (1984); ***Crider v. Dean Jones Coal Co.***, 6 BLR 1-606 (1983); ***Peabody Coal Co. v. Lowis***, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983); *see also* ***Stevenson v. Windsor Power House Coal Co.***, 6 BLR 1-1315 (1984). The weight of the evidence, and determinations concerning credibility of medical experts and witnesses, however, is for the administrative law judge. ***Mabe v. Bishop Coal Co.***, 9 BLR 1-67 (1986); ***Brown v. Director, OWCP***, 7 BLR 1-730 (1985); *see also* ***Roberts v. Bethlehem Mines Corp.***, 8 BLR 1-211 (1985); ***Henning v. Peabody Coal Co.***, 7 BLR 1-753 (1985); ***Peabody Coal Co. v. Benefits Review Board***, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977).

In evaluating the record, if the adjudicator states that no evidence exists on a particular issue, this assertion must be correct or the case must be remanded for reevaluation of the issue. ***Johnson v. Califano***, 585 F.2d 89, 90 (4th Cir. 1978); ***Ohler v. Secretary of Health, Education and Welfare***, 583 F.2d 501, 505-06 (10th Cir. 1978); ***Burks v. Hawley Coal Mining Corp.***, 2 BLR 1-323 (1979). Additionally, if the adjudicator misconstrues either the quality or the quantity of relevant evidence, *i.e.*, if the evidentiary analysis does not coincide with the evidence of record, the case must be remanded for reevaluation of the issue to which the evidence is relevant. ***Tackett v. Director, OWCP***, 7 BLR 1-703 (1985); ***Branham v. Director, OWCP***, 2 BLR 1-111, 1-113 (1979).

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. ***Kuchwara v. Director, OWCP***, 7 BLR 1-167 (1984). In considering the evidence on any particular issue, the administrative law judge must be cognizant of which party bears the burden of proof. Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. *See* ***White v. Director, OWCP***, 6 BLR 1-368 (1983); *see also* Part IV.A.4.c. of the Desk Book. Claimant, therefore, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 BLR 1-860 (1985). Where claimant has introduced sufficient evidence to qualify for a presumption under the Act or regulations, and the presumption is one that provides for rebuttal by establishing particular facts, such as the 20 C.F.R. §727.203 interim presumption, the burden of persuasion or proof generally shifts to the party opposing entitlement. *See* ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Kozele v. Rochester & Pittsburgh Coal Co.***, 6 BLR 1-378 (1983); *see also* Part IV.D.1 of the Desk Book. If the party opposing entitlement has failed to carry its burden of proof, claimant must prevail. ***Gilson v. Price River Coal Co.***, 6 BLR 1-96 (1983).

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[where record shows respiratory condition could have arisen from conditions other than coal mine employment, claimant must produce competent medical evidence to carry burden of proof] ***Shepherd v. Director, OWCP***, 6 BLR 1-485 (1983); *cf*. ***Henderson v. Director, OWCP***, 7 BLR 1-866 (1985); ***Collura v. Director, OWCP***, 6 BLR 1-100 (1983).

[burden of proof to establish entitlement rests on claimant, who bears risk of non-persuasion; Director has no duty to gather evidence or seek clarification of doctor's opinion] ***Oggero v. Director, OWCP***, 7 BLR 1-860 (1985); *see also* ***Belcher v. Beth-Elkhorn Corp.***, 6 BLR 1-1180 (1984); ***White v. Director, OWCP***, 6 BLR 1-368 (1983).

["bursting bubble" theory of rebuttal, that employer's burden of proof on rebuttal ceases to operate upon introduction of contrary medical evidence, rejected in ***McCluskey v. Zeigler Coal Co.***, 2 BLR 1-1248 (1981)] ***Tucker v. Eastern Coal Corp.***, 6 BLR 1-743 (1983); *see also* ***Peabody Coal Co. v. Hale***, 771 F.2d 246, 8 BLR 2-34 (7th Cir. 1985); ***Kaiser Steel Corp. v. Director, OWCP***, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984); ***American Coal Co. v. Benefits Review Board***, 738 F.2d 387, 6 BLR 2-81 (10th Cir. 1984); ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Seese v. Keystone Coal Mining Corp.***, 6 BLR 1-149 (1983).

[Eighth Circuit held employer has burden of showing decedent's work was "usual" in order to establish rebuttal pursuant to subsection (b)(1) in survivor's claim] ***Consolidation Coal Co. v. Smith***, 699 F.2d 446, 5 BLR 2-51 (8th Cir. 1983).

[remand for subsection (b)(2) reconsideration where adjudicator placed burden on claimant to establish total disability rather than employer to disprove existence of totally disabling respiratory-pulmonary impairment] ***Ross v. Director, OWCP***, 6 BLR 1-1039 (1983).

