Federal Black Lung Update

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FEDERAL BLACK LUNG UPDATE

WILLIAM S. MATTINGLY*

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I. INTRODUCTION

Since the last Federal Black Lung update appeared two years ago, there have been continuing developments in the interpretation of the Black Lung Benefits Act¹ and its implementing regulations.² This article provides a synopsis of those recent decisions that have a significant impact on claims adjudicated under the Black Lung Benefits Act (BLBA). As before,³ the most significant changes are seen in the decisions handed down by the various federal circuit courts of appeals.

II. TRUE DOUBT RULE

The headline issue arising out of claims adjudicated under the Black Lung Benefits Act provides the greatest scholarly interest and

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potential impact on American jurisprudence. This involves the seemingly unpretentious manner of resolving conflicting evidence, which has become known as the "true doubt" rule. When contrary evidence submitted by a claimant and by the party opposing entitlement to benefits (either a coal mine operator or the Director, Office of Workers' Compensation Programs) is of equal weight, a true doubt situation is said to exist. When there is a true doubt as to the resolution of conflicting, but equally probative, evidence in the trier-of-fact's mind, the Benefits Review Board has consistently upheld the option of the Administrative Law Judge (ALJ) to resolve such doubt in favor of the claimant.4

Recently, several circuit courts have addressed the validity of fact finders relying on the true doubt rule, and a split among the circuits has resulted. Two panels of the Third Circuit5 rejected reliance on the true doubt rule as violative of the burden of persuasion required by the Administrative Procedure Act (APA).6 The Sixth7 and Seventh8 Cir-

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Section (7)(c) of the APA, 5 U.S.C. § 556(d) (1988) is the provision at issue. It provides:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

Id.


8. Freeman United Coal Mining Co. v. Office of Workers' Comp. Programs, 988 F.2d 706 (7th Cir. 1993), reh'g denied, 999 F.2d 291 (7th Cir.), cert. pending, No. 93-935
cuits, however, have embraced the use of true doubt to resolve equally probative evidence in favor of the claimant when the evidence is believed to be in equipoise or an evidentiary gridlock exists. The Supreme Court of the United States has accepted the writ of criteria filed by the claimant and Solicitor General in the claims arising out of the Third Circuit.

The differing resolutions of the validity of an ALJ relying on the true doubt rule will offer the Supreme Court the opportunity to resolve the split in the circuits. The issue, as framed by the decisions of the circuits, will weigh the humanitarian or remedial nature of the Act against the seemingly clear burden of proof placed on the claimant as the proponent of an order to award benefits. Although endorsing the use of the true doubt rule, even the Seventh Circuit acknowledges that the BLBA contains many substantive and evidentiary rules favorable to claimants, but no true doubt rule or any facsimile. The Sixth Circuit has also sent mixed messages. Until Skukan, the Sixth Circuit had plainly stated that a claimant bears the burden of proving each of the elements of the claim by a preponderance of the evidence, except insofar as aided by a presumption. Inasmuch as the true doubt rule allows a claimant to prevail on equally probative evidence, the burden of proof is relaxed.

(filed December 10, 1993).

9. The Fourth Circuit had previously upheld the use of the true doubt rule. See Adkins v. Director, Office of Workers' Comp. Programs, 958 F.2d 49, 52 (4th Cir. 1992); Greer v. Director, Office of Workers' Comp. Programs, 940 F.2d 88, 90-91 (4th Cir. 1991). However, when the validity of the rule was challenged, the Fourth Circuit rejected the reasoning of the Seventh Circuit, but deferred from passing on the validity of the true doubt principle. Grizzle v. Pickands Mather & Co., 994 F.2d 1093, 1098 n.7 (4th Cir. 1993).

10. Santoro, 992 F.2d 1277, is a claim arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988); Ondeclo, 990 F.2d 730, is a claim arising under the BLBA.

11. Skukan, 993 F.2d at 1236; Freeman, 988 F.2d at 706; Freeman, 999 F.2d at 291.

12. 20 C.F.R. § 718.403 (1993) provides that the burden of proving a fact alleged shall rest with the party making such allegation.

13. Freeman, 999 F.2d at 292.

14. Adams v. Director, Office of Workers' Comp. Programs, 886 F.2d 818, 820 (6th Cir. 1989). The Fourth Circuit has similarly held that the standard of proof is a preponderance of the evidence. See also Robinson v. Pickands Mather & Co., 914 F.2d 35, 38 (4th Cir. 1990) (to be entitled to benefits, a claimant must prove by a preponderance of the evidence).
These conflicting decisions provide the Court the chance to clear the muddled interpretations of the burden of proof placed on the parties by both the BLBA and the APA. The Court previously addressed "the burden of proof that the claimant must satisfy to invoke the presumption," holding that Part 727 requires the claimant to establish at least one of the four qualifying facts by a preponderance of the evidence. Absent specific statutory directives, American jurisprudence has not accepted a standard of proof tolerating "something less than the weight of the evidence." Reliance on the true doubt rule would be a dramatic departure in the standard of proof.

One circuit depicts the Supreme Court as having ducked the opportunity to resolve the burden of proof issue. The belief that the Mullins Court ducked the issue seems to stem from footnotes in Mullins and a perceived tension by some circuit courts in the Supreme Court's decisions in Steadman v. SEC and NLRB v. Transportation Management. In both Steadman and Transportation Management, the Court addresses the burden of proof placed on litigants by the APA. Despite the contrary discussions of these cases by the Sixth Circuit in Skukan and Seventh Circuit in Freeman United, commentators have understood a preponderance of the evidence as the


16. Mullins Coal Co. v. Director, Office of Workers' Comp. Programs, 484 U.S. 135, 138 (1987). In Mullins, the Court considered a claim filed prior to April 1, 1980, and considered under the criteria at 20 C.F.R. § 727. Here, miners with at least ten years of coal mine employment are entitled to a rebuttable presumption of total disability due to pneumoconiosis, if they can establish the existence of pneumoconiosis, laboratory studies indicating a pulmonary impairment, or a physician's assessment of pulmonary disability.


18. Freeman, 999 F.2d at 292.

19. Mullins, 484 U.S. at 156 n.29, 161 n.35.


burden of persuasion enunciated in Steadman v. SEC and required by section 556 of the APA.  

