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The "Black Lung" Act: An Analysis of Legal Issues Raised Under the Benefit Program Created by the Federal Coal Mine Health and Safety Act of 1969 (as Amended)

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THE "BLACK LUNG" ACT: AN ANALYSIS OF LEGAL ISSUES RAISED UNDER THE BENEFIT PROGRAM CREATED BY THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 (AS AMENDED)

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E. G.

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I. INTRODUCTION

The Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. § 801 et seq., was enacted in response to controversy over safety practices in the nation's coal mines. The catalytic event, an explosion on November 20, 1968, at a mine near Farmington, West Virginia, that killed 78 miners, led to numerous steps designed to improve mine safety including regulation of dust levels, inspections for explosive gases, and improvements in ventilation, roof supports, and mandatory use of respiratory equipment. Another major consequence was that the federal government, for the first time, established a compensation system solely to provide benefits for miners disabled by "black lung" disease, a progressive ailment described by the technical name coal worker's pneumoconiosis that is caused by inhaling coal dust through years of exposure in underground coal mines. 30 U.S.C. § 901 (Title IV).[1]

The disease results in decreased lung capacity, ineffective exchange of gases between blood and lungs, and in its advanced stage to large masses of scar tissue in the lung and resistance to blood flow in the pulmonary vessels. More specifically, coal dust irritates the lung causing the formation of scar tissue (fibrosis). This fibrosis impairs the transfer of oxygen and

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1. Unless otherwise designated all references to the statute are to the original section numbers. Selected parts are reprinted in Appendix A.

carbon dioxide between the blood and lungs, thus restricting the physiological function of the lung. Pneumoconiosis is generally considered chronic and progressive; that is, unless something else intervenes it will cause death. Once contracted, the disease is irreversible since no therapy has been developed. Death from pneumoconiosis results from the ultimate failure of the right ventricle of the heart which encounters increased difficulty in attempting to pump blood through the lungs which become inelastic due to fibrosis.

In creating this compensation system for victims of black lung, Congress was responding to the felt inadequacies of state workmen's compensation programs as well as to the standards of proof otherwise required for work-related compensation benefits under the Social Security disability program. Neither provided coal miners with adequate benefits despite provisions designed to protect workers from employment-related injuries or diseases because claims had to be substantiated by specific evidence that the disease was caused by working in a mine. Where the disease takes years to manifest itself and even then may not be reflected in direct medical evidence (such as an x-ray)--both typical of pneumoconiosis--the claimant is likely to be denied benefits for failing to show either the existence of the disease or that his disability was work-related. Nor were other compensation programs designed to respond to the difficult questions of medical proof typical of black lung where little specific medical evidence is available and the primary symptoms may not manifest themselves for many years.

Rather than rewriting federal conditions on state compensation programs or remaking the Social Security disability scheme especially for coal miners, Congress developed a comprehensive compensation program and assigned its administration to the Department of Labor.[2] Under it a miner seeking compensation must show first that he is an eligible worker under the Act, and second, that he is entitled to black lung benefits. Eligibility is demonstrated by the claimant's showing that he was a coal miner; entitlement is established by proving that he is disabled from pneumoconiosis as a result of that employment and can no longer work. While the burden of showing eligibility and entitlement remains on the claimant, the Act as amended has lessened this requirement so that a miner with substantial employment in the mines who is disabled can generally obtain benefits. Specifically, entitlement is presumptively established (by statute) once the claimant shows that he worked in a mine for 15 years and has a disabling breathing impairment. Similarly, a series of statutory presumptions has eased the entitlement burden of showing

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2. Claims filed prior to June 30, 1973, were adjudicated by HEW under Part B of the Act. Part B includes §§ 411-415 of the Act. Claims filed between the date of enactment, Dec. 30, 1969, and June 30, 1973 were adjudicated under this Part. The regulations of the Secretary of HEW applicable to Part B are found at 20 C.F.R. §§ 410.101-490. Benefits under Part B are paid by the United States. Section 415 of Part B presents adjudication standards for the "transition period" claims which were filed from July 1, 1973, to December 31, 1973. Claims filed after December 31, 1973 were intended to be processed under an applicable state worker's compensation law approved by the Secretary of Labor under § 421 of the Act. After this date, such claims are filed with and adjudicated by the Labor Department under Part C (§§ 421-435) of the Act. Payment for benefits is by individual coal operators or by the Black Lung Disability Trust Fund. The regulations promulgated by the Labor Department in adjudicating Part C claims are found at 20 C.F.R. § 715 et seq. Selected parts of the current regulations are printed in Appendix B.

sufficient medical evidence, at least where the miner has worked in the mines for a substantial period and can show that he is in fact disabled. Even where the claimant cannot meet these threshold requirements, he can still establish eligibility and entitlement by fellow worker testimony, but in this instance he must rely on the usual methods of proof--i.e., usually by a mixture of work records, positive medical evidence and lay opinion that persuades a law judge that the miner has carried the burden of proof of mine-work caused disability.

A. The Black Lung Act

This monograph outlines the Act's legal requirements and examines some of the interpretive problems that have arisen. Before doing so, a brief description of the Act and how it has developed is provided in order to assure an understanding of the basis for legal challenges frequently asserted today. The Act was first passed in 1969. As administrative difficulties were encountered and Congress' expectation of payments to afflicted miners was not met, additional amendments were adopted in 1972 and 1977. With these amendments Congress enlarged the coverage of the Act to increase the number of workers covered, lessened the burden of proving disability to increase the benefit entitlement, and increased the responsibility of coal mine operators for funding (and challenging) payments to claimants.

With each change the coverage of the program was extended so that eligibility was broadened and entitlement claims for compensation more readily established. For example, the original Act provided coverage only for underground coal miners. This defini-

tion excluded many workers disabled by pneumoconiosis because of exposure to similar dust levels in other mining operations. The effect of this limitation was spelled out in studies and congressional hearings and support for an expansion of the Act was mobilized. One result was that in 1972 the number of workers covered by the Act was expanded to include all coal miners, not just those working in underground mines. Finally, in 1977 the Act's eligibility provisions were rewritten to cover persons who work "in or around" a coal mine in the extraction or preparation of coal, thus including coal mine construction workers or truckers transporting coal. Interpretive questions remain. For example, one issue frequently raised on appeal is whether the claimant is a covered worker and the extent to which direct exposure to coal dust in a mine is a necessary element for a person to come within the definition of a "miner" under the Act.

Important as these changes and issues in the Act's eligibility provisions are to an understanding of the black lung program, they are overshadowed by major changes and questions in the entitlement scheme. Initially the Act required claimants to establish that they were in fact disabled by pneumoconiosis. This proved impossible for many claimants. Black lung causes progressive deterioration of the lungs and often is not seen by positive x-ray evidence until after the disease has reached an advanced state or has been shown by autopsy to have caused the miner's death. Requiring positive medical evidence was seen as frustrating the program's compensatory purpose. Congress responded in the 1972 amendments by easing the burden of proof on entitlement through limitation of the significance of rebuttal evidence. That is, Congress specifically forbade the denial of benefits

solely because chest x-rays were negative and did not show evidence of pneumoconiosis. In fact, the 1972 amendments went so far as to create a rebuttable presumption that a miner with 15 years underground coal mining experience is entitled to black lung benefits simply by showing that he suffered from a disabling respiratory or pulmonary impairment--even though all x-rays for pneumoconiosis were negative.

The 1972 amendments, then, had the effect of extending the Act's protection to miners with respiratory or pulmonary ailments other than classical coal worker's pneumoconiosis, once it was shown that the claimant had worked in a mine for the requisite period and had some lung-related impairments preventing his usual coal mine employment. However, even this causal inference proved insufficient in many cases. A review of benefit payments showed that miners unable to work were often denied black lung benefits. Thus in 1977 Congress further expanded the Act's coverage of diseases to include the "sequelae" (i.e., the consequences or after-effects) of pneumoconiosis. It also changed the significance of certain evidentiary events. For example, the administrator is now bound by affidavits of persons with knowledge of a deceased miner's condition, a favorable interpretation of x-ray evidence from a certified reader, or positive autopsy reports. These modifications have not removed all interpretive questions, and it is still often disputed what medical evidence is necessary to show pneumoconiosis or, indeed, whether one whose existing (other) disease is aggravated by coal dust and then disabled is entitled to benefits. Nevertheless, the amendments reflect a predominant congressional purpose that the Black Lung Act is to

be interpreted generously in an effort to protect miners from the consequences of having worked in or near coal mines for a number of years.

B. The Administrative Process

These issues of eligibility and entitlement dominate the cases brought before the courts of appeals. In order to develop an understanding of the issues in these cases and why they reach the appellate courts, a brief review of the payment and processing systems is necessary. When the black lung compensation program was first created, the entire responsibility for payment was assumed by the federal government--although a phased takeover for funding by coal mine operators of disability payments was established. Federal funding of claims based on past exposure seemed appropriate since high coal dust concentrations had not been held to be dangerous before 1969; retroactive responsibility would have been unfair. The progressive nature of the disease, its long-term latency, and the economic burden of paying for the claims system also supported some postponement of placing liability on existing coal mine operators. Thus, the legislation selected January 1, 1974, as a dividing date, with claims based on pneumoconiosis before 1974 being paid by the federal government. Subsequent claims are the responsibility of individual operators if they are found to be "responsible" coal mine operators under the Act. (Generally, this is the last coal operator for whom the miner worked for a cumulative period of one year.) 20 C.F.R. § 725.490-493. Further contributions were also required of coal mine operators when, in 1977, Congress created the Black Lung Disability Trust Fund (92 Stat. 11 (1977), 26 U.S.C. § 4121) which is financed by an excise tax on coal sold after

March 31, 1978. This Fund now pays the administrative expense of the black lung compensation program. It is primarily liable for claims in which the claimant's coal mine employment ended before January 1, 1970, as well as for all claims in which no responsible operator is identified. The Fund is secondarily responsible (with a right of reimbursement) for benefit payments where the operator fails to make timely payment. Obviously complex legal issues can be presented under either provision. Among the legal issues that have been raised are rights to attorney's fees and the extent of federal liability under transition period claims.

The processing of a black lung claim generally follows rules and standards common to most benefit payment agencies. Claims currently are filed with the Department of Labor.[3] If the Department's initial administrative determination on eligibility is not satisfactory to the parties, a hearing may be requested before an administrative law judge. In addition to the claimant, the parties to such a hearing may include the potentially liable coal operator and the Director of the Office of Worker's Compensation Programs of the Labor Department. All parties may participate fully and are given an opportunity to present and rebut evidence. Although the law judge is empowered to develop the record, primary responsibility for investigation and development of evidence is with the Director. The hearing is not conducted by formal rules of procedure or evidence. However, the Department's procedural rules restrict the introduction of extraneous evidence and the raising of new issues not presented in the claim. The decision of the

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3. In the 1977 amendments, Congress provided in § 435 for a rehearing of all previously denied and all pending claims. Claimants were permitted to choose a rehearing by HEW or a new hearing with Labor.

law judge must be made upon evidence in the record and the decision is appealable to the Benefits Review Board, an intermediate appellate review body in the Department of Labor. Review by the Board is available only under a substantial evidence standard. A claimant denied compensation may appeal the Secretary's order (which is, in fact the order of the Review Board) to the United States Court of Appeals. Again the statutory issue is whether the decision is supported by substantial evidence on the whole record.

II. ELEMENTS OF A BLACK LUNG CLAIM

In order to prove eligibility and entitlement to a disability claim, a miner must satisfy four basic requirements: (1) that he is a worker covered by the Act--i.e., a coal miner as defined therein; (2) that he is afflicted with pneumoconiosis; (3) that he is totally disabled; and (4) that the cause of his disability is pneumoconiosis. A claimant satisfies these elements by presenting records of his work history, specific evidence of his medical illness, and in some circumstances by personal or third-party affidavits describing the claimant's inability to engage in heavy work and his breathing difficulties. The statute seeks to ease this burden by establishing the five statutory presumptions which claimants can rely upon in proving one or more elements. These are further amplified in recent Labor Department regulations, 20 C.F.R. § 718, that identify the elements which each presumption satisfies.

Proof of the first element, that the claimant is a miner, is probably the least difficult or controversial element in most

cases. The claimant must satisfy two tests to fit within the class of workers covered by the program. That is, the miner must show that he has worked in a coal mine (the situs test) and that he has performed functions of a miner (the functional test). The structures, work areas, and facilities that qualify as work areas covered by the statutory designation "coal mine" are described in 30 U.S.C. § 802(h)(2) and (i). The definition of who is a "miner" in § 402(d) now includes "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal . . . [or] in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment."

A plain reading of the last clause of § 402(d) arguably could support the conclusion that a claimant who has worked only in coal construction or transportation must at least prove the extent of his exposure to coal dust. However, adhering to the congressional purpose that seeks to include within the Act's coverage all workers subject to serious risk of black lung disease, the Labor Department has ruled that this requirement of on-the-job exposure to coal dust is fully satisfied by showing the requisite employment. The practical result is that the employer can rebut this presumption only by showing that the claimant who was a construction or transportation worker was not in fact exposed to dust during all periods of this employment. Proof of this negative is almost impossible so it is not surprising that very few employers dispute this eligibility issue.

The primary dispute in contested black lung cases is on the second element of entitlement, namely whether there is adequate proof that the miner has pneumoconiosis. As previously noted, it is often difficult to find direct medical evidence of the disease until it reaches advanced stages. That is, x-rays seldom show sufficient opacities to prove the existence of the disease. Reflecting the Act's purpose of compensating disabled miners and their families, Congress has expanded the definition of "black lung" and enacted five presumptions which have the effect of substantially lowering a claimant's burden of proof establishing that he has pneumoconiosis. For example, the 1977 amendments added the "sequelae" or consequences of pneumoconiosis to the definition, thus expanding coverage now to include those who have the symptoms of the disease--e.g., shortness of breath, fatigue--even though no direct evidence, such as x-rays or ventilatory studies, support the finding of black lung disability.

In substantiating the existence of pneumoconiosis, however, most claimants still rely on direct evidence such as chest x-rays that meet the tests established by § 718.102 of the Labor Department regulations. These regulations further provide that a physician's opinion that the miner has pneumoconiosis may be sufficient even though based upon objective medical tests other than x-rays. In other words, doctors reports are not only admissible (even though technically hearsay), but if such reports are reliable and probative they constitute substantial evidence that will support a finding that the claimant has the disease.

