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**Stapleton v. Westmoreland Coal Company: Toward Making the Interim Presumption Irrebuttable**

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STAPLETON v. WESTMORELAND COAL COMPANY: TOWARD MAKING THE INTERIM PRESUMPTION IRREBUTTABLE?

I. INTRODUCTION

Coal workers' pneumoconiosis ("CWP"), more popularly referred to as black lung disease, is an insidious respiratory impairment caused by the inhalation of coal dust over an extended period of time.¹ Title IV of the Federal Coal Mine Health and Safety Act of 1969² ("Act") was passed by Congress to provide cash benefits for miners who were totally disabled or had died from coal workers' pneumoconiosis. Under the Act, the Social Security Administration ("SSA") was responsible for the administration of all claims (Part B) filed before December 31, 1973, and the Department of Labor ("DOL") for claims (Part C) filed on or after January 1, 1973.³

Part B and Part C black lung claimants experienced substantial delays in the processing of their claims by both the SSA and the DOL. Congressional concern over these delays resulted in the Act being amended in 1972 and 1977 to reduce eligibility requirements, to mandate the development of interim procedures facilitating improvement in the claims approval rate, and to reduce the significant number of backlogged claims. The regulations developed to satisfy these objectives allow the claimant a rebuttable presumption of total disability once minimal evidentiary requirements have been satisfied.⁴

Stapleton v. Westmoreland Coal Co.⁵ is the consolidation for en banc review of three cases primarily concerned with the common issue of the type and quantum of proof required for the invocation and rebuttal of the "interim presumption" provided for under 20 C.F.R. section 727.203.⁶

With a three-way split and four separate opinions filed, the Stapleton court held that the interim presumption is properly invoked if a claimant produces a single piece or set of qualifying medical evidence as delineated in 20 C.F.R. sec-

¹ See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 6 (1976).
³ 30 U.S.C. § 901(c). See also id. §§ 921-925 (Part B), and id. §§ 931-945 (Part C).
⁶ Id. at 427.

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tions 727.203(a)(1), (2), or (3). In addition, one qualifying physician’s opinion or, absent that, a preponderance of other medical evidence will invoke the interim presumption under 20 C.F.R. section 727.203(a)(4). This decision overruled the Consolidation Coal Co. v. Sanati holding that all evidence must be weighed before the interim presumption is invoked and maintained the Sanati holding regarding the establishment of the presumption under (a)(4) in the absence of a qualified physician’s opinion.

The Stapleton court also held that when a presumption established under 20 C.F.R. section 727.203(a) is being rebutted under section (b), all relevant medical evidence must be considered and weighed, with the exception that a claim denial cannot be based solely on one negative chest X-ray. The court also overruled two past decisions, Whicker v. United States Department of Labor Benefits Review Board and Hampton v. United States Department of Labor Benefits Review Board. Finally, the court held that interest on a black lung benefits award starts to accrue thirty days after the first agency decision awarding benefits.

This Comment will review the legislative history of the regulation containing the interim presumption and significant prior cases interpreting its meaning. It also will discuss the futility of attempting rebuttal under the plain language of 20 C.F.R. section 727.203(b)(3) as a result of Stapleton.

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7 Id. at 426-27.
8 Consolidation Coal Co. v. Sanati, 713 F.2d 480 (4th Cir. 1983), overruled, Stapleton, 785 F.2d 424.
9 Stapleton, 785 F.2d at 427. Santi followed the general rule that all evidence must be weighed before the interim presumption is invoked. See Orange v. Island Creek Coal Co., 786 F.2d 724 (6th Cir. 1986); see also Back v. Director, Office of Workers' Compensation, 796 F.2d 169, 172 (6th Cir. 1986) (“As the decisions discussed herein demonstrate, this court has rejected the plurality view of the Fourth Circuit in Stapleton v. Westmoreland Coal Co.”); Alabama By-Products v. Killingsworth, 733 F.2d 1511, 1517 (11th Cir. 1984) (“[M]ine employment for ten years does not alone activate the presumption; the miner must also show chest X-rays establishing pneumoconiosis.”); Kaiser Steel v. Director, Office of Workers' Compensation, 748 F.2d 1426, 1430 (10th Cir. 1984) (“[W]e find that the ALJ’s finding that the ‘interim presumption’ . . . was clearly supported by substantial evidence.”); Evasive v. Consolidation Coal Co., 789 F.2d 1021, 1023 n.22 (3d Cir. 1986) (“In light of the conclusion we reached [rejection of petition for review after claim was denied] . . . we do not address the propriety of the presumptions here invoked” without the weighing of conflicting evidence.); Peabody Coal Co. v. Director, Office of Workers' Compensation, 778 F.2d 358, 361 (7th Cir. 1985) (“Section 727.203(a) directly presumes a miner eligible for benefits under the Act, provided the miner has worked at least 10 years in a coal mine . . . and can prove qualifying medical values.”)
10 Stapleton, 785 F.2d at 427.
13 Stapleton, 785 F.2d at 434.
II. STATEMENT OF THE CLAIMANTS' CASES