Whether or not the BLBA and the APA allow a party to prove its case by less than a preponderance of the evidence or require a preponderance of the evidence to prevail should be resolved by the summer of 1994. The potential impact of the Court’s decision will be shaped by however narrowly or broadly the Court defines the issue it must decide. Yet the seemingly apt concession by a panel of the Seventh Circuit that the true doubt rule is a judicial attempt to reconstruct a presumption no longer available seems to ring true.

III. BURDEN OF PROOF FOR SURVIVOR’S CLAIMS FILED ON OR AFTER JANUARY 1, 1982

Survivors of miners are provided benefits when a miner’s death was due to pneumoconiosis. For claims filed on or after January 1, 1982, “death will be considered due to pneumoconiosis if . . . pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or where the death was caused by complications of pneumoconiosis.” Several circuits have addressed whether or not this standard allows benefits when pneumoconiosis is not found to be a proximate cause of death, yet had some tangible effect in death. In four separate decisions, ALJs considered the evidence and ruled that pneumoconiosis was not a cause or factor leading to death since pneumoconiosis was not the proximal cause of death. Three of the four

24. Freeman, 999 F.2d at 293.
25. The presumption of total disability due to pneumoconiosis is available only for claims filed prior to March 31, 1980. After that date, the regulations require a claimant to prove the existence of pneumoconiosis and disability causation in all but very few instances. See 20 C.F.R. § 718.305 (1993).
28. Brown v. Rock Creek Mining Co., 996 F.2d 812 (6th Cir. 1993); Shuff v. Cedar Creek Coal Co., 967 F.2d 178 (4th Cir. 1992); cert. denied, 113 S. Ct. 969 (1993); Peabody Coal Co. v. Railey, 972 F.2d 178 (7th Cir. 1992); Lukosevicz v. Director, Office of Workers’ Compensation Programs, 888 F.2d 1001 (3d Cir. 1989).
29. In Brown, the ALJ denied the widow’s claim and ruled that pneumoconiosis had
decisions were reversed when considered at the circuit level. In the fourth case, a denial of widow’s benefits was vacated, and the case remanded for reconsideration. Recently, the Sixth Circuit embraced the reasoning in the other circuit court decisions, adopting the standard that pneumoconiosis is a “substantially contributing cause or factor” of a miner’s death when pneumoconiosis has actually hastened death.

The Third Circuit was the first of the circuits to grapple with the question of what “substantially contributing cause or factor” meant. In a decision issued in 1989, a panel of the Third Circuit directed an award of benefits where the primary cause of death was pancreatic cancer clearly unrelated to pneumoconiosis, but pneumoconiosis was believed to have hastened, albeit briefly, death. The Fourth Circuit adopted the same legal standard, holding that pneumoconiosis substantially contributes to death if pneumoconiosis serves to hasten death in any way. The Seventh Circuit joined in this interpretation of what constitutes a substantially contributing cause. While such an interpretation of “substantially contributing cause” has been supported by the Director, Office of Workers’ Compensation Programs, and now adopted by the four circuits, at least one circuit judge has dissented, raising valid questions about the reasoning underlying the analysis of the standard in Lukosevicz and its progeny.

The dissenting voice in Brown, Circuit Judge Batchelder, questions the majority’s reasoning on three fronts. The dissent challenges: (1)
whether an interpretation of “substantially contributing cause” is warranted; (2) whether the majority errs in adopting the Director’s recommended interpretation of “substantially contributing cause”; and (3) whether the case should be remanded for further consideration by the ALJ, rather than reversed.\textsuperscript{37} As the dissent first points out, the ALJ who considered the facts failed to correctly identify the legal standard to apply.\textsuperscript{38}

The ALJ analyzed the evidence under a standard requiring that death be due to or “significantly caused” by pneumoconiosis, rather than whether pneumoconiosis was a “substantially contributing cause” of death. The court had no need to interpret the meaning of the pertinent legal standard since the ALJ erred in identifying the standard to apply. The case should have been remanded for the ALJ to consider if pneumoconiosis was a substantially contributing cause of death.

Second, since the claim should have been remanded, the consideration of the Director’s interpretation of “substantially contributing cause” or the decision to defer to the Director in ascertaining the meaning of the standard was unnecessary.\textsuperscript{39} As the dissent correctly points out, even if addressed, the meaning of “substantially contributing cause” is not ambiguous.\textsuperscript{40} Accordingly, the Director is worthy of no special deference in the interpretation of the meaning of the standard.\textsuperscript{41} Instead of conducting needless and unsupported excursions into legislative history, the ALJ could have been left to “consult any dictionary for guidance, and after that it is our [circuit court’s] job simply to see if the conclusion drawn by the ALJ is supported by substantial evidence.”\textsuperscript{42}

\begin{itemize}
  \item \textsuperscript{37} Brown, 996 F.2d at 817.
  \item \textsuperscript{38} Id.
  \item \textsuperscript{39} Id. at 818.
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} Judicial deference to an administrative agency's interpretation of ambiguous provisions of the statute it is authorized to implement can be proper. Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984); see also Pauley v. BethEnergy Mines, Inc., 111 S. Ct. 2524, 2534 (1991) (for a discussion of whether the Court need defer to the Director's interpretation of the regulations).
  \item \textsuperscript{42} Brown, 996 F.2d at 818.
\end{itemize}
Finally, the dissent questions the majority’s conclusion that the evidence was “abundantly clear” so as to require the circuit court to order that benefits be awarded. The circuit court is in a very poor position to weigh conflicting evidence and only in the exceptional case should the court reverse the ALJ’s finding with instructions to award or deny benefits. Nevertheless, the majority reversed the ALJ’s denial of benefits.

While all of the dissent’s criticisms are valid, there would appear little chance to alter the predominant interpretation of “substantial contributing cause.” The result of the prevailing interpretation of the standard to establish entitlement to survivor’s benefits has diminished the claimant’s burden of proof, in much the same way that the meaning of disability is due to pneumoconiosis was judicially reduced so as to allow entitlement if pneumoconiosis was at least in part responsible for disability.

