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Federal Black Lung Update: The Standard of Disability Causation for Federal Black Lung Benefits

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I. INTRODUCTION

The practitioner litigating federal black lung claims once relied upon the United States Department of Labor’s Benefits Review Board for guidance in both the interpretation of regulations and the definition of legal standards in claims under the Black Lung Benefits Act. More and more frequently, however, the various United States Circuit Courts of Appeal and the United States Supreme Court define legal standards by which black lung claims are tried. Since 1990, these courts have increasingly continued to define the standards used in determining disability due to pneumoconiosis.

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For claims filed with the Department of Labor on or before 31 March 1980, the United States Supreme Court has resolved the conflict which had arisen among the circuits over what proof can be used to rebut the presumption of disability. However, for claims filed after 31 March 1980, there still exists a significant conflict among the circuits as to the standard of disability causation. In addition to these disability causation decisions, this Article will discuss several other decisions which significantly impact the federal black lung program.

II. REBUTTAL CRITERIA FOR CLAIMS FILED BEFORE 1 APRIL 1980

PAULEY v. BETHENERGY MINES, INC.

To recognize the impact of the Supreme Court's decision in Pauley v. BethEnergy Mines, Inc., an appreciation of the decisions which precede Pauley is necessary. As mentioned above, claims for black lung benefits can roughly be divided between those claims filed on or before 31 March 1980 and those filed thereafter. The regulations which control the evaluation of claims filed with the Department of Labor from 30 June 1973, until 31 March 1980, were designed to replace the eligibility criteria used by the Department of Health, Education and Welfare (HEW), which had previously been responsible for the evaluation of black lung claims.

The Department of Labor's newly promulgated eligibility criteria were a result of the Black Lung Benefits Reform Act of 1977. The Reform Act provided very general guidelines to be utilized, but required the DOL criteria to be "no more restrictive" than the HEW criteria employed to evaluate claims filed on 30 June 1973.

3. See Shelton v. Director, Office of Workers' Compensation Programs, 889 F.2d 690 (7th Cir. 1990) (contributing but necessary cause to disability); Bonessa v. United States Steel Corp., 884 F.2d 726 (3d Cir. 1989) (pneumoconiosis must be a substantial contributor to disability); Adams v. Director, Office of Workers' Compensation Programs, 886 F.2d 818 (6th Cir. 1989) (disabling respiratory impairment must be due at least in part to pneumoconiosis).
4. The criteria promulgated to evaluate claims filed with the Department of Labor from 30 June 1973 until 31 March 1980 are provided at 20 C.F.R. Part 727.
The DOL eligibility criteria differ from the HEW criteria in two important ways. First, both eligibility criteria offer a rebuttable presumption of disability due to pneumoconiosis. To be eligible for consideration for the DOL presumption, however, a claimant must have at least ten years of coal mine employment. Second, the HEW
interim criteria appear to provide for rebuttal only when the claimant is performing or is able to perform his or her usual coal mine work. The DOL provisions specifically provide for rebuttal of a presumption of disability due to pneumoconiosis by establishing that the miner is performing or is able to perform the usual coal mine work or by either proving that: (1) the disability or death is not due to pneumoconiosis; or (2) the miner does not have pneumoconiosis.

The validity of the DOL criteria used to invoke a presumption of disability due to pneumoconiosis for miners with at least ten years of coal mine employment was upheld in *Pittston Coal Group v. Sebben*. However, the Court found that for miners with short term exposure of less than ten years of coal mine employment, the ten year employment requirement of the DOL criteria violated the no more restrictive mandate of the Reform Act. Instead, the invocation criteria of the HEW interim regulations at section 410.490 were to be employed to evaluate the presumption of disability due to pneumoconiosis for miners with less than ten years of exposure. While noting that the DOL rebuttal provisions might also violate the Act, the *Sebben* Court declined to address the validity of the DOL rebuttal provisions.

In light of the *Sebben* decision and lack of a ruling concerning the validity of the rebuttal criteria, an almost predictable conflict arose among the circuits as to the validity of DOL’s rebuttal criteria. The circuits arrived at contrary determinations regarding whether the rebuttal provisions of the DOL’s interim regulations were prohibitively more restrictive, especially when contrasted to the rebuttal provisions of HEW’s interim section 410.490 regulations.

12. 488 U.S. at 120.
13. The respondents in *Sebben* conceded the validity of the rebuttal provisions. 488 U.S. at 119.
The split occurred over the validity of the third (§ 727.203(b)(3)) and fourth (§ 727.203(b)(4)) provisions of the DOL rebuttal criteria. It was suggested these provisions — allowing rebuttal by proving either the absence of pneumoconiosis or that pneumoconiosis did not contribute to disability — provided methods of rebuttal unavailable under section 410.490. These additional rebuttal methods were viewed to have rendered the DOL rebuttal criteria prohibitively “more restrictive.”

