PART IX

REGULATORY PRESUMPTIONS

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

1. INVOCATION OF THE INTERIM PRESUMPTION GENERALLY

b. Section 727.203(a)(2)

Section 727.203(a)(2) sets out the criteria to be used to invoke the interim presumption through ventilatory or pulmonary function studies. A pulmonary function study is either qualifying or non-qualifying, conforming or non-conforming. A qualifying study is one with FEV_1 and MVV (or MBC) values are equal to or less than those set forth in Section 727.203(a)(2). A conforming study is one that satisfies the quality standards contained in 20 C.F.R. §410.430, *i.e.* a study that contains a statement of cooperation and comprehension and three spirometric tracings. For further discussion of the quality standards, *see* Part IV.D.8. of the Desk Book. The Seventh Circuit has noted that the Board does not exceed its authority as a reviewing body where it looks at undisputed facts in the record to determine whether pulmonary function studies are qualifying or conforming. ***Amax Coal Co. v. Anderson***, 771 F.2d 1011, 8 BLR 2-40 (7th Cir. 1985).

Pulmonary function studies must meet both the table values of Section 727.203(a)(2) and the applicable quality standards in order to support invocation at Section 727.203(a)(2). *See* ***Estes v. Director, OWCP***, 7 BLR 1-414 (1984); ***Verdi v. Price Pine Coal Co.***, 6 BLR 1-1067 (1984). Thus, invocation under Section 727.203(a)(2) requires a finding as to whether the studies are both conforming and qualifying. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); ***Twin Pines Coal Co. v. United States Dept. of Labor***, 854 F.2d 1212, 11 BLR 2-198 (10th Cir. 1988); ***Zeigler Coal Co. v. Sieberg***, 839 F.2d 1280, 11 BLR 2-80 (7th Cir. 1988); *see also* ***Anderson v. Youghiogheny & Ohio Coal Co.***, 7 BLR 1-152 (1984). Before invoking the interim presumption under subsection (a)(2), the administrative law judge must weigh all conforming pulmonary function studies. *See* ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP***, 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987).

The Board has held that studies that are non-conforming solely because they lack a statement of cooperation and comprehension may be considered on rebuttal. ***Crapp v. United States Steel Corp.***, 6 BLR 1-476 (1983). In addition, the Sixth Circuit has held that an administrative law judge is not required to resolve all allegations regarding the validity of pulmonary function studies on rebuttal, and must consider all medical evidence, conforming and non-conforming. ***Saginaw***, 879 F.2d at 206, 12 BLR

at 387.

Either a pre-bronchodilator or a post-bronchodilator test will invoke the presumption. *See* ***Coen v. Director, OWCP***, 7 BLR 1-30 (1984). Where the record contains both and one qualifies while the other does not, the administrative law judge must weigh the values and explain those results s/he considers more probative. ***Keen v. Jewell Ridge Coal Corp.***, 6 BLR 1-454 (1983); ***Strako***, *supra*.

CASE LISTINGS

[pulmonary function study that both conforms and qualifies will, if not contradicted by conforming, non-qualifying study, invoke presumption regardless of comments by physician who administered test that almost all of miner's disability attributable to cardiac disease] ***Black v. Alabama By-Products Corp.***, 4 BLR 1-221 (1981).

[where only ventilatory test conforming to applicable quality standards is also qualifying, interim presumption is invoked as matter of law] ***Nichols v. Director, OWCP***, 4 BLR 1-667 (1982).

[proper for adjudicator to apply table values indicating miner 71" in height to 70 1/2" claimant] ***Anderson v. Amax Coal Co.***, 5 BLR 1-616 (1983), *aff'd sub nom*. ***Amax Coal Co. v. Anderson***, 771 F.2d 1011, 8 BLR 2-40 (7th Cir. 1985).

[if substantial differences in heights recorded in ventilatory studies, adjudicator must make factual finding of miner's actual height and use that height in considering invocation] ***Protopappas v. Director, OWCP***, 6 BLR 1-221 (1983).

