PART IX

REGULATORY PRESUMPTIONS

A. *20 C.F.R. §727.203 INTERIM PRESUMPTION*

1. INVOCATION OF THE INTERIM PRESUMPTION GENERALLY

a. Section 727.203(a)(1)

Section 727.203(a)(1) provides that the interim presumption may be invoked if "a chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (*see* Section 410.428 of this title)." Under the rule set forth by the Supreme Court in ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP***, 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987), the administrative law judge must weigh all of the x-rays of record and explain why s/he credits or discounts particular readings. Failure to consider all x-ray readings of record generally constitutes a basis for remand. *See* ***Isaacs v. Bailey Mining Co.***, 7 BLR 1-62 (1984).

An x-ray must also be properly classified as required by 20 C.F.R. §727.206 to invoke the interim presumption. ***Casey v. Director, OWCP***, 7 BLR 1-873 (1985); ***Parsons v. Director, OWCP***, 6 BLR 1-272 (1983). An 0/1 x-ray may not be considered positive for pneumoconiosis and thus can be relied on to prevent invocation. *See* ***Canton v. Rochester & Pittsburgh Coal Co.***, 8 BLR 1-475 (1986); ***Stanford v. Director, OWCP***, 7 BLR 1-541 (1984).

In order to invoke the interim presumption, an x-ray report must identify the reader. Failure to identify the reader requires a remand where the administrative law judge relied on the x-ray over the objections of the aggrieved party at the hearing. ***Stanley v. Director, OWCP***, 7 BLR 1-386 (1984). The Sixth Circuit has held that if the reader is not identified, an x-ray reading has no evidentiary value. ***Director, OWCP v. Congleton***, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984).

In evaluating the x-ray evidence, the administrative law judge must be aware of the provisions of Section 413(b) of the Act, 30 U.S.C. §923(b), which bars the consideration of negative rereadings and, in certain instances, of x-rays originally read as positive. For full discussion of this issue, *see* Part IV.D.6.b. of the Desk Book.

The administrative law judge may consider many factors in weighing x-ray evidence. Greater weight may be accorded to the x-ray interpretation of a C-reader, ***Alley v. Riley Hall Coal Co.***, 6 BLR 1-376 (1983); a B-reader, ***Vance v. Eastern Associated Coal Corp.***, 8 BLR 1-68 (1985), or a board certified radiologist. *See*

Hatfield v. Secretary of HHS, 743 F.2d 1150, 7 BLR 2-1 (6th Cir. 1984). For a discussion of x-ray readers' qualifications, *see* Part IV.D.6. of the Desk Book. The administrative law judge, though, is not bound by the x-ray interpretation of a B-reader. *See* ***Clark v. Karst-Robbins Coal Co.***, 12 BLR 1-149 (1989)(en banc); ***McMath v. Director, OWCP***, 12 BLR 1-6 (1988). If the administrative law judge credits the x-ray interpretation of one B-reader over the contrary interpretation of the same film by another B-reader, the decision must be based on an adequate rationale. ***Isaacs***, *supra*.

Another factor on which the administrative law judge may rely is the numerical weight of the evidence. ***Sheckler v. Clinchfield Coal Co.***, 7 BLR 1-128 (1984). Finally, the administrative law judge may assign greater weight to the more recent x-ray evidence. ***Clark***, *supra*; *see* Part IV.D.3.b. of the Desk Book. An administrative law judge is not required, however, to give more weight to the most recent x-ray evidence, even where probative. ***McMath***, *supra*; ***York v. Jewell Ridge Coal Corp.***, 7 BLR 1-766 (1985). An administrative law judge is, therefore, not required to consider significant a two-month span between x-rays, ***Martin v. Director, OWCP***, 6 BLR 1-535 (1983), nor an eight month span. ***Aimone v. Morrison Knudson Co.***, 8 BLR 1-32 (1985). In weighing x-ray evidence, the paramount principle to be applied by the administrative law judge is to rely upon the evidence judged to be most probative. ***Tokarcik v. Consolidation Coal Co.***, 6 BLR 1-666, 1-668 (1983). The Board held that the failure of the administrative law judge to consider a five-year span between positive and negative x-rays when crediting the earlier, negative x-rays, constitutes reversible error. ***Edwards v. Director, OWCP***, 6 BLR 1-265 (1983).