Yet while some circuits rejected this interpretation, others embraced it. This conflict was presented to the Supreme Court when contrary decisions of the Third and Fourth Circuits were granted certiorari and consolidated for hearing to resolve the issue of statutory construction.

The Third Circuit found the DOL rebuttal criteria not prohibitively more restrictive when it addressed the validity of the interim presumption in BethEnergy Mines, Inc. v. Director, Office of Workers’ Compensation Programs. Mr. Pauley worked for thirty years as a coal miner and, as the parties agreed, had radiographic evidence of simple coal workers’ pneumoconiosis. The DOL presumption of disability due to pneumoconiosis was conceded to be established by radiographic evidence under section 727.203(a)(1). Consequently, the burden of persuasion shifted to the employer to rebut the presumption that the miner was disabled due to pneumoconiosis.

The Administrative Law Judge (ALJ) determined that the evidence proved pneumoconiosis was not a contributing factor to any disabling pulmonary condition — the employer having successfully rebutted the presumption of disability due to pneumoconiosis under section 727.203(b)(3) by proving that disability did not arise out of coal mine employment.

However, the ALJ then analyzed Mr. Pauley’s claim under the HEW criteria at section 410.490. The presumption of disability due

17. 890 F.2d 1295 (3d Cir. 1989).
to pneumoconiosis was again invoked based on radiographic evidence of pneumoconiosis. Here, the ALJ ruled that there was no evidence to rebut the presumption under sections 410.490(c)(1) or (c)(2) since the medical evidence demonstrated that Mr. Pauley could not work. Thus, despite the earlier finding that Mr. Pauley had no impairment arising from his coal mine employment, the ALJ awarded benefits, ruling that the presumption had not been rebutted despite the earlier determination that the miner had no disability arising out of coal mine employment.

The Third Circuit reversed the ALJ’s award of benefits, reasoning that it was “perfectly evident that no set of regulations under [the Act] may provide that a claimant who is statutorily barred from recovery may nevertheless recover.” The court further stated that since the purpose of the Act is to provide benefits to miners totally disabled at least in part due to pneumoconiosis arising out of coal mine employment, it was inconsistent with the purpose of the Act to award pneumoconiosis benefits when evidence proved there was no disability arising out of coal mine employment.

The United States Court of Appeals for the Fourth Circuit reached a contrary determination concerning the validity of the DOL rebuttal criteria, finding the DOL interim rebuttal criteria were more restrictive than the “limited” HEW rebuttal methods. Two of the Fourth Circuit’s decisions were consolidated for the Court’s review, in Taylor v. Clinchfield Coal Co. and Dayton v. Consolidation Coal Co.20

The first of these decisions concerned the claim of John Taylor who applied for federal black lung benefits after working for twelve years as a coal miner. The ALJ denied the claim, finding no evidence of pneumoconiosis and that the miner’s respiratory disease, chronic bronchitis, was caused by 30 years of cigarette smoking. The Fourth Circuit vacated the denial and remanded the case for reconsideration under the “limited rebuttal” of sections 410.490(c)(1) and (c)(2). The

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18. 890 F.2d at 1300.
ALJ was found to have erred by considering whether disability had arisen out of coal mine employment — a rebuttal method the Court believed unavailable under section 410.490.

In the companion Fourth Circuit case, Albert Dayton filed for black lung benefits after working seventeen years as a miner. Although found to be eligible for the DOL presumption of disability due to pneumoconiosis, the medical evidence was determined to prove that Mr. Dayton had neither a disabling pulmonary impairment nor coal workers' pneumoconiosis. The DOL presumption was ruled rebutted and the claim denied.21

The Fourth Circuit reversed the denial of benefits, reasoning that the absence of pneumoconiosis was superfluous and had no bearing on the case, since the HEW regulations do not provide for rebuttal upon proof of no pneumoconiosis.22 Thus, the introduction of evidence disputing either the presence of pneumoconiosis or its connection to disability violated the prohibition in the Act on making the DOL regulations more restrictive than the HEW regulations.23

The conflicting interpretations of the validity of the DOL's rebuttal regulations were presented to the United States Supreme Court in Pauley v. BethEnergy Mines, Inc. — a consolidated action containing the black lung claims filed by Messrs. Pauley, Taylor, and Dayton.24 The contrary interpretations of the DOL rebuttal criteria presented a conflict affecting as many as 3500 miners' disability claims valued at as much as $650 million.25

Seven of the eight participating members of the Supreme Court determined that the DOL rebuttal provisions were not prohibitively more restrictive than the prior HEW criteria. The majority deferred to the DOL's interpretation of the intent of Congress in the promulgation of section 727.203 concluding:

... that the Secretary of Labor has not acted unreasonably, or inconsistently with section 402(f)(2) of the ... Black Lung Benefits Act, in promulgating interim

21. The presumption was determined to be rebutted under §§ 727.203(b)(3) and (b)(4).
22. 895 F.2d at 175.
23. Id.
regulations that permit the presumption of entitlement to black lung benefits to be rebutted with evidence demonstrating that the miner does not, or did not, have pneumoconiosis or that the miner's disability does not, or did not, arise out of coal mine employment.26

