PART IV

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

D. EVALUATION AND WEIGHING OF EVIDENCE

2. ELEMENTS OF ENTITLEMENT

d. Existence of Pneumoconiosis

The existence of pneumoconiosis may be established with x-ray evidence because x-rays are diagnostic of the presence or absence of disease. ***Short v. Westmoreland Coal Co.***, 10 BLR 1-127, 1-129, n. 4 (1987); ***Arnoni v. Director, OWCP***, 6 BLR 1-423 (1983). In order to affirmatively establish the existence of pneumoconiosis, an x-ray must be classified, in accordance with the applicable quality standards, as at least category 1/0. 20 C.F.R. §§410.428, 718.102, 727.206. For a complete discussion of the quality standards, *see* Part IV.D.8. of the Desk Book. An x-ray interpretation of 0/1 is not a positive reading for the existence of pneumoconiosis. *See* 20 C.F.R. §§410.428, 718.102(b); ***Trent v. Director, OWCP***, 11 BLR 1-26 (1987); ***Canton v. Rochester & Pittsburgh Coal Co.***, 8 BLR 1-475 (1986); ***Stanford v. Director, OWCP***, 7 BLR 1-541 (1984); *see* ***Preston v. Director, OWCP***, 6 BLR 1-1229 (1984)[interpretation of 0/0 is a negative reading for the existence of pneumoconiosis].

An x-ray interpretation that does not mention pneumoconiosis will, in appropriate circumstances, support an inference that the miner does not have pneumoconiosis. ***Marra v. Consolidation Coal Co.***, 7 BLR 1-216 (1984). Negative x-rays alone, however, are insufficient to establish the absence of pneumoconiosis. *See* ***Sakach v. Director, OWCP***, 8 BLR 1-237 (1985).

A claimant need not prove the existence of an impairment in order to prove he has pneumoconiosis. The Board has held that the absence of an impairment does not establish the absence of pneumoconiosis. ***Sainz v. Kaiser Steel Corp.***, 5 BLR 1-758 (1983), *aff'd sub nom*. ***Kaiser Steel Corp. v. Director, OWCP***, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). Results of ventilatory studies by themselves are not diagnostic of the non-existence of pneumoconiosis, *see* ***Lambert v. Itmann Coal Co.***, 6 BLR 1-256 (1983), as they serve to demonstrate impairment. Blood gas studies are also primarily of probative value on the question of impairment, but may be additionally relevant insofar as showing the absence of any disease process and, by implication, the absence of any disease arising out coal mine employment, *i.e.*, clinical pneumoconiosis. *See* 20 C.F.R. §727.202; ***Morgan v. Bethlehem Steel Corp.***, 7 BLR 1-226 (1984).

The Board has held that autopsy evidence is the most reliable evidence for determining the existence of pneumoconiosis. ***Terlip v. Director, OWCP***, 8 BLR 1-363 (1985); ***Fetterman v. Director, OWCP***, 7 BLR 1-688 (1985). An autopsy report based on macroscopic examination and slides may be credited over a report based solely on an autopsy review. It is generally reasonable, therefore, to assign more weight to the opinion of the autopsy prosector than to the opinions of others based on the prosector's findings. ***Peskie v. United States Steel Corp.***, 8 BLR 1-126 (1985); ***Fetterman***, ***supra***.

CASE LISTINGS

[death certificate listing pneumoconiosis as significant condition insufficient to establish existence of pneumoconiosis as examining physician had not made this diagnosis in any previous report] ***Williams v. Black Diamond Coal Mining Co.***, 6 BLR 1-188 (1983).

[although crediting x-ray notation of "no active chest disease" accompanying 1/1 reading, adjudicator provided adequate alternate rationale for finding of no pneumoconiosis] ***Valazak v. Bethlehem Mines Corp.***, 6 BLR 1-282 (1983).

[x-rays only identifying progression of cancer and silent on existence of pneumoconiosis of no probative value in establishing pneumoconiosis] ***Sacolick v. Rushton Mining Co.***, 6 BLR 1-930 (1984).

[0/0 x-ray interpretation is *negative* for pneumoconiosis notwithstanding reader's indication film evidenced emphysema, not necessarily a finding of pneumoconiosis] ***Preston v. Director, OWCP***, 6 BLR 1-1229 (1984).

[absence of impairment does not establish non-existence of pneumoconiosis] ***Sainz v. Kaiser Steel Corp.***, 5 BLR 1-758 (1983), *aff'd sub nom*. ***Kaiser Steel Corp v. Director, OWCP***, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984).

