

## PART IV

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

#### D. EVALUATION AND WEIGHING OF EVIDENCE

##### 5. LAY TESTIMONY

The adjudication officer must discuss the testimony of all participants at the hearing. Such testimony constitutes substantial evidence as to some issues and it must be evaluated and weighed along with the medical evidence of record. **Spencer v. Winston Mining Co.**, 1 BLR 1-686 (1978).

The administrative law judge is not required to accept a party's testimony merely because it is uncontradicted. **Glenroy Construction Co. v. NLRB**, 527 F.2d 465 (7th Cir. 1975); **Miller v. Director, OWCP**, 7 BLR 1-693 (1985). The determination of which testimony is credible is the prerogative of the adjudication officer. Similarly, consideration of the competency of a witness is within the sound discretion of the adjudication officer. **Elswick v. Eastern Associated Coal Corp.**, 2 BLR 1-1016, 1-1018 (1980). Failure to extensively explore a witness' mental capacity is not error when no formal objection is raised to the witness' mental qualifications and the record reveals that the witness responded to questions posed. **Elswick**, 2 BLR at 1-1018.

In a living miner's case, lay testimony is generally insufficient to establish either the existence of pneumoconiosis or total respiratory disability unless it is corroborated by at least "a quantum of medical evidence." See **Trent v. Director, OWCP**, 11 BLR 1-26 (1987); **Casias v. Director, OWCP**, 2 BLR 1-259 (1979). In a deceased miner's case, however, lay evidence may be sufficient to establish a totally disabling respiratory impairment. See **Henderson v. Director, OWCP**, 7 BLR 1-866 (1985); **Woolwine v. Director, OWCP**, 6 BLR 1-1023 (1984).

Subsection (a)(5) is available where the medical evidence of record is insufficient to establish total disability or lack thereof under subsection (a)(1)-(4). **Dempsey v. Director, OWCP**, 611 F.2d 1154, 9 BLR 2-226 (7th Cir. 1987); **Hillibush v. U.S. Department of Labor**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988); **Collins v. Old Ben Coal Co.**, 861 F.2d 481 (7th Cir. 1988); **Koppenhaver v. Director, OWCP**, 864 F.2d 287, 12 BLR 2-103 (3d Cir. 1988), *vacating* 11 BLR 1-51 (1988)(en banc recon.); **Pekala v. Director, OWCP**, 13 BLR 1-1 (1989). Based on **Hillibush** and **Coleman v. Director, OWCP**, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987), however, the Board has held that where medical evidence of record affirmatively establishes "no lung disease

was present", claimant is precluded from establishing total disability with lay evidence under Section 413(b) of the Act, as implemented by 20 C.F.R. §718.204(c)(5). **Pekala, supra.**

### **CASE LISTINGS**

[lay evidence alone may support finding that deceased miner was totally disabled due to respiratory impairment in survivor's case] **Dobbins v. Schweiker**, 641 F.2d 1354, 3 BLR 2-9 (9th Cir. 1981).

[claimant's testimony regarding overtime in two years preceding retirement provided additional support finding of no total disability] **Kozele v. Rochester and Pittsburgh Coal Co.**, 6 BLR 1-378, 1-384 (1983).

[miner's testimony not medical evidence and not sufficient by itself to invoke presumption at subsection (a)(4)] **Keen v. Jewell Ridge Coal Corp.**, 6 BLR 1-454 (1983); **White v. Director, OWCP**, 6 BLR 1-368 (1983).

[lay testimony relevant evidence to be considered along with medical evidence under subsection (b)(2)] **Olszewski v. The Youghioghny and Ohio Coal Co.**, 6 BLR 1-521 (1983); **Sturnick v. Consolidation Coal Co.**, 2 BLR 1-972, 1-980 (1980).

[medical evidence as whole need not establish total respiratory disability before lay testimony may be used to defeat rebuttal] **Crider v. Dean Jones Coal Co.**, 6 BLR 1-606 (1983).

[adjudicator may reject or ignore lay testimony regarding impairment after properly rejecting supporting medical evidence] **Guiliano v. Director, OWCP**, 6 BLR 1-1008 (1984).

[lay testimony alone may establish total disability in survivor's claim where no medical evidence relevant to existence or extent of disability] **Woolwine v. Director, OWCP**, 6 BLR 1-1023 (1984).

[lay testimony absent corroborating medical evidence insufficient to establish totally disabling pulmonary or respiratory impairment in living miner's case] **Centak v. Director, OWCP**, 6 BLR 1-1072 (1984); **Looney v. Jim Walters Resources, Inc.**, 6 BLR 1-361 (1983).

[irrational for adjudicator to discredit claimant's testimony regarding to miner's physical condition solely because she was unable to remember names of medication he was

taking prior death] **Kosack v. Director, OWCP**, 7 BLR 1-248 (1984).

[lay testimony alone insufficient to overcome contrary, probative medical evidence of record] **Cooper v. United States Steel Corp.**, 7 BLR 1-842 (1985).

[lay evidence by itself may be sufficient under Section 410.414(c) to establish total disability in survivor's case where there is no medical evidence relative to existence or extent of respiratory disability] **Henderson v. Director, OWCP**, 7 BLR 1-866 (1985).