To invoke the HEW presumption, a claimant must present convincing evidence of radiographic abnormalities (§ 410.490(b)(1)(i)) or ventilatory impairment (§ 410.490(b)(1)(ii)). Moreover, the claimant must also prove "'the impairment established in accordance with paragraph (b)(1) . . . arose out of coal mine employment.'"27

Causation of impairment is defined by section 410.490(b)(2), which refers back to subparts section 410.416 and section 410.456.28 Subparts sections 410.416 and section 410.456 ease the proof of disease causation with ten years of coal mine employment by providing that pneumoconiosis is then presumed to have arisen out of coal mine employment.29 Without a minimum of ten years of coal mine employment, affirmative medical proof that pneumoconiosis arose out of coal mine employment must be presented.

Thus a miner without proof not only of pneumoconiosis, but also that pneumoconiosis arose out of coal mine employment, cannot invoke the HEW presumption of disability due to pneumoconiosis.30 Such an interpretation is consistent with the Act which defines

27. 111 S. Ct. 2524 (1991); see 20 C.F.R. § 410.490(b)(2).
28. Section 410.416 provides:
   (a) If a miner was employed for 10 or more years in the Nation's coal mines, and is suffering or suffered from pneumoconiosis, it will be presumed, in the absence of persuasive evidence to the contrary, that the pneumoconiosis arose out of such employment.
   (b) In any other case, a miner who is suffering or suffered from pneumoconiosis, must submit the evidence necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines.
Section 410.456 provides:
   (a) If a miner was employed for 10 years or more in the Nation's coal mines, and suffered from pneumoconiosis, it will be presumed, in the absence of persuasive evidence to the contrary, that the pneumoconiosis arose out of such employment.
   (b) In any other case, the claimant must submit the evidence necessary to establish that the pneumoconiosis from which the deceased miner suffered, arose out of employment in the Nation's coal mines.
30. Short term miners with x-ray evidence of pneumoconiosis gain the benefit of a § 410.490 presumption only if there is direct proof of disease causation. 20 C.F.R. §§ 410.416(b), 410.456(b) (1991).
“pneumoconiosis” as a “chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.” Considerations of existence of pneumoconiosis and its causal nexus with coal mine employment are encompassed in the HEW criteria. It follows, then, that DOL could establish regulatory criteria encompassing both these necessary elements to entitlement — albeit placing these elements in the rebuttal criteria.

The authorization to promulgate eligibility criteria which generated from the statute expressly provides that presumptions in question will be rebuttable and that all relevant evidence must be considered. The factual scenarios before the Court revealed that Mr. Dayton had no pneumoconiosis, while Messrs. Taylor and Pauley had no pulmonary disability attributable to pneumoconiosis. Therefore, an award of black lung benefits to any of these claimants, who either did not have pneumoconiosis or whose disability did not arise in whole or in part out of coal mine employment, would have been contrary to the purpose of the Act.

Furthermore, the Court rejected a cost-benefit argument which might have “foregone” inquiry into disease existence or disability of causation. While it was suggested that, by not including elements of disease existence or etiology of disability under the HEW rebuttal criteria, a conscious decision was made to forego inquiry into these areas because of inadequate diagnostic capability, this suggestion, without adequate legislative or regulatory support, was unpersuasive. The Black Lung Act simply does not encompass compensation for those who do not suffer from pneumoconiosis or who are disabled from causes unrelated to coal dust exposure.

In a lone dissent, Justice Scalia found the majority’s analysis unpersuasive. The dissent emphasized that the HEW regulations provide only two methods of rebuttal — both relating to the extent of disability. Existence of disease and causation of disease are not in-

34. 111 S. Ct. at 2538.
cluded. However, the DOL regulations authorize four rebuttal pathways: the two extent-of-disability methods expressed in the HEW regulations, as well as the two methods allowing rebuttal if the pneumoconiosis did not cause the disability or if the miner does not have pneumoconiosis. Contending that the DOL regulations provided more opportunities for rebuttal, the dissent argued that since the DOL criteria are less favorable to the claimant, they must violate the Act’s provision that any DOL criteria adopted should not be more restrictive.

Such an analysis, however, is contrary to the mandate that all relevant evidence should be considered. Moreover, Congress did not envision these eligibility criteria as unrebuttable presumptions, since in the same Act Congress created an irrebuttable presumption of entitlement when complicated pneumoconiosis is proven. The dissent further does not appreciate that elements of disease existence and disease causation were included in the HEW criteria as well as in the subsequent DOL criteria. Finally, it is without consequence to the validity of the regulatory criteria whether entitlement elements are to be affirmatively proven by the miner or whether the burden is placed on the party opposing entitlement to prove the absence of necessary entitlement elements.

