

PART IV

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

D. EVALUATION AND WEIGHING OF EVIDENCE

7. AUTOPSY AND BIOPSY EVIDENCE, QUALITY STANDARDS

Autopsy or biopsy reports must be complete and include a macroscopic and microscopic description of the lungs. 20 C.F.R. §410.428(c); 20 C.F.R. §718.106(a). In addition, if a surgical procedure has been performed to obtain a portion of the lung, a copy of the surgical note and the pathology report of the examinations of the surgical specimen must be included in the evidence. 20 C.F.R. §§410.428(c), 718.106(a), (b). Furthermore, interpretations of tissue samples from original autopsies and biopsies that conflict with original findings must contain evidence indicating whether the tissue samples were representative of the total lung condition and whether they were properly prepared and stored, thus reflecting on their value as valid samples. See **McLaughlin v. Jones & Laughlin Steel Corp.**, 2 BLR 1-103, 1-109 (1979). **McLaughlin**, however, does not establish a mandatory standard governing the reinterpretation of lung tissue samples. **Kerstetter v. Director, OWCP**, 9 BLR 1-42 (1986).

Section 413(b) of the Act requires the acceptance of an autopsy report concerning the existence and degree of pneumoconiosis unless the Secretary has good cause to believe that the autopsy report is not accurate or that the condition of the miner is being fraudulently represented. See **McLaughlin v. Jones & Laughlin Steel Corp.**, 2 BLR 1-103, 1-108 (1979). Autopsy reports must be accorded significant probative value regarding the existence and degree of pneumoconiosis because the pathologist who performs the autopsy sees the entire respiratory system as well as other body systems. **Fetterman v. Director, OWCP**, 7 BLR 1-688, 1-691 (1985).

CASE LISTINGS

[where no evidence offered to show autopsy was not performed in accordance with quality standards of Section 410.428(c), it may constitute substantial evidence that miner's death due to multiple causes pursuant to Section 410.462(b)] **McLaughlin v. Jones & Laughlin Steel Corp.**, 2 BLR 1-103, 1-108 (1979); **Kinnick v. National Mines Corp.**, 2 BLR 1-221, 1-224 (1979).

[Third Circuit held it not unreasonable for adjudicator to give more weight to testimony of physician who performed autopsy over opinion of one reinterpreting autopsy slides, medical records] **United States Steel Corp. v. Oravetz**, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982); see also **Cantrell v. United States Steel Corp.**, 6 BLR 1-1003 (1984).

[autopsy evidence is most reliable evidence of existence of pneumoconiosis; reasonable for adjudicator to assign greater weight to opinion of autopsy prosector than to opinions of others who reviewed his findings] **Terlip v. Director, OWCP**, 8 BLR 1-363 (1985); **Fetterman v. Director, OWCP**, 7 BLR 1-688 (1985); **Kinnick v. National Mines Corp.**, 2 BLR 1-221 (1979).

DIGESTS

The Board held that **McLaughlin v. Jones & Laughlin Steel Corp.**, 2 BLR 1-103 (1979), does not set a standard requiring that medical reports based on an interpretation of slides of lung tissue from an autopsy be accompanied by evidence that the tissue samples were representative of total lung condition or that the slides were properly stored and handled to avoid deterioration. **Kerstetter v. Director, OWCP**, 9 BLR 1-42 (1986).

Where an autopsy performed by a qualified physician fails to establish that the miner's death was due to pneumoconiosis, the administrative law judge need not consider the physician's lack of personal knowledge of the miner's work history. **Neeley v. Director, OWCP**, 11 BLR 1-85 (1988).

While the administrative law judge should consider the quality standards found in Section 718.106, the standards are not mandatory and autopsy or biopsy reports cannot be mechanically precluded from consideration by the administrative law judge because the evidence fails to comply with those standards. The standards set forth in Section 718.106 are to be considered and should be used as guidelines by the administrative law judge. **Dillon v. Peabody Coal Co.**, 11 BLR 1-113 (1988).

In the absence of an autopsy, a death certificate may not be used to preclude invocation of a presumption of a totally disabling respiratory or pulmonary impairment. **Hillibush v. U.S. Department of Labor**, 853 F.2d 197, 11 BLR 2-223 (3d 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 reviewed histological slides. **Gruller v. Bethenergy Mines, Inc.**, 16 BLR 1-3 (1991).

The Court held that the administrative law judge must supply a medical basis for preferring the autopsy prosector's opinion, in reiterating its holding in **Peabody Coal Co. v. Director, OWCP [Railey]**, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992) that the administrative law judge may not automatically credit the conclusions of an autopsy prosector, but must supply a valid rationale for adopting them. The Court held that crediting an autopsy prosector's analysis of slides simply because the prosector performed the autopsy is just a restatement of the rule that **Railey** disapproved. **Peabody Coal Co. v. McCandless**, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).

The Board held that a report by a pathologist who has reviewed the autopsy tissue slides, but has not provided a detailed gross macroscopic description of the lungs or visualized portion of a lung, as set forth at 20 C.F.R. §718.106(a), is nonetheless in substantial compliance with the Section 718.106(a) quality standards, and, therefore, can constitute a report of an autopsy. **Keener v. Peerless Eagle Coal Co.**, 23 BLR 1-229 (2007)(*en banc*).

The Board extended its reasoning in **Keener v. Peerless Eagle Coal Co.**, 23 BLR 1-229, 1-241 (2007) (*en banc*) to biopsy evidence and held that a biopsy slide review can be in substantial compliance with 20 C.F.R. §718.106 even if it does not include a gross macroscopic description of the tissue samples. **J.V.S. v. Arch of West Virginia/Apogee Coal Co.**, BLR (2008).

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