Cf. Richardson v. Perales, 402 U.S. 389 (1971) (physician's written reports sufficient to support denial of disability claim even though opposed by live testimony on behalf of claimant). In addition to relying on such medical evidence from the miner's treating or other consulting physicians, the Office of Worker's Compensation Programs of the Department of Labor has the responsibility for developing the necessary medical evidence upon which to base a determination of whether the claimant is entitled to compensation. In other words, although the burden of proof is technically still on the claimant, the evidence may in fact have to be developed by the Department for the miner seeking benefits since it is obligated to assure the completeness of the record.

The support available to establish a miner's claim of pneumoconiosis is by statute not limited to medical proof. Several presumptions may be employed to prove the existence of black lung disease. In particular, § 411(c)(4) provides that when a miner with 15 years of underground coal mine employment establishes that he suffers from a "totally disabling respiratory or pulmonary impairment," it is presumed that the miner's impairment is pneumoconiosis. Alternatively, a deceased miner with 25 years work experience in or around mines is presumed to have had pneumoconiosis, though this presumption is rebuttable.

The third element of a black lung claim, that the miner is "totally disabled," is established by a living miner whenever "pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously

engaged with some regularity and over a substantial period of time." § 404(f)(1)(A). Even under the frequently used 15-year presumption (§ 411(c)(4)), a miner must show that he is suffering from a totally disabling lung impairment. This definition, first effective in 1972, was adopted to reflect the reality of work and health of miners in the coal fields. That is to say, a coal miner as a practical matter is totally disabled when he is unable to work as a miner. Alternative employment is generally not available. In this spirit, Labor Department regulations have interpreted the statutory terms "totally disabled" liberally by holding that a claimant is disabled if he is unable to work "in the immediate area of his or her residence." 20 C.F.R. § 718.204 (b)(2).[4]

There is an alternative method by which a miner may also show total disability. Under it, if the miner can show that his condition has deteriorated into the final and incurable stage of the disease, known as complicated pneumoconiosis, he is irrebuttably presumed to be totally disabled. This irrebutable presumption is invoked by clinical evidence, which meets the standards of the presumption found in § 411(c)(3). In other words, Congress has mandated that the final, incurable stage of the disease is always compensable if its existence can be shown by positive clinical evidence, whatever his work ability; at any

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4. The significance of this view of the total disability standard is sharply revealed by contrasting it with similar standards under the social security disability program. Under social security, disability is found only if the claimant cannot engage in any gainful employment; whereas under the black lung program the claimant is disabled if he cannot engage in his former work wherever located (i.e., a particular type of position in the immediate locality).

other stage of the disease, the claim will be granted when the miner shows that he is in fact physically disabled under the terms of § 402(f).

The liberal design of the black lung program is further illustrated by the Labor Department's regulation that mere employment in the mines at the time of death or filing of a claim is not conclusive evidence that the miner was not totally disabled. (Nor, however, is the fact that the miner has given up his employment conclusive of his disability.) The regulation thus seeks to avoid discouraging or penalizing the miner who continues to work by assuring him that subsequent benefits claimed by his survivors are not thereby reduced or denied. On the other hand, the Benefits Review Board and courts are free to look at changed circumstances of a miner's continued employment for an indication that the miner's physical condition in fact limited his work abilities.

The fourth element of a black lung case--that the miner's work disability was caused by pneumoconiosis--is in many cases difficult to establish. Because claimants often are of advanced years or suffer from multiple health problems, it is difficult to show that the impairment which prevents them from working is pneumoconiosis rather than another condition or disease. Following the program's fundamental compensatory purpose, however, Congress has established five express presumptions in § 411(c)(4), any one of which can be relied upon by a claimant to establish causation. Frequently claimants rely upon presumptions based on 10 years of coal mine employment. However, even a claimant without 10 years

in a mine can recover by showing through "competent evidence" that his "pneumoconiosis arose at least in part out of coal mine employment." 20 C.F.R. § 718.203(a)(c).

III. ISSUES ON JUDICIAL REVIEW

A. The Standard of Review

The starting place for examining issues commonly raised on appellate court review of black lung orders issued by the Secretary is the standard of review applicable to adjudicative decisions traditionally applied in Administrative Law. The Federal Coal Mine and Safety Act adopts the well-established substantial evidence standard also otherwise required for review of decisions made in trial-type hearings under the Adminstrative Procedure Act. Compare 30 U.S.C. § 923(b)(incorporating by reference 42 U.S.C. § 405(g) of the Social Security Act) with 5 U.S.C. § 706(2)(E) (APA). Under this approach, the evidence supporting the agency decision must be "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (Frankfurter, J.); see also NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938) (evidence on which "responsible persons" rely in the conduct of "serious affairs").

While this evidentiary requirement warrants reversal if there is a clear error of judgment by the deciding agency, a court may not substitute its judgment for that of the administrator since Congress has delegated the basic decisional authority and choice to him and not to the court. It may,

however, set aside findings of fact and conclusions of law (and remand the case for a new decision) if unsupported by substantial evidence on the record read as a whole. That is, evidence that detracts as well as that which supports the administrator's conclusion is to be considered by the reviewing court. Still, if a reasonable person could have reached the conclusion of the Secretary, whether or not the court agrees with that conclusion and even though the record would also support a contrary result, the administrative determination should be upheld. See Adkins v. Weinberger, 536 F.2d 113, 116 (6th Cir. 1976); see generally, B. Schwartz, Administrative Law § 211 (1976).

B. Eligibility Issues

As outlined previously in this manual, the first element in substantiating a claim for black lung benefits is proof of miner eligibility under the statute. That is, the claimant must show that he is a worker covered by the statute. Several courts have dealt with eligibility issues. In Roberts v. Weinberger, 527 F.2d 600 (4th Cir. 1975), the court held that a claimant who operated a truck hauling coal from the strip mine to the tipple where the coal was processed was a miner within the meaning of the statute. The record showed that the driver had been exposed to substantial amounts of coal dust during loading and unloading and while traveling over the dirt roads of the mining company. The court relied on the fact that such a "miner" would clearly be included under the expansive language of the 1977 amendment which specifically covers "any individual who

works or has worked in . . . transportation in or around a coal mine." § 402(d). It is, therefore, not essential that the covered worker be employed by a coal mine as opposed to being employed by an ancillary industry such as a trucking firm or railroad. The significant factor is the nature of the work.

A similar line of analysis was suggested in Freeman v. Califano, 600 F.2d 1057 (5th Cir. 1979), where the claimant had five years work in mining as well as six years in railroad work in the vicinity of the coal mines. Freeman filed his claim under Part B (before 1974 and his benefits would therefore be paid from general federal revenues). Arguing that his two periods of employment could be combined, Freeman then sought to invoke the ten-year presumption of disability caused by mine work under § 411(c)(1). While the court remanded the matter to the district court for more developed reasons, it also ruled that denial of benefits would be permissible only if based upon a determination that the nature of the claimant's railroad work was not within the statutory coverage for ancillary activities. It specifically concluded that the fact that Freeman was employed by a railroad was legally irrelevant to the issue under § 411(c)(1).

Another initially surprising case in the eligibility area is Adelsberger v. Mathews, 543 F.2d 82 (7th Cir. 1976). Here the court found that a clerical employee was within the statute's broad language of "work of preparing the coal" because the employee's duties went beyond those associated with the typical clerical employee, and included: acting as an intermediary between the office and miners, directing the switching of grates and railroad cars, and being responsible for the weighing of the coal.

Examined as a group, these and other cases emphasize that the critical issue for determining eligiblity is not whether the claimant was employed by a coal mine operator. Instead, the key issue is the nature of the work performed, and the extent to which that work exposed the miner to coal dust. A Part C claimant[5] who is not employed by a mine operator but whose work exposed him to coal dust--for example, a railroad employee as in Freeman--would receive benefits from the Black Lung Disability Trust Fund since no responsible operator exists to assume liability. The Secretary's regulations recognize that requiring a worker in coal transportation or coal construction to prove the extent of exposure to coal dust would be a tremendous burden. Thus, in keeping with the inclusive purpose of the Act, the Secretary's regulations remove this burden from the claimant. 20 C.F.R. § 725.202. Transportation and construction workers are therefore given the benefit of a rebuttable presumption that they were exposed to coal dust at all times during their employment in coal-related transportation or construction work. Under this presumption, the burden of persuasion shifts to the employer to rebut the fact of employment or the exposure, in fact, of the individual to coal dust. Id.

C. Procedural Issues

Numerous procedural problems have resulted from the complex relationship between the three parts of the statute, its two amendments and several sets of agency regulations. One parti-

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5. A Part C claimant is one filing after December 30, 1973 with the Secretary of Labor. See note 3.

cularly vexing issue concerns the issue of retroactive application of the proof requirements liberalized under the 1977 reform amendments to claims still pending under Part B (i.e., to those filed before HEW prior to December 31, 1973). Retroactive application is important to some claimants since the new provisions add another statutory presumption and more importantly expanded the definition of what constitutes black lung disease as well as what evidence justifies a finding of total disability. On the other hand, retroactive application of new evidentiary standards is not wholly one-sided since if the claim is established under the 1977 Act, benefits are limited to claims established after January 1, 1974. Claims established under the prior law are not so limited since such claimants are entitled to payments back to the time the claim is filed, or, if later, when the claimant becomes totally disabled with pneumoconiosis. Therefore, the retroactivity question cannot be resolved simply by one result to effectuate the inclusive intent of the statute. One group of claimants will benefit by retroactive application because of the relaxed proof requirements. However, retroactive application harms another group of claimants whose benefits would not be as extensive.

Courts have frequently sought to avoid this perplexing issue by simply denying all retroactive application. United States Steel Corp. v. Gray, 588 F.2d 1022, 1030 (5th Cir. 1979); Beck v. Mathews, 601 F.2d 376, 379 n.4 (9th Cir. 1978) (refusal to remand in light of 1977 Reform Act; claimant must reapply); Ohler v. Secretary of HEW, 583 F.2d 501, 506 (10th Cir. 1978). On the other hand, several courts have been willing to read

the statutory amendments retroactively when the only question is whether x-rays should be reread. In this circumstance, however, the miner's benefits are not restricted. Even so, as discussed further below, courts have reached diverse conclusions in this situation.

The general rule of retroactivity is stated by two frequently cited cases, Yakim v. Califano, 587 F.2d 149 (3rd Cir. 1978) and Treadway v. Califano, 584 F.2d 48 (4th Cir. 1978). There the Third and Fourth Circuits held that cases filed prior to the amendment but brought upon appeal after the effective date of the Reform Act (March 1, 1978) should be governed by the pre-reform law. Opinions following this line of cases, e.g., Freeman v. Califano, 600 F.2d 1057 (5th Cir. 1979), acknowledge that a court generally must apply the law in effect at the time of the court's decision unless there is statutory instruction or legislative history to the contrary or where manifest injustice would result. Cf. Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974). These courts, however, point to the statutory scheme of the Black Lung Act in finding an exception to the general retroactivity rule. Because Congress specifically provided in § 435 that all claims pending before or denied by the Secretary should be reconsidered under the 1977 Reform Act, it is reasonable to conclude that Congress intended to make the Reform Act non-retroactive as to cases pending in the courts. Additional support for this position is drawn from the legislative history. In particular, a provision which would have made the amendment retroactive to December 30, 1969, was considered and specifically rejected by Congress, and the Conference Committee report states

only that the amendment would become effective on the date of enactment. From this, it follows that Congress must have intended that claims re-established under the Reform Act should fall within the retroactivity exception. See Moore v. Califano, 633 F.2d 727 (6th Cir. 1980). One court has also reached this result under the "necessary to prevent manifest injustice" rationale against retroactive application. Thus in United States Steel Corp. v. Gray, 588 F.2d 1022 (5th Cir. 1979), the court ruled that the Benefits Review Board should have applied the pre-amendment definition of pneumoconiosis to justify the miner's claim. In this case manifest injustice would have otherwise resulted unless all the parties were also given an opportunity to present new evidence based upon the amended definition.

A general rule of refusing to apply the 1977 Act retroactively seems fully consistent with the liberal purpose of the act and its amendments. By reviewing the claim under the old law, the court leaves open the possibility that the successful claimant can receive payments back to the time his claim was filed or to the onset of total disability, whichever is later. If the claimant loses, he is still free under § 435 to request a review of his case and in such review he would still have all the benefits of the reform provisions. Nonretroactive application is also beneficial to claimants because each claimant requesting review under § 435 may choose review by either the Secretary of HEW (as formerly) or the Secretary of Labor and, if he chooses Labor, he may introduce new evidence. Section 435 requires HEW to notify all claimants who had previously been denied benefits and all claimants who at the time of the effective date of

the amendment had claims pending before HEW that their claims could be reconsidered. The statute, in other words, gives the claimant two choices: one is a rehearing with HEW, in which case a new determination is made on the basis of evidence already on file. § 435(a)(1)(A). In the alternative, the claimant can choose a rehearing from the Secretary of Labor "with an opportunity for the claimant to present additional medical or other evidence." § 435(a)(1)(B).

The Treadway line of cases is important for more than the particular holdings. They indicate a typical analytical approach in reviewing procedural questions. That is, the underlying scheme and purpose of the statute is as important as its literal language in interpreting its reach and effect. Thus, in resolving procedural issues courts frequently focus on three considerations in addition to the statutory terms: the inclusive intent of the Act, the degree of deference to be given to the Secretary's position, and the liberal purpose of the amendments. Each deserves further examination.

In keeping with the stated inclusive intent of the statute, courts have prevented disparities in treatment simply on the basis of different application dates, unless the disparity is required by the statute. In Ohio River Collieries, Inc. v. Secretary of Labor, 558 F.2d 353 (6th Cir. 1977), the court was faced with the application of the statute of limitations to a transition period Part C claim. The claimant in Ohio River had filed on August 14, 1973, during the transition period. Transition period claims are governed by the procedural provisions of § 415, which provide for joint jurisdiction between HEW and

Labor, while applying the substantive rules of Part C. Under the time limitation then applicable in Part C (30 U.S.C. § 932(f)(2)), an employer's liability was generally limited to claims filed within three years from the miner's last exposure to coal dust, and this claim was filed after that time period. The court agreed with the employer's argument that this limitation period operated to relieve the employer of liability. The court reasoned that an employer should not have more liability under transition period claims than he would have under a Part C claim. The Secretary of Labor made a similar argument of non-liability. Following the employer's suggestion, it argued that the government's liability under § 424 arises only where the claimant is entitled to benefits under § 932 and here no operator was required to pay the benefits. That is, since the claimant's failure to file within the statutory limitation period cut off employer liability under § 932, the Secretary argued that liability should not be assumed by the government. However, relying on the purpose of the statute to provide benefits and the express purpose of the transition period provision (§ 415) to provide for an orderly transfer of responsibility from HEW to Labor, the court rejected the government's argument and required that the Secretary of Labor assume liability throughout the claimant's disability. In so doing, the court pointed out the obvious injustice of providing lifetime benefits for a miner who files June 30, 1973 (during Part B) and of limiting or denying benefits to a miner who files on July 1, 1973 (during the transition period). Id. at 357.