[adjudicator *may* find x-ray negative for pneumoconiosis when the reader fails to mention presence of the disease] ***Marra v. Consolidation Coal Co.***, 7 BLR 1-216 (1984).

[ventilatory studies by themselves not diagnostic of non-existence of pneumoconiosis] ***Lambert v. Itmann Coal Co.***, 6 BLR 1-256 (1983); *but see* ***Morgan v. Bethlehem Steel Corp.***, 7 BLR 1-226 (1984).

[blood gas studies, probative primarily of existence or extent of impairment, may also indicate absence of any disease process and by implication, absence of

pneumoconiosis] ***Morgan v. Bethlehem Steel Corp.***, 7 BLR 1-226 (1984).

[tracheobronchitis not included within statutory definition of pneumoconiosis] ***Adamson v. Director, OWCP***, 7 BLR 1-229 (1984).

[statutory definition of pneumoconiosis includes but is not limited to coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthro-silicosis, massive fibrosis, silicosis or silicotuberculosis arising out of coal mine employment] 20 C.F.R. §727.202; ***Adamson v. Director, OWCP***, 7 BLR 1-229, 1-231, n. 3 (1984).

[adjudicator affirmed in crediting negative x-ray readings from 1970's over a positive reading from 1981 as claimant's dust exposure ceased in 1940 and reasonable inference that evidence of pneumoconiosis should have appeared well before date of last film] ***Sabett v. Director, OWCP***, 7 BLR 1-299 (1984).

[whether diagnosis of anthracotic pigmentation and anthracotic lymph nodes is diagnosis of pneumoconiosis is question of fact for adjudicator] ***Dobrosky v. Director, OWCP***, 4 BLR 1-680 (1982); *cf*. ***Bueno v. Director, OWCP***, 7 BLR 1-337 (1984).

[Sixth Circuit held fact-finder erred giving greater weight to non-examining doctor's negative reading of single x-ray than to results of examinations and x-ray readings by two qualified doctors] ***Sexton v. Director, OWCP***, 752 F.2d 213, 7 BLR 2-102 (6th Cir. 1985).

[reasonable to assign greater weight to autopsy prosector than to opinions of others reviewing his findings] ***Peskie v. United States Steel Corp.***, 8 BLR 1-126 (1985); ***Fetterman v. Director, OWCP***, 7 BLR 1-688 (1985).

[medical report sufficient to establish absence of pneumoconiosis where, based on physical examination, negative x-ray and objective studies, it concludes there is no evidence of occupational disease but respiratory disability due to smoking] ***Stanford v. Valley Camp Coal Co.***, 7 BLR 1-906 (1985).

[Autopsy evidence is most reliable evidence of existence of pneumoconiosis; medical finding of anthracosis on autopsy slides is diagnosis of pneumoconiosis as defined in Act] ***Terlip v. Director, OWCP***, 8 BLR 1-363 (1985); ***Fetterman v. Director, OWCP***, 7 BLR 1-688 (1985); ***Bueno v. Director, OWCP***, 7 BLR 1-337 (1984).

[adjudicator's finding under Part 410 of no pneumoconiosis at time of death affirmed where x-rays and hospital records do not mention pneumoconiosis, disability, or origins of miner's tuberculosis] ***Reed v. Director, OWCP***, 8 BLR 1-217 (1985).

[earlier results of doctor's pulmonary function study does not tend to discredit subsequent conclusion of no pneumoconiosis and that lung disease not related to

occupational exposure] ***Marshall v. Jim Walter Resources, Inc.***, 8 BLR 1-229 (1985).

[opinion of no pneumoconiosis based on a negative x-ray and work history violates Section 413(b) because work history does not tend to establish absence of any respiratory disease arising out of coal mine employment and physician failed to offer any explanation] ***Taylor v. Brown Badgett, Inc.***, 8 BLR 1-405 (1985).

[Third Circuit held that adjudicator may credit medical opinion that provides review of deceased miner's entire body over opinion based solely on six lung tissue slides] ***Hall v. Jones & Laughlin Steel Corp.***, No. 85-3208 (3d Cir. Nov. 25, 1985)(unpublished).

DIGESTS

Pursuant to Section 718.202(a)(4), the administrative law judge must consider and weigh all relevant 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).

Reasonable interpretation of doctor's opinion that claimant has COPD but not occupational pneumoconiosis is that claimant does not have pneumoconiosis as defined in the Act and regulations. ***Dockins v. McWane Coal Co.***, 9 BLR 1-57 (1986).

Administrative law judge can properly make the determination that a physician's diagnosis that claimant does not have pneumoconiosis or occupational pneumoconiosis is sufficient to establish the absence of pneumoconiosis as defined in the Act and regulations. ***Dockins v. McWane Coal Co.***, 9 BLR 1-57 (1986).