A. Stapleton v. Westmoreland Coal Company

Stapleton had been employed for at least fifteen years in the coal mines. He was an employee of Westmoreland Coal Company from 1969 until 1972 when he quit working at age thirty-five because of heart and respiratory problems. The evidence considered by the administrative law judge ("ALJ") in denying benefits consisted of the following:

1. A 1973 X-ray noting minimal pneumonitis but otherwise clear lungs;
2. A 1976 X-ray read by a "B" reader indicating changes in the lungs consistent with CWP;
3. A 1980 X-ray read by a "B" reader, finding no evidence of pneumoconiosis, and reread by another "B" reader who reached the same conclusion;
4. A pulmonary function study performed in 1976 showing qualifying values;
5. A 1980 study reflecting nonqualifying values;
6. Arterial blood gas studies from 1976 and 1980 reflecting nonqualifying values;
7. Two 1973 medical reports from two different examining physicians each stating that Stapleton suffered from a heart disorder;
8. A 1976 medical report from a physician who examined Stapleton at the request of the DOL finding evidence of pneumoconiosis and possible bronchitis, but noting that the functional impairment was primarily from a heart condition and back pain with only slight respiratory impairment;
9. A 1980 medical report from an examining physician concluding that the evidence was insufficient to validate a diagnosis of CWP and determining that the primary impairment was related to a heart condition and cardiac neurosis; and
10. A 1980 report from a nonexamining physician concluding that Stapleton did not suffer from pneumoconiosis or any significant respiratory problem.

The ALJ invoked the interim presumption under 20 C.F.R. section 727.203(a)(1) on the basis of the 1976 X-ray, but concluded that the presumption was suffi-

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14 Id. 428-29 ("A 'B' reader is a physician who has completed a course and passed a proficiency examination conducted by the National Institute for Occupational Safety and Health for reading pneumoconiosis on x-ray films." Id. n.2).
15 Id. at 429.
efficiently rebutted by the conflicting medical evidence under section 727.203(b)(4). Upon review of the decision, the Benefits Review Board ("BRB") concluded that the denial of benefits was correct. However, they determined the ALJ had erred in invoking the presumption on the basis of a single positive X-ray. The Stapleton court concluded that the ALJ was correct both in invoking the presumption on the basis of the 1976 X-ray and finding that the presumption had been sufficiently rebutted by substantial evidence.

B. **Ray v. Jewell Ridge Coal Corporation**

Ray had worked as a coal miner for sixteen years before quitting in 1973 at the age of thirty-four because of stomach problems. The medical evidence considered by the ALJ in Ray's claim included six ventilatory studies, ten X-rays, and reports from six physicians.

One of the X-rays, made in 1974, was interpreted as positive; however, the reader was not identified and the signature was illegible. A 1977 X-ray also was read as positive for pneumoconiosis, and the most recent X-ray, made in 1980, was read as showing only a "suspicion" of pneumoconiosis. The other seven X-rays were interpreted as negative.

Pulmonary disability was shown in two of the six physicians' reports, but these reports were discounted because they failed to positively state that the disability was due to coal dust exposure. A 1975 physician's report concluded that the disability was "probably" due to exposure to coal dust, and a 1980 report concluded that smoking cigarettes had caused the disability. A 1977 report determined total disability in spite of the fact that the arterial blood gas and ventilatory studies performed on the claimant were normal. Ray's treating physician reported that his pulmonary difficulties were not significant. In addition, there were two ventilatory studies.

The ALJ found that the negative ventilatory studies outweighed the two earlier positive ventilatory studies and concluded that the interim presumption had not been invoked; thus benefits were denied. The BRB affirmed the decision. On appeal, the Stapleton court concluded that the presumption had been triggered by either the qualifying ventilatory studies or the opinion of one physician finding

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16 Id. at 430.
17 Id. at 427.
18 Id. at 430.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id. at 437.
Ray totally disabled from a respiratory impairment. 24 "The five negative or inconclusive doctor's opinions should have been considered on rebuttal as should the negative or nonqualifying test results and X-rays." 25 Accordingly, Ray's case was remanded for redetermination of whether "in the light of all relevant evidence the presumption was rebutted." 26

C. Mullins Coal Company v. Cornett

Cornett had worked in the coal mines for about thirty-six years, nine of which were spent as an employee of Mullins Coal Company. In 1977, he suffered a heart attack and was informed by his family physician that he was suffering from CWP. Following the heart attack, Cornett attempted to return to the coal mines, but quit within one year because of shortness of breath and coughing. 27