*Pauley*, therefore, resolves the conflict concerning the standard of disability causation to be applied to claims filed prior to 1 April 1980, since in claims wherein miners are eligible for presumption of disability contained at section 410.490 the rebuttal provisions of Part 727 are no more restrictive. It is self-evident that if a claimant is afforded a presumption of disability due to pneumoconiosis based on evidence which suggests, but may not prove, either pneumoco-

35. 111 S. Ct. at 2541.
36. 30 U.S.C. § 923(b) (1988). A denial of the opportunity to rebut a presumption makes such a presumption irrebuttable and thus inconsistent with the expressed Congressional intent. The Act provides presumptions (except in the case of complicated pneumoconiosis [*see infra* n.37]) which are rebuttable. 30 U.S.C. §§ 921(c)(1), (2), and (4).
37. 30 U.S.C. § 921(c)(3); complicated pneumoconiosis is an advanced form of pneumoconiosis which frequently causes respiratory disability or death. [*See N. Leroy Lapp, A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721 (1981)].
niosis, total disability, or disability due to pneumoconiosis, then parties opposing entitlement should be afforded the opportunity to rebut such a presumption with affirmative proof. The presumption as interpreted by the Court, and as was envisioned by Congress in the stated purpose of the Act, shifts the burden of persuasion from a miner to the party (either the Department of Labor or a named employer) opposing entitlement.

Once the burden is shifted, the party opposing entitlement must affirmatively prove no disability, that disability did not arise out of coal mine employment, or that pneumoconiosis not present. Yet while the parties opposing entitlement are faced with proving a negative (the absence of pneumoconiosis or absence of disability due to coal dust), they at least are provided a defense. The Pauley decision therefore preserves the status quo from 1978, upholding the validity of the DOL regulations which provide a defense to parties opposing a miner’s claim to benefits.

III. Disability causation for claims filed after 31 March 1980

A conflict presently exists among the circuits concerning the standard of disability causation to employ in evaluating claims filed after 31 March 1980. The permanent Department of Labor criteria, contained at 20 C.F.R. Part 718, have been interpreted to require: (1) affirmative proof of pneumoconiosis; (2) that pneumoconiosis arose out of coal mine employment; and (3) that disability or death is "due to pneumoconiosis." The chief source of controversy among the circuits is the interpretation assigned to the meaning of "due to pneumoconiosis."
The Act provides "'total disability' has the meaning given it by regulations of the Secretary of Health and Human Services, except that regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment." The conflict in the interpretation of "due to pneumoconiosis" can be traced to a Benefits Review Board 1988 decision in *Wilburn v. Director, Office of Workers' Compensation Programs*. The standard of disability causation was held to require proof that "pneumoconiosis is, in and of itself, totally disabling" — the "in and of itself" standard requiring proof that any pulmonary impairment due to pneumoconiosis caused total disability. Such an interpretation of "due to pneumoconiosis" has been uniformly rejected by all of the circuits which have considered the proper standard to utilize in evaluating disability causation.

The conflict over the meaning of "due to pneumoconiosis" can be roughly divided between two interpretations of "due to pneumoconiosis." One interpretation requires proof that pneumoconiosis is a substantial contributor or a substantial contributing factor in the causation of total pulmonary disability. A countervailing interpretation adopts a less demanding burden of proof — holding that a miner must demonstrate a totally disabling respiratory impairment which is caused, at least in part, by pneumoconiosis. Thus, the conflict in interpretation is between the quantum of disability

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44. *Id.* at 1-138.
47. Adams v. Director, Office of Workers' Compensation Programs, 886 F.2d 818 (6th Cir. 1989); Mangus v. Director, Office of Workers' Compensation 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. Pickards Mather & Co./Leslie Coal Co., 914 F.2d 35 (4th Cir. 1990); Shelton v. Director, Office of Workers' Compensation Programs, 899 F.2d 690 (7th Cir. 1990).
attributable to pneumoconiosis which serves as a predicate to entitlement.

The conflict is dramatically illustrated if a coal worker’s pneumoconiosis is causing an insignificant or de minimis portion of pulmonary impairment. The Third and Eleventh Circuit standards reject de minimis contribution by pneumoconiosis as sufficient to establish disability due to pneumoconiosis. Other circuits’ standards are either not clear or can be interpreted to hold that a de minimis contribution is sufficient to establish entitlement.

The Sixth Circuit has adopted an “at least in part” standard for proving disability.48 However, the court appeared overtly concerned that miners or their survivors could be awarded benefits where contribution to disability by pneumoconiosis is so insignificant as to be meaningless. In a footnote, the court noted that nothing in the record before it suggested that pneumoconiosis played an infinitesimal or de minimis part in disability.49 The Court thus deferred from addressing whether a de minimis contribution to pneumoconiosis would support denial of benefits under the Act.