IV. More Recent Evidence—More Probative or Not?

For many years, Administrative Law Judges have been asked to resolve starkly conflicting medical evidence in black lung claims. Conflicts frequently (almost predictably) arise among physicians’ assessments as to the existence of pneumoconiosis or in the assessment of degree of pulmonary disability arising out of coal mine dust induced lung disease. In weighing conflicting medical opinions, ALJs fre-

43. Id.
44. Id. at 819.
45. Adams v. Director, Office of Workers’ Comp. Programs, 886 F.2d 818 (6th Cir. 1989); Mangus v. Director, Office of Workers’ Comp. Programs, 882 F.2d 1527 (10th Cir. 1989) (holding if pneumoconiosis is at least a contributing cause, then there is a significant nexus between pneumoconiosis and the total disability to satisfy the burden of proof); see also Robinson v. Pickands Mather & Co./Leslie Coal Co., 914 F.2d 35 (4th Cir. 1990); Shelton v. Director, Office of Workers’ Comp. Programs, 899 F.2d 690 (7th Cir. 1990); Contra Lollar v. Alabama By-Products Corp., 893 F.2d 1258 (11th Cir. 1990); Bonessa v. U.S. Steel Corp., 884 F.2d 726 (3d Cir. 1989).
46. To prevail in a BLBA claim filed since 1982, a miner must prove four distinct elements: (1) the existence of pneumoconiosis; (2) pneumoconiosis arose out of coal mine employment; (3) that there is a totally disabling pulmonary impairment; and (4) that the pulmonary impairment was caused, in part, by coal mine employment. Newell v. Director, Office of Workers’ Comp. Programs, 933 F.2d 510 (7th Cir. 1991).
sequently look to the more recent medical reports as more probative of a miner's current condition. This practice of according deference to later evidence, dubbed the "later evidence rule," seemed especially apt in evaluating black lung claims, as coal workers' pneumoconiosis is considered to be a progressive and irreversible disease.\textsuperscript{47} To resolve conflicting medical evidence, the Benefits Review Board has upheld the determination to accord added weight to more recent evidence, especially when a significant amount of time separates the newer from the older evidence.\textsuperscript{48} While it is reasonable to place greater weight on more recent evidence, ALJs were not to mechanically credit later evidence to resolve conflicting evidence.\textsuperscript{49}

Against this background, the Fourth Circuit considered a decision where the ALJ found more recent x-ray interpretations more probative and denied benefits.\textsuperscript{50} Unlike many black lung claims, there was sparse medical evidence presented for consideration. The pertinent evidence consisted of three x-rays and a single physician's interpretation of each x-ray. The earliest chest x-ray was taken in 1982 and interpreted to reveal changes consistent with simple and complicated coal workers' pneumoconiosis.\textsuperscript{51} Subsequent radiographs taken in 1983 and 1984 were interpreted by two other physicians as compatible


\textsuperscript{48} Numerous decisions of the Benefits Review Board have upheld ALJs' use of the later evidence rule. See, e.g., Wetzel v. Director, Office of Workers' Comp. Programs, 8 Black Lung Rep. 1-139 (1985); Edwards v. Director, Office of Workers' Comp. Programs, 6 Black Lung Rep., 1-265 (1983); Stanley v. Director, Office of Workers' Comp. Programs, 7 Black Lung Rep., 1-386 (1984). For a listing of later evidence cases see BLACK LUNG DESKBOOK, BLACK LUNG REP., Vol. A, Part IV, 3(c), at A6-308.


\textsuperscript{50} Adkins v. Director, Office of Workers' Comp. Programs, 958 F.2d 49 (4th Cir. 1992).

\textsuperscript{51} Simple pneumoconiosis is defined as radiographic opacities ranging from 1.5 millimeters to 10 millimeters as defined by the ILO/UICC classification system. See 20 C.F.R. § 718.103 (1993). Complicated pneumoconiosis produces radiographic opacities in excess of 10 millimeters in diameter identified as large opacities of size A, B, or C in the ILO/UICC system. See 20 C.F.R. § 718.304. When proven, complicated coal workers' pneumoconiosis invokes an "irrebuttable" presumption of entitlement. See 30 U.S.C. § 923(b)(2) (1988); 20 C.F.R. § 718.304 (1993).
with a much lower profusion of simple pneumoconiosis without any changes diagnostic of complicated coal workers' pneumoconiosis. All three of the physicians were certified as B-readers of x-rays, while the earlier chest x-ray had been interpreted by a physician also board certified by the American College of Radiology.\textsuperscript{52} The ALJ determined that the interpretations of the later x-rays from 1983 and 1984 outweighed the reading of the older x-ray. Faced with conflicting evidence as to the existence of complicated coal workers' pneumoconiosis, the ALJ ruled that the x-ray evidence as a whole was insufficient to prove the existence of complicated coal workers' pneumoconiosis. When asked to review this resolution of the conflicting x-ray evidence, the circuit panel concluded that the "later evidence is better rationale" has no logical force.\textsuperscript{53} The court flatly rejected the approach as a valid means to reconcile evidence that cannot be reconciled by reference to its sequence.

In a nutshell, the three-judge panel described the later evidence rule as a theory premised on: (1) pneumoconiosis is a progressive disease; (2) claimants cannot get better; and (3) a later test or exam is a more reliable indicator of the miner's condition than an earlier one. That logic only holds where the evidence is consistent with premises 1 and 2. If the evidence shows the miner has improved, the reasoning underlying the later is better rule does not apply.\textsuperscript{54}

Without the underpinnings of the later is better principle, the decision to find the "more qualified" radiologist's x-ray interpretation not entitled to equal or greater weight was deemed "unreasoned." Reminding the Benefits Review Board and Administrative Law Judges\textsuperscript{55} that

\begin{footnotesize}
\begin{enumerate}
\item B-readers are physicians who have demonstrated a proficiency in interpreting chest radiographs for the presence or absence of pneumoconiosis and have done so by passing an examination given by the Appalachian Laboratory for Occupational Safety and Health. \textit{See} 42 C.F.R. § 37.51(b) (1993); 20 C.F.R. § 718.202(a)(1)(ii)(E) (1993).
\item \textit{Adkins}, 958 F.2d at 51.
\item \textit{Id.} at 52.
\item Claims brought under the Black Lung Benefits Act are adjudicated by Administrative Law Judges and then reviewed by the United States Department of Labor's Benefits Review Board. Parties are accorded review by the federal circuit court wherein the injury occurred. \textit{See} 33 U.S.C. § 921 (1988).
\end{enumerate}
\end{footnotesize}
the Act embodies the principle “that doubt is to be resolved in favor of the claimant,” the court reversed the denial of benefits. 56