The interim presumption may also be invoked under Section 727.203(a)(1) on the basis of autopsy or biopsy evidence of pneumoconiosis. A diagnosis of pulmonary anthracosis listed in an autopsy report qualifies as a diagnosis of simple pneumoconiosis. *See* ***Bueno v. Director, OWCP***, 7 BLR 1-337 (1984); ***Cartwright v. Gibraltar Coal Corp.***, 5 BLR 1-325 (1982). Where an autopsy contains findings of anthracotic pigment, the question of whether these findings constitute pneumoconiosis under Part 727 is a finding of fact for the administrative law judge. *See* ***Peskie v. United States Steel Corp.***, 8 BLR 1-126, 1-128 n.3 (1985); ***Lykins v. Director, OWCP***, 819 F.2d 146, 10 BLR 2-129 (6th Cir. 1987).

CASE LISTINGS

[where pneumoconiosis uncontested and more than ten years coal mine employment established, subsection (a)(1) invoked as matter of law] ***Simpson v. Director, OWCP***, 6 BLR 1-49 (1983).

[claim that adjudicator placed undue emphasis on x-ray notation of "no active chest disease" accompanying 1/1 reading so as to require finding of no subsection (a)(1)

invocation rejected as he did not conclude that this violation converted reading into negative interpretation] ***Valazak v. Bethlehem Mines Corp.***, 6 BLR 1-282 (1983).

[adjudicator may accord greater weight to x-ray interpretation based on credentials of reader; doctor need not perform physical examination in order to provide credible opinion regarding an x-ray] ***Alley v. Riley Hall Coal Co.***, 6 BLR 1-376 (1983).

[Seventh Circuit rejected argument that x-ray reading *itself* must be in evidence to invoke presumption; here medical report incorporating x-ray reading by reference sufficient] ***Consolidation Coal Co. v. Chubb***, 741 F.2d 968, 6 BLR 2-92 (7th Cir. 1984).

[existence of single, positive x-ray does not require invocation under (a)(1)] ***Horn v. Jewell Ridge Coal Co.***, 6 BLR 1-933 (1984).

[adjudicator must distinguish between date of x-ray reading and date of x-ray itself under latest evidence rule since date of reading has no relevance in determining most recent x-ray] ***Wheatley v. Peabody Coal Co.***, 6 BLR 1-1214 (1984).

[0/0 x-ray interpretation is negative for pneumoconiosis, notwithstanding reader's indication that film not completely negative because he found evidence of emphysema] ***Preston v. Director, OWCP***, 6 BLR 1-1229 (1984).

[adjudicator may not invoke presumption based on autopsy report showing only carbon pigment associated with smoking] ***Buchanan v. Director, OWCP***, 6 BLR 1-902 (1984).

[***Dickson v. Califano***, 590 F.2d 616 (6th Cir. 1978), and ***Haywood v. Secretary of Health and Human Services***, 699 F.2d 277, 5 BLR 2-30 (6th Cir. 1983), addressed issue of negative rereadings of x-rays that were originally read as positive and not situation where positive and negative readings of different x-rays are being weighed] ***Spurlock v. Director, OWCP***, 6 BLR 1-1151 (1984).

[adjudicator may, as question of fact, find x-ray negative for pneumoconiosis when reader fails to mention presence of disease] ***Marra v. Consolidation Coal Co.***, 7 BLR 1-216 (1984).

[adjudicator could properly reject positive 1981 x-ray and credit three negative x-rays taken from 1971 to 1976; inference that evidence of progressive disease should have appeared in earlier films rational since miner's dust exposure ceased in 1940] ***Sabett v. Director, OWCP***, 7 BLR 1-299 (1984)(Ramsey, C.J., dissenting).