A second factor that frequently arises in procedural matters is whether deference should be paid to the Secretary's position,

and how much. See, e.g., Republic Steel Corp. v. United States Department of Labor, 590 F.2d 77 (3rd Cir. 1978). Before examining black lung cases in this area note should be taken of the two opposing views of the degree of deference due to agency interpretations of its statutory authority that have emerged in Administrative Law. See, e.g., Democratic Senatorial Campaign Committee v. FEC, Dkt. No. 80-2074 (D.C. Cir. Oct. 9, 1980) (per curiam) (majority of two--Wright and Ginsburg arguing for little deference and that courts need not rubber stamp administrative decision; Judge Wilkey dissenting arguing that the court is not to construe the statute de novo but should instead determine if the Commission's interpretation of the statute is supported by a rational basis). Whether deference should be shown and the amount applicable in the particular case turns on several factors. One is the consistency of the agency interpretation with relevant statutory language, purpose and history. Another is whether the agency claims expertise in an area; if so, courts are often highly deferential, especially where the decision turns on technical matters. However, little deference is accorded where courts are equally able to resolve the issue. Similarly, where the Secretary can point to indications of congressional endorsement of his position--for example, where Congress knows of the agency's interpretation yet reenacts a provision without modification--courts can be persuaded to defer. See Moore v. Harris, 623 F.2d 908, 919 (4th Cir. 1980). Courts also frequently defer to the long-standing and consistent application of the agency's position and the need to allow some experimentation on new issues of the Secretary. See generally, L. Jaffe, Judicial Control of Administrative Action, 569-85 (1965); G. Robinson, E. Gellhorn, & H. Bruff,

The Administrative Process, 132-41 (2d ed. 1980).[6]

This dichotomy in the rule of judicial deference is also reflected in black lung cases. For example, in Hall v. Secretary of HEW, 600 F.2d 556 (6th Cir. 1979), the court found that the interpretations of the statute by HEW and Labor who both agreed to relegate survivor's claims to HEW because of statutory ambiguity conflicted with congressional intent and held that no deference should be shown. Accord Moore v. Harris, 623 F.2d 908 (4th Cir. 1980) (courts are not freed from their responsibilities to determine what the law is and whether the regulation is consistent with law). However, in Hill v. Califano, 592 F.2d 341 (6th Cir. 1979), the court deferred to the agency's regulations on resolution of conflicting x-ray readings by designating two classes of readers. (See p. 33, infra).

A third consideration in procedural, as well as in other areas, is the liberal purpose of the amendments. In both amendments to the Act, Congress has expanded the scope of the program. This generally expansive trend,[7] supports a judicial posture justifying payments favorable to claimants where close questions of law are present. In 1972, Congress extended black lung coverage from underground miners to all coal miners, and in 1977 the benefit program was further extended to include workers in mining-related activities. In addition, new categories of beneficiaries

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6. See S. 111, 1st Sess. (1979) (Bumpers amendment to 5 U.S.C. § 706 proposing a reversal of the reversing presumption of validity of agency regulations and requiring de novo review on questions of law).

7. Compare the generally restrictive trend in social security disability legislation. See [1967] U.S. Code Cong. & Admin. News, 2882-83.

were added in each instance. Congress has also consistently made it easier for miners to establish their entitlement to benefits by a series of amendments that lowered the evidentiary standards (e.g., forbidding denial of benefits solely on the basis of negative chest x-rays) and added presumptions that the disability was work-related such as the 15 year rule of § 411(c)(4) and the 25 year rule of § 411(c)(5)). This legislative direction justifies an approach to "black lung" issues that is claimant oriented, based upon the remedial purposes of the statute.

One final nonsubstantive issue that has been litigated in several circuits is the question of the payment of a claimant's attorney's fees. (Payment of such fees is provided for under Part B by the government and Part C claims by the responsible operator, where one is found.) The statutory interpretation problem arose as a result of the 1977 amendments. Before the operators could be found liable for pre-1970 payments and claimants were entitled to seek counsel fees (under 30 U.S.C. § 932 (a) which incorporates the counsel fee provisions of the Longshoremen and Harbor Worker's Compensation Act, 33 U.S.C. § 928 (a)). The 1977 amendments relieved the operator of this pre-1970 liability for benefit payments by placing it on the industry as a whole through the Trust Fund. Yet there was no specific reference to counsel fees in either the amendment or the legislative history.

The Department of Labor first contended that the Black Lung Disability Trust Fund was not liable to pay a claimant's attorney's fees where no responsible operator is found (and the Fund therefore has secondary liability) or where the claimant's employment terminated before 1970 (in which case the statute places primary liability upon the Fund to provide benefits to the claim-

ant.) 43 Fed. Reg. 36789, 20 C.F.R. § 725.367(comment (f)). However, in Republic Steel Corp. v. Department of Labor, 590 F.2d 77 (3rd Cir. 1978), the Benefits Review Board had assessed attorney's fees against the Fund where it was also liable for the claimant's pre-1970 payments. In upholding this conclusion, the court examined the three potential sources of the fee payments. It agreed with the employer that the Randolph Amendment in 1977 intended to relieve the employer of financial burdens for pre-1970 payments, including payments of attorney's fees. On the other hand, the court also reasoned that the claimant should not be forced to bear the burden of paying his attorney's fees since the thrust of the 1977 amendments was to liberalize benefits to claimants. It would be incongruous to interpret them as depriving a claimant of a benefit that he would have received prior to the amendment. Thus it was held that the Labor Department's position could be sustained only if there is a clear congressional policy requiring the court to deny claimants such fees. See also Director, Office of Worker's Compensation Programs v. South East Coal Co., 598 F.2d 1046 (6th Cir. 1979); Director, Office of Worker's Compensation Programs v. Leckie Smokeless Coal Co., 598 F.2d 881 (4th Cir. 1979); Director, Office of Worker's Compensation Programs v. Black Diamond Coal Mining Co., 598 F.2d 945 (5th Cir. 1979); Bethlehem Mines Corp. v. Warmus, 578 F.2d 59 (3rd Cir. 1978).

D. Medical Evidence

By far the largest group of black lung cases on appeal involve questions that can be loosely grouped under the rubric of medical evidence. Within this heading are such issues as:

what evidence is admissible; what weight must be given to certain types of medical evidence; and what is the role of medical opinion.

Although the administrative law judge does not have a specific statutory duty to develop the record, he has power to do so. Thus several courts have imposed a responsibility on ALJs in black lung cases for assuring the completeness of the evidence. This duty includes assisting the claimant in developing sufficient medical evidence to substantiate his claim. See, e.g., Prokes v. Mathews, 559 F.2d 1057, 1059 (6th Cir. 1977); Farmer v. Mathews, 584 F.2d 796 (6th Cir. 1978).

The Act does not specify any particular means of proving the existence of the disease. It mentions the usual techniques of chest x-rays, biopsies and autopsies. Each has its limitations: x-rays may be read as negative because of their poor quality, because the disease is in an early stage at which point it is difficult to be seen, or because of other respiratory problems, such as emphysema, which may mask evidence of pneumoconiosis; biopsies are complicated and sometimes painful procedures that claimants may be reluctant to undergo; and autopsies are obviously only available in establishing a survivor's claim. In addition to these types of evidence, the regulations provide standards for tests of breathing capacity which may be used in connection with the statutory presumptions. Because of the limitations of direct evidence, doctor's reports, including medical opinion evidence, are often a substantial portion of the record. Since these are administrative hearings, doctor's reports are admissible and the doctor need not be available to assure their introduction into evidence. 5 U.S.C. § 556(d). That is, if

reliable and probative, hearsay evidence is treated like other evidence and may be the basis for granting or denying a claim. See United States Pipe and Foundry Co. v. Webb, 595 F.2d 264 (5th Cir. 1979); cf. Richardson v. Perales, 402 U.S. 389 (1971). See generally, Gellhorn, Rules of Evidence and Official Notice in Formal Administrative Hearings, 1971 Duke L.J. 1, 12-26.

1. "Relation Back" Doctrine

One particularly pressing issue in the area of medical evidence is the probative value of evidence obtained after June 30, 1973, the date of transition of authority from HEW to Labor, in reviewing a claim filed with HEW under Part B or during the transition period. Under the strict view adopted by the Secretary of HEW, claimants who filed with HEW prior to June 30, 1973 had to present evidence which showed proof of disability by that date. However, in reviewing these claims, courts have consistently adopted a doctrine of "relation back." That is, medical evidence established after the July 1, 1973 cut-off date is admissible and may be considered by the administrative law judge to establish the existence of the disease. The importance of the relation-back doctrine to claimants is that by coming within the scope of Part B, claimants avoid the statute of limitations established in Part C and thereby may obtain permanent federal coverage. In addition, the interim regulations available for Part B and transition claimants are generally more favorable. Therefore, the decision as to admissibility and weight of evidence obtained after the cut-off date may be critical to some claimants.

The doctrine of relation back has been adopted by several courts. See, e.g., Armstrong v. Califano, 599 F.2d 1282 (3rd Cir. 1979); Begley v. Mathews, 544 F.2d 1345 (6th Cir. 1976), cert. denied, 430 U.S. 985 (1977). One argument advanced in support of the doctrine is that HEW's jurisdiction requires only that the claim be filed prior to June 30, 1973, with no additional requirement that the disability be shown to have existed on or before that date. Other courts have rejected this argument, however, even while applying the doctrine. They relied on a different rationale, namely that the disability must be proven to have existed before the transition date in order to establish a claim. In allowing subsequent medical testing to be used in proving the existence of disabling pneumoconiosis, they justify the rule by pointing to the progressive nature of the disease and the liberal evidentiary standards. See Begley v. Mathews, supra. Such evidence is relevant, therefore, to the extent that it tends to show the claimant's condition before the cut-off date. On the other hand, where a ventilatory study made immediately after the cut-off date shows "normal" breathing capacity, later contrary studies will not be considered probative. See Moore v. Califano, 633 F.2d 727 (6th Cir. 1980). Whatever the rationale, the result under the relation back doctrine is to allow claimants to rely on later developed evidence to prove the existence of a disability prior to the June 30, 1973 cut-off date.

2. Discretion of Secretary to Evaluate Evidence

In general, the Black Lung Act's regulatory scheme assumes that the Secretary is free to use his discretion in resolving conflicts in medical evidence. This assumption is the result of the usual understanding that the evaluation of witness credibility is within the discretion of the hearing officer. See United States Steel Corp. v. Bridges, 582 F.2d 7 (5th Cir. 1978). This discretion can be overturned only if "arbitrary, unreasonable, or an abuse of discretion." Hill v. Califano, 592 F.2d 341, 346 (6th Cir. 1979); 5 U.S.C. § 706(2)(A). On the other hand, several review courts have narrowed the usual deference given to the Secretary's decision of how to weigh conflicting medical evidence. Generally greater weight is accorded to the report of an examining physician than to that of a consulting physician. Thus, several courts have restricted the ALJ in the use of his own expertise when his impressions are contrary to the medical opinion of a physician who testifies before him. See, e.g., Gober v. Mathews, 574 F.2d 772 (3rd Cir. 1978); Schaaf v. Mathews, 574 F.2d 157 (3rd Cir. 1978).

Because of the complexity of the medical evidence involved, an ALJ in reaching his decision may call an independent, consulting physician to review and comment upon the evidence. This practice presents the danger that an ALJ may call more frequently upon consulting physicians who are likely to agree with him. Thus in addition to agency restraints on the use of such testimony, courts have limited the degree to which an ALJ may rely on the testimony of a consulting physician. The usual approach is

to state the requirement in qualitative terms. For example, in Shrader v. Califano, 608 F.2d 114 (4th Cir. 1979), the court ruled that an ALJ may not base his decision on the opinion of a consulting physician where the physician's report is stated in conclusory terms and the law judge's decision was not adequately explained. Similarly, in Petry v. Califano, 577 F.2d 860 (4th Cir. 1978), the court reversed the Secretary's decision where there was no evidence other than normal pulmonary function tests to support the opinion of the consulting physician upon which the ALJ based his denial of the claim.

3. X-ray Evidence

Since x-ray evidence is one of the major sources of medical evidence for black lung claimants, strongly controverted issues concerning the reading of chest x-rays continue to be pressed. In the 1972 amendments, Congress added § 413(b) to the Act, ruling that no claim may be denied solely on the basis of negative chest x-rays. This provision was upheld against constitutional attack on substantive due process (arbitrariness) grounds since Congress had evidence demonstrating the questionable reliability of x-ray evidence. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). Prior to 1972, agency procedures required that claims be denied if the x-ray evidence of pneumoconiosis was negative. Congress changed the rule, forbidding denial solely on negative x-rays, after hearings at which it was revealed that 62% of denials of benefits were based on negative x-rays. [1972] U.S. Code Cong. & Admin. News 2316. The question remains, however, whether negative x-rays corroborated by a physician's opinion that claimant does not suffer from totally disabling pneumoconiosis are sufficient to deny benefits.

The practice of "rereading x-rays" by the Department of Labor (and previously of HEW) to deny claims has created strong adverse reaction. Under this agency practice, the government has relied on contract radiologists to provide independent interpretations of x-rays submitted with black lung claims. Congressional reaction, as reflected in the 1977 amendment conference report, was direct: "This procedure has elicited deep resentment among claimants, who believe strongly that the government readers are utilized solely for the purpose of denying claims. While the Committee does not concur in this belief, it is concerned that this procedure alone has done more to destroy the credibility of the federal government's administration of this program among miners and widows than any other factor." [1978] U.S. Code Cong. & Admin. News 256. The revised statute now provides that readers of x-rays shall be certified and classified as either "A" or "B" readers, with "B" readers passing a higher level proficiency exam. The agencies must give finality to a "B" reader's interpretation of an x-ray for purposes of classification over an interpretation of an "A" reader's interpretation.

Despite criticism of this practice, it withstood constitutional challenge as a violation of due process in Hill v. Califano, 592 F.2d 341 (6th Cir. 1979). In addition, the court held that the procedure did not exceed the Secretary's statutory authority under § 203 to process and classify hundreds of thousands of x-rays received by the agency. The court, however, did note that there is no evidence that "B" readers' interpretations are binding outside the Secretary's internal classification system.