Instrumental, if not outcome determinative, in this panel’s decision may have been the characterization that the conflict was one regarding the severity of coal workers’ pneumoconiosis rather than a conflict concerning the existence of the disease. 57 Although this miner had radiographic evidence of pneumoconiosis, the decision to reverse the ALJ’s denial of benefits is troubling for several reasons. First, this panel departs from the circuit’s own long standing stated standard of review. While repeating the standard of review, requiring determinations below to be upheld if rational and supported by substantial evidence, 58 the panel departs from that standard. In reviewing an ALJ’s factual findings, a circuit court does not have the authority to re-weigh and resolve conflicting evidence, but is to determine if the decision below is supported by substantial evidence. 59 Yet, this panel engages in re-weighing the conflicting x-ray evidence. While the 1982 chest x-ray was read by a radiologist, two subsequent physicians 60 interpreted separate chest x-rays, independently concluding there was a strikingly lesser degree of the disease present. 61 Applying the standard of review, the resolution of this question of fact is exclusively reserved for the ALJ as the trier-of-fact. As the Supreme Court has taught, “the ALJ’s task is, of course, to weigh the quality, and not just the quanti-

56. The assertion that the Black Lung Benefits Act embodies the principle that doubt is to be resolved in favor of the claimant is not embodied in the language of the Black Lung Benefits Act, the implementing regulations, or statutory provisions of the Longshore and Harbor Workers’ Compensation Act. See supra part II. Nevertheless the “humanitarian” purpose of the Act has become part and parcel of the lore surrounding federal black lung claims.

57. Adkins, 958 F.2d at 52.
58. Napier v. Director, Office of Workers’ Comp. Programs, 890 F.2d 669, 672 (4th Cir. 1989).
60. Both of whom were qualified as NIOSH-certified B-readers but not Board-certified in radiology.
61. The 1980 x-ray was classified as revealing complicated pneumoconiosis category A large opacities and a background of small opacities of 2/3. Later x-rays were described to evidence only small opacities of a 1/0 profusion. Adkins, 958 F.2d at 51.
The proper course was to remand, not reweigh, the conflicting evidence.63

The logic is further muddled with the reminder addressed to the Benefits Review Board and Administrative Law Judges that the Act embodies “humanitarian principles.”64 Humanitarian in scope or not, the opinions of two physicians who each reviewed a later chest radiograph can rationally be found more persuasive than one physician who believed an earlier radiograph showed a much more advanced form of disease. Reasonable minds would agree.65 In reversing the denial of benefits, the panel falls prey to the same empty logic it attacks. Mechanical deference based on “superior credentials,” much like later evidence, is devoid of persuasive logic.

An alternative to one doctor being “right,” while the two other physicians were “wrong,” is possible. Radiographic opacities on a chest x-ray may be consistent with coal workers’ pneumoconiosis.66 If the densities disappear, they are not the permanent scarring and fibrosis associated with coal workers’ pneumoconiosis. Thus, it is possible that the physician correctly identified abnormalities apparent in 1982, but since the radiographic changes were a result of an acute infection or inflammatory disease that subsequently disappeared, the later x-rays failed to manifest such changes. Yet, this is a question for a trier-of-fact, not for an appellate tribunal, to attempt to weigh and resolve.

The third, and perhaps most troubling, aspect of this decision is the suggestion that x-rays taken subsequent to an x-ray read positive for pneumoconiosis have no probative value when interpreted as revealing a lesser degree of pneumoconiosis. If such is to be the holding in Adkins, both the Director and coal mine operators are put at a tremendous and irrational disadvantage. Should a physician interpret a

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62. Mullins, 484 U.S. at 149 n.23.
63. See Thom v. Itmann Coal Co., 3 F.3d 713 (4th Cir. 1993).
64. Adkins, 958 F.2d at 52.
66. 20 C.F.R. § 718.102(b) (1993) adopts the ILO/UICC classification system for radiographic opacities relating to coal workers’ pneumoconiosis. The classification scheme provides that shadows seen on a chest x-ray may be “consistent with” coal workers’ pneumoconiosis.
radiograph as positive for pneumoconiosis and is simply wrong, subsequent x-rays interpreted by equally qualified physicians might be accorded no weight given the assumption underlying the Adkins holding that once some physician appreciates pneumoconiosis it must be present. Such a result is just as irrational as the later is better principle that the court attacks.

Had the ALJ mechanically credited the more recent x-ray interpretations over the earlier interpretation given the sequence alone, the panel would have been correct to vacate the finding. Yet, from the portion of the ALJ’s decision quoted, this does not seem to have been the case. The ALJ held that the positive finding was disputed by two findings of simple pneumoconiosis on two subsequent x-rays. Since pneumoconiosis is progressive and since there are two findings of simple pneumoconiosis on two subsequent x-rays, I reject [the finding of complicated pneumoconiosis].

The trier-of-fact concluded that the positive reading of complicated pneumoconiosis was errant. The ALJ did not mechanically hold that the interpretation of complicated pneumoconiosis was based on evidence that was “old” and therefore irrelevant.

A subsequent unpublished decision by the same circuit ruled that the currency of a medical report is an appropriate consideration in the balancing of medical reports. While unpublished, this panel retreats from the overly broad suggestion that later is better is always irrational. Prior decisions of this same circuit have held that more recent blood gas studies are more indicative of a claimant’s pulmonary health. Other circuits have affirmed a determination that more recent

68. Adkins, 958 F.2d at 51.
70. Gray v. Director, Office of Workers’ Comp. Programs, 943 F.2d 513 (4th Cir. 1990).
evidence warrants greater deference.\textsuperscript{71} ALJs certainly should consider the temporal proximity of conflicting test results in determining which of the two different medical opinions to credit.\textsuperscript{72}

A panel of an adjoining circuit joined in rejecting later evidence.\textsuperscript{73} In \textit{Woodward}, the ALJ was ruled to have misapplied the "later evidence" principle. The ALJ considered only the later x-rays, not seeking to reconcile the positive results of earlier x-rays with the negative interpretations of the later x-ray interpretations. The mechanical use of later evidence to resolve conflicting x-ray interpretations is irrational and prohibited.\textsuperscript{74}

The same circuit has retreated from the potentiality of an overly broad holding of \textit{Adkins} in a published decision.\textsuperscript{75} The court held:

\begin{quote}
In \textit{Adkins v. Director, OWCP}, we struck down, as arbitrary and irrational, the practice of blindly ascribing more weight to the most recent evidence.