The Tenth Circuit appears to have adopted a de minimis standard, holding that:

[j]if the pneumoconiosis is at least a contributing cause, there is a sufficient nexus between the pneumoconiosis and the total disability to satisfy claimant’s burden of proof. This standard is consistent with congressional intent of liberal assistance to totally disabled coal miners. It is also consistent with nearly twenty years of court interpretation of the Act in eight different circuits during the course of three sets of legislative amendments.50

The Seventh Circuit has also struggled with the disability causation standard, with no consensus within the circuit as to the proper standard to employ.51 After initially considering and rejecting the

49. Id. at 826 n.11.
50. Mangus v. Director, OWCP, 882 F.2d 1527, 1531-32 (10th Cir. 1989) (emphasis in original).
51. Compton v. Inland Steel Coal Co., 933 F.2d 477 (7th Cir. 1991); Collins v. Director, Office of Workers’ Compensation Programs, 932 F.2d 1191 (7th Cir. 1991); Shelton v. Old Ben Coal Co., 933 F.2d 504 (7th Cir. 1991); Newell v. Director, Office of Workers’ Compensation Programs, 933 F.2d 510 (7th Cir. 1991); Shelton v. Director, Office of Workers’ Compensation Programs, 899 F.2d 690 (7th Cir. 1990); Hawkins v. Director, Office of Workers’ Compensation Programs, 907 F.2d 697 (7th Cir. 1990).
Board's "in and of itself" standard, the circuit adopted a contributing cause standard — an all-inclusive standard, interpreted to require pneumoconiosis to be a necessary, but not sufficient, cause of the miner's total disability.\(^{52}\) Thus, applying this standard, the panel found that mining must be a necessary — but need not be a sufficient — condition of the miner's disability: if he had not mined, the miner would not have become totally disabled, although he might have avoided the disability by care on some other front — by not smoking, for example.\(^{53}\)

When confronted again with the issue of the disability causation standard, the Seventh Circuit not only specifically rejected the substantial or primary cause of disability standard, but also interpreted the "necessary but not sufficient" causation standard as applying a simple but/for test to determine disability.\(^{54}\) Moreover, in a third consideration of the issue, in *Compton v. Inland Steel Co.*, a three judge panel presented an unreconsiderable split over the interpretation of the "due to pneumoconiosis" requirement for Part 718 claims.\(^{55}\)

In order to satisfy the causation disability requirement under Part 718, the two judge majority held that pneumoconiosis must be a contributing cause to total disability. The majority thus adopts the standard which previously found that coal mining must be a necessary, but need not be a sufficient, causation of the miner's disability.\(^{56}\) The majority apparently concludes that this standard is a workable, sensible framework for determining whether disability causation is satisfied under the Act.

Furthermore, the court recognized that the suggestion that a miner needs to establish that pneumoconiosis was a "substantial" contributor to disability unnecessarily complicated the legal analysis, since such an interpretation would inappropriately transform a

\(^{52}\) *Shelton*, 899 F.2d at 692.

\(^{53}\) *Id.* at 693.

\(^{54}\) *Hawkins*, 907 F.2d 697 (rejecting Bonessa v. U.S. Steel Corp., 884 F.2d 726 (3d Cir. 1989)).

\(^{55}\) 933 F.2d 477 (7th Cir. 1991).

\(^{56}\) 933 F.2d at 480. The disability causation inquiry has been divided into two questions: (1) is there a disabling impairment; and (2) did pneumoconiosis contribute to that disabling impairment. See *Hutson v. Freeman United Coal Co.*, 12 Black Lung Rep. (MB) 1-72 (1988).
"medical question" into a "legal question." The court reasoned that it is the attending physician who is best qualified to determine whether pneumoconiosis causes a miner’s disability; therefore, Administrative Law Judges, as triers-of-fact, need only review physician’s medical conclusions and need not be required to make a medical assessment as to whether pneumoconiosis substantially contributes to a miner’s total disability.

In a concurring opinion, the ambiguous phrase "due to pneumoconiosis" was analyzed based on not only other courts’ decisions but also on the Act, regulations, and applicable legislative history. The purpose of the Act is to provide compensation as a result of disability or death due to pneumoconiosis. The implementing regulations provide that “no claim shall be approved unless the record considered as a whole... provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.” The statutory definition of disability provides that disability is established “when pneumoconiosis prevents [a miner] from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which [the miner] previously engaged with some regularity and over a substantial period of time.”

While the legislative history supports the conclusion that the Act was reformed in order to provide compensation for those coal workers’ who have pneumoconiosis, the “due to” language further re-
quires pneumoconiosis to be not simply one of the causes of disability — but also the primary and substantial cause of disability. The Seventh Circuit has previously interpreted the HEW regulations (20 C.F.R. § 410.426) to require that pneumoconiosis be proven the primary reason for inability to engage in comparable work — that is, in numerical terms, pneumoconiosis must account for a preponderance (more than 50%) of a pulmonary disability. Thus, the "primary and substantial cause" standard alleviates a need for an ALJ to make conclusions concerning medical findings. Rather, the ALJ is to analyze physicians' opinions to determine if the weight of the physicians' opinions persuasively establishes that the majority of a pulmonary impairment is due to pneumoconiosis.