Thus, in entitlement proceedings the Secretary must still consider all the evidence. Nonetheless, the cases are in conflict as to whether this prohibition of rereading of x-rays also applies to Part B claims. For example, one panel of the Sixth Circuit, in Dickson v. Califano, 590 F.2d 616 (6th Cir. 1978), held that the 1977 Amendment's provision making x-rays binding on an ALJ also applied to a Part B claim. The Fourth Circuit and other panels in the Sixth Circuit have not agreed with this conclusion. Sharpless v. Califano, 585 F.2d 664, 665 n.1 (4th Cir. 1978); Back v. Califano, 593 F.2d 758 (6th Cir. 1979); Moore v. Califano, 633 F.2d 727 (6th Cir. 1980).

A finding of non-retroactivity of the negative x-ray provision seems to be the better approach for several reasons. (pp. 19-20, supra). The statutory scheme itself supports this result as does the legislative history. See Moore v. Califano, 633 F.2d 727, 732 (6th Cir. 1980). Since Congress explicitly rejected a proposal that would make x-ray reading provisions retroactive, the intent of Congress is clear. Id. In addition, application of new provisions at the appellate review stage embroils the court in inappropriate fact-finding determinations. Id.

4. Other Medical Evidence

Although black lung claimants usually rely on x-rays as their first source of substantiation, they may, because of the difficulty in x-ray detection of the disease, find it necessary to introduce other types of medical proof such as pulmonary function tests, medical opinion, or corroborated lay opinions. On the other hand, this "other" medical evidence is frequently

questioned, especially in cases in which the miner seeks to establish his entitlement to benefits through the use of the statutory presumption under § 411(c)(4).

The presumption created by § 411(c)(4) is one of the most frequently used in the statute. It allows a miner with fifteen years of underground coal mine employment, who does not otherwise qualify for benefits through positive chest x-rays, to rely on "other evidence" to show a totally disabling respiratory impairment. Once sufficient "other evidence" is shown, it is presumed that the miner is totally disabled because of pneumoconiosis. While a powerful aid to claimants, the statutory presumption can be rebutted (as described further below) but only with convincing proof either that the miner did not in fact have pneumocuniosis or that his impairment was not caused by being employed as a coal miner.

The "other evidence" most frequently relied upon under § 411 (c)(4) is the reading of pulmonary function tests. These tests measure the breathing capacity of the miner. If a miner's breathing capacity is sufficiently impaired and therefore falls below the level established by regulations issued by the Secretary of Labor, the claimant is presumed to have pneumoconiosis. 20 C.F.R. § 718.103. However, where the pulmonary test results do not meet these established levels, the question arises as to what inference may properly be drawn from them.

Several courts have now concluded that such nonpresumptive pulmonary tests may, when joined with other probative evidence, adequately support a black lung claim. First, in Henson v. Weinberger, 548 F.2d 695 (7th Cir. 1977). it was held that a failure

to achieve a test score which would trigger a presumption is not proof of the nonexistence of pneumoconiosis. Then, in cases such as Ohler v. Secretary of HEW, 582 F.2d 500, 504 (10th Cir. 1978), it was held that even if a claimant's test scores meet the regulation's criteria for establishing that his breathing difficulties are due to pneumoconiosis, tests that show some breathing problem may be used as the "other" evidence of a chronic respiratory impairment required by the § 411(c)(4) presumption. The final step was recently taken in Prater v. Harris, 620 F.2d 1074, 1085 (4th Cir. 1980), where the court ruled that the closer the claimant's score is to the presumption levels in the tables set forth in the regulation, the stronger the inference that the claimant does indeed have some form of respiratory disability.

5. Evidence Sufficient to Invoke Presumption

While pulmonary function tests are one type of evidence qualifying as "other" evidence for purposes of invoking § 411(c)(4), the evidence used to invoke the presumption need not be limited to medical (i.e., clinically verifiable) evidence. In United States Steel v. Bridges, 582 F.2d 7 (5th Cir. 1978), the corporation argued that the hearing examiner's reliance on a claimant's testimony in addition to medical evidence was in violation of the definition of "other evidence" in the regulations. The court rejected this argument that only medical evidence came within the "other evidence" category.

> "We hold that the phrase 'other evidence' as used in reference to the third element necessary to create a presumption under 30 U.S.C. § 921(c)(4) is to be given its ordinary meaning and that the hearing officer may therefore take into account all relevant evidence in determining the existence of disabling pneumoconiosis, including the claimant's testimony." Id. at 8.

However, no court has gone so far as to invoke the § 411(c)(4) presumption solely on the basis of lay testimony. That is, the testimony of co-workers, neighbors, and relatives regarding the claimant's breathing difficulties or incapacity to work in the mines is not in itself substantial evidence. See Peabody Coal Co. v. Director, 581 F.2d 121, 123 (7th Cir. 1978)("[I]n order to invoke the statutory presumption, it must be established from medical evidence, and not lay testimony alone, that the claimant is suffering from a totally disabling pulmonary disease, which then may be presumed to be pneumoconiosis.").

On the other hand, opinion testimony by the claimant's physician has been relied upon to invoke the presumption, even if the record contains little or no objective data to support the physician's opinion. Miniard v. Califano, 618 F.2d 405 (6th Cir. 1980) is illustrative of the mere semblance of medical evidence which courts have found sufficient for applying the presumption. There, the court found that adequate evidence existed despite the fact that the record consisted of seven contradictory readings of three x-rays and one inconclusive report from the claimant's personal physician. The conclusion of pulmonary disability was accepted even in the absence of a specific statement by the treating physician of total disability due to a respiratory impairment and the claimant's continued working for three years after he filed for benefits.

In another frequently cited Sixth Circuit opinion involving § 411(c)(4), Ansel v. Weinberger, 529 F.2d 304 (6th Cir. 1976), the claimant was unable to prove the existence of pneumoconiosis by either x-ray evidence or pulmonary function studies. He

therefore sought to substantiate his claim by reliance on the § 411(c)(4) presumption. The medical evidence clearly indicated that the claimant was suffering from cerebral arteriosclerosis and anteriosclerotic heart disease (which led the ALJ to conclude that these nonmine-related conditions were the cause of the claimant's disability). Nonetheless, the court emphasized the report of Ansel's personal physician which ascribed his total inability to work to chronic respiratory or pulmonary disease. This singular piece of medical opinion evidence which was derived from a cryptic reply to a question in a black lung medical report[8] along with lay testimony was held to be sufficient to invoke the presumption.

Ansel's broad reading of § 411(c)(4) has been followed in the Sixth and other circuits in holding that the affirmative testimony of the claimant's doctor alongside uncontradicted lay testimony is sufficient to invoke the presumption. See, e.g., Singleton v. Califano, 591 F.2d 383 (6th Cir. 1979); Henson v. Weinberger, 548 F.2d 695 (7th Cir. 1977). Singleton specifically cited Ansel in holding that the testimony of the claimant as to his breathing difficulties and the statement of the claimant's personal physican that Singleton was permanently disabled due to chronic lung disease entitled the claimant to the statutory presumption. Henson similarly holds that the Secretary is required to award benefits where the claimant and

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8. "To the question, 'If the applicant has chronic respiratory or pulmonary disease, what is your medical assessment of the severity of this impairment, i.e., to what extent does it prevent him from performing coal mine work?--Explain,' he answered, 'Total.'" 529 F.2d at 305.

his doctor testify as to total disability from respiratory impairment. "The testimony of Mr. Henson and Dr. Peters make out a prima facie case of a respiratory or pulmonary impairment, totally disabling from coal mine or comparable work."

This is not to say that there are no limits to the possible use of the statutory presumption in support of a miner's claim. For example, in Moore v. Califano, 633 F.2d 727 (6th Cir. 1980), the Sixth Circuit, while citing Ansel, showed an unwillingness to invoke the § 411(c)(4) presumption on the basis of scant medical opinion testimony. The claimant clearly suffered from heart disease, and the court found that one physician's report was inconclusive and that the Secretary was justified in refusing to invoke the presumption. (The only positive evidence was the physician's statement that there was a "possibility" the claimant's heart disease was related to his black lung ailment.) Whether this approach to medical opinion evidence, which is more consistent with the traditional stance of limited judicial review under the substantial evidence standard, will lead to a contraction of the fourth statutory presumption is difficult to assess. Congress intended that benefits be liberally granted. Yet the program was also designed to protect black lung victims, and pressures to limit benefit costs seem likely to encourage other courts to follow the Moore court's lead of relying upon a standard of some reliable evidence.

The effort to draw a reasonable and workable line has proved difficult. For example, the attempt to resolve the problem by a negative inference drawn from negative tests has been

severely criticized. Social Security Ruling, SSR 73-37 provided that where x-ray or ventilatory function studies fail to establish total disability, an inference can be drawn that the miner is not totally disabled. But the Eighth Circuit rejected this approach as unreasonably creating a counter-presumption contrary to the legislative purpose of the 1972 Act. See Bozwich v. Mathews, 558 F.2d 475 (8th Cir. 1977). Similarly, the Sixth Circuit has not followed the ruling's suggested approach, although it did not invalidate the ruling entirely. See, e.g., Prokes v. Mathews, 551 F.2d 383 (6th Cir. 1979); Singleton v. Califano, 591 F.2d 383 (6th Cir. 1979); Cunningham v. Califano, 590 F.2d 635 (6th Cir. 1978); Maddox v. Califano, 601 F.2d 920 (6th Cir. 1979).

As a consequence of this criticism, a new ruling, SSR 79-33 (Cumulative Edition, 1979), was issued. It supercedes the earlier approach and abandons the effort to draw an adverse inference from negative x-rays and tests. SSR 79-33 provides that the other supporting evidence must be of the "level of severity contemplated in § 410.426" to establish the existence of total disability. That is to say, just as proving total disability by meeting test criteria "must be based on medical evidence that demonstrates that the requisite level of severity is met, so too must such a finding under paragraph (d) [other relevant evidence] be based, where the evidence is conflicting, on evaluation of all the available relevant evidence and the preponderance of all such evidence must prove total disability. While the opinion of a physician that a person is totally disabled is 'relevant evidence'

and must be considered, such opinion, in itself without the support of clinical findings, will not be controlling." Id.

The effect of the new ruling is not substantially different from the disapproved rule it replaces. It will still only be an unusual case where a claimant's ventilatory tests do not meet the regulatory criteria that the claimant could be found totally disabled due to a lung impairment. This is because the ruling specifies that objective medical evidence should be afforded greater weight than subjective evidence: where all clinical tests are negative the claimant is not totally disabled despite observation and opinion evidence of his physician. Although the new ruling eliminates the negative inference which was so objectionable to the courts, it remains in basic conflict with numerous cases invoking the § 411(c)(4) presumption to award benefits largely on the basis of subjective testimony.

6. Rebuttal Evidence

In addition to questions concerning the requisite evidence for the § 411(c)(4) presumption to apply, the issue of rebuttal evidence is frequently raised. Rebuttal is limited by the terms of the statute to two types of evidence showing (1) that the miner does not, or did not, have pneumoconosiosis; or (2) that the claimed impairment did not arise out of coal mining employment.

Where a claimant suffers from multiple medical problems, the employer may seek to show that the disability "arose out of" another cause and not because of the claimant's employment. In general this effort is unlikely to be successful once the claimant

has invoked the § 411(c)(4) presumption, because causation is presumptively established and the burden of ruling out causality shifts to the employer. As Rose v. Clinchfield Coal Co., 614 F.2d 936 (4th Cir. 1980) illustrates, proof of a negative is extraordinarily difficult. There the court explicitly shifted the burden to the employer.

In addition, Ansel v. Weinberger, 529 F.2d 304 (6th Cir. 1976), holds that negative x-ray evidence is not sufficient to rebut the statutory presumption. There the court relied upon the statutory prohibition which forbids the use of negative x-rays as the sole basis for denying benefits. It similarly stated that the presumption cannot be rebutted by showing negative pulmonary function studies. At the very least, the Secretary must rely on some medical opinion in concluding that the claimant did not have pneumoconiosis if the presumption is to be overcome. The Seventh Circuit approved this reasoning in Henson v. Weinberger, 548 F.2d 695 (7th Cir. 1977), when that court held that failure to achieve qualifying ventilatory test scores does not establish that the claimant is not entitled to the presumption. In the words of the Ansel court: "The regulation which establishes the levels required for a finding of disabling pneumoconiosis on the basis of a ventilatory study does not purport to provide proof of the non-existence of pneumoconiosis." 529 F.2d at 310.

Rebuttal evidence based upon the time intervening between the claimant's last work in a coal mine and his filing for benefits was considered in Bozwich v. Mathews, 558 F.2d 475 (8th Cir. 1977). There the court rejected the Secretary's

argument that a 30-year interval between coal mine employment and the claimant's first attempt to seek benefits indicates that the impairment did not arise out of such employment. "The mere possibility of an intervening cause is insufficient to rebut a statutory presumption." 558 F.2d at 480.

A potential problem in the area of medical evidence is the "aggravation theory" of pneumoconiosis. Under this theory, the statute covers not only coal worker's pneumoconiosis but also any pre-existing impairment which has been aggravated over the years by coal dust exposure. This coverage goes even further than the extension of the definition of pneumoconiosis beyond the classical medical definition of coal worker's pneumoconiosis to cover the "sequelae" or consequences of a chronic dust disease of the lung. The regulations amplify this statutory definition by specifying: "For purposes of this definition [of pneumoconiosis], a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by, dust exposure in employment." 20 C.F.R. § 727.202 (emphasis added).

However, the Fifth Circuit questioned this "aggravation theory" of the disease in United States Steel v. Gray, 588 F.2d 1022 n.3 (5th Cir. 1979), although the validity of the regulation was not specifically challenged there. In Gray the court held that a hearing officer had not adequately evaluated the evidence; his finding that the claimant had severe emphysema aggravated by dust exposure--a conclusion that stopped short of finding pneumoconiosis--was inadequate to support the § 411(c)(4) presumption. "[E]mphy-

sema however aggravated by dust, is not a chronic dust disease of the lung arising out of employment in coal mines." Id.

E. Proof of Total Disability

While issues concerning the sufficiency of medical evidence predominate, several cases have centered on the proof of total disability. Here the claimant's continued work has been frequently asserted as a defense. Several principles are now established. First, where a living miner has been in gainful and comparable employment after leaving the mines, he is not totally disabled. Padavich v. Mathews, 561 F.2d 142 (8th Cir. 1977). This does not mean that there can be no claim where the benefit claim is filed by a survivor and the miner had worked until the time of death; continued employment itself does not completely destroy the claim. However, the survivor must prove that the miner either died from pneumoconiosis or was disabled by it at the time of death. The statute establishes that "a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled." § 402(f)(1)(B)(i).