[adjudicator may, prior to invocation, rely on report of consulting doctor who reviews ventilatory study tracings and recalculates FEV_1 results] ***Bushilla v. North American Coal Corp.***, 6 BLR 1-365 (1983).

[adjudicator properly rejected contention that pulmonary function study inadmissible hearsay for failure to show competency of person preparing report; it is beyond dispute that pulmonary function study report, recorded on DOL form with adequate tracings and comments by physician, is probative evidence] ***Huber v. Peabody Coal Co.***, 6 BLR 1-648 (1983).

[subsection (a)(2) results require that recorded test values be less than or equal to table values to invoke presumption and contain no provision for rounding off test values; if reported values exceed table values, even by small amount, test is therefore non-qualifying] ***Bolyard v. Peabody Coal Co.***, 6 BLR 1-767 (1984), *overruling in part* ***Strako v. Zeigler Coal Co.***, 3 BLR 1-136.

[ventilatory study indicating cooperation-comprehension as "poor" may be found conforming but adjudicator may give such study no weight as unreliable] ***Runco v. Director, OWCP***, 6 BLR 1-945 (1984).

[error for adjudicator to reject pulmonary function studies because contemporaneous blood gas studies below subsection (a)(3) table values since studies measure different respiratory functions] ***Whitaker v. Director, OWCP***, 6 BLR 1-983 (1984).

[finding of "fair" cooperation makes study conforming; finding of invocation based on one qualifying and conforming study plus one study that is qualifying but non-conforming is proper as reliance in part on the non-conforming study harmless error] ***Verdi v. Price River Coal Co.***, 6 BLR 1-1067 (1984).

[to invoke under subsection (a)(2), both FEV_1 and MVV values must meet regulatory table values] ***Tischler v. Director, OWCP***, 6 BLR 1-1086 (1984); ***Rydbom v. North Camp Mining Co.***, 5 BLR 1-849 (1983).

[adjudicator properly found qualifying ventilatory studies unreliable because administering doctors questioned validity of tests' results; although improperly characterized as non-conforming, finding academic as tests unreliable, thus insufficient to invoke] ***Houchin v. Old Ben Coal Co.***, 6 BLR 1-1141 (1984).

[adjudicator properly discounted ventilatory test because values "so low. . .in comparison" to other tests it had no credibility] ***Burich v. Jones and Laughlin Steel Corp.***, 6 BLR 1-1189 (1984).

[if tracings accompany ventilatory study, adjudicator may, absent contrary expert evidence, presume that paper speed appropriate, that scores are largest of three attempts, that MVV is observed value and that tracings show distance per second (abscissa) and distance per liter (ordinate); party challenging study's conformance to 20 C.F.R. §410.430 must support contentions with expert opinion] ***Inman v. Peabody Coal Co.***, 6 BLR 1-1249 (1984).

[within adjudicator's discretion to discredit pulmonary function study with values disparately low in comparison with later studies] ***Baker v. North American Coal Corp.***, 7 BLR 1-79 (1984).

[to be considered conforming study, ventilatory study must include three spirometric tracings, 20 C.F.R. §410.430; if study contains fewer than three tracings and no reason given why, test is non-conforming and cannot support invocation] ***Bueno v. Director, OWCP***, 7 BLR 1-337 (1984); ***Clay v. Director, OWCP***, 7 BLR 1-82 (1984).

[adjudicator exceeded expertise in discussing validity of tests, improperly rejecting medical opinion that all ventilatory tests unreliable because of poor effort on grounds

that doctor's comments "afterthought"] ***Lese v. Bethlehem Mines Corp.***, 7 BLR 1-149 (1984).

[adjudicator may not reevaluate ventilatory study numerical test results: would entail impermissible fact finding involving medical expertise] ***Hess v. Clinchfield Coal Co.***, 7 BLR 1-295 (1984).

[requirement of three spirometric tracings for each portion of test is mandatory requirement not technical in nature and can be verified by fact-finder without expert opinion; here record did not contain three tracings for MVV portion of test and finding of subsection (a)(2) invocation reversed] ***Estes v. Director, OWCP***, 7 BLR 1-414 (1984).