The employer argues that a recent physician's opinion can be more reliable than an old one. Of course it can be. There may be new or additional evidence developed that discredits an earlier opinion; a comparison of medical reports and tests over a long period may conceivably provide a physician with a better perspective than the pioneer examiner. The reasons for crediting such an opinion could be perfectly rational. But "recency," in and of itself, is not one of those reasons. A bare appeal to "recency" is an abdication of rational decisionmaking.\textsuperscript{76}
\end{quote}

In about one year, the courts suggested a vast departure from the weighing of conflicting medical evidence. After suggesting a departure, at least the Fourth Circuit has deferred to embrace the Benefits Review Board's prior resolution of the tension in conflicting evidence. Reliance on more recent evidence is permissible, but mechanical deference based on date alone is irrational, and prohibited. An ALJ can credit

\begin{itemize}
\item \textsuperscript{71} Robinson v. Missouri Mining Co., 955 F.2d 1181, 1183-84 (8th Cir. 1992).
\item \textsuperscript{72} Mullins Coal Co. v. Director, Office of Workers' Comp. Programs, 484 U.S. 135, 151-52 (1987); Island Creek Coal Co. v. Cooley, 845 F.2d. 622 (6th Cir. 1988).
\item \textsuperscript{73} Woodward v. Director, Office of Workers' Comp. Programs, 991 F.2d 314 (6th Cir. 1993).
\item \textsuperscript{74} \textit{Id.} at 320-21.
\item \textsuperscript{75} \textit{Thorn}, 3 F.3d at 718.
\item \textsuperscript{76} \textit{Id.} (citation omitted).
\end{itemize}
more recent evidence, not just because it is more recent, but because the evidence fails to support a claimant's entitlement to benefits, based on the presence of pneumoconiosis or pulmonary disability.

V. REBUTTAL OF THE INTERIM PRESUMPTION

Despite having been promulgated and applied for nearly one decade and a half, circuit courts are still trying to attach meaning to the rebuttal provisions of the interim presumption.\(^77\) Courts have struggled with the meaning of 20 C.F.R. section 727.203(b)(2) and whether it encompasses only pulmonary or whole-man disability.\(^78\) At least one circuit court has now struggled with the meaning of the seemingly clear language of 20 C.F.R. § 727.203(b)(3).\(^79\)

In what, at least until now, was deceptively clear language, subsection (b)(3) provides the presumption of disability due to pneumoconiosis shall be rebutted if "[t]he evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment."\(^80\)

The disability referred to in subsection (b)(3) is that disability presumed in section 727 subpart A, a pulmonary disability.\(^81\) The BLBA confers disability benefits on coal miners or their families as prolonged exposure to coal dust has subjected hundreds of thousands of coal miners to pneumoconiosis—a serious and progressive condition.\(^82\) For nearly a decade, the prevailing standard has required the party oppos-

\(^{77}\) The interim presumption affords long term miners with evidence of a pulmonary impairment or pneumoconiosis with the presumption of disability due to coal workers' pneumoconiosis, 20 C.F.R. § 727.203(a) (1993). Employers can rebut this under any of four methods described at 20 C.F.R. § 727.203(b) (1993).

\(^{78}\) E.g., Martin v. Alabama By-Products Corp., 864 F.2d 1555 (11th Cir. 1989); Sykes v. Director, Office of Workers' Comp. Programs, 812 F.2d 890 (4th Cir. 1987); York v. Benefits Review Board, 819 F.2d 134 (6th Cir. 1987); Wetherill v. Director, Office of Workers' Comp. Programs, 812 F.2d 376 (7th Cir. 1987); Kertesz v. Crescent Hills Coal Co., 788 F.2d 158 (3d Cir. 1986).

\(^{79}\) Cort v. Director, Office of Workers' Comp. Programs, 996 F.2d 1549 (3d Cir. 1993).


\(^{82}\) Mullins, 484 U.S. at 138.
ing entitlement to "rule out" any relationship between the miner's disability and coal mine employment. The rule out standard requires a party to establish that the miner's primary condition (usually understood to be of pulmonary origin) was not aggravated to the point of total disability by prolonged exposure to coal dust. This interpretation of subsection (b)(3) seemed settled. An illustrative example is helpful. A retired coal miner, with an x-ray positive for simple pneumoconiosis, is disabled due to a non-occupationally caused stroke. Rebuttal under subsections (b)(1), (b)(2), and (b)(4) is not possible because of the x-ray evidence of pneumoconiosis and the debilitating effects of the stroke. However, if there was "no pulmonary impairment" the claim would be properly denied as the disability, due to a stroke, was not a pulmonary impairment due to pneumoconiosis. The presumption of total disability due to pneumoconiosis should be rebutted because pneumoconiosis causes a pulmonary impairment and the evidence shows no pulmonary impairment. Thus, the evidence "rules out" total disability arising out of coal mine employment. The Benefits Review Board embraced such a use of (b)(3) rebuttal.

In a June 1993 decision, the Third Circuit rejected such an understanding of the meaning of (b)(3) rebuttal, by showing that a claimant has no respiratory or other pulmonary impairment. Subsection (b)(3) was deemed as limited to concerning whether the claimant's total disability results in whole, or in part, from coal mine employment. Subsection (b)(3) is limited to those instances where disability was

83. The rule out standard has been adopted by several circuits. E.g., Rosebud Coal Sales Co. v. Weigand, 831 F.2d 926 (10th Cir. 1987); Palmer Coking Coal Co. v. Director, Office of Workers' Comp. Programs, 720 F.2d 1054 (9th Cir. 1983). Several circuits require that pneumoconiosis not be a contributing cause to the disability. Consolidation Coal Co. v. Smith, 837 F.2d 321 (8th Cir. 1988); Wetherill v. Director, Office of Workers' Comp. Programs, 812 F.2d 376 (7th Cir. 1987); Carozza v. U.S. Steel Corp., 727 F.2d 74 (3d Cir. 1984).


