PART IV

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

D. EVALUATION AND WEIGHING OF EVIDENCE

4. MEDICAL REPORTS

c. Non-Examining Physician

The Board has held that a non-examining physician's opinion may be sufficient to rebut the interim presumption where it corroborates the opinion of an examining physician. ***Himes v. Rochester & Pittsburgh Coal Co.***, 5 BLR 1-49 (1982); *see also* ***French v. Consolidation Coal Co.***, 4 BLR 1-446 (1982). The Board later concluded, in a survivor's claim, that a non-examining physician's report could support rebuttal as it was uncontradicted by the other physicians' reports of record. ***Bostic v. South Hollow Coal Co.***, 6 BLR 1-487 (1983). In ***Fullman v. Consolidation Coal Co.***, 6 BLR 1-622 (1983), the Board, in effect, rejected the contention that its prior holdings established a rule of law precluding the use of non-examining physicians' opinions in support of rebuttal. The Board ruled that the proper interpretation of the holding in ***French*** does no more than address the weight to be accorded the opinion of a non-examining physician and that such opinions may constitute substantial evidence. ***Fullman***, *supra*; *see e.g.*, Part IV.D.4.e. of the Desk Book. The United States Courts of Appeals for the Fourth and Sixth Circuits, however, have held that the opinions of non-examining physicians, on matters not addressed by examining physicians, are insufficient as a matter of law to defeat entitlement. ***Bethlehem Mines Corp. v. Massey***, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); ***Collins v. Secretary of Health and Human Services***, 734 F.2d 1177, 6 BLR 2-54 (6th Cir. 1984).

CASE LISTINGS

[adjudicator may properly consider physician's failure to examine miner and may give greater weight to opinion of treating physician] ***Wilson v. United States Steel Corp.***, 6 BLR 1-1055 (1984).

[fact-finder erroneously rejected medical reports because authored by non-examining physicians] ***Newland v. Consolidation Coal Co.***, 6 BLR 1-1286 (1984).

[adjudicator failed to recognize that non-examining physician's medical opinion can constitute substantial evidence] ***Hall v. Consolidation Coal Co.***, 6 BLR 1-1306 (1984).

[whether or not physician examines miner is only one factor to be considered by adjudicator in weighing of medical evidence] ***Worthington v. United States Steel Corp.***, 7 BLR 1-522 (1984).

[medical opinion of non-examining physician may constitute substantial evidence, especially where conflicting opinion has been discredited] ***Cadwallader v. Director, OWCP***, 7 BLR 1-879 (1985).

[fact-finder may credit report of non-examining physician over examining physician where s/he has valid reasons] ***Wetzel v. Director, OWCP***, 8 BLR 1-139 (1985); ***King v. Cannelton Industries, Inc.***, 8 BLR 1-146 (1985); ***Easthom v. Consolidation Coal Co.***, 7 BLR 1-582 (1984); ***Chancey v. Consolidation Coal Co.***, 7 BLR 1-240 (1984).

DIGESTS

In an unpublished decision, the Fourth Circuit held that the reports of non-examining physicians may be relied upon to rebut the interim presumption where they corroborate the reports of examining physicians. ***Liddle v. Consolidation Coal Co.***, No. 84-1403 (4th Cir. May 1, 1986)(unpub.).

The Third Circuit held that the opinion of a non-examining physician may in some circumstances have probative worth sufficient for substantial evidence. In so doing, the court noted that the non-examining physician was qualified, was interpreting medical evidence gathered by various examining physicians, was corroborating the opinion of an examining physician, and that the administrative law judge did not rely on the opinion to discredit the conflicting medical opinions of record. ***Evosevich v. Consolidation Coal Co.***, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986).

The Fourth Circuit stated that while medical opinions of non-examining physicians have diminished probative value, an administrative law judge may, in some instances, give them some weight. ***Vogel v. Consolidation Coal Co.***, No. 85-1718 (4th Cir. Feb. 27, 1986)(unpub.).

Administrative law judge properly discredited doctor's report because, *inter alia*, doctor did not conduct a physical examination. ***Tackett v. Cargo Mining Co.***, 12 BLR 1-11 (1988)(en banc), *aff'd sub nom.* ***Director, OWCP v. Cargo Mining Co.***, Nos.88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.).
The Board declined to follow the Fourth Circuit's view as expressed in ***Bethlehem***

Mines Corp. v. Massey, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), that a non-examining physician's opinion on matters not addressed by examining physicians is insufficient as a matter of law to establish rebuttal. The Board reaffirmed its view that a non-examining physician's opinion may be sufficient to establish rebuttal. ***Cochran v. Consolidation Coal Co.***, 12 BLR 1-136 (1989); ***Presley v. Sunshine, Inc.***, 8 BLR 1-410 (1985).

Administrative law judge reasonably accorded diminished weight to medical opinions after noting that these non-examining physicians were not fully apprised of the qualifying blood gas studies. ***Clark v. Karst-Robbins Coal Co.***, 12 BLR 1-149 (1989)(en banc).

It is within the administrative law judge's discretion to reject the opinions of non-examining physicians which the administrative law judge finds are contradictory to the opinion of the prosector. ***Hawkins v. Peabody Coal Co.***, 11 BLR 1-157 (1988), *aff'd on other grd's*, No. 89-3336 (6th Cir. Jan. 2, 1990)(unpub.).

The Eleventh Circuit held that the administrative law judge was entitled to accord greater significance to the opinion of an examining physician than to the opinion of a physician who only reviewed the miner's records after his death. ***McClendon v. Drummond Coal Co.***, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988).

In determining the existence of complicated pneumoconiosis, the administrative law judge acted within his discretion in assigning greater weight to the opinion of the autopsy prosector, and less weight to the opinions of pathologists who only reviewed histological slides. ***Gruller v. Bethenergy Mines, Inc.***, 16 BLR 1-3 (1991).

The Board agreed to reverse the administrative law judge's Section 727.203(b)(3) finding that rebuttal was established, and therefore overrule its previous published decision, ***Johnson v. Old Ben Coal Co.***, 17 BLR 1-1 (1992), and hold that its prior ruling under ***Turner v. Director, OWCP***, 927 F.2d 778, 15 BLR 2-6 (4th Cir. 1991), is inconsistent with ***Malcomb v. Island Creek Coal Co.***, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994), which was issued subsequent to the Board's 1992 decision in this case. A comparison of the facts in ***Malcomb***, ***Turner***, and ***Bethlehem Mines Corp. v. Massey***, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), and ***Johnson***, *supra*, led the panel to agree that the mere mention of a smoking history by an examining physician did not sufficiently address the "matter" so as to provide a proper basis for reliance on the opinion of a non-examining physician who found that claimant's disability was due to smoking rather than coal mine employment. The Board therefore reversed on the foregoing basis. ***Johnson v. Old Ben Coal Co.***, 19 BLR 1-103 (1995), *overruling* ***Johnson v. Old Ben Coal Co.***, 17 BLR 1-1 (1992)[Board noted that its holding in ***Kittle v. Badger Coal Co.***, 5 BLR 1-474 (1982), was **overruled** insofar as inconsistent].

The administrative law judge acted within his discretion in according diminished weight to the opinions of the non-examining physicians. ***Cole v. East Kentucky Collieries***, BLR (1996).

Citing ***Sterling Smokeless Coal Co. v. Akers***, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the Fourth Circuit held that an administrative law judge may not discredit a physician's opinion solely because the physician did not examine the claimant. ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, No. 98-2051 (4th Cir. May 2, 2000).

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