Administrative law judge could properly rely upon doctor's reasoned and documented opinion that claimant's moderate airways obstruction is unrelated to coal mine dust exposure together with the negative x-ray evidence of record to conclude that claimant does not have pneumoconiosis as defined in the Act and regulations. ***Kurcaba v. Consolidation Coal Co.***, 9 BLR 1-73 (1986).

The absence of pneumoconiosis is not established where neither administrative law judge's decision nor credited doctor's report states whether conclusion that miner did not suffer from "coal workers' pneumoconiosis" was equivalent to a finding that the miner suffered from no lung impairment within the definition of pneumoconiosis found in the statute and regulations. ***Campbell v. Consolidation Coal Co.***, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); ***Pavesi v. Director, OWCP***, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985).

X-rays are diagnostic of the presence or absence of disease. ***Arnoni v. Director, OWCP***, 6 BLR 1-423 (1983); ***Short v. Westmoreland Coal Co.***, 10 BLR 1-127, 1-129,

n. 4 (1987).

An x-ray reading of 0/1 is not considered a positive reading for the existence of pneumoconiosis. ***Trent v. Director, OWCP***, 11 BLR 1-26 (1987); ***Canton v. Rochester and Pittsburgh Coal Co.***, 8 BLR 1-475 (1986); ***Stanford v. Director, OWCP***, 7 BLR 1-541 (1984); *see* ***Preston v. Director, OWCP***, 6 BLR 1-1229 (1984).

A radiologist's reading for film quality requires no explanation inasmuch as such conclusion can only indicate that the physician found the film to be unclear and of such poor quality that it was not susceptible to expert interpretation. The administrative law judge therefore may not discredit a radiologist's reading for film quality as unseasoned on the basis that no explanation was provided by the physician. ***Gober v. Reading Anthracite Co.***, 12 BLR 1-67 (1988).

A physician need not perform a physical examination in order to provide a credible opinion concerning the existence of pneumoconiosis by x-ray. ***Bobick v. Saginaw Mining Co.***, 13 BLR 1-52 (1988).

Based on the express language of the Act as set forth at 30 U.S.C. §923(b) and ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP***, 484 U.S. 135, 11 BLR 2-1 (1987), the Board held that Section 718.304(a)-(c) does not provide alternative means of establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis, but rather requires the administrative law judge to first evaluate the evidence in each category, and then weigh together the categories at Section 718.304(a), (b) and (c) prior to invocation. ***Melnick v. Consolidation Coal Co.***, 16 BLR 1-31 (1991)(*en banc*).

Although the regulations provide no guidance for the evaluation of CT or CAT scans, Section 718.304(c) provides for new methods of diagnosis, and allows the consideration of any acceptable medical means of diagnosis. *See* 20 C.F.R. §718.304(c). Therefore, when initially weighing the evidence in each category pursuant to Section 718.204, CT scans are not to be considered x-rays but must be evaluated pursuant to subsection (c) together with any evidence or testimony which bears on the reliability and utility of CT scans and any other evidence not applicable to subsections (a) and (b). ***Melnick v. Consolidation Coal Co.***, 16 BLR 1-31 (1991)(*en banc*).

The administrative law judge did not err in crediting a physician's report which was based in part on a positive x-ray, even though the weight of the x-ray evidence was negative for pneumoconiosis. ***Trumbo v. Reading Anthracite Co.***, 17 BLR 1-85 (1993).

In a footnote, responding to employer's reliance on the Surgeon General's report, *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace* (1985), the Board noted that employer has submitted no evidence to support its

argument that simple pneumoconiosis is not a progressive disease and because the miner had no further coal dust exposure, his disease could not have progressed since the prior denial; *see* ***Mullins Coal Co. of Va. v. Director, OWCP***, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); ***Chubb v. Consolidation Coal Co.***, 741 F.2d 968 (7th Cir. 1984); ***Cosalter v. Mathies Coal Co.***, 6 BLR 1-1182 (1984). ***Spese v. Peabody Coal Co.***, 19 BLR 1-45 (1995).