86. Cort, 996 F.2d at 1551-53.

87. Id. at 1552.
caused by some other disease, addressing the source not the degree of disability.  

The ALJ had ruled that because the miner had “no impairment,” there was not total disability due to coal mine employment and rebuttal established via subsection (b)(3). While acknowledging the obvious logic in the ALJ’s reasoning, it was believed to “subvert” the “carefully structured” rebuttal scheme of 20 C.F.R. § 727.203(b). The change in the interpretation of subsection (b)(3) strikes out at a perceived injustice. In considering Cort’s claim, the ALJ had initially ruled that the presumption of disability due to pneumoconiosis had been rebutted under subsection (b)(2) because the miner had “no impairment.” The Benefits Review Board vacated this finding as a medical opinion of “no impairment” was insufficient to establish that a miner is “able to do his usual coal mine or comparable and gainful work.” The ALJ was perceived as trying to evade the impact of a prior decision by squeezing the same bit of reasoning (no impairment ergo no total disability) into subsection (b)(3). Rebuttal under subsection (b)(3) was limited to addressing the source of the disability;
rebuttal regarding the existence of total disability must proceed only under the rubric of subsection (b)(1) or (b)(2).

Such an interpretation of the rebuttal scheme is not only needlessly restrictive, but illogical. Such an interpretation deprives a party opposing benefits of the opportunity to efficiently rebut the presumed existence of pulmonary disability arising out of coal mine employment. A party opposing entitlement must be allowed to rebut the presumption of total disability due to pneumoconiosis by proving that the miner has no pneumoconiosis, has no pulmonary impairment, or is not disabled from performing the usual coal mine employment.94

Confusion over the meaning of “impairment” versus “disability” adds another layer of confusion to the analysis.95 If the miner retired 15 years ago and has now reached the age of 80, he cannot do the exertional labors required in underground coal mining. The rule suggested in Cort prohibits an employer from rebutting the presumption of disability due to pneumoconiosis by showing that there is no impairment arising out of coal mine employment by proving no pulmonary impairment.

Disability benefits are payable when a miner is totally disabled, the disability was caused at least in part by pneumoconiosis, and the disability arose out of coal mine employment.96 In enacting the BLBA, Congress expressed a concern with the insidious effects of the work environment on a coal miner’s health. But if a miner is not actually suffering from the type of impairment with which Congress was concerned, there is no justification for presuming that the miner is entitled to benefits. There needs to be a logical connection between the proven fact and the presumed conclusion to satisfy the constitutional concern that there is some rational connection between the fact proved

94. Pauley, 111 S. Ct. at 2539.
95. While seemingly synonymous, disability is a legal concept and impairment is a medical concept. By way of analogy, if a ballet dancer loses a leg, the impairment (loss of a leg) is totally disabling; it forever prevents the dancer from dancing as before. If a bureaucrat suffers the same injury, the degree of impairment does not hamper the ability to work at a desk. There is the same impairment, but no accompanying disability. In fact, as the worker may be forced to stick close by the desk, an advancement may result. Keith W. Morgan, Occupational Lung Diseases 63 (2d ed. 1984).
96. Mullins, 484 U.S. at 141.
and the ultimate fact presumed. It disserves congressional intent to interpret Health, Education and Welfare's interim regulations to allow recovery by miners who do not have pneumoconiosis or whose total disability did not arise, at least in part, from their coal mine employment.

The holding in Cort allows applicants with no pulmonary or respiratory disability to be shielded from rebuttal evidence proving there is neither impairment nor disability arising out of coal mine employment. A party opposing entitlement may not be able to show that the miner is able to do his usual work, but there may be no medical impairment or legal disability. The standard in Cort undermines the intent of the rebuttal criteria and deprives, without justification, either the Department of Labor or a coal mine operator of the ability to construct a defense based on the notion that there is no compensable disability when no pulmonary impairment exists.

VI. DUTY TO NAME RESPONSIBLE OPERATORS

The regulations provide that at the initial stage of a claim, the District Director is to identify and name the potential responsible operators. In 1984, the Benefits Review Board ruled that this task must be correctly performed prior to a formal hearing before an ALJ. The Director was not entitled to another opportunity to identify other putative responsible operators. This decision was interpreted to prohibit the remanding of claims by an ALJ for further exploration of the responsible operator issue. Once referred to the ALJ for a hearing, the Director was limited to the pool of operators named to select the ultimate responsible operator. The Sixth Circuit limited such a broad interpretation, holding in situations where a hearing had not been held, the Director was not prohibited from naming a new responsible opera-

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97. Id. at 158-59.
98. Id. at 159.
99. As an aside, it is interesting to note that the Director's interpretation of the regulations was not found to be entitled to any special deference as the court believed it was "not reasonable" and "cannot be sustained." Cort, 996 F.2d at 1551-52 n.6.
tor after an earlier operator had been dismissed. In this case, the ALJ had dismissed the alternative responsible operator after the District Director had failed to name the party "as soon after the filing of the claim as the evidence allowed." The Sixth Circuit was not persuaded to extend the Crabtree doctrine to such situations.

Since the issuance of Crabtree, the Director routinely names all potential responsible operators in the initial proceedings and retains the multiple operators as potential parties when a black lung claim is forwarded to the Office of Administrative Law Judges. While the implementing regulations for the BLBA clearly extend liability for the payment of black lung benefits to officers and directors of coal mine operators, the Department seems reluctant to proceed against a primary responsible operator or its officers or directors when the operator is out of business. Rather, the Department of Labor routinely names all or any potential responsible operators (all employers since January 1970) in an attempt to proceed against those that either have insurance for the payment of black lung benefits or are still financially viable coal producers. Such alternative naming of operators is incorrect. The scope and intent section of the subpart providing the criteria for the naming of responsible operators specifically contemplates the Black Lung Disability Trust Fund to pay benefits if the responsible operator is in default.

