

## PART IX

### REGULATORY PRESUMPTIONS

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

##### 2. REBUTTAL OF THE INTERIM PRESUMPTION GENERALLY

###### d. Section 727.203(b)(4)

Subsection (b)(4) allows the party opposing entitlement to rebut the interim presumption by establishing that the miner does not have pneumoconiosis. To rebut the presumption under subsection (b)(4), the evidence must establish both the absence of clinical pneumoconiosis and the absence of pneumoconiosis as defined in the Act, *i.e.*, the absence of any respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§727.203(b)(4); 727.202.

Based on the Supreme Court decision in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 108 S.Ct. 427, 435-36, n.26, 11 BLR 2-9 n.26 (1987), the Board held 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 Youghioghny and Ohio Coal Co.*, 6 BLR 1-521 (1983), to the extent it conflicts with this holding. See *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988).

The U.S. Supreme Court upheld as valid the rebuttal provisions at 20 C.F.R. §727.203(b)(3) and (b)(4). *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991).

### CASE LISTINGS

[Act does not allow rebuttal based solely on negative x-rays] *U.S. Steel Corp. v. Gray*, 588 F.2d 1022, 1 BLR 2-168 (5th Cir. 1979); *Ansel v. Weinberger*, 529 F.2d 304 (6th Cir. 1976); *Bishop v. Director, OWCP*, 4 BLR 1-761 (1982); *Taranto v. Barnes and Tucker Co.*, 4 BLR 1-308 (1981); *Murphy v. Consolidation Coal Corp.*, 3 BLR 1-575 (1981).

[physician not required to establish etiology of miner's symptoms to establish no pneumoconiosis] *Pavesi v. Director, OWCP*, 6 BLR 1-1169 (1984), *vacated and remanded on other gr'ds*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Coleman v.*

**Kentland Elkhorn Coal Co.**, 5 BLR 1-260 (1982).

[diagnosis that x-ray and blood gas studies did not reveal "typical signs of pneumoconiosis" too inconclusive to establish rebuttal under subsection (b)(4)] **Elkins v. Director, OWCP**, 5 BLR 1-590 (1982); see also **Tollis v. Director, OWCP**, 5 BLR 1-320 (1982).

[Seventh Circuit held although negative x-rays, that cannot rebut presumption of pneumoconiosis alone, are highly probative and must be given great weight when corroborated by other medical evidence] **Peabody Coal Co. v. Lewis**, 708 F.2d 266, 5 BLR 2-84 (7th Cir.1983).

[adjudicator must consider diagnosis of cor pulmonale at subsection (b)(4) as it is sequelae of pneumoconiosis] **Gilson v. Price River Coal Co.**, 6 BLR 1-96 (1983).

[irrational to conclude x-rays dictated rebuttal when adjudicator invoked under subsection (a)(1); ventilatory studies not diagnostic of non-existence of pneumoconiosis] **Lambert v. Itmann Coal Co.**, 6 BLR 1-256 (1983).

[diagnosis of respiratory disease unrelated to dust exposure can rebut pursuant to subsection (b)(4)] **Honaker v. Habco Coal Co.**, 6 BLR 1-408 (1983).

[proof of no impairment does not prove pneumoconiosis non-existent] **Borgeson v. Kaiser Steel Corp.**, 6 BLR 1-655 (1983).

[medical report that does not address existence of pneumoconiosis insufficient to rebut at (b)(4)] **Tucker v. Eastern Coal Corp.**, 6 BLR 1-743 (1983).

[adjudicator may properly credit miner's treating physician's diagnosis of pulmonary condition over opinion of non-examining physician based in part on hospital records silent as to existence of pulmonary condition that may be probative as to its non-existence] **Sacolick v. Rushton Mining Co.**, 6 BLR 1-930 (1984).

[diagnosis that calcified granuloma did not arise out of coal mine employment and was not pneumoconiosis relates to both subsection (b)(3), (b)(4)] **Jefferies v. Director, OWCP**, 6 BLR 1-1013 (1984).