[where party attempts to discredit medical report with later conflicting evidence, must establish that doctor's consideration and conclusions would have been different if later evidence had been available] ***York v. Director, OWCP***, 7 BLR 1-641 (1985); ***Coleman v. Kentland Elkhorn Coal Co.***, 5 BLR 1-260 (1982).

[where evidence conflicting, equally probative on rebuttal, employer has failed to carry burden] ***Gilson v. Price River Coal Co.***, 6 BLR 1-96 (1983).

[Tenth Circuit held that Rule 301 of Federal Rules of Evidence inapplicable to interim presumption, rejecting employer's argument that effect of presumption simply to shift

burden of production of evidence from claimant to operator rejected] ***American Coal Co. v. Benefits Review Board,* [*Callor*]**, 738 F.2d 387, 6 BLR 2-81 (10th Cir. 1984).

[Eleventh Circuit held employer bears burden of persuasion, not merely production, on rebuttal] ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director, OWCP,* [*Sainz*]**, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984); *see* ***Burt v. Director, OWCP***, 7 BLR 1-197 (1984).

[adjudicator applied erroneous standard requiring claimant to establish causation on rebuttal] ***Burt v. Director, OWCP***, 7 BLR 1-197 (1984).

[where miner with pneumoconiosis establishes total disability by blood gas study pursuant to Appendix to 20 C.F.R Part 410, opposing party bears burden of proving condition other than pneumoconiosis primary cause of disability] ***Saunders v. Director, OWCP***, 7 BLR 1-186 (1984); ***Smith v. Director, OWCP***, 7 BLR 1-156 (1984).

[under Part 410 it is claimant's burden to introduce pertinent medical evidence addressing severity of impairment and totally disabling nature of impairment] ***Shortt v. Director, OWCP***, 7 BLR 1-318 (1984); ***Parino v. Old Ben Coal Co.***, 6 BLR 1-104 (1983).

[claimant's burden of proof to establish length of coal mine employment] ***Brewster v. Director, OWCP***, 7 BLR 1-120 (1984); ***Shelesky v. Director, OWCP***, 7 BLR 1-34 (1984).

[claimant must establish invocation of interim presumption; party opposing entitlement has burden of proof to establish rebuttal] ***Burt v. Director, OWCP***, 7 BLR 1-197 (1984).

[Seventh Circuit held that under Section 411(c)(5), burden of proof shifts to employer on rebuttal] ***Amax Coal Co. v. Director, OWCP* [*Chavis*]**, 772 F.2d 304, 8 BLR 2-46 (7th Cir. 1985).

[Seventh Circuit held that once interim presumption invoked, burden shifts to employer to rebut presumption] ***Peabody Coal v. Director, OWCP* [*Huber*]**, 778 F.2d 358, 8 BLR 2-84 (7th Cir. 1985).

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Once the interim presumption is invoked, the burden shifts to employer to establish rebuttal by a preponderance of the evidence. ***Lattimer v. Peabody Coal Co.***, 8 BLR 1-509 (1986); *see also* ***Allen v. Union Carbide Corp.***, 8 BLR 1-393 (1985); ***Gilson v.***

Price River Coal Co., 6 BLR 1-96 (1983); *see generally* ***Bizzarri v. Consolidation Coal Co.***, 775 F.2d 751, 8 BLR 2-65 (6th Cir. 1985).

Pursuant to Section 718.202(a)(4), the administrative law judge must consider and weigh all relevant medical evidence to ascertain whether or not claimant has established the presence of pneumoconiosis by a preponderance of the evidence. ***Perry v. Director, OWCP***, 9 BLR 1-1 (1986).

Claimant's burden is to establish total disability due to pneumoconiosis pursuant to Section 718.204 as defined in Section 718.201 by a preponderance of the evidence. ***Gee v. W. G. Moore and Sons***, 9 BLR 1-4 (1986).

The administrative law judge incorrectly held that a single medical report diagnosing total disability was insufficient to establish total disability because of the existence in the record of contrary probative evidence. Rather, all evidence relevant to the question of total disability due to pneumoconiosis is to be weighed with claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. ***Mazgaj v. Valley Camp Coal Co.***, 9 BLR 1-201 (1986).

Lay evidence alone cannot establish a causal nexus between claimant's pneumoconiosis and coal mine employment in a living miner's claim where dust exposure occurred in covered and non-covered coal mine employment. ***Tucker v. Director, OWCP***, 10 BLR 1-35 (1987); ***Baumgartner v. Director, OWCP***, 9 BLR 1-65 (1986).

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. ***Anderson v. Valley Camp of Utah, Inc.***, 12 BLR 1-111 (1989); ***Fagg v. Amax Coal Co.***, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); ***Worley v. Blue Diamond Coal Co.***, 12 BLR 1-20 (1988); ***Short v. Westmoreland Coal Co.***, 10 BLR 1-127 (1987).