[where subsection (a)(2) raised on appeal, but study's non-conformity not raised at hearing or on appeal, Board will raise issue *sua sponte* because regulatory language as to quality standards mandatory] ***Turner v. Director, OWCP***, 7 BLR 1-419 (1984).

[ventilatory study of deceased doctor admissible, notwithstanding no longer available for cross examination, because conforming study *prima facie* reliable, and no evidence offered to cast doubt on reliability] ***Fowler v. Freeman United Coal Co.***, 7 BLR 1-495 (1984).

[reviewing doctor's opinion that pulmonary function study is unreliable because based on less than maximal effort must be considered under subsection (a)(2)] ***Revnack v. Director, OWCP***, 7 BLR 1-771 (1985).

[adjudicator must provide rationale for crediting opinion of consulting physician over that of administering physician in regard to validity of ventilatory study] ***Siegel v. Director, OWCP***, 8 BLR 1-156 (1984); ***Bolyard v. Peabody Coal Co.***, 6 BLR 1-767 (1984).

[where adjudicator errs in crediting non-qualifying study, where non-conforming due to lack of spirometric tracings, to defeat subsection (a)(2) invocation, presumption is invoked as matter of law if only remaining study both qualifying and conforming] ***Turner v. Director, OWCP***, 7 BLR 1-419 (1984); *accord* ***Moore v. Dixie Pine Coal Co.***, 8 BLR 1-334 (1985).

DIGESTS

The Board held that the administrative law judge erred by failing to consider a physician's deposition testimony that the miner's qualifying pulmonary function study scores were caused by a neuromuscular disease unrelated to, and thus not indicative of, a chronic respiratory or pulmonary disease. The Board overruled ***Endrizzi v. Bethlehem Mines Corp.***, 4 BLR 1-252 (1981), to the extent it is inconsistent with this

holding. ***Casella v. Kaiser Steel Corp.***, 9 BLR 1-131 (1986).

An administrative law judge may not reject a consulting physician's evaluation of a pulmonary function study merely because the evaluation was performed a significant time after the study was administered or because the consulting physician never examined the claimant. ***Zeigler Coal Co. v. Sieberg***, 839 F.2d 1280, 11 BLR 2-80 (7th Cir. 1988).

The mere fact that the quality standards of Section 410.430 are satisfied does not automatically warrant invocation under Section 727.203(a)(2). Invocation must be established by a preponderance of the evidence. ***Dotson v. Peabody Coal Co.***, 846 F.2d 1134, 1137 (7th Cir. 1988), *citing* ***Mullins***; ***Zeigler Coal Co. v. Sieberg***, 839 F.2d 1280, 11 BLR 2-80 (7th Cir. 1988).

Administrative law judge erred in not considering physician's opinion that pulmonary function study qualified due to a cause other than pulmonary disease. ***Twin Pines Coal Co. v. United States Dept. of Labor***, 854 F.2d 1212, 11 BLR 2-198 (10th Cir. 1988).

Invocation at Section 727.203(a)(2) requires a finding by the administrative law judge as to whether the pulmonary function studies are both conforming and qualifying. However, when considering rebuttal, an administrative law judge is not required to resolve allegations regarding the validity of pulmonary function studies. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989).

An administrative law judge's weighing of the pulmonary function studies under Section 727.203(b)(2), if based on a proper subsection (a)(2) standard, can be applied to subsection (a)(2) to support invocation. ***Cochran v. Consolidation Coal Co.***, 12 BLR 1-136 (1989).

The Board held that the administrative law judge rationally accorded more weight to the observations of the technicians who administered the pulmonary function studies than to the opinions of the highly qualified physician who reviewed the tracings. The Board noted that the administrative law judge properly considered that the pulmonary function studies were subsequently reviewed and determined unacceptable by the consulting physicians, *see* ***Revnack v. Director, OWCP***, 7 BLR 1-771 (1985), and that when the findings and conclusions of consultants are preferred to those who actually observed the tests, a rationale must be provided, *see* ***Siegel v. Director, OWCP***, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J., dissenting). ***Brinkley v. Peabody Coal Co.***, 14 BLR 1-147 (1990).

6/95