[adjudicator erred considering only medical report and failing to consider x-ray evidence; negative x-rays in combination with medical opinions not based solely on x-rays can rebut] **Shepherd v. Allied Coals, Inc.**, 6 BLR 1-1138 (1984).

[report of no pneumoconiosis, negative rereading of positive x-ray and two x-rays not mentioning pneumoconiosis may rebut at (b)(4)] **Foster v. National Mines Corp.**, 6 BLR 1-1255 (1984).

[proof of impairment not required to prove pneumoconiosis; absence of impairment does not establish non-existence of pneumoconiosis] **Sainz v. Kaiser Steel Corp.**, 5 BLR 1-758 (1983), *aff'd sub nom. Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984).

[blood gas studies are relevant primarily to existence or extent of impairment but may also bear on existence of pneumoconiosis insofar as test results indicate absence of disease process implying no disease arising out of coal mine employment, *i.e.*, pneumoconiosis where also medical opinion supporting finding; medical opinion of no pneumoconiosis may be considered at subsection (b)(4) notwithstanding conflict with Act]] **Morgan v. Bethlehem Steel Corp.**, 7 BLR 1-226 (1984).

[**Blevins III**, 6 BLR 1-750 (1983), not applicable to opinion of no pneumoconiosis under subsection (b)(4)] **Shaw v. Bradford Coal Co.**, 7 BLR 1-462 (1984); **Honaker v. Habco Coal Co.**, 6 BLR 1-408 (1983).

[adjudicator may infer x-ray is negative when reader fails to mention pneumoconiosis; no requirement that x-ray interpretation be classified under Section 410.428] **Wiggins v. Director, OWCP**, 7 BLR 1-442 (1984).

[Third Circuit held to rebut under subsection (b)(4), opposing party must establish miner does not suffer from pneumoconiosis as defined by statute and regulations--coal workers' pneumoconiosis nor any other chronic dust disease of lung arising out of coal mine employment] **Pavesi v. Director, OWCP**, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985).

[Eleventh Circuit held rebuttal requires affirmative proof that pneumoconiosis does not exist, not silence as to whether miner's lung condition is or is not pneumoconiosis] **Black Diamond Coal Mining Co. v. Benefits Review Board [Raines]**, 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985).

[irrational for adjudicator to find negative x-rays and report of no pneumoconiosis outweighed by pulmonary function and blood gas studies as they are not determinative of presence of disease] **Merashoff v. Consolidation Coal Co.**, 8 BLR 1-108 (1985).

[adjudicator erred rejecting medical opinion at subsection (b)(4) as based solely on negative x-ray where physician testified that he considered results of several clinical tests, miner's work and personal history and physical examination; follows **Peabody Coal Co. v. Lowis**] **Walker v. Brown Badgett, Inc.**, 8 BLR 1-220 (1985).

[adjudicator's findings that medical reports not based exclusively or primarily on negative x-ray affirmed where doctor's statement that diagnosis was based principally on negative x-ray evidence taken out of context] **Marshall v. Jim Walters Resources, Inc.**, 8 BLR 1-229 (1985).

[negative x-ray alone insufficient to rebut under subsection (b)(4) and medical opinion based solely on x-ray insufficient to rebut] **Sakach v. Director, OWCP**, 8 BLR 1-237 (1985).

[scope of inquiry under subsection (b)(4) is whether miner has pneumoconiosis as defined in Section 727.202, including chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to or significantly aggravated by dust exposure in coal mine employment] **Biggs v. Consolidation Coal Co.**, 8 BLR 1-317 (1985).

[opinion that miner has C.O.P.D. probably related to coal mine employment could preclude rebuttal] **Jones v. Kaiser Steel Corp.**, 8 BLR 1-339 (1985).

