PART VII

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

C. PNEUMOCONIOSIS ARISING OUT OF COAL MINE EMPLOYMENT

[*See* Part VIII.A. of the Desk Book for a more detailed discussion of Section 411(c)(1)).

Section 718.203(b), in conjunction with Section 718.302 which implements Section 411(c)(1) of the Act, provides a rebuttable presumption that the miner's pneumoconiosis arose out of coal mine employment if the presence of pneumoconiosis is established and the miner had at least ten years of coal mine employment. ***Adams v. Director, OWCP***, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1989). Before Section 718.203 is applicable, a finding must first be made that the miner has pneumoconiosis. ***Adams***, *supra*. Section 718.203(c) provides that where the miner has less than ten years of coal mine employment it shall be determined that pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship. *See* ***Stark v. Director, OWCP***, 9 BLR 1-36 (1986).

The language of Section 718.201 requiring that pneumoconiosis be "significantly related" to or "substantially aggravated" by dust exposure in coal mine employment must be read into the requirements of Section 718.203. ***Shoup v. Director, OWCP***, 11 BLR 1-110 (1987). Some courts, however, have held that claimant need only establish that his pneumoconiosis arose "in part" from coal mine employment, pursuant to Section 718.203. *See* ***McClendon v. Drummond Coal Co.***, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988); ***Stomps v. Director, OWCP***, 816 F.2d 1533, 10 BLR 2-107 (11th Cir. 1987); ***Southard v. Director, OWCP***, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984).

CASE LISTINGS

DIGESTS

A "no" response to question on a standardized medical report is sufficient to resolve the issue of causation under Part 718. ***Perry v. Director, OWCP***, 9 BLR 1-1 (1986).

The administrative law judge may not reasonably infer that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c) based merely

upon claimant's employment history. Claimant must present affirmative medical evidence relating his pneumoconiosis to dust exposure during coal mine employment. ***Baumgartner v. Director, OWCP***, 9 BLR 1-65 (1986).

In living miners' cases in which the record indicates that the miner's pneumoconiosis could have arisen from conditions other than his qualifying coal mine employment, there must be competent *medical* evidence to carry claimant's burden to establish the etiology of the disease pursuant to Section 718.203(c). The administrative law judge erred in relying on lay evidence alone to establish the causal nexus between the miner's pneumoconiosis and his coal mine employment. ***Tucker v. Director, OWCP***, 10 BLR 1-35 (1987).

The Sixth Circuit held that the presumption at Section 718.203(b) is rebuttable, and the regulation specifically requires that the miner be suffering from pneumoconiosis before its provisions are available. ***Adams v. Director, OWCP***, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Citing ***Maxey v. Califano***, 598 F.2d 874 (4th Cir. 1979), the Fourth Circuit held that, at Section 718.203(c), if the record does not suggest any employment that could be the cause of the miner's acknowledged black lung disease, claimant is entitled to a finding that the pneumoconiosis in question was connected to his coal mine employment. ***Blevins v. Director, OWCP***, No. 89-2393 (4th Cir., Nov. 13 1990)(unpub).

The Board held that a physician's comments that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Rather, those comments are to be considered at 20 C.F.R. §718.203. ***Cranor v. Peabody Coal Co.***, 21 BLR 1-201 (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).

The Seventh Circuit held that the administrative law judge properly determined claimant's testimony about his coal mine employment to be credible, finding that claimant was regularly exposed to coal mine dust for thirteen and one-quarter years and thus was entitled to the presumption provided at 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of coal mine employment. The Seventh Circuit rejected employer's argument that claimant's testimony that he could distinguish between coal and concrete dust, was incredible and unscientific, as employer cited to "no authority for the proposition that only scientific evidence is admissible to prove exposure to coal dust." ***Roberts & Schaefer Co. v. Director, OWCP [Williams]***, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005).

In light of the definition of legal pneumoconiosis set forth in the revised regulation at 20 C.F.R. §718.201(a)(2), and the historical evolution of the Act, the Tenth Circuit held that the rebuttable presumption at 20 C.F.R. §718.203 is only applicable to claims of clinical pneumoconiosis and does not extend to claims of legal pneumoconiosis. ***Andersen v. Director, OWCP***, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

In a case arising in the Fourth Circuit, the Board agreed with the Director and rejected employer's argument that ***Cranor v. Peabody Coal Co.***, 22 BLR 1-1, 1-5 (1999) (*en banc*) should not be applied because of ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). In doing so, the Board agreed with the Director's reasoning that there is nothing in ***Compton*** that conflicts with the Board's holding in ***Cranor***. ***Compton*** holds that all evidence relevant to Section 718.202(a) should be weighed together before a claimant can establish the existence of pneumoconiosis, whereas ***Cranor*** holds that evidence that is relevant to the source of the

pneumoconiosis should be considered at Section 718.203. The Board stated that because the comments made by Dr. Halbert, in the instant case, address the source of the pneumoconiosis he diagnosed, the administrative law judge properly applied ***Cranor***. Consequently, the Board held that the administrative law judge properly found Dr. Halbert's x-ray interpretation to be positive at Section 718.202(a)(1) and properly considered Dr. Halbert's comments at Section 718.203(b). ***Kiser v. L & J Equipment Co.***, BLR , BRB No. 05-0838 BLA (Dec. 29, 2006).

The Fourth Circuit held that the presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 does not subsume a 20 C.F.R. §718.203 "arising out of" causation finding. Thus, a miner who is found totally disabled due to pneumoconiosis pursuant to Section 718.304 is not automatically entitled to benefits. The miner must independently establish, and the administrative law judge must specifically find, that the miner's pneumoconiosis arose at least in part out of coal mine employment pursuant to Section 718.203, either through the ten-years presumption, or through medical evidence. ***Daniels Co. v. Mitchell***, 479 F.3d 321, BLR (4th Cir. 2007).

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