The Fourth Circuit recognized that Section 718.201 encompasses a wide variety of conditions; including diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nonetheless been made worse by coal dust exposure. The Fourth Circuit held that the plain language of Section 718.201 demands that these diseases result in some sort of respiratory or pulmonary impairment before they can be considered "pneumoconiosis." ***Clinchfield Coal Co. v. Fuller***, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

However, the Fourth Circuit noted that Section 718.201 also includes diseases that are or can be caused by coal dust inhalation. Any "chronic dust disease of the lung and its sequelae...arising out of coal mine employment" will qualify. Examples include "coal workers' pneumoconiosis" and "anthracosis." The Fourth Circuit noted that Section 718.201 nowhere requires these coal dust-specific diseases to attain the status of an "impairment" to be classified as "pneumoconiosis." The Fourth Circuit held that the definition is satisfied whenever one of these diseases is present in the miner at a detectable level; whether the particular disease exists to such an extent as to be compensable is a separate question. ***Clinchfield Coal Co. v. Fuller***, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

In an *en banc* decision, the majority held that the administrative law judge properly determined that the biopsy findings, which include diagnoses of "subpleural fibrosis with anthracosis" and "perivascular anthracosis," with associated disease process, fall within the regulatory definition of "pneumoconiosis" provided at 20 C.F.R. §718.201, notwithstanding the fact that there is no medical evidence linking these diagnoses to claimant's coal mine employment. The majority thereby adopted the Director's position that the etiology of claimant's conditions diagnosed on biopsy is properly considered not pursuant to the regulation at 20 C.F.R. §718.202(a), but pursuant to the regulation at 20 C.F.R. §718.203. The majority also held that the administrative law judge's determination that the biopsy findings support a finding of the existence of pneumoconiosis, is consistent with the decision of the United States Court of Appeals for the Fourth Circuit in ***Clinchfield Coal Co. v. Fuller***, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). ***Hapney v. Peabody Coal Co.***, 22 BLR 1-104 (2001)(*en banc*)(SMITH and DOLDER, Administrative Appeals Judges, dissenting in part and concurring in part).

Judges Smith and Dolder, for the minority, agreed with employer's contention that the administrative law judge committed reversible error in determining that the biopsy

findings establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2). In the absence of any medical evidence affirmatively linking the biopsy findings with claimant's coal mine employment, the diagnoses of "anthracosis" cannot constitute "pneumoconiosis" within the meaning of the Act and implementing regulations. 30 U.S.C. §902(b); 20 C.F.R. §§718.201, 718.202(a), (a)(1) and (b). The minority thus indicated that the Director's interpretation of the regulations, namely that the etiology of claimant's conditions diagnosed on biopsy is properly considered not pursuant to the regulation at 20 C.F.R. §718.202(a) but pursuant to the regulation at 20 C.F.R. §718.203, is not reasonable in this instance and does not merit the deference accorded it by the majority. The minority disagreed with the majority's conclusion that the administrative law judge's finding, that the diagnoses of "anthracosis" made on biopsy support a finding of the existence of pneumoconiosis, is supported by the Fourth Circuit's decision in ***Fuller***, as the court did not reach the issue *sub judice*. ***Hapney v. Peabody Coal Co.***, 22 BLR 1-104 (2001) (*en banc*) (SMITH and DOLDER, Administrative Appeals Judges, dissenting in part and concurring in part).

Where an administrative law judge considered the conflicting x-ray readings in light of the physicians' radiological qualifications and deferred to the readings of those physicians who were dually-qualified as Board-certified radiologists and B-readers to find that a preponderance of the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and substantial evidence supported the administrative law judge's finding, the administrative law judge properly considered the x-ray evidence. Contrary to the responsible operator's contention, the administrative law judge was not required to defer to a particular physician's radiological experience or to his status as a professor of radiology. ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

The Board rejected employer's argument that the rulemaking record is devoid of proof that legal pneumoconiosis may be latent and progressive in the absence of further coal dust exposure. In ***Nat'l Mining Ass'n v. U.S. Dep't of Labor***, 292 F.3d 849 (D.C. Cir. 2002), the validity of 20 C.F.R. §718.201, as amended, was upheld as supported by its underlying medical and scientific literature, and employer in the present case failed to produce the type and quality of medical evidence that would invalidate the regulation. While pneumoconiosis is not latent and progressive in the majority of cases, the potential for these characteristics is inherent in every case, thus a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of coal mine employment, or who proves that the pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a progressive nature. ***Workman v. Eastern Associated Coal Corp.***, 23 BLR 1-22 (2004) (Motion for Recon.)(*en banc*); ***Parsons v. Wolf Creek Collieries***, 23 BLA 1-29 (2004) (Motion for Recon.)(*en banc*)(McGranery, J., concurring and dissenting).

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 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).

There is no requirement that an administrative law judge credit the readings of a doctor because he or she reviewed multiple x-rays. ***J.V.S. v. Arch of West Virginia/Apogee Coal Co.***, BLR (2008).

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