### DIGESTS

The Seventh Circuit, while stating that negative x-rays alone are not always sufficient to rebut the presumption, found that they assume significant probative value when they exist without any significant medical evidence to the contrary. **Knudson v. Benefits Review Board**, 782 F.2d 97, 8 BLR 2-102 (7th Cir. 1986).

The Third Circuit reversed a finding of rebuttal under subsection (b)(4) where the administrative law judge, although mentioning medical reports and other evidence, concluded that the x-ray evidence was decisive, thereby improperly basing the decision on negative x-rays alone. The Court also noted that a physician's report which is silent as to pneumoconiosis cannot be affirmative proof of its absence. **Madden v. Director, OWCP**, No. 85-3408 (3d Cir., Apr. 7, 1986)(unpub.).

The Board held that an administrative law judge could properly conclude that a diagnosis that a claimant does not have pneumoconiosis or occupational pneumoconiosis may be sufficient to establish the absence of pneumoconiosis as defined in the Act and regulations. The administrative law judge could reach this conclusion as well where the physician also diagnoses other respiratory impairments, if the administrative law judge rationally draws the inference that the physician is excluding coal mine employment as a causal factor. In reaching this decision, the Board noted that prior decisions culminating in **Shonborn**, 8 BLR 1-434 (1986), provided only general guidelines and must not be interpreted as placing restrictions upon the fact finder's discretion in weighing and evaluating the relevant evidence under subsection (b)(4). **Dockins v. McWane Coal Co.**, 9 BLR 1-5 (1986).

The Board affirmed the administrative law judge's finding on remand of rebuttal pursuant to subsection (b)(4) where the administrative law judge properly relied on negative x-rays together with one physician's opinion that claimant's airways obstruction

is unrelated to coal mine dust exposure and another non-examining physician's opinion that the evidence did not support a finding of coal workers' pneumoconiosis. **Kurcaba v. Consolidation Coal Co.**, 9 BLR 1-73 (1986).

The Eleventh Circuit vacated the Board's decision, holding that a physician's "reasoned medical judgment" that the miner's impairment was due to cigarette abuse rather than coal dust exposure could support rebuttal at Section 727.203(b)(4). **Taylor v. Alabama By-Products Coal Corp.**, 862 F.2d 1529, 12 BLR 2-110 (11th Cir. 1989).

The Sixth Circuit stated that the proper avenue for rebuttal in cases where the miner's disability is arguably not "significantly" related to coal dust is Section 727.203(b)(4), since under the Section 727.202 definition of pneumoconiosis, the respiratory or pulmonary impairment must be significantly related to, or aggravated by, coal dust exposure in coal mine employment. **Tennessee Consolidated Coal Co. v. Crisp**, 866 F.2d 179, 187 n.5, 12 BLR 2-121, 2-133 n.5 (6th Cir. 1989).

The Third Circuit held that a physician's letter which suggested possible alternative causes of the miner's disability and death, but did not offer an affirmative diagnosis incompatible with pneumoconiosis, did not support rebuttal under Section 727.203(b)(4). **Kline v. Director, OWCP**, 877 F.2d 1175, 12 BLR 2-346 (3d Cir. 1989).

**[Note: the following holding is included FYI although the case has been reversed by the Fourth Circuit. The Court did not reach this issue digested here but reversed the denial on other grounds]**

Based on the Supreme Court decision in **Mullins Coal Co. of Va. v. Director, OWCP**, 484 U.S. 135, 11 BLR 2-1, 2-9 n.26 (1987), *reh'g denied*, 484 U.S. 1047 (1988), the Board held that rebuttal under 20 C.F.R. §727.203(b)(4) is precluded where invocation of the interim presumption is established pursuant to Section 727.203(a)(1); see **Buckley v. Director, OWCP**, 11 BLR 1-37 (1988). **Curry v. Beatrice Pocahontas Coal Co.**, 18 BLR 1-59 (1994), *rev'd on other grds*, 67 F.3d 517, BLR (4th Cir. 1995).

12/95