The greatest obstacle to consistent application of the standards of "necessary but not sufficient cause," "contributing cause," or "substantial contributing cause" is determining at what point in the continuum pneumoconiosis becomes a necessary or contributing cause to disability. Resolution of identical facts by different ALJs could yield vastly different results. Moreover, a determination that a de minimis contribution is sufficient under these standards would provide the opportunity for abuse which Congress tried to prevent in the amendments to the Act.

For example, one of the concerns acknowledged by the Seventh Circuit is that the Black Lung Act might provide compensation for coal miners who also are cigarette smokers and whose disability is primarily the result of a medical factor other than pneumoconiosis. In such a case, a standard of disability causation where less than a majority of disability is proven caused by pneumoconiosis would confer a windfall upon individuals who may have pneumoconiosis but who do not have a substantial portion of any pulmonary or respiratory impairment caused by pneumoconiosis.

As suggested by previous authors, the issue of what standard of causation disability is to be applied is one which may not be able to

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66. 933 F.2d at 496.
67. Shelton v. Director, Office of Workers' Compensation Programs, 899 F.2d 690, 693 (7th Cir. 1990).
to be resolved without a decision by the Supreme Court.\textsuperscript{68} As the Seventh Circuit decisions illustrate, the disability causation issue is one subject to vastly different interpretations — in part as a result of the extreme positions taken by the Benefits Review Board and the various circuit courts.\textsuperscript{69} For example, the Board's standard requiring pneumoconiosis to be the sole cause of disability swings the pendulum too far in one direction, while the \textit{de minimus} and "contributing cause" standards adopted by several circuits in reaction to the "sole cause" standard swings the pendulum too far the other way.\textsuperscript{70} The interpretation most consistent with the intent of the Act and regulations is one that requires pneumoconiosis to be a primary cause of a disabling pulmonary impairment.

\section*{IV. Other Significant Decisions}
\subsection*{A. Application of Developing Medical Technology}

In \textit{Pauley}, the petitioners argued that the HEW regulations conferred a presumption of disability which should be unrebutted by proof of causation or absence of pneumoconiosis because of inadequate medical technology to determine the presence or absence of pneumoconiosis or the disability due to pneumoconiosis.\textsuperscript{71} In the past two decades, medical technology has continued to develop, bringing new degrees of sophistication to evaluation of the degree of respiratory impairment and etiology of pulmonary diseases. And although not specifically provided for in the regulations, relevant


\textsuperscript{69} In light of the various circuit decisions, the Benefits Review Board reversed the prior holding that "due to pneumoconiosis" required proof that pneumoconiosis was in and of itself totally disabling. Scott v. Mason Coal Co., 14 Black Lung Rep. (MB) 1-37 (1990). For those circuits who have specifically considered the disability causation standard to be employed, the Board will employ their standards. The Benefits Review Board adopts a contributing cause standard in those circuits that have not considered the meaning of "due to pneumoconiosis." A contributing cause standard was believed most consistent with the various standards adopted by the different circuit courts.

\textsuperscript{70} The problem of vastly oscillating interpretations of standards is nothing new to the Federal Black Lung Program. \textit{See infra} Section II; Mullins Coal Co. v. Director, Office of Worker's Compensation Programs, 484 U.S. 135 (1987); Lukman v. Director, Office of Worker's Compensation Programs, 896 F.2d 1248 (10th Cir. 1990).

medical testing must be considered by a trier-of-fact in weighing evidence of disability.\textsuperscript{72} The Fourth Circuit addressed the applicability of diffusing capacity studies in \textit{Walker v. Director, OWCP and Eastern Associated Coal}.\textsuperscript{73} In evaluating the evidence of pulmonary disability under the criteria of sections 718.204(c)(1)-(4), the Administrative Law Judge discredited the validity of the diffusion study and the doctor's opinion resting on that study, since studies of diffusion are not specifically included in the criteria listed to evaluate impairment by the regulations.\textsuperscript{74} The ALJ found that since the physician had not based his assessment on any test sanctioned by section 718.204(c), the diffusion study was unreliable.

However, the Fourth Circuit found that the trier-of-fact erred as a matter of law in failing to consider the results of the diffusing capacity studies and the physician's opinion based on that study.\textsuperscript{75} The diffusion study must be weighed together with all the other relevant evidence to determine disability under the eligibility criteria of section 718.204(c).\textsuperscript{76} The Act requires "all relevant evidence" be considered and nowhere in the statute or regulations is it suggested that the list of tests is exhaustive or tests not specifically included are deemed unreliable.\textsuperscript{77}