On the other hand, continued employment is often persuasive grounds for denial of a black lung claim. E.g., Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975). One instance of such a result is where the miner has performed regular, full-time work up until his death. Adkins v. Weinberger, 536 F.2d 113 (6th Cir. 1976); Jackson v. Weinberger, 532 F.2d 1059 (6th Cir. 1976). Another situation in which continued employment may constitute substantial evidence to support the Secretary's denial is where the miner's job at the time of his death was as a foreman or super-

visor. Felthager v. Weinberger, 529 F.2d 130 (10th Cir. 1976). Finally, the regulations also provide that where "it can be shown that there are no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work," the claim should be denied. 20 C.F.R. § 718.204(e)(2).

F. Causation Issues

Once a miner has established that he is a worker covered by the Act, that he suffers from pneumoconiosis, and that he is totally disabled, the only other element left for him to satisfy in order to prove his claim is causation. The black lung law requires that in order for entitlement to benefits be established, a miner's disability must arise out of coal mine employment. Therefore, as a theoretical matter, a claimant has the burden of demonstrating that the respiratory impairment from which he suffers is due to his exposure to coal dust and not to other causes, such as years of cigarette smoking or a preexisting condition of the lungs. However, as a practical matter, the burden has been lessened significantly by the presumptions in the Act, by the Secretary of Labor's administrative regulations, and by judicial construction.

If a claimant can invoke any of the five statutory presumptions in § 411(c), it is presumed that the claimant's impairment is due to coal mine employment. Thus, in most cases the issue of causality does not arise. Nonetheless, the causal link may be destroyed where the claimant relies on a rebuttable presumption and the coal operator can demonstrate that the miner's disability was in fact due to other causes. Similarly, the causation prob-

lem is more difficult for a miner who was not employed in a coal mine for the required number of years to rely on one of the statutory presumptions. Such a claimant must establish through "competent evidence" that his "pneumoconoisis arose at least in part out of coal mine employment." 20 C.F.R. § 718.203.

Under the regulations promulgated by the Secretary of HEW which still govern Part B claims, pneumoconiosis must be the primary cause of the claimant's disability. 20 C.F.R. § 410.26 (a). Establishing this primary contribution may be all but impossible where the claimant suffers from more than one medical condition and it is unclear which cause is "primary." However, courts have shown a willingness in some circumstances to relax the primary cause requirement. For example, in Peabody Coal Co. v. Benefits Review Board, 560 F.2d 797 (7th Cir. 1977), the court ruled that substantial evidence supported the grant of benefits where the hearing officer found that both heart disease and pneumoconiosis were totally disabling and did not specifically use the "primary cause" wording of the regulations. The court ruled that "as long as the decision contains a finding which is equivalent to a conclusion that pneumoconiosis is the primary reason for the disability, the decision complies with the regulations." 560 F.2d at 801. Here the court relied upon the hearing officer's statement that "pneumoconiosis is the operative cause, in whole or in part, of the claimant's totally disabling impairment." Id.

The Fourth Circuit in Rose v. Clinchfield Coal Co., 614 F.2d 936 (4th Cir. 1980), showed a similar willingness to relax the

causation burden where the claim is based on one of the statutory presumptions. There the claimant was a miner's widow who established her claim by relying on § 411(c)(4)'s fifteen-year presumption. In response, it was argued that cancer was listed as the cause of death on the death certificate. The Board accepted this argument in denying benefits, ruling that the claimant had failed to establish a causal relationship between the cancer and pneumoconiosis, or between the cancer and coal mine employment. In overturning this interpretation, the court in Rose implicitly rejected the regulation's requirement that claimant show that pneumoconiosis was the primary cause of his impairment. Once the claimant triggers the § 411(c)(4) presumption by showing fifteen years employment in the mines and a disabling respiratory impairment, the burden of demonstrating another cause shifts to the respondent. In this circumstance it is not necessary for the claimant to establish a causal link: "on the contrary it is the respondent's failure effectively to rule out such a relationship that is crucial here." 614 F.2d at 939. The court justified this shift in the burden of production and persuasion by pointing to both the language of § 411(c)(4) and the congressional purpose. The court reasoned that the claimant invokes the presumption by showing (1) that claimant had worked the requisite number of years and (2) that the miner had suffered from a disabling respiratory impairment. The statute does not require that claimant make any showing on causation. Causation issues arise by way of rebuttal under § 411(c)(4)(B) in which the Secretary may show that the claimant's impairment did not arise out of coal mine

employment. The court also pointed to the congressional intent that the Act should receive a construction favorable to the miner.

A similar result was reached in Farmer v. Mathews, 584 F.2d (6th Cir. 1978), where a miner's death certificate indicated that the cause of death was "probably myocardial infarction." The Farmer court ruled that this statement was not sufficient evidence to show that pneumoconiosis was not the cause of death because the autopsy report revealed that the miner had pneumoconiosis at the time of his death. Again the burden appears to have been shifted to the respondent since the court remanded the case for a finding as to whether death could be medically ascribed to a chronic dust disease of the lungs. New regulations promulgated by the Secretary of Labor which apply to claims filed after March 30, 1980, follow this trend in liberalizing the claimant's causation burden. These regulations do not impose a "primary cause" requirement, but instead require only that the miner's pneumoconiosis arise "at least in part out of coal mine employment." 20 C.F.R. § 718.203 (emphasis added).

IV. CONCLUSION

The general trend of appellate courts in reviewing black lung appeals shows a clear bias favoring claimants. This approach is supported not only by the remedial purpose of the statute but also by the series of broadening amendments enacted by Congress in the 1970s. In contrast to social security disability cases (which courts at times appear to confuse with black lung matters) where Congress has often expressed its concern with overly expansive interpretations by the district courts, judicial review of black lung cases seems properly confined. Appellate courts have usually restricted themselves to limited review of the administrative findings under the substantial evidence standard and recognized that their primary obligation is to assure that the evidence, viewing the record as a whole, supports the Secretary's conclusions. They have recognized that the question on appeal is not whether the reviewing court would have read the evidence in the same fashion and reached the same conclusion as the deciding agency; their function is limited to protecting against arbitrary actions and unsupported results.

Similarly, review court interpretation of the Black Lung Act is generally congruent with the congressional intent, including that evidenced in recent amendments. Despite this apparent faithfulness to the legislative direction, the cases have not entirely avoided unpersuasive, inconsistent and sometimes anomalous results. Many claims are now approved solely because of statutory presumptions or expansive interpretations of the evidence. In any other setting the determinations of liability would be viewed more suspiciously and the administrative findings considered less convincing. Different

treatment of evidence because of irrebutable presumptions also leads to fortuitous rather than reasoned benefit awards. For example, the 1977 amendments preclude any rereading of x-ray evidence. This creates a situation in which liability is based on a positive reading for pneumoconiosis by one reader as long as the miner has at least 10 years of coal mine employment--even though subsequent readings of the x-ray by more skilled readers are negative or other negative medical evidence is introduced. That is to say, the inferential power of identical medical evidence may vary dependent upon the unrelated fact of time, i.e., how long a period the claimant can show that he worked in the mines. Similar anomalies exist because of the weight given to physician comments in differing situations. Another disturbing feature is the inconsistency of case results despite similar evidence. The one constant is that there is little, if any, verifiable medical proof in most cases considered on appeal.

This variance between case results and the rationale for black lung benefits will continue as long as claimants are to be strongly favored yet claims are required to be related to coal mine or related framework. The absence of a satisfactory and coherent legal framework, especially when connected to the program's rapidly escalating costs and possible future costs, also seem likely to create pressures for a more restrictive program. Support for this view, itself a sharp shift from past congressional actions, surfaced in a report submitted to Congress in July 1980. See Comptroller General, Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability, General Accounting Office (July 29, 1980). Its random sampling of 200 claims approved under the 1977 amendments'

provision for rehearing of previously denied claims revealed that in 88.5 percent of the cases the medical evidence in the record "was not adequate to establish disability or death from black lung." Particular criticism was directed at the extensive agency reliance on affidavit evidence, the prohibition on rereading x-rays which lead to the approval of claims even where the medical evidence is otherwise contradictory or inconclusive, and the overwhelming presumptive weight given years of coal mine employment. GAO therefore urged legislative reconsideration of the coal mine employment standard and suggested its replacement by medical evidence of disability as the basis for benefit liability.

Current attention to the cost of government grant programs in general and black lung in particular, and the controversy raised as a consequence, suggest renewed attention to the Black Lung Act. One approach may be, of course, to focus on the benefit package. This would not directly affect judicial review. Another and possibly more likely area for revision will be the evidentiary standards applied in finding that the claimant is totally disabled from pneumoconiosis caused by coal mine employment. If this approach is followed appellate review of black lung cases will be altered and the guides outlined in this manual should be reconsidered.

V. APPENDIXES

Appendix A

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 as amended by BLACK LUNG BENEFITS REFORM ACT OF 1977 (Selected Parts)*

SEC. 401. (*a*) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease or who were totally disabled by this disease at the time of their deaths; and that few States provide benefits for death or disability due to this disease or who were totally disabled by this disease at the time of their deaths to coal miners or their surviving dependents. It is, therefore, the purpose of this title to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis. . . .

PART B—CLAIMS FOR BENEFITS FILED ON OR BEFORE DECEMBER 31, 1973

SEC. 411. (a) The Secretary shall, in accordance with the provisions of this part, and the regulations promulgated by him under this part, make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or who at the time of his death was totally disabled by pneumoconiosis.

(b) The Secretary shall by regulation prescribe standards for determining for purposes of section 411(a) whether a miner is totally disabled due to pneumoconiosis and for determining whether the death of a miner was due to pneumoconiosis. Regulations required by this subsection shall be promulgated and published in the Federal Register at the earliest practicable date after the date of enactment of this title, and in no event later than the end of the third month following the month in which this title is enacted. Final regulations required for implementation of any amendments to this title shall be promulgated and published in the Federal Register at the earliest practicable date after the date of enactment of such amendments, and in no event later than the end of the fourth month following the month in which such amendments are enacted.

Such regulations may be modified or additional regulations promulgated from time to time thereafter.

(c) For purposes of this section—

(1) [if] *If* a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment[;].

(2) [if] *If* a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis[;].

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*Section number references reprinted here are to Title IV of the 1969 Act as amended; the entire act is codified at 30 U.S.C. §§ 801 et seq.

(3) [if] *If* a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis as the case may be[; and].

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his window's, his child's his parent's, his brother's, his sister's, or his dependent's claim under this title and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner worked in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory of pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(5) In the case of a miner who dies on or before the date of the enactment of the Black Lung Benefits Reform Act of 1977 who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 412(a)(2), unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evidence as is available with respect to the health of the miner at the time of his or her death.

(d) Nothing in subsection (c) shall be deemed to affect the applicability of subsection (a) in the case of a claim where the presumptions provided for therein are inapplicable.

SEC. 412. (a) Subject to the provisions of subsection (b) of this section, benefit payments shall be made by the Secretary under this part as follows: . . .

SEC. 413. (a) Except as otherwise provided in section 414 of this part, no payment of benefits shall be made under this part except pursuant to a claim filed therefor on or before December 31, 1973, in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe.

(b) In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to disability insurance benefit payments under section 223 of the Social Security Act, but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. *Where there is no medical or other relevant evidence in the case of a deceased miner, such affidavits shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis. In any case in which there is other evidence that a miner has a pulmonary or respiratory impairment, the Secretary shall accept a board certified or board eligible radiologist's interpretation of a chest roentgenogram which is of a quality sufficient to demonstrate the presence of pneumoconiosis submitted in support of a claim for benefits under this title if such roentgenogram has been taken by a radiologist or qualified technician, except where the Secretary has reason to believe that the claim has been fraudulently represented. In order to insure that any such roentgenogram is of adequate quality to demonstrate the presence of pneumoconiosis, and in order to provide for uniform quality in the roentgenograms, the Secretary of Labor may, by regulation, establish specific requirements for the techniques used to take roentgenograms of the chest. Unless the Secretary has good cause to believe that an autopsy report is not accurate, or that the condition of the miner is being fraudulently misrepresented, the Secretary shall accept such autopsy report concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis.* Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of subsections (a), (b), (c), (d), and (g) of section 221 of such Act shall be applicable. The provisions of sections 204, 205 (a), (b), (d), (e), [(f),] (g), (h), (j), (k), [and (l),] *(l), and (n),* 206, 207, and 208 of the Social Security Act shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister, or dependent, as if benefits under this part were benefits under title II of such Act. *Each miner who files a claim for benefits under this title shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation....*

SEC. 414. (a)(1) No claim for benefits under this part on account of total disability of a miner shall be considered unless it is filed on or before December 31, 1973, or, in the case of a claimant who is a widow, within six months after the death of her husband or by December 31, 1973, whichever is the later....

SEC. 415. (a) Notwithstanding any other provision in this title, for the purpose of assuring the uninterrupted receipt of benefits by claimants at such time as responsibility for administration of the benefits program is assumed by either a State workmen's compensation agency or the Secretary of Labor, any claim for benefits under this part filed during the period from July 1, 1973 to December 31, 1973, shall be considered and determined in accordance with the procedures of this section. With respect to any such claim—

(1) Such claim shall be determined and, where appropriate under this part or section 424 of this title, benefits shall be paid with respect to such claim by the Secretary of Labor.

(2) The manner and place of filing such claim shall be in accordance with regulations issued jointly by the Secretary of Health, Education, and Welfare and the Secretary of Labor, which regulations shall provide, among other things, that such claims may be filed in district offices of the Social Security Administration and thereafter transferred to the jurisdiction of the Department of Labor for further consideration.

(3) The Secretary of Labor shall promptly notify any operator who he believes, on the basis of information contained in the claims, or any other information available to him, may be liable to pay benefits to the claimant under part C of this title for any month after December 31, 1973.

(4) In determining such claims, the Secretary of Labor shall, to the extent appropriate, follow the procedures described in sections 19 (b), (c), and (d) of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended.

(5) Any operator who has been notified of the pendency of a claim under paragraph 4 of this subsection shall be bound by the determination of the Secretary of Labor on such claim as if the claim had been filed pursuant to part C of this title and section 422 thereof had been applicable to such operator. Nothing in this paragraph shall require any operator to pay any benefits for any month prior to January 1, 1974.

(b) The Secretary of Labor, after consultation with the Secretary of Health, Education, and Welfare, may issue such regulations as are necessary or appropriate to carry out the purpose of this section.

PART C—CLAIMS FOR BENEFITS AFTER DECEMBER 31, 1973

SEC. 421. (a) On and after January 1, 1974, any claim for benefits for death or total disability due to pneumoconiosis shall be filed pursuant to the applicable State workmen's compensation law, except that during any period when miners or their surviving widows, children, parents, brothers, or sisters, as the case may be, are not covered by a State workmen's compensation law which provides adequate coverage for pneumoconiosis, *and in any case in which benefits based upon eligibility under paragraph (5) of section 411(c) are involved*, they shall be entitled to claim benefits under this part. . . .