[where adjudicator erroneously admitted negative rereading of x-ray originally read positive by board-certified radiologist, and where positive readings became only x-ray of record, Board reversed and held invocation established pursuant to subsection (a)(1)]

Piper v. Director, OWCP, 7 BLR 1-287 (1984).
[adjudicator need not base subsection (a)(1) determination solely on numerical superiority] ***Shortt v. Director, OWCP***, 7 BLR 1-318 (1984); ***Tokarcik v. Consolidation Coal Co.***, 6 BLR 1-666 (1984).

[adjudicator may take into account whether numerical superiority based on multiple readings of single x-ray] ***Minor v. Alabama By-Products Corp.***, 7 BLR 1-676 (1985); ***Warman v. Pittsburgh and Midway Coal Mining Co.***, 4 BLR 1-601, 1-606 (1982).

[x-ray reading expressed as "stage two" pneumoconiosis conforms to quality standards at Section 410.428(a)(1), and must be weighed at Section 727.203(a)(1)] ***Casey v. Director, OWCP***, 7 BLR 1-873 (1985).

[adjudicator may give greater weight to reader who was B-reader at time of reading than to one who became B-reader after his reading] ***Aimone v. Morrison Knudson Co.***, 8 BLR 1-32 (1985).

[arbitrary and irrational for adjudicator to treat one physician's four negative x-ray readings as one negative reading and another physician's two positive readings as one positive reading] ***Rankin v. Keystone Coal Mining Corp.***, 8 BLR 1-54, 1-56 n.1 (1985).

[remand required where adjudicator failed to consider x-ray reading included in medical report and rereading of x-ray by B-reader] ***Shelosky v. Consolidation Coal Co.***, 8 BLR 1-303 (1985).

[adjudicator properly discussed all x-rays and autopsy report, reasonably giving greater weight to negative autopsy over single positive x-ray reading in finding subsection (a)(1) invocation not established] ***Terlip v. Director, OWCP***, 8 BLR 1-363 (1985).

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A 0/1 x-ray may not be weighed at 20 C.F.R. §727.203(a)(1) as positive for pneumoconiosis. ***Canton v. Rochester & Pittsburgh Coal Co.***, 8 BLR 1-475 (1986).

The Tenth Circuit held that an x-ray report finding "comparative minimal fibrosis, approximately 1/1" is not sufficient to invoke the presumption under subsection (a)(1). ***Swasey v. Director, OWCP***, No. 85-1-473 (10th Cir. May 6, 1986)(unpublished).

Board rejects employer's argument that autopsy evidence is insufficient to establish invocation of the interim presumption pursuant to subsection (a)(1) in claim that had

been filed by the miner himself, and holds that the regulations make no distinction between a claim filed by the miner and a claim filed by a survivor for purposes of establishing invocation by autopsy evidence. ***Ives v. Jeddo Highland Coal Co.***, 9 BLR 1-167 (1986).

The Sixth Circuit ruled that an autopsy reporting "large amounts of anthracotic pigments" must be considered under Section 727.203(a)(1) because it may meet the requirements of a biopsy that establishes the existence of pneumoconiosis. Anthracosis is defined as "miner's lung. . .(an) accumulation of carbon form inhaled smoke or coal dust in the lungs." ***Lykins v. Director, OWCP***, 819 F.2d 146, 10 BLR 2-129 (6th Cir. 1987).

Where invocation is established pursuant to subsection (a)(1), rebuttal pursuant to subsection (b)(4) is precluded. ***Mullins***, 108 S.Ct. at 435-36 n.26, 11 BLR 2-9 n.26.

Based on the Supreme Court decision in ***Mullins***, the Board holds that rebuttal under 20 C.F.R. §727.203(b)(4) is precluded where the administrative law judge found invocation of the interim presumption pursuant to subsection (a)(1), thus overruling ***Olszewski v. The Youghiogheny and Ohio Coal Company***, 6 BLR 1-521 (1983) to the extent that ***Olszewski*** conflicts with this holding. ***Buckley v. Director, OWCP***, 11 BLR 1-37 (1988).