\begin{itemize}
  \item \textsuperscript{72} 20 C.F.R. § 718.204(c)(4) provides where disability cannot be established under the preceding paragraphs that it may, nevertheless, be established "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 . . . ."
  \item \textsuperscript{73} 927 F.2d 181 (4th Cir. 1991). The carbon monoxide diffusing capacity of the lung (DLCO) is a test for overall gas exchange that does not require sampling of arterial blood. In conjunction with other tests, such as spirometry and those designed to measure lung volumes, this test can sensitively detect, during life, the presence of emphysema (destruction of alveolar walls with their associated capillary vessels) and diseases involving thickening, scarring or inflammation of the alveolar walls. N. Leroy Lapp, \textit{A Lawyer's Medical Guide to Black Lung Litigation}, 83 W. Va. L. Rev. 721 (1981).
  \item \textsuperscript{74} 20 C.F.R. § 718.204(c) provides ventilatory and arterial blood gas studies are to be analyzed.
  \item \textsuperscript{75} \textit{Walker}, 927 F.2d at 185.
  \item \textsuperscript{77} 30 U.S.C. § 923(b); Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135, 139 (1987) \textit{reh'g denied} 484 U.S. 1047 (1988); Cook v. Director, Office of Workers' Compensation Programs, 901 F.2d 33, 36 (4th Cir. 1990).
\end{itemize}
Other diagnostic radiographic techniques — such as computerized tomography (CT scans) — and other measurements of dynamic lung function — such as lung volume studies and alveolar-arterial oxygen gradients (A-a)O2 — although absent from the specified criteria in Part 718, provide information relevant to the disability causation issue. Thus, the results of these studies must be considered in evaluating physicians' assessments of degree or cause of pulmonary or respiratory disease.

B. The Prohibition of Section 923(b): To Reread or Not to Reread

In a case of first impression, the Fourth Circuit was asked to determine whether section 923(b) of the Act, which limits the use of x-ray readings procured by the Secretary, also limits x-ray rereads offered by private employers. The miner contended that an ALJ erred by not invoking the interim presumption of disability due to pneumoconiosis because of "improper reliance" upon negative rereadings of x-rays submitted by an employer. It was alleged that negative rereadings of x-rays were in violation of the rereading prohibition at 30 U.S.C. § 923(b) which, in pertinent part, provides:

[i]n 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 . . . except where the Secretary has reason to believe that the claim has been fraudulently represented.

The suggestion that section 923(b) prohibited rereadings of radiographs by parties other than the Department of Labor was rejected by the court, since the contention that section 923(b) could be interpreted as prohibiting private parties from obtaining rereadings is inconsistent with the decisions of the Benefits Review Board, the Act's legislative history, the implementing legislation, and due process.

79. Gray v. Director, Office of Workers' Compensation Programs, 943 F.2d 513 (4th Cir. 1991).
The section 923(b) prohibition does not prohibit x-ray rereadings offered by a private employer. Rather, as the plain language suggests, section 923(b) limits only the Secretary of Labor from obtaining additional rereadings when an x-ray is interpreted as diagnostic of pneumoconiosis by a qualified physician.\textsuperscript{81} Thus, a flat prohibition against the use of x-ray rereadings would be inconsistent with the Supreme Court’s decision that an ALJ must weigh conflicting interpretations of the same x-ray in order to determine whether it intends to prove or disprove the existence of pneumoconiosis.\textsuperscript{82}

By alleging that rereadings submitted by private employers should be prohibited, the claimant attempted to return to a prior, and invalid, interpretation of the interim presumption.\textsuperscript{83} The interim presumption of section 727.203(a)(1) was held to be established when a single piece of credible evidence indicates the presence of pneumoconiosis. Under this view, the trier-of-fact was prohibited from weighing contrary interpretations when a positive x-ray interpretation was included in the record and the presumption of disability was invoked as a matter of law. The Supreme Court overruled such an interpretation, holding that the trier-of-fact need not accept one positive interpretation and ignore any conflicting interpretations.\textsuperscript{84} It must now be viewed as resolved that all relevant evidence must be evaluated by the trier-of-fact in weighing evidence in federal black lung claims.

C. \textit{Who is a Coal Miner?}

1. Riverworkers

Whether a riverworker who works on barges and transports coal or engages in the loading of coal on barges from the shore is considered a miner under the Act depends on the particular facts of the case. A two-pronged test has long been employed to determine

\textsuperscript{81} 943 F.2d at 520.
\textsuperscript{82} Mullins Coal Co., Inc. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135, 148-49 (1987).
\textsuperscript{84} Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987).
whether an employee is a miner under the Black Lung Act. The employee must have worked in and around a coal mine (situs requirement) and have been employed in the extraction or preparation of coal (function requirement). An ALJ’s determination that a riverman, who loads coal onto barges at a dock loading facility, is not a coal miner was upheld as rational.

Coal is not considered as being beyond the preparation stage until it is processed and prepared for market, and coal which is processed and blended at other facilities and then shipped to the dock loading facility has been determined to be beyond the scope of extraction or preparation of coal encompassed by the Act. Thus, coal which has been placed on barges has already been prepared for market and has entered the stream of commerce. The fact that a riverman worked at a dockhouse loading facility located only 300 yards from the preparation plant was found to be insufficient cause to overturn the ALJ’s finding that the individual did not work in and around a coal mine, since the work was not that of the extraction or preparation of coal.