SEC. 422. (a) During any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 421(b) of this part, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended, *and as it may be amended from time to time* (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof), shall (except as otherwise provided in this subsection [and except as the Secretary shall by regulation otherwise provide] *or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 424*), be applicable to each operator of a coal mine in such

State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, *or with respect to entitlements established in paragraph (5) of section 411(c)*. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

(f) Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later—

(1) a medical determination of total disability due to pneumoconiosis; or

(2) the date of the enactment of the Black Lung Benefits Reform Act of 1977.

SEC. 435. (a)(1) The Secretary of Health, Education, and Welfare shall promptly notify each claimant who has filed a claim for benefits under part B of this title and whose claim is either pending on the effective date of this section or has been denied on or before that effective date, that, upon the request of the claimant, the claim shall be either—

(A) reviewed by the Secretary of Health, Education, and Welfare under paragraph (2) for a determination based on the evidence on file, taking into account the amendments made by the Black Lung Benefits Reform Act of 1977; or

(B) referred directly by the Secretary of Health, Education, and Welfare to the Secretary of Labor for a determination under paragraph (3), with an opportunity for the claimant to present additional medical or other evidence in accordance with that paragraph, taking into account the amendments made by the Black Lung Benefits Reform Act of 1977.

Appendix B

Labor Department Standards for Determining Coal Miner's Total Disability or Death Due to Pneumoconiosis

20 C.F.R. §§ 718 et seq. (1981)

Subpart A—General

§ 718.1 Statutory provisions.

(a) Under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, the Federal Mine Safety and Health Amendments Act of 1977, the Black Lung Benefits Reform Act of 1977, and the Black Lung Benefits Revenue Act of 1977, benefits are provided to miners who are totally disabled due to pneumoconiosis and to certain survivors of a miner who died due to or while totally or partially disabled by pneumoconiosis. Before the enactment of the Black Lung Benefits Reform Act of 1977, the authority for establishing standards of eligibility for miners and their survivors was placed with the Secretary of Health, Education, and Welfare. These standards were set forth by the Secretary of Health, Education, and Welfare in subpart D of part 410 of this title, and adopted by the Secretary of Labor for application to all claims filed with the Secretary of Labor (see 20 CFR 718.2, 1978). Amendments made to section 402(f) of the Act by the Black Lung Benefits Reform Act of 1977 authorize the Secretary of Labor to establish criteria for determining total or partial disability or death due to pneumoconiosis to be applied in the processing and adjudication of claims filed under part C of Title IV of the Act. Section

§ 718.2 Applicability of this part.

This part is applicable to the adjudication of all claims filed after the effective date of this part and considered by the Secretary of Labor under section 422 of the Act and Part 725 of this subchapter. If a claim subject to the provisions of section 435 of the Act and Subpart C of Part 727 of this subchapter cannot be approved under that subpart, such claim may be approved, if appropriate, under the provisions contained in this part. The provisions of this part shall, to the extent appropriate, be construed together in the adjudication of all claims.

§ 718.3 Scope and intent of this part.

(a) This part sets forth the standards to be applied in determining whether a coal miner is or was totally, or in the case of a claim subject to § 718.306 partially, disabled due to pneumoconiosis or died due to pneumoconiosis. It also specifies the procedures and requirements to be followed in conducting medical examinations and in administering various tests relevant to such determinations.

(b) This part is designed to interpret the presumptions contained in section 411(c) of the Act, evidentiary standards and criteria contained in section 413(b) of the Act and definitional requirements and standards contained in section 402(f) of the Act within a coherent framework for the adjudication of claims. It is intended that these enumerated provisions of the Act be construed as provided in this part.

(c) In enacting Title IV of the Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

§ 718.4 Definitions and use of terms.

Except as is otherwise provided by this part, the definitions and usages of terms contained in § 725.101 of Subpart A of Part 725 of this title, as amended from time to time, shall be applicable to this part.

Subpart B—Criteria for the Development of Medical Evidence

§ 718.101 General.

The Office of Workers' Compensation Programs (hereinafter OWCP or the Office) shall develop the medical evidence necessary for a determination with respect to each claimant's entitlement to benefits. Each miner who files a claim for benefits under the Act shall be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation including, but not limited to, a chest roentgenogram (X-ray), physical examination, pulmonary function tests and a blood-gas study.

§ 718.102 Chest roentgenograms (X-rays).

(a) A chest roentgenogram (X-ray) shall be of suitable quality for proper classification of pneumoconiosis and

402(f) of the Act further authorizes the Secretary of Labor, in consultation with the National Institute for Occupational Safety and Health, to establish criteria for all appropriate medical tests administered in connection with a claim for benefits. Section 413(b) of the Act authorizes the Secretary of Labor to establish criteria for the techniques to be used to take chest roentgenograms (X-rays) in connection with a claim for benefits under the Act.

(b) The Black Lung Benefits Reform Act of 1977 provides that with respect to a claim filed prior to the effective date of this part or reviewed under section 435 of the Act, the standards to be applied in the adjudication of such claim shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, with the Social Security Administration, whether or not the final disposition of the claim occurs after the effective date of this part. All such claims shall be reviewed under the criteria set forth in Part 727 of this title.

shall conform to the standards for administration and interpretation of chest X-rays as described in Appendix A.

(b) A chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconioses (ILO-U/C 1971), or subsequent revisions thereof. A chest X-ray classified as Category Z under the ILO Classification (1958) or Short Form (1968) shall be reclassified as Category O or Category 1 as appropriate, and only the latter accepted as evidence of pneumoconiosis. A chest X-ray classified under any of the foregoing classifications as Category O, including subcategories 0/-, 0/0, or 0/1 under the UICC/Cincinnati (1968) Classification or the ILO-U/C 1971 Classification does not constitute evidence of pneumoconiosis.

(c) A description and interpretation of the findings in terms of the classifications described in paragraph (b) of this section shall be submitted by the examining physician along with the film. The report shall specify the name and qualifications of the person who took the film and the name and qualifications of the physician interpreting the film. If the physician interpreting the film is a Board-certified or Board-eligible radiologist or a certified "B" reader (see § 718.202), he or she shall so indicate. The report shall further specify that the film was interpreted in compliance with this paragraph.

(d) The original film on which the X-ray report is based shall be supplied to the Office, unless prohibited by law, in which event the report shall be considered as evidence only if the original film is otherwise available to the Office and other parties. Where the chest X-ray of a deceased miner has been lost, destroyed or is otherwise unavailable, a report of a chest X-ray submitted by any party shall be considered in connection with the claim.

(e) No chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is in substantial compliance with the requirements of this section and Appendix A, except that special consideration shall be given in the case of a deceased miner where the only available X-ray is of sufficient quality for determining the presence or absence of pneumoconiosis and such X-ray was interpreted by a Board-certified or Board-eligible radiologist or a certified "B" reader (see § 718.202). It shall be presumed, in the absence of evidence to the contrary, that the requirements of Appendix A have been met.

§ 718.103 Pulmonary function tests.

(a) Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of the forced expiratory volume in one second (FEV_1) and either the forced vital capacity (FVC) or the maximum voluntary ventilation (MVV) or both. If the MVV is reported, the results of such test shall be obtained independently rather than calculated from the results of the FEV_1. Such tests shall be administered and reported in accordance with the standards for the administration and interpretation of pulmonary function tests as described in Appendix B. It shall be presumed, in the absence of evidence to the contrary, that these requirements have been met.

(b) All pulmonary function test results submitted in connection with a claim for benefits shall be accompained by three tracings of each test performed, unless the results of two tracings of the MVV are within 5% of each other, in which case two tracings for that test shall be sufficient. Pulmonary function test results submitted in connection with a claim for benefits shall also include a statement signed by the physician or technician conducting the test setting forth the following:

(1) Date and time of test;

(2) Name, DOL claim number, age, height, and weight of claimant at the time of the test;

(3) Name of technician;

(4) Name and signature of physician supervising the test;

(5) Claimant's ability to understand the instructions, ability to follow directions and degree of cooperation in performing the tests. If the claimant is unable to complete the test, the person executing the report shall set forth the reasons for such failure;

(6) Paper speed of the instrument used;

(7) Name of the instrument used;

(8) Whether a bronchodilator was administered. If a bronchodilator is administered, the physician's report must detail values obtained both before and after administration of the bronchodilator and explain the significance of the results obtained; and

(9) That the requirements of paragraph (b) and (c) of this section have been complied with.

(c) No results of pulmonary function tests shall constitute evidence of a respiratory or pulmonary impairment unless such tests are conducted and reported in substantial compliance with this section and Appendix B. Special consideration shall be given in the case of a deceased miner where, in the opinion of the adjudication officer, the only available tests demonstrate technically valid results obtained with good cooperation of the miner.

§ 718.104 Report of physical examinations.

A report of any physical examination conducted in connection with a claim shall include the miner's medical and employment history. A medical report form supplied by the Office or a report containing substantially the same information shall be completed for all findings. In addition to the chest X-ray and pulmonary function tests, the physician shall use his or her judgment in the selection of other procedures such as electrocardiogram, blood-gas studies, and other blood analyses in his or her evaluation of the miner. All manifestations of chronic respiratory disease shall be noted. Any pertinent findings not specifically listed on the form shall be added by the examining physician. If heart disease secondary to lung disease is found, all symptoms and significant findings shall be noted.

§ 718.105 Arterial blood-gas studies.

(a) Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall

in arterial oxygen tension either at rest or during exercise. No blood-gas study shall be performed if medically contraindicated.

(b) A blood-gas study shall initially be administered at rest and in a sitting position. If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C, an exercise blood-gas test shall be offered to the miner unless medically contraindicated. If an exercise blood-gas test is administered, blood shall be drawn during exercise.

(c) Any report of a blood-gas study submitted in connection with a claim shall specify:

(1) Date and time of test;

(2) Altitude and barometric pressure at which the test was conducted;

(3) Name and DOL claim number of the claimant;

(4) Name of technician;

(5) Name and signature of physician supervising the study;

(6) The recorded values for $_{p}CO_2$, $_{p}O_2$, and pH, which have been collected simultaneously (specify values at rest and, if performed, during exercise);

(7) Duration and type of exercise;

(8) Pulse rate at the time the blood sample was drawn;

(9) Time between drawing of sample and analysis of sample; and

(10) Whether equipment was calibrated before and after each test.

§ 718.106 Autopsy; biopsy.

(a) A report of an autopsy or biopsy submitted in connection with a claim shall include a detailed gross macroscopic and microscopic description of the lungs or visualized portion of a lung. If a surgical procedure has been performed to obtain a portion of a lung, the evidence shall include a copy of the surgical note and the pathology report of the gross and microscopic examination of the surgical specimen. If an autopsy has been performed, a complete copy of the autopsy report shall be submitted to the Office.

(b) No report of an autopsy or biopsy submitted in connection with a claim shall be considered unless the report complies with the requirements of this section. Special consideration shall, however, be given to the report of a biopsy or autopsy of a miner who died before the effective date of this part, even where the report is not in substantial compliance with the requirements of this section.

(c) A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis. However, where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis.

§ 718.107 Other medical evidence.

The results of any medically acceptable test or procedure reported by a physician not addressed in this subpart which test or procedure tends to demonstrate the presence or absence of pneumoconiosis or the sequelae of pneumoconiosis or the presence or absence of a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.

Subpart C—Determining Entitlement to Benefits

§ 718.201 Definition of pneumoconiosis.

For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

§ 718.202 Determining the existence of pneumoconiosis.

(a) A finding of the existence of pneumoconiosis may be made as follows:

(1) A chest X-ray conducted and classified in accordance with § 718.102 may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

(i) In all claims where there is other evidence of pulmonary or respiratory impairment, a Board-certified or Board-eligible radiologist's interpretation of a chest X-ray shall be accepted by the Office if the X-ray is in compliance with the requirements of § 718.102 and if such X-ray has been taken by a radiologist or qualified radiologic technologist or technician and there is no evidence that the claim has been fraudulently represented.

(ii) The following definitions shall apply when making a finding in accordance with this paragraph.

(A) The term "other evidence" means medical tests such as blood-gas studies, pulmonary function studies or physicial examinations or medical histories which establish the presence of a chronic pulmonary, respiratory or cardio-pulmonary condition, and in the case of a deceased miner, in the absence of medical evidence to the contrary, affidavits of persons with knowledge of the miner's physical condition.

(B) "Pulmonary or respiratory impairment" means inability of the human respiratory apparatus to perform in a normal manner one or more of the three components of respiration, namely, ventilation, perfusion and diffusion.

(C) "Board-certified" means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association.

(D) "Board-eligible" means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology.

(E) "Certified 'B' reader" or "'B' reader" means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed

proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. See 42 CFR 37.51(b)(2).

(F) "Qualified radiologic technologist or technician" means an individual who is either certified as a registered technologist by the American Registry of Radiologic Technologists or licensed as a radiologic technologist by a state licensing board.

(2) A biopsy or autopsy conducted and reported in compliance with § 718.106 may be the basis for a finding of the existence of pneumoconiosis. A finding in an autopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis. A report of autopsy shall be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented.

(3) If the presumptions described in §§ 718.304, 718.305 or § 718.306 are applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis.

(4) A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

(b) No claim for benefits shall be denied solely on the basis of a negative chest X-ray.

(c) A determination of the existence of pneumoconiosis shall not be made solely on the basis of a living miner's statements or testimony.

§ 718.203 Establishing relationship of pneumoconiosis to coal mine employment.

(a) In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment. The provisions in this section set forth the criteria to be applied in making such a determination.

(b) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

(c) If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.

§ 718.204 Total disability defined; criteria for determining total disability.

(a) *General.* Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. The standards of this section shall be applied to determine whether a miner is or was "totally disabled" for the purpose of the Act.