While an administrative law judge may give more weight to the most recent x-ray evidence, he is not required to do so, even when it is positive. ***McMath v. Director, OWCP***, 12 BLR 1-6 (1988); *see also* ***York v. Jewell Ridge Coal Corp.***, 7 BLR 1-766 (1985).

A radiologist's reading for film quality requires no explanation inasmuch as such conclusion can only indicate that the physician found the film to be unclear and of such poor quality that it was not susceptible to expert interpretation. The administrative law judge therefore may not discredit a radiologist's reading for film quality as unreasoned on the basis that no explanation was provided by the physician. ***Gober v. Reading Anthracite Co.***, 12 BLR 1-67 (1988).

Where an administrative law judge invokes the interim presumption at subsection (a)(1) based on a single positive x-ray pursuant to ***Stapleton***, the Board may review the administrative law judge's weighing of the x-ray evidence under subsection (b)(4) and apply this rationale to subsection (a)(1). ***Prater v. Clinchfield Coal Co.***, 12 BLR 1-121, 1-124 (1989); *see also* ***Campbell v. Director, OWCP***, 11 BLR 1-16 (1987).

An administrative law judge may accord greatest weight to the most recent x-ray evidence of record. ***Clark v. Karst-Robbins Coal Co.***, 12 BLR 1-149 (1989)(en banc).

In evaluating the x-ray evidence, an administrative law judge is not required to defer to

the opinion of a physician with superior credentials. ***Clark v. Karst-Robbins Coal Co.***, 12 BLR 1-149 (1989) (en banc); *see also* ***McMath v. Director, OWCP***, 12 BLR 1-6 (1988).

In this case involving a survivor's claims, the Board reiterates that invocation of the interim presumption under Section 727.203 entitles claimant to two sets of presumed facts: the deceased miner died due to pneumoconiosis arising out of coal mine employment; and he was totally disabled due to pneumoconiosis arising out of coal mine employment at the time of death. Employer must rebut both presumptions in order to defeat entitlement. ***Lewis v. Consolidation Coal Co.***, 15 BLR 1-37 (1991); *see* ***Connors v. Director, OWCP***, 7 BLR 1-482 (1984); ***Vivian v. Director, OWCP***, 7 BLR 1-360 (1984).

Remand was required where the administrative law judge invoked the interim presumption at 20 C.F.R. §727.203(a)(1) by applying the true-doubt rule, subsequently held to be invalid in ***Director, OWCP v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom*. ***Greenwich Collieries v. Director, OWCP***, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and relied on his invocation determination to find rebuttal precluded pursuant to 20 C.F.R. §727.203(b)(4). ***Cole v. East Kentucky Collieries***, 20 BLR 1-50 (1996).

The Seventh Circuit affirmed the administrative law judge's award of benefits under 20 C.F.R. Part 727. The Seventh Circuit held that the administrative law judge, in finding invocation under 20 C.F.R. §727.203(a)(1), permissibly accorded greater weight to the x-ray readings rendered by physicians with superior radiological credentials. The Seventh Circuit also held that the administrative law judge, in finding that employer failed to establish rebuttal under 20 C.F.R. §727.203(b)(3), permissibly discounted Dr. Tuteur's opinion on disability causation because Dr. Tuteur did not believe that the miner had pneumoconiosis, and permissibly found Dr. Myers' opinion to be too equivocal to carry employer's burden. The Seventh Circuit reversed the administrative law judge's onset determination based on the date of filing pursuant to 20 C.F.R. §725.503, and held that where, as in the instant case, the miner temporarily returns to work subsequent to the date of filing, the proper course is to award benefits suspended during the period of coal mine employment pursuant to 20 C.F.R. §725.503A (now codified at 20 C.F.R. §725.504). The Seventh Circuit rejected employer's argument that the sixteen-year delay in adjudicating this claim deprived employer of its right to due process. The court noted that employer received notice of, and participated in, all proceedings since the 1978 filing of the claim. Further, the court detected no prejudice to employer despite this delay. ***Amax Coal Co. v. Director, OWCP* [*Chubb*]**, F.3d , 2002 WL 31730841 (7th Cir., Dec. 6, 2002).