No authority exists in the BLBA or the implementing regulations for an alternative responsible operator, absent successor operators, to affirmatively establish that another potential operator has the ability to pay benefits if found liable. The Director has no authority to shift


103. Oglebay Norton, 877 F.2d at 1302.


the burden of proof on another potential responsible operator to demonstrate the ability of another operator to assume payment. Rather, an alternative operator need only show that the primary operator employed the claimant for at least one calendar year as a coal miner. If the first operator "qualifies" as a responsible operator, the prior employers avoid potential liability.\textsuperscript{109}

The Board expanded on the Director's responsibilities to identify potential responsible operators in a second decision.\textsuperscript{110} The Director shoulders the burden to "identify, notify, and obtain evidence from all of the responsible operators who may be liable in any given claim."\textsuperscript{111} This duty includes a determination as to the ability of the named operators to assume the responsibility and the capability for the payment of any benefits awarded. The regulations mandate employer compliance, providing for operators to assume either self insurance or to obtain a policy of insurance.\textsuperscript{112} The Director, as the administrator of the Act, must "vigorously" enforce these provisions.\textsuperscript{113} Contrary to the view of the Director, there is no authority (absent a successor in operations)\textsuperscript{114} to hold liable for the payment of black lung benefits operators that happen to fall in line as the second, third, or more remote operator to have formerly employed a miner. Liability for these claims reverts to the Black Lung Disability Trust Fund.\textsuperscript{115} These decisions should cause better and earlier assessments of potential conflicts regarding who the operator potentially responsible for benefits may be.

\begin{flushright}
109. \textit{Id.}
113. \textit{Matney}, 17 Black Lung Rep. at 1-149.
115. \textit{Matney}, 17 Black Lung Rep. at 1-149 to 1-150.
\end{flushright}
VII. ATTORNEY’S FEES

A repeatedly problematic portion of the BLBA surrounds the fee shifting portion of the Act. The BLBA has no specific provisions concerning attorney’s fees, but incorporates the Longshore and Harbor Workers’ Compensation Act (LHWCA) provisions. Those provisions shift the payment of attorney’s fees to the losing party when a claim is successfully prosecuted. If the claim is ultimately denied, an attorney representing a claimant is prohibited from collecting any fee.

The fee is reviewed by the appropriate adjudicatory body to assure the fee is reasonable. Although contingent on prevailing, attorneys representing claimants are now not allowed to include a risk of loss in the calculation of the reasonable hourly rate charged. Risk of loss multipliers are prohibited under fee-shifting statutes. While some attorneys have sought and had received a premium for the risk of loss in black lung claims, use of such risk of loss multiplier to enhance a fee under a fee shifting statute has been questioned in other fee shifting statutes. The Fourth Circuit has specifically rejected use of risk of loss multipliers to enhance an hourly rate in black lung claims.


119. The resultant strains of the contingent nature of representative’s fees is discussed by the Court in U.S. Dep’t of Labor v. Triplet, 494 U.S. 715 (1990).


122. Barrow v. Falck, 977 F.2d 1100 (7th Cir. 1992); Gusman v. Unisys Corp., 986 F.2d 1146 (7th Cir. 1993).

123. Broyles v. Director, Office of Workers’ Comp. Programs, 974 F.2d 508 (4th Cir. 1992) (approving $43,000 in fees in a case that was presented to the Supreme Court and approval for over $300,000 in fees was sought).
VIII. WHERE DO WE GO FROM HERE?

Various circuit courts have expressed open frustration and considerable exasperation in addressing claims under the black lung program.124 In claims adjudicated under Part 718 of the regulations,125 the miner has the burden to prove126 the existence of pneumoconiosis. The most common method to establish the existence of pneumoconiosis is by presenting x-ray evidence of pneumoconiosis.127

The BLBA provides that the Department of Labor shall, on request, provide to each miner who files a claim an opportunity to substantiate the claim by means of a complete pulmonary evaluation.128 This requirement includes not only a physical examination, but laboratory testing of lung function and a chest x-ray. The Department of Labor has the x-ray read by a physician with board certification in the subspecialty of radiology or one that is certified as having expertise in the interpretation of x-rays for pneumoconiosis. The parties in black lung claims frequently have the x-ray taken in association with the DOL examination or x-rays taken in association with pulmonary evaluations scheduled by the other parties reread by experts of their own choice. In Woodward,129 the circuit court confronted the problem of conflicting interpretations of x-rays by equally qualified experts. The ALJ in Woodward was faced with resolving conflicting interpretations of 8 different chest x-rays taken between 1975 and 1987. Of these

124. Grizzle v. Pickands Mather and Co., 994 F.2d 1093 (4th Cir. 1993) (Hall, J., dissenting); Woodward v. Director, Office of Workers’ Comp. Programs, 991 F.2d 314 (6th Cir. 1993); Adkins, 950 F.2d 49.
126. See discussion supra part II for an explanation of the meaning of the burden to prove.
127. The regulations provide x-rays are to be classified according to the ILO/UICC classification system for pneumoconiosis. The ILO system provides for classification of opacities under a graduated scale where 0/0 indicates no abnormalities, I/0 a level of abnormalities consistent with a diagnosis of pneumoconiosis, and 3/3 an advanced case of pneumoconiosis. 20 C.F.R. § 718.103 (1993).
129. Woodward v. Director, Office of Workers’ Comp. Programs, 991 F.2d 314 (6th Cir. 1993).
eight x-rays, the more recent\textsuperscript{130} had conflicting interpretations for pneumoconiosis, three positive and ten negative. The eight x-rays had been read a total of 38 times. At least seven of the 12 positive readings were sponsored by the claimant, the remaining 26 negative readings were sponsored by the employer.\textsuperscript{131} The ALJ resolved the conflict, finding no evidence of pneumoconiosis. Faced with the ALJ’s solution, the court held:

This cumulative evidence inquiry also reveals certain policy flaws in the adjudication of claims that typically operate to disadvantage Black Lung Benefits Act claimants. First, experts hired exclusively by either party tend to obfuscate rather than facilitate a true evaluation of a claimant’s case. Second, when one party is able to hire significantly more experts because it has infinitely more resources, the truth-seeking function of the administrative proceeding is skewed and indirectly undermined. Third, hiring armies of experts often results in needless expense. If such a system continues unchecked, justice will not be served, while moneyed interests thrive.\textsuperscript{132}

A dissenting opinion in an adjoining circuit voiced a similar frustration over BLBA claims:

The current norm is the contest of physician’s reports. If this exercise ever had a fresh, truth-seeking outlook, it has long since faded. Tell me where the miner lives and the name of the respondent employer, and I can make a pretty accurate guess as to who the various experts are and what their reports say. I am not singling out one side for blame. Disability, or the lack thereof, seems inevitably in the eye of the paid beholder.\textsuperscript{133}