(b) *Total disability defined.* A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If the irrebuttable presumption described in § 718.304 does not apply, a miner shall be considered totally disabled if pneumoconiosis as defined in § 718.201 prevents or prevented the miner:

(1) From performing his or her usual coal mine work; and

(2) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

(c) *Criteria.* In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (c)(1), (2), (3), (4) or (5) of this section shall establish a miner's total disability:

(1) Pulmonary function tests showing values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in Appendix B to this part for an individual of the miner's age, sex, and height for the FEV_1 test; if, in addition, such tests also reveal the values specified in either paragraphs (c)(1) (i) or (ii) or (iii) of this section:

(i) Values equal to or less than those listed in Table B3 (Males) or Table B4 (Females) in Appendix B of this part, for an individual of the miner's age, sex, and height for the FVC test, or

(ii) Values equal to or less than those listed in Table B5 (Males) or Table B6 (Females) in Appendix B to this part, for an individual of the miner's age, sex, and height for the MVV test, or

(iii) A percentage of 55 or less when the results of the FEV_1 test are divided by the results of the FVC test (FEV_1/FVC equal to or less than 55%), or

(2) Arterial blood-gas tests show the values listed in Appendix C to this part, or

(3) The miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right sided congestive heart failure, or

(4) Where total disability cannot be established under paragraphs (c)(1), (c)(2) or (c)(3) of this section, or where pulmonary function tests and/or blood-gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b) of this section, or

(5) In the case of a claim filed by the survivor of a miner, where there is no medical or other relevant evidence, the affidavits of persons knowledgeable of the miner's physical condition shall be sufficient to establish total disability.

(d) In determining total disability, the following shall apply to statements made by miners about their condition:

(1) Statements made before death by a deceased miner about his or her physical condition are relevant and shall be considered in making a deter-

mination as to whether the miner was totally disabled at the time of death.

(2) In the case of a living miner's claim, a finding of total disability shall not be made solely on the miner's statements or testimony.

(e) In determining total disability to perform usual coal mine work, the following shall apply in evaluating the miner's employment activities:

(1) In the case of a deceased miner, employment in a mine at the time of death shall not be conclusive evidence that the miner was not totally disabled. To disprove total disability, it must be shown that at the time the miner died, there were no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(2) In the case of a living miner, proof of current employment in a coal mine shall not be conclusive evidence that the miner is not totally disabled unless it can be shown that there are no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(3) Changed circumstances of employment indicative of a miner's reduced ability to perform his or her usual coal mine work may include but are not limited to:

(i) The miner's reduced ability to perform his or her customary duties without help; or

(ii) The miner's reduced ability to perform his or her customary duties at his or her usual levels of rapidity, continuity or efficiency; or

(iii) The miner's transfer by request or assignment to less vigorous duties or to duties in a less dusty part of the mine.

(f) No miner who is engaged in coal mine employment shall (except as provided in § 718.304) be entitled to any benefit under this part while so employed. Any miner who has been determined to be eligible for benefits shall be entitled to benefits only if the miner's employment terminates within one year after the date such determination becomes final.

§ 718.205 Death due to pneumoconiosis.

(a) Benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis.

(b) Death will be considered due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or

(2) Where death was due to multiple causes including pneumoconiosis and it is not medically feasible to distinguish which disease caused death or the extent to which pneumoconiosis contributed to the cause of death, or

(3) Where the presumption set forth at § 718.304 is applicable, or

(4) Where either of the presumptions set forth at § 718.303 or § 718.305 is applicable and has not been rebutted.

(c) For the purpose of this section, death shall be considered to be due to pneumoconiosis where the cause of death is significantly related to or aggravated by pneumoconiosis.

§ 718.206 Effect of findings by persons or agencies.

Decisions, statements, reports, opinions, or the like, of agencies, organizations, physicians or other individuals, about the existence, cause, and extent of a miner's disability, or the cause of a miner's death, are admissible. If properly submitted, such evidence shall be considered and given the weight to which it is entitled as evidence under all the facts before the adjudication officer in the claim.

Subpart D—Presumptions Applicable to Eligibility Determinations

§ 718.301 Establishing length of employment as a miner.

(a) The presumptions set forth in §§ 718.302, 718.303, 718.305 and 718.306 apply only if a miner has been employed in one or more coal mines for specified periods. Regular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses, and shall not be contingent upon a finding of a specific number of days of employment within a given period.

(b) For the purposes of the presumptions described in this subpart, a year of employment means a period of one year, or partial periods totalling one year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. A "working day" means any day or part of a day for which a miner received pay for work as a miner. If an operator or other employer proves that the miner was not employed in or around a coal mine for a period of at least 125 working days during a year, such operator or other employer shall be determined to have established that the miner was not regularly employed for a year for the purposes of this section. If a miner worked in or around one or more coal mines for fewer than 125 days in a calendar year, he or she shall be credited with a fractional year based on the ratio of the actual number of days worked to 125. No periods of coal mine employment occurring outside the United States shall be credited toward the use of any presumption contained in this part.

§ 718.302 Relationship of pneumoconiosis to coal mine employment.

If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. (See § 718.203.)

§ 718.303 Death from a respirable disease.

(a) If a deceased miner was employed for ten or more years in one or more coal mines and died from a respirable disease, there shall be a rebuttable presumption that his or her death was due to pneumoconiosis.

(1) Under this presumption, death shall be found due to a respirable disease in any case in which the evidence establishes that death was due to multiple causes, including a respirable disease, and it is not medically feasible to distinguish which disease caused death or the extent to which the respirable disease contributed to the cause of death.

(b) The presumption of paragraph (a) of this section may be rebutted by a showing that the deceased miner did not have pneumoconiosis, that his or her death was not due to pneumoconiosis or that pneumoconiosis did not contribute to his or her death.

§ 718.304 Irrebuttable presumption of total disability or death due to pneumoconiosis.

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:

(a) When diagnosed by chest X-ray (see § 718.202 concerning the standards for X-rays and the effect of interpretations of X-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C in:

(1) The ILO-U/C International Classification of Radiographs of the Pneumoconioses, 1971, or subsequent revisions thereto; or

(2) The International Classification of the Radiographs of the Pneumoconioses of the International Labour Office, Extended Classification (1968) (which may be referred to as the "ILO Classification (1968)"); or

(3) The Classification of the Pneumoconioses of the Union Internationale Contra Cancer/Cincinnati (1968) (which may be referred to as the "UICC/Cincinnati (1968) Classification"); or

(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

§ 718.305 Presumption of pneumoconiosis.

(a) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his or her survivor's claim and it is interpreted as negative with respect to the requirements of § 718.304, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that such miner's death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis. In the case of a living miner's claim, a spouse's affidavit or testimony may not be used by itself to establish the applicability of the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where it is determined that conditions of the miner's employment in a coal mine were substantially similar to conditions in an underground mine. The presumption may be rebutted only by establishing that the miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(b) In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment for purposes of this section.

(c) The determination of the existence of a totally disabling respiratory or pulmonary impairment, for purposes of applying the presumption described in this section, shall be made in accordance with § 718.204.

(d) Where the cause of death or total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment or the evidence establishes that the miner does not or did not have pneumoconiosis, the presumption will be considered rebutted. However, in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

§ 718.306 Presumption of entitlement applicable to certain death claims.

(a) In the case of a miner who dies on or before March 1, 1978, who was employed for 25 or more years in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, unless it is established that at the time of death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request, furnish such evidence as is available with respect to the health of the miner at the time of death, and the length of the miner's coal mine employment.

(b) For the purpose of this section, a miner will be considered to have been "partially disabled" if he or she had reduced ability to engage in work as defined in § 718.204(b).

(c) In order to rebut this presumption the evidence must demonstrate that the miner's ability to perform work as defined in § 718.204(b) was not reduced at the time of his or her death or that the miner did not have pneumoconiosis.

(d) None of the following items, by itself, shall be sufficient to rebut the presumption:

(1) Evidence that a deceased miner was employed in a coal mine at the time of death;

(2) Evidence pertaining to a deceased miner's level of earnings prior to death;

(3) A chest X-ray interpreted as negative for the existence of pneumoconiosis;

(4) A death certificate which makes no mention of pneumoconiosis.

§ 718.307 Applicability of 33 U.S.C. 920(a).

(a) Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 920(a), provides that in any claim for benefits under the Longshoremen's Act it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of

the Act. Section 422(a) of the Act incorporates such provision except as the Secretary provides by regulation.

(b) Where one or more of the presumptions contained in §§ 718.302-718.305 is or may be applicable to a claim, the provisions of Section 20(a) of the Longshoremen's Act shall not apply to relieve a claimant from the burden of proving the facts necessary to give rise to the presumption, nor do the provisions of Section 20(a) relieve a claimant of the burden of proving any element of the claim. See § 718.403.

Subpart E—Miscellaneous Provisions

§ 718.401 Right to obtain evidence.

Each miner who files a claim for benefits under the Act shall be provided an opportunity tc substantiate his or her claim by means of a complete pulmonary evaluation. Accordingly, the Office shall assist each claimant in obtaining the evidence, including medical evidence, necessary for a complete adjudication of a claim. In the case of a miner's claim, initial medical tests and examinations shall be arranged for the miner by the Office, at no cost to the miner (See §§ 725.405 and 725.406 of this subchapter). If a conflict in medical evidence is determined to exist by the deputy commissioner or if a miner is dissatisfied with the results of medical evidence obtained by the deputy commissioner, additional medical evidence may be obtained by the miner or the deputy commissioner, as provided in § 725.407 of this subchapter.

§ 718.402 Failure to furnish required medical evidence.

An individual shall not be determined entitled to benefits unless he or she furnishes such medical evidence as is reasonably required to establish his or her claim. A miner who unreasonably refuses (a) to provide the Office or a coal mine operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records, or (b) to submit to an examination or test requested by the deputy commissioner or a coal mine operator which may be liable for the payment of a claim, shall not be found eligible for benefits under this subchapter (See §§ 725.408 and 725.414 of this subchapter).

§ 718.403 Burden of proof.

Except as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.

§ 718.404 Cessation of entitlement.

(a) An individual who has been finally adjudged to be totally disabled due to pneumoconiosis and is receiving benefits under the Act shall promptly notify the Office and the responsible coal mine operator, if any, if he or she engages in any work as defined in § 718.204(c).

(b) An individual who has been finally adjudged to bc totally disabled due to pneumoconiosis shall, if requested to do so upon reasonable notice, where there is an issue pertaining to the validity of the original adjudication of disability, present himself or herself for, and submit to, examinations or tests as provided in § 718.101, and shall submit medical reports and other evidence necessary for the purpose of determining whether such individual continues to be under a disability. Benefits shall cease as of the month in which the miner is determined to be no longer eligible for benefits. . . .

Subpart E—Hearings

§ 725.450 Right to a hearing.

Any party to a claim (see § 725.360) shall have a right to a hearing concerning any contested issue of fact or law unresolved by the deputy commissioner. There shall be no right to a hearing until the processing and adjudication of the claim by the deputy commissioner has been completed. There shall be no right to a hearing in a claim with respect to which a determination of the claim made by the deputy commissioner has become final and effective in accordance with this part.

§ 725.451 Request for hearing.

After the completion of proceedings before the deputy commissioner, or as is otherwise indicated in this part, any party may in writing request a hearing on any contested issue of fact or law. A deputy commissioner may on his or her own initiative refer a case for hearing. If a hearing is requested, or if a deputy commissioner determines that a hearing is necessary to the resolution of any issue, the claim shall be referred to the Chief Administrative Law Judge for a hearing under § 725.421.

§ 725.452 Type of hearing; parties.

(a) A hearing held under this part shall be conducted by an administrative law judge designated by the Chief Administrative Law Judge. Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 et seq.

(b) All parties to a claim shall be permitted to participate fully at a hearing held in connection with such claim.

(c) A full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

§ 725.453 Notice of hearing.

All parties shall be given at least 30 days written notice of the date and place of a hearing and the issues to be resolved at the hearing. Such notice shall be sent to each party or representative by certified mail.

§ 725.453A Time and place of hearing.

(a) The Chief Administrative Law Judge shall assign a definite time and place for a formal hearing, and shall, where possible, schedule the hearing to be held at a place within 75 miles of the claimant's residence unless an alternate location is requested by the claimant.

(b) If the claimant's residence is not in any State, the Chief Administrative Law Judge may, in his or her discre-

tion, schedule the hearing in the country of the claimant's residence.

(c) The Chief Administrative Law Judge or the administrative law judge assigned the case may in his or her discretion direct that a hearing with respect to a claim shall begin at one location and then later be reconvened at another date and place.

§ 725.454 Change of time and place for hearing; transfer of cases.

(a) The Chief Administrative Law Judge or administrative law judge assigned the case may change the time and place for a hearing, either on his or her own motion or for good cause shown by a party. The administrative law judge may adjourn or postpone the hearing, or reopen the hearing for the receipt of additional evidence, for good cause shown, at any time prior to the mailing to the parties of the decision in the case. Unless otherwise agreed, at least 10 days notice shall be given to the parties of any change in the time or place of hearing.

(b) The Chief Administrative Law Judge may for good cause shown transfer a case from one administrative law judge to another.

§ 725.455 Hearing procedures; generally.

(a) *General.* The purpose of any hearing conducted under this subpart shall be to resolve contested issues of fact or law. Except as provided in § 725.421(b)(8), any findings or determinations made with respect to a claim by a deputy commissioner shall not be considered by the administrative law judge.

(b) *Evidence.* The administrative law judge shall at the hearing inquire fully into all matters at issue, and shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and this subpart. The administrative law judge shall receive into evidence the testimony of the witnesses and parties, the evidence submitted to the Office of Administrative Law Judges by the deputy commissioner under § 725.421, and such additional evidence as may be submitted in accordance with the provisions of this subpart. The administrative law judge may entertain the objections of any party to the evidence submitted under this section.

(c) *Procedure.* The conduct of the hearing and the order in which allegations and evidence shall be presented shall be within the discretion of the administrative law judge and shall afford the parties an opportunity for a fair hearing.

§ 725.456 Introduction of documentary evidence.

(a) All documents transmitted to the Office of Administrative Law Judges under § 725.421 shall be placed into evidence by the administrative law judge as exhibits of the Director, subject to objection by any party.

(b)(1) Any other documentary material, including medical reports, which was not submitted to the deputy commissioner, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties within 20 days before a hearing is held in connection with the claim.

(2) Documentary evidence, which is not exchanged with the parties in accordance with this paragraph, may be admitted at the hearing with the written consent of the parties or on the record at the hearing, or upon a showing of good cause why such evidence was not exchanged in accordance with this paragraph. If documentary evidence is not exchanged in accordance with paragraph (b)(1) of this section and the parties do not waive the 20-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the deputy commissioner for consideration of such evidence.

(3) A medical report which is not made available to the parties in accordance with paragraph (b)(1) of this section shall not be admitted into evidence in any case unless the hearing record is kept open for at least 30 days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence. If, in the opinion of the administrative law judge, evidence is withheld from the parties for the purpose of delaying the adjudication of the claim, the administrative law judge may exclude such evidence from the hearing record and close the record at the conclusion of the hearing.

(4) Notwithstanding any other provision of this paragraph, documentary evidence other than medical reports which is presented or discovered in connection with the testimony of a witness at the hearing may be admitted into the hearing record, subject to the objection of any party.

