PART IV

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

D. EVALUATION AND WEIGHING OF EVIDENCE

3. SPECIFIC EVIDENTIARY PRINCIPLES

d. Adverse Inferences

The Board has stated that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." ***Hansen v. Oilfield Safety, Inc.***, 9 BRBS 490, 492 (1978), *aff'd on other grounds sub nom*. ***Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited, Inc.***, 625 F.2d 1248 (5th Cir. 1980). This principle is applied at the discretion of the administrative law judge.

CASE LISTINGS

DIGESTS

The decision as to what weight to assign evidence is within the province of the administrative law judge and, in determining whether rebuttal under Section 411(c)(5) has been established, s/he may draw inferences from medical evidence that does not mention pneumoconiosis or from the absence of evidence of chronic pulmonary/respiratory symptoms or findings. ***Gober v. Reading Anthracite Co.***, 12 BLR 1-67 (1988).

The Seventh Circuit has held that silent evidence may be sufficient to rebut the Section 411(c)(5) presumption where the record suggests that if lung disease were present, it would have been detected and reported. ***Amax Coal Co. v. Burns***, 855 F.2d 499 (7th Cir. 1988).

While the Third Circuit declined to decide whether negative inferences by themselves gathered from the evidence in the record can ever overcome a presumption, the Court stated:

> To permit the absence of an explicit diagnosis to constitute rebuttal in a case in which respiratory disability is evident would, in effect, shift back to the claimant the burden of proving that which the regulations, in implementation of the legislative purpose, have instructed the courts to presume.

Kline v. Director, OWCP, 879 F.2d 1175, 1181 fn.15, 12 BLR 2-346 (3d Cir. 1989); *see also* ***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).

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