Faced with the frustrations over the observed shortcomings in the BLBA, both of the circuits posited suggestions for the reform of the system. Judge Hall suggests that Congress could seek to “fix” this “tired, scandalously slow process.”\textsuperscript{134} The Sixth Circuit suggests that

\textsuperscript{130} The more recent x-rays being those taken in 1987. See infra part II for discussion of “recent evidence.”
\textsuperscript{131} Woodward, 991 F.2d at 316-17.
\textsuperscript{132} Id. at 321.
\textsuperscript{133} Grizzle, 994 F.2d at 1101 (Hall, J., dissenting).
\textsuperscript{134} Id. Reform legislation has been introduced in the last two sessions of the House of Representatives, H.R. 1637, 102d Congress, 2d Session (1992) and H.R. 792, 103d Congress, 1st Session (1993).
an ALJ not admit unduly repetitious evidence and seek "to have the parties agree upon a predetermined number of experts to qualitatively evaluate the x-rays taken, while sharing the costs of hiring [the experts]." Such a procedure, the court suggested, would likely increase the fairness and reduce attendant costs.

The regulations and the APA provide the mechanisms for an ALJ to control truly needless or unduly repetitious evidence scorned by the courts. Moreover, the time lag in the decision making process could be better controlled by the agency itself. Yet, due process and the regulations dictate that there must be a fair hearing, which must include the opportunity to oppose a claim and present evidence. Attorneys defending these claims are partially at fault. When a positive x-ray reading is offered and prior readings were negative, the x-ray, a static piece of evidence, is passed from expert to expert in lieu of in-person cross-examination. When a claimant sponsors positive x-ray readings and an employer’s or the DOL’s experts conclude that the same x-ray is completely negative, frequently a group of rereadings of the same x-ray are obtained to respond to the claimant’s evidence. Instead, maybe the experts should be brought to the administrative hearing and demonstrate for the ALJ, with the ILO classification films, why the x-ray is or is not positive for pneumoconiosis.

From the standpoint of a practitioner, applicant courts are seeing the types of conflicts faced by lawyers on a daily basis. Instead of suggesting a process to “obfuscate rather than facilitate a true evaluation, a “skewed process” or “a process directly undermining a truthseeking administrative proceeding which allows moneyed interests to thrive,” the conflicts seen are those that spring from a legally defined disease. Coupled with the legal disease is the emotional baggage attached to coal workers’ pneumoconiosis. Unlike many diseases, a

135. Woodward, 991 F.2d at 321.
137. Ignored is 20 C.F.R. § 725.476 (1993), which provides that an ALJ shall issue a decision and order after 20 days of the termination of the hearing.
139. The author represents several coal mine operators.
healthy person can experience breathlessness and imagine the agony of such a debilitating illness caused by coal workers' pneumoconiosis.

Despite the improvements in the regulation of underground coal mine dust, with the seemingly uncontested lessening of the degree of pneumoconiosis experienced by coal miners in the United States, miners continue to seek disability benefits under BLBA after retirement. The BLBA, presented as a pension program, unfortunately is not. It is to provide disability benefits to miners, their dependents, or survivors for pulmonary impairments that arose out of coal mine employment.

The contradictions in the legal as opposed to medical definitions of pneumoconiosis, the failure to apportion a disability benefit when a pulmonary impairment is due to multiple causes, and the apparent agreement category 1 radiographic pneumoconiosis is not generally regarded by informed medical opinion as a disease process, and presents layers of contradictions and fictions which only serve to frustrate those seeking black lung benefits. The federal program envisioned to be replaced by state programs has, after more than 20 years, become a part of life for retiring coal miners, attorneys, and physicians in the coal fields of the United States.

ADDENDUM

Just prior to publication of this article, the United States Supreme Court handed down its decision in Director, Office of Workers' Compensation Programs v. Greenwich Collieries. A six-member major-
ity of the Court held use of the “true doubt” rule to resolve equally balanced evidence violates section 7(c) of the Administrative Procedure Act (APA). In so holding, the Court affirms the decisions of the United States Court of Appeals for the Third Circuit and vacates contrary decisions issued by the Sixth and Seventh Circuits. The APA and Black Lung Benefits Act (BLBA) are controlled by a burden of persuasion requiring the benefits claimant to persuade the trier-of-fact of the truth of a proposition by a preponderance of the evidence. Reliance on “true doubt” violates this burden, by allowing a trier-of-fact to resolve equally conflicting evidence in favor of the benefits claimant.

Not only was the “true doubt” rule found to be afool of the burden of proof set forth by section 7(c) of the APA, but also contrary to the APA’s general goals of greater uniformity of procedure and standardization of administrative practice. Had use of the “true doubt” rule been allowed, the Court would have to defer to the Department of Labor’s reliance on marginally relevant and imprecise passages from the APA’s legislative history, opening the possibility of a multitude of interpretations. Each federal agency would be free to decide which party bears the burden of proof.

The Greenwich decision is not limited to cases arising under the BLBA. Rather, this decision may be one of the more significant Administrative Law decisions to have been rendered in the last decade, given the broad way the Court defines the issue. The majority provides a hornbook-like analysis of confusion caused by imprecise language arising out of the dual meanings of a burden of persuasion and a burden of production attributed to “burden of proof.” The “burden of proof” as used by the Administrative Procedure Act is held to refer to a burden of persuasion. The majority also finds a contrary footnote in a prior Supreme Court decision that cannot now withstand scruti-

145. Maher Terminals v. Director, Office of Workers’ Compensation Programs, 992 F.2d 1277 (3d Cir. 1993); Greenwich Collieries v. Ondezko, 990 F.2d 730 (3d Cir. 1993).
146. Skukan v. Consolidation Coal Co., 993 F.2d 1228 (6th Cir. 1993).
147. Freeman United Coal Mining Co. v. Office of Workers’ Compensation Programs, 988 F.2d 706 (7th Cir. 1993), reh’g denied, 999 F.2d 291 (7th Cir. 1993).
ny. The Court’s principal decision interpreting the meaning of section 7(c)\(^{149}\) is reaffirmed, construing section 7(c) to set forth the burden of persuasion not burden of production.