An adjudicator errors by utilizing a "selective analysis" of evidence in crediting a doctor's opinion based solely on negative x-ray. ***Peabody Coal Co. v. Lowis***, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983); ***Justice v. Island Creek Coal Co.***, 11 BLR 1-91 (1988).

Claimant bears the burden of proving his entitlement to benefits under the applicable regulations, even where employer offers no defense. ***Young v. Barnes & Tucker Co.***, 11 BLR 1-147 (1988).

Employer must rebut the presumption at Section 411(c)(4) by establishing that the totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. ***DeFore v. Alabama By-Products Corp.***, 12 BLR 1-27 (1988).

With respect to Section 727.203(b)(3) rebuttal, Board adopted the "rule out" standard, that requires party opposing entitlement to either establish claimant's pneumoconiosis was not a contributing cause of total disability or rule out any causal relationship between total disability and coal mine employment. ***Borgeson v. Kaiser Steel Corp.***, 12 BLR 1-169 (1989), *rev'd on other grds*, 12 BLR 1-169 (1989)(en banc).

The Tenth Circuit held that with respect to establishing total disability due to pneumoconiosis pursuant to Section 718.204, claimant's burden of burden of proof is satisfied if pneumoconiosis is at least a contributing cause. ***Mangus v. Director, OWCP***, 882 F.2d 1527, 13 BLR 2-9 (10th Cir. 1989).

The Third Circuit held that with respect to establishing total disability due to pneumoconiosis pursuant to Section 718.204, claimant must prove the causal connection of pneumoconiosis and total disability by showing that the disease is a substantial contributor to disability. ***Bonessa v. U.S. Steel Corp.***, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

The Sixth Circuit held that in order to qualify for benefits under Part 718, claimant must affirmatively establish only that his totally disabling respiratory impairment was due at least in part to his pneumoconiosis. ***Adams v. Director, OWCP***, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

The Eleventh Circuit enunciated a standard of causation which requires claimants to establish that pneumoconiosis is a substantial contributing factor in the causation of total pulmonary disability. ***Lollar v. Alabama By-Products Corp.***, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

The Board rejected claimant's contention that the physician's checking of the box on the Department of Labor physical examination Form 988 cannot support Section 727.203(b)(3) rebuttal under ***Warman v. Pittsburg and Midway Mining Coal Co.***, 829 F.2d 257, 11 BLR 2-62 (6th Cir. 1988). ***Hall v. Director, OWCP***, 12 BLR 1-133 (1989), *modified on recon.*, 14 BLR 1-1 (1989).

Medical conclusion that claimant's diagnosed cardiopulmonary conditions are not related to dust exposure in coal mine employment, as indicated by examining physician's checking "no" box is sufficient to establish pneumoconiosis played no role in claimant's total disability. ***Hall v. Director, OWCP***, 12 BLR 1-133 (1989), *modified on recon.*, 14 BLR 1-1 (1989).

Notwithstanding claimant's burden of proving entitlement to benefits, the Department of Labor has a statutory duty to provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. ***Hall v. Director, OWCP***, 14 BLR 1-51 (1990)(*en banc*); ***Pettry v. Director, OWCP***, 14 BLR 1-98 (1990)(*en banc*).

A finding of equally probative evidence under the discredited true-doubt principle does not automatically require a finding of insufficient evidence under a preponderance of the evidence standard. Rather, the administrative law judge as fact-finder must determine on remand whether, under this standard, claimant has met his burden of proof pursuant to Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). ***Cole v. East Kentucky Collieries***, 20 BLR 1-50 (1996).

An administrative law judge has discretionary authority under 20 C.F.R. §725.456(e) to remand a case to the district director for a complete pulmonary evaluation, prior to the assembly of the evidentiary record at the formal hearing and without prior notice to the parties. ***R.G.B., et. al. v. Southern Ohio Coal Co., et. al.***, BLR , BRB Nos. 08-0491 BLA, 08-0521 BLA, 08-0463 BLA, 08-0464 BLA, 08-0465 BLA (Aug. 28, 2009) (*en banc*).

Applying ***Greene v. King James Coal Mining, Inc.***, 575 F.3d 628, BLR (6th Cir. 2009), the Board held that the administrative law judge erred in concluding that the claimants had not received complete pulmonary evaluations because the physicians' reports did not provide a detailed explanation for their findings. Because the physicians had performed all of the necessary tests and their reports addressed the requisite elements of entitlement, the Board agreed with the Director that, pursuant to ***Greene***, the Director had satisfied his obligation to provide a complete pulmonary evaluation under the Act and, therefore, vacated the administrative law judge's Orders of Remand issued pursuant to 20 C.F.R. §725.456(e). ***R.G.B., et. al. v. Southern Ohio Coal Co., et. al.***, BLR , BRB Nos. 08-0491 BLA, 08-0521 BLA, 08-0463 BLA, 08-0464 BLA, 08-0465 BLA (Aug. 28, 2009) (*en banc*).

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