[lay testimony may be substantial evidence to find length of coal mine employment] **Kephart v. Director, OWCP**, 8 BLR 1-185 (1985).

[under Part 410, Subpart D, lay testimony alone may be sufficient when the miner is deceased and no relevant medical evidence exists] **Lipka v. Director, OWCP**, 8 BLR 1-360 (1985).

### DIGESTS

In a survivor's case, the Court held that lay evidence alone may be sufficient to support a finding of total disability due to pneumoconiosis. **Rapier v. Secretary of Health and Human Services**, 808 F.2d 456, 9 BLR 2-191 (6th Cir. 1986).

Administrative law judge could properly consider the lay testimony when assessing the credibility of the medical reports. **Fields v. Island Creek Coal Co.**, 10 BLR 1-19 (1987).

In a living miner's claim under Part 718, a finding of total disability shall not be made based solely on the miner's statements or testimony. **Fields v. Island Creek Coal Co.**, 10 BLR 1-19 (1987); **Matteo v. Director, OWCP**, 8 BLR 1-200 (1985).

Administrative law judge erred in relying on lay evidence alone in a living miner's claim involving dust exposure in covered and non-covered coal mine employment to establish the causal nexus between claimant's pneumoconiosis and his coal mine employment under Section 718.203(c). **Tucker v. Director, OWCP**, 10 BLR 1-35 (1987).

Where medical evidence exists regarding the miner's pulmonary condition, Section 727.203(a)(5) is not available. **Coleman v. Director, OWCP**, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987).

Medical evidence relevant to the existence of, or disability due to, a respiratory or pulmonary impairment precludes access to the substantive criteria of Section 727.203(a)(5). **Adams v. Director, OWCP**, 8 BLR 1-369 (1985). The threshold

requirements regarding access to Sections 718.204(c)(5) and 727.203(a)(5) are the same. **Gessner v. Director, OWCP**, 11 BLR 1-1 (1987).

The administrative law judge must evaluate the lay testimony in a two-step approach. First, s/he must determine whether the lay evidence is sufficient, if fully credited, to establish the existence of a totally disabling respiratory or pulmonary impairment. If sufficient, the administrative law judge must determine the credibility of the evidence and weigh that evidence which is favorable to claimant against that evidence which is unfavorable. **Gessner v. Director, OWCP**, 11 BLR 1-1 (1987); **Kosack v. Director, OWCP**, 7 BLR 1-248 (1984).

The administrative law judge did not abuse his discretion in crediting claimant's testimony and supporting evidence pertaining to her dependency on the miner although there were discrepancies between this evidence and claimant's prior testimony. **Zyskoski v. Director, OWCP**, 12 BLR 1-159 (1989).

Based on **Hillibush v. U.S. Department of Labor**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988) and **Coleman v. Director, OWCP**, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987), the Board held that where medical evidence of record affirmatively establishes "no lung disease was present", claimant is precluded from establishing total disability with lay evidence under Section 413(b) of the Act, as implemented by 20 C.F.R. §718.204(c)(5). **Pekala v. Director, OWCP**, 13 BLR 1-1 (1989).

In a survivor's case, the administrative law judge may consider Section 718.204(c)(5) where the evidence is insufficient to establish subsections (c)(1)-(c)(4). **Hillibush v. U.S. Department of Labor**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988). The Board has construed **Hillibush** and other circuit cases to mean that Section 718.204(c)(5) is not available where the medical evidence of record affirmatively establishes "that no lung disease was present." **Pekala v. Director, OWCP**, 13 BLR 1-1 (1989).

Subsection (a)(5) is available where the medical evidence is insufficient to establish total disability or lack thereof under subsection (a)(1)-(4). **Dempsey v. Director, OWCP**, 611 F.2d 1154, 9 BLR 2-226 (7th Cir. 1987); **Hillibush v. U.S. Department of Labor**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988); **Collins v. Old Ben Coal Co.**, 861 F.2d 481 (7th Cir. 1988); **Koppenhaver v. Director, OWCP**, 864 F.2d 287, 12 BLR 2-103 (3d Cir. 1988), *vacating* 11 BLR 1-51 (1988)(en banc recon.); **Pekala v. Director, OWCP**, 13 BLR 1-1 (1989).

The Board held that in a living miner's case, lay testimony is generally insufficient to establish total respiratory disability unless it is corroborated by at least a quantum of medical evidence. **Madden v. Gopher Mining Co.**, 21 BLR 1-122 (1999).

Where a treating physician opined that pneumoconiosis hastened the miner's death, but a consulting physician opined that the miner had no impairment from pneumoconiosis at

the time of his death, the administrative law judge “improperly minimized” lay testimony that the miner had increasing difficulty breathing, coughed up mucus, and was placed in an oxygen tent during his terminal hospitalization, when the administrative law judge weighed the conflicting opinions and credited the consulting physician’s opinion. ***Soubik v. Director, OWCP***, F.3d , 2004 WL 912807, at \*6 (3d Cir. 2004)(Roth, J., dissenting).

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