(c) All medical records and reports submitted by any party shall be considered by the administrative law judge in accordance with the quality standards contained in part 718 of this subchapter as amended from time to time.

(d) Documentary evidence which is obtained by any party during the time a claim is pending before the deputy commissioner, and which is withheld by such party until the claim is forwarded to the Office of Administrative Law Judges shall, notwithstanding paragraph (b) of this section, not be admitted into the hearing record in the absence of extraordinary circumstances, unless such admission is requested by any other party to the claim (see § 725.414(e)).

(e) If, during the course of a hearing, it is determined by the administrative law judge that the documentary evidence submitted in accordance with this section is incomplete as to any issue which must be adjudicated, the administrative law judge may, in his or her discretion, remand the claim to the deputy commissioner with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

§ 725.457 Witnesses.

(a) Witnesses at the hearing shall testify under oath or affirmation. The administrative law judge and the parties may question witnesses with respect to any matters relevant and material to any contested issue. Any party who intends to present the testimony of an expert witness at a hearing shall so notify all other parties to the claim at least 10 days before the hearing. The failure to give notice of the appearance of an expert witness in accordance with this paragraph,

unless notice is waived by all parties, shall preclude the presentation of testimony by such expert witness.

(b) No person shall be required to appear as a witness in any proceeding before an administrative law judge at a place more than 100 miles from his or her place of residence, unless the lawful mileage and witness fee for 1 day's attendance is paid in advance of the hearing date.

§ 725.458 Deposition; interrogatories.

The testimony of any witness or party may be taken by deposition or interrogatory according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the U.S. District Court for the District of Columbia if the case is pending in the District or outside the United States), except that at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived. No post-hearing deposition or interrogatory shall be permitted unless authorized by the administrative law judge upon the motion of a party to the claim.

§ 725.459 Witness fees.

(a) A witness summoned to hearing before an administrative law judge, or whose deposition is taken, shall receive the same fees and mileage as witnesses in courts of the United States. Except as provided in paragraph (c) of this section, such fees shall be paid by the party summoning the witness.

(b) No claimant shall be required to bear the financial responsibility for producing an expert witness for cross-examination if such expert witness, regardless of his or her availability to attend the hearing, has previously submitted depositions, interrogatories, or medical reports. Such expert witness, if he or she is required to attend the hearing, respond to interrogatories or give a deposition, shall be summoned and shall have his or her expert witness fee paid by the party who summons such witness.

(c) If a claimant is determined entitled to benefits, there may be assessed as costs against a responsible operator, if any, fees and mileage for necessary witnesses attending the hearing at the request of the claimant. Both the necessity for the witness and the reasonableness of the fees of any expert witness shall be approved by the administrative law judge. The amounts awarded against a responsible operator as attorney's fees, or costs, fees and mileage for witnesses, shall not in any respect affect or diminish benefits payable under the Act.

§ 725.459A Oral argument and written allegations.

The parties, upon request, may be allowed a reasonable time for the presentation of oral argument at the hearing. Briefs or other written statements or allegations as to facts or law may be filed by any party with the permission of the administrative law judge. Copies of any brief or other written statement shall be filed with the administrative law judge and served on all parties by the submitting party.

§ 725.460 Consolidated hearings.

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one claim may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.

§ 725.461 Waiver of right to appear and present evidence.

(a) If all parties waive their right to appear before the administrative law judge, it shall not be necessary for the administrative law judge to give notice of, or conduct, an oral hearing. A waiver of the right to appear shall be made in writing and filed with the Chief Administrative Law Judge or the administrative law judge assigned to hear the case. Such waiver may be withdrawn by a party for good cause shown at any time prior to the mailing of the decision in the claim. Even though all of the parties have filed a waiver of the right to appear, the administrative law judge may, nevertheless, after giving notice of the time and place, conduct a hearing if he or she believes that the personal appearance and testimony of the party or parties would assist in ascertaining the facts in issue in the claim. Where a waiver has been filed by all parties, and they do not appear before the administrative law judge personally or by representative, the administrative law judge shall make a record of the relevant documentary evidence submitted in accordance with this part and any further written stipulations of the parties. Such documents and stipulations shall be considered the evidence of record in the case and the decision shall be based upon such evidence.

(b) Except as provided in § 725.456(a), the unexcused failure of any party to attend a hearing shall constitute a waiver of such party's right to present evidence at the hearing, and may result in a dismissal of the claim (see § 725.465).

§ 725.462 Withdrawal of controversion of issues set for formal hearing; effect.

A party may, on the record, withdraw his or her controversion of any or all issues set for hearing. If a party withdraws his or her controversion of all issues, the administrative law judge shall remand the case to the deputy commissioner for the issuance of an appropriate order.

§ 725.463 Issues to be resolved at hearing; new issues.

(a) Except as otherwise provided in this section, the hearing shall be confined to those contested issues which have been identified by the deputy commissioner (see § 725.421) or any other issue raised in writing before the deputy commissioner.

(b) An administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the deputy commissioner. Such new issue may be raised upon application of any party, or upon an administrative law judge's own motion, with notice to all parties, at any time after a claim has been transmitted by the deputy commissioner to the Office of Administrative Law Judges and prior

phrase designating the particular type of order, such as "award of benefits," "rejection of claim," "suspension of benefits," "modification of award."

(b) A decision and order shall contain a statement of the basis of the order, the names of the parties, findings of fact, conclusions of law, and an award, rejection or other appropriate paragraph containing the action of the administrative law judge, his or her signature and the date of issuance. A decision and order shall be based upon the record made before the administrative law judge.

§ 725.478 Filing and service of decision and order.

On the date of issuance of a decision and order under § 725.477, the administratlve law judge shall serve the decision and order on all parties to the claim by certified mail. On the same date, the original record of the claim shall be returned to the DCMWC in Washington, D.C., and the decision and order shall be considered to be filed in the office of the deputy commissioner. Immediately upon receipt of a decision and order awarding benefits, the deputy commissioner shall compute the amount of benefits due, including any interest or penalties, and the amount of reimbursement owed the Fund, if any, and so notify the parties. Any computation made by the deputy commissioner under this paragraph shall strictly observe the terms of the award made by the administrative judge.

§ 725.479 Finality of decisions and orders.

(a) A decision and order shall become effective when filed in the office of the deputy commissioner (see § 725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing (see § 725.481).

(b) Any party may, within 30 days after the filing of a decision and order under § 725.478, request a reconsideration of such decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

(c) The time for appeal to the Benefits Review Board shall be suspended during the consideration of a request for reconsideration. After the administrative law judge has issued and filed a denial of the request for reconsideration, or a revised decision and order in accordance with this part, any dissatisfied party shall have 30 days within which to institute proceedings to set aside the new decision and order or affirmance of the original decision and order.

§ 725.480 Modification of decisions and orders.

(a) A party who is dissatisfied with a decision and order which has become final in accordance with § 725.479 may request a modification of the decision and order if the conditions set forth in § 725.310 are met.

§ 725.481 Right to appeal to the Benefits Review Board.

Any party dissatisfied with a decision and order issued by an administrative law judge may, before the decision and order becomes final (see § 725.479), appeal the decision and order to the Benefits Review Board. A notice of appeal shall be filed with the Board. Proceedings before the Board shall be conducted in accordance with Part 802 of this title.

§ 725.482 Judicial review.

(a) Any person adversely affected or aggrieved by a final order of the Benefits Review Board may obtain a review of that order in the U.S. court of appeals for the circuit in which the injury occurred by filing in such court within 60 days following the issuance of such Board order a written petition praying that the order be modified or set aside. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless the court finds that irreparable injury would otherwise ensue to an operator or carrier.

(b) The Director, Office of Workers' Compensation Program, as designee of the Secretary of Labor responsible for the administration and enforcement of the Act, shall be considered the proper party to appear and present argument on behalf of the Secretary of Labor in all review proceedings conducted pursuant to this part and the Act, either as petitioner or respondent.

§ 725.483 Costs in proceedings brought without reasonable grounds.

If a United States court having jurisdiction of proceedings regarding any claim or final decision and order, determines that the proceedings have been instituted or continued before such court without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings. . . .

Subpart F—Responsible Coal Mine Operators

General Provisions

§ 725.490 Statutory provisions and scope.

(a) One of the major purposes of the black lung benefits amendments of 1977 is to provide a more effective means of transferring the responsibility for the payment of benefits from the Federal government to the coal industry with respect to claims filed under this part. In furtherance of this goal, a Black Lung Disability Trust Fund financed by the coal industry was established by the Black Lung Benefits Revenue Act of 1977. The primary purpose of the Fund is to pay benefits with respect to all claims in which the last coal mine employment of the miner on whose account the claim was filed occurred before January 1, 1970. With respect to claims in which the miner's last coal mine employment occurred after January 1, 1970, individual coal mine operators will be liable for the payment of benefits. Where no such operator exists or the operator determined to be liable is in default in any case, the Fund shall pay the benefits due and seek reimbursement as is appropriate. In addition, the Black Lung Benefits Reform Act of 1977 amended certain provisions affecting the scope of coverage under the Act and describing the ef-

fects of particular corporate transactions on the liability of operators.

(b) The provisions of this subpart define the term "operator," prescribe the manner in which the identity of an operator which may be liable for the payment of benefits—referred to herein as a "responsible operator"—will be determined, and briefly describe the obligations of operators to secure the payment of benefits. (See also Part 726 of this subchapter.)

§ 725.491 Operator defined.

(a) In accordance with Section 3(d) of the Act, an operator for purposes of this part is "any owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine." In accordance with Sections 402(d) and 422(b) of the Act, certain other employers, including those engaged in coal mine construction, maintenance, and transportation, shall also be considered to be operators for purposes of this part. An independent contractor or self-employed miner, construction worker, coal preparation worker, or transportation worker may also be considered a coal mine operator for purpose of this part. It is Congress' intent that any employer of a miner as defined in § 725.202(a) shall, to the extent appropriate, be considered an operator for for the purposes of this part, and the provisions of this part shall be construed in accordance with this intent.

(b)(1) In determining which operator or other employer is the employer of a particular miner, primary consideration shall be given to the identity of the employer which is directly responsible for the supervision, operation and control of the mine or mines or other facilities where the miner was employed. However, Congress has made it clear that such supervision or control may be directly or indirectly exercised. Therefore, in appropriate cases where, for example, the individual or business entity most directly connected with the mine site is not capable of assuming liability for the payment of benefits (§ 725.492(d)) or is no longer in business and such individual or business entity is a subsidiary of a parent company, a member of a joint venture, a partner in a partnership, or is substantially owned or controlled by another business entity, such parent entity or other member of a joint venture or partner or controlling business entity may be considered an operator for purposes of this part, regardless of the nature of its business activities.

(2) Where a coal mine is leased, and the lease empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced, the lessor may be considered an operator with respect to employees of the lessee. An individual land owner or others who lease coal lands or mineral rights, who have never been coal mine operators or are not in the regular business of leasing coal mines, shall not be considered a coal mine operator in accordance with the terms of this section. Where a lessor previously operated a coal mine, it may be considered an operator with respect to employees of any lessee of such mine, particularly where the leasing arrangement was executed or renewed after the effective date of this part and does not require the lessee to secure benefits provided by the Act.

(3) In any claim in which the liability of a lessor for claims arising out of employment with a lessee is brought into question, the lessee shall be considered primarily liable for the claim, and the liability of the lessor may be established only after it has been determined that the lessee is unable to provide for the payment of benefits to a successful claimant. In any case involving the liability of a lessor for a claim arising out of employment with a lessee, any determination of lessor liability shall be made on the basis of the facts present in the case in consideration of the terms and intent of the act and this part.

(4) A former coal mine operator which has become a lessor of coal miner shall be liable for approved claims arising out of coal mine employment with such lessor during the time the lessor was a coal mine operator, if such employment terminated on or after January 1, 1970, and the conditions for liability contained in § 725.492 are met.

(c) (1) An independent contractor which performs or performed services or engages or engaged in construction at a mine or preparation or transportation facility may be held liable for the payment of benefits under this part as a coal mine operator with respect to its employees who work or have worked in or around a coal mine or coal preparation or transportation facility in the extraction, preparation, or transportation of coal or in coal mine construction in any period during which such employees were exposed to coal dust during their employment with such contractor. Such contractor's status as an operator shall not be contingent upon the amount or percentage of its work or business related to activities in or around a mine, nor upon the number or percentage of its employees engaged in such activities.

(2) (i) Any individual who works or has worked as a sole proprietor, a partner in a partnership, a member of a family business or who is otherwise self-employed in or around a coal mine or coal preparation or transportation facility in the extraction, preparation, or transportation of coal or in coal mine construction during any period such individual was exposed to coal dust may be considered an operator under this part.

(ii) A self-employed operator, depending upon the facts of the case, may be considered an employee of any other operator, person, or business entity which substantially controls, supervises, or is financially responsible for the activities of the self-employed operator.

(iii) For the purposes of this part, a lessor of a coal mine which leases such mine to a self-employed operator shall be considered the employer of such self-employed operator and its employees if the lease or agreement is executed or renewed after the effective date of this part and such lease or agreement does not require the lessee to guarantee the payment of benefits which may be required under this part.

§ 725.492 Responsible operator defined.

(a) A "responsible operator" is the operator which is determined liable for the payment of benefits under this part for any period after December 31, 1973. In order for an employer to be considered a responsible operator in any case, the following shall be established:

(1) The miner's disability or death shall have arisen at least in part out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator, except as provided in § 725.493(a)(2);

(2) The operator shall have been an operator of a coal mine or other facility for any period after June 30, 1973;

(3) The miner's employment with the operator or other employer shall have included at least 1 working day (§ 725.493(b)) after December 31, 1969; and

(4) The operator or the employer shall be capable of assuming its liability for the payment of continuing benefits under this part, through any of the following means:

(i) By obtaining a policy or contract of insurance under section 423 of the act and part 726 of this subchapter; or

(ii) By qualifying as a self-insurer under section 423 of the act and part 726 of this subchapter; or

(iii) By possessing any assets that may be available for the payment of benefits under this part or through an action under subpart H of this part.

(b) In the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability under this part.

(c) For the purposes of determining whether an employer is or was an operator or other employer covered by the Act which may be found liable for the payment of benefits to an employee of such employer under this part, there shall be a rebuttable presumption that during the course of an individual's employment such individual was regularly and continuously exposed to coal dust during the course of employment. The presumption may be rebutted by a showing that the employee was not exposed to coal dust for significant periods during such employment.

For purposes of § 725.493(a), a year of coal mine employment may be established by accumulating intermittent periods of coal mine employment.

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