However, the Third Circuit has found that a riverworker, who worked on a tug crew that loaded coal from a preparation plant and then travelled with coal to the delivery site, was a miner under the Act. This work was held to be a necessary part of the preparation of coal to be introduced into the stream of commerce, since the riverworker worked with coal which was loaded onto barges directly out of a preparation plant — a situation distinguishable from the riverworker who works with coal shipped some distance from the preparation plant.

85. Eplion v. Director, Office of Workers' Compensation Programs, 794 F.2d 935, 937 (4th Cir. 1986); Amigo Smokeless Coal Co. v. Director, Office of Workers' Compensation Programs, 646 F.2d 68 (4th Cir. 1981).
87. Collins v. Director, Office of Workers’ Compensation Programs, 795 F.2d 368 (4th Cir. 1986).
88. Consolidation Coal Co., 923 F.2d at 41.
89. Id.
90. Hanna v. Director, Office of Workers’ Compensation Programs, 860 F.2d 88 (3d Cir. 1988).
91. Consolidation Coal Co., 923 F.2d at 41.
Both decisions are consistent with a prior Fourth Circuit decision, holding that employees who hauled slate from a tipple were not coal miners. The Court held:

traditionally . . . the tipple marks the demarkation point between the mining and marketing of coal. It is at that structure that screening of the coal occurs and the final product is loaded for transport. When coal leaves the tipple, extraction and preparation are complete and it is entering the stream of commerce. While individuals who come in contact with the coal at this interval or later may still suffer harmful exposure to coal dust, they are not within the class protected by the black lung statute.

While reaching what appears to be inconsistent results, these decisions are nonetheless consistent. The ultimate determination of whether an employee is a miner rests within the discretion of the ALJ, and ALJs may in fact reach different conclusions as to coverage under the Act even when the situations are factually similar.

2. Railroad Employees

Generally, when coal leaves a preparation plant, it is considered to have entered the stream of commerce and has left the coal mining process. Transportation workers have typically been construed as falling within the class protected by the Act only when they are engaged in the transportation of raw or unprocessed coal which has not been introduced into the stream of commerce. When asked to determine if a railroad worker met the test, the Fourth Circuit upheld an ALJ's decision finding a railroad worker was a coal miner.

Finding that the railroad worker met the "function" and "situs" tests, the worker was thus determined to be eligible for consideration for black lung benefits. Rather than looking at the nature of the

92. Collins v. Director, Office of Workers' Compensation Programs, 795 F.2d 368 (4th Cir. 1986).
93. Id. at 372.
94. Director, Office of Workers' Compensation Programs v. Consolidation Coal Co., 884 F.2d 926, 935 (6th Cir. 1989).
95. Norfolk & Western Ry. Co. v. Roberson, 918 F.2d 1144 (4th Cir. 1990); Collins, 795 F.2d at 368.
96. Mitchell v. Director, Office of Workers' Compensation Programs, 855 F.2d 485, 490 (7th Cir. 1988).
97. Roberson, 918 F.2d at 1144.
employer's business, the trier-of-fact as well as the subsequent appellate tribunals were influenced by the employee's status and whether the employee's work qualified for that as a miner. Although affirming the decision that this employee was a miner, the court noted that the scope of the decision is limited:

... in the ordinary case, a railroad employee engaged in the transportation of coal may well not qualify for benefits under the Act. The demanding tests of function and situs must be met, as they were in this case. After the coal is prepared and reloaded for shipment, a railroad employee would not satisfy the function test. And the possibility of satisfying the situs requirement diminishes as the distance traveled on the rails increases, rendering the employment other than 'in around a coal mine.' If a claimant fulfills all the statutory requirements, however, as Roberson has here, we decline to hold that his status as a railroad employee negates his recovery of benefits under the Act . . . .

After two decades, the question of who is a miner under the Act is still not clearly delineated. However, the Act has been interpreted expansively, and more often than not the definition has been expanded to include the individual who has filed for benefits.

V. CONCLUSION

The Federal Black Lung Program continues to evolve. Its stated purpose — to provide disability benefits — is misunderstood and frequently misconstrued to be a miner’s pension. As vividly illustrated by the current debate concerning the proper standard of disability causation under 20 C.F.R. Part 718, the program has been subjected to wide variances in the interpretation of the applicable regulations.

The program seems subject to vastly different interpretations given the emotional nature of its subject. Despite the wildly swinging pendulum of shifting standards, however, the program has generally returned to an equilibrium to provide a fair hearing for both those who file claims and those who defend against those claims. While beyond the scope of this Article, the greatest weakness of the pro-

98. Id. at 1150.
gram remains with the provisions which prohibit claimants from retaining and paying for legal counsel.\textsuperscript{100}

\textsuperscript{100} U.S. Dep't of Labor v. Triplett, 494 U.S. 715 (1990).