The medical evidence evaluated by the ALJ in Cornett's claim included both qualifying and nonqualifying X-rays, arterial blood gas studies, ventilatory function tests and medical opinions from two physicians, one of which was the family physician. The ALJ gave greater weight to the qualifying opinion of Cornett's family physician because there was no indication that the physician who rendered the nonqualifying opinion had examined Cornett on more than one occasion. 28 The ALJ determined that the presumption had been invoked under 20 C.F.R. sections 727.203(a)(1), (a)(2), and (a)(3), and had not been sufficiently rebutted. 29 The ALJ then awarded benefits and interest at the rate of six percent per annum beginning in July 1978, the eligibility date. The BRB affirmed the decision. 30

The Fourth Circuit Court of Appeals affirmed the award of benefits to Cornett but limited the award of interest to commence thirty days from the date of the initial determination of eligibility. 31

III. THE DEVELOPMENT AND INTERPRETATION OF THE 1969 ACT


Title IV of the Federal Coal Mine Health and Safety Act of 1969 32 was enacted to compensate miners for the adverse economic impact of coal workers' pneu-

24 Id. at 468 (Widener, J., concurring in part, dissenting in part).
25 Id.
26 Id. at 430.
27 Id.
28 Id. at 430-31.
29 Id. at 431.
30 Id. at 437.
31 See supra note 2.
32 Solomons, supra note 4, at 870 n.5.
moconiosis. The Act provided for the payment of lifetime benefits to miners who were totally disabled by CWP as well as to the survivors of those miners who had died from CWP.33

The Act required that claims for benefits filed between December 31, 1969, and December 31, 1972, were to be processed and paid by the Secretary of Health, Education, and Welfare through the Social Security Administration ("SSA").34 Claims filed after December 31, 1972 (Part C claims), were to be processed under the workers' compensation laws of the state in which the miner was employed if that state's laws had been approved by the DOL.35 Otherwise, claims filed after December 31, 1972, were to be processed by the DOL and paid by the miner's coal mine employer in accordance with the criteria established by the Secretary of Labor.36 Under both the 1969 Act and the 1972 amendments, the SSA was given exclusive authority to develop medical standards and criteria for evaluating claims.37

B. The Black Lung Benefits Act of 1972

In enacting the 1972 amendments, Congress, apparently concerned with the backlog of claims, expressly directed the Secretary of Health, Education, and Welfare ("HEW") to adopt interim procedures (interim presumption) to permit expedient processing of its backlogged Part B claims.38

The SSA, in responding to the congressional directive, proposed less stringent medical criteria than previously followed in processing claims for benefits. The HEW issued a regulation embodying the use of an interim presumption or interim standards for processing Part B claims.39 This interim presumption did not apply to Part C claims.40

The claimant's burden of establishing total disability or death due to CWP was substantially reduced with the creation of the interim presumption of total disability.41 The presumption is easily invoked and "by its terms permits an inference of critical facts which are not, medically speaking, justified by the invoking evidence."42 "[I]t is well accepted that a chest radiograph showing early stage simple pneumoconiosis does not demonstrate a disabling respiratory impairment.

33 Id.
34 Id.
35 Id.
36 Id. at 871.
38 20 C.F.R. 410.490(a) (1980).
39 Solomons, supra note 4, at 871-73. See generally 20 C.F.R. § 410.490.
40 See generally 20 C.F.R. § 410.490.
41 Solomons, supra note 4, at 880.
42 Id.
Yet under the presumption, a totally disabling impairment is presumed from this evidence alone.43 Because the qualifying pulmonary function values are not graduated for the age of the claimant, they allow the presumption of a totally disabling pulmonary or respiratory deficiency in an older miner whose pulmonary function is essentially normal.44 Using the interim presumption, the SSA claims approval rate, which was almost fifty percent prior to the adoption of the interim standards, steadily increased.45

Soon after the Department of Labor began processing claims, it was discovered that the approval rate for Part C claims was substantially lower than the approval rate for Part B claims.46 The interim presumption’s inapplicability to Part C claims was recognized as a significant causative factor.47 However, the DOL had no independent authority to extend the presumption’s application to Part C claims.48

C. The Black Lung Benefits Reform Act of 1977

Despite the recognition of the disparity in approval rates as early as July 197349 and the DOL’s support for the use of the interim presumption, the SSA refused to extend the application of the presumption to Part C claims. The DOL’s support was based on the belief that Part B and Part C claimants should be accorded equal treatment rather than any belief in the validity of the interim presumptions. The DOL “never consulted medical or scientific experts in connection with the matter.”50

The SSA argued that the interim presumption was simply an administrative device developed to expedite claims approval and that use of the permanent regulations for Part C claims would not prevent a miner disabled by pneumoconiosis from obtaining benefits.51 This argument was rejected as pressure from various groups representing the claimants’ positions increased.52

As a result of the pressure applied by these groups and the DOL’s comparatively low approval rate, the Black Lung Benefits Reform Act of 1977 was in-

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43 Id.
44 Id. at 871, 884.
45 Id. at 873.
46 Id.
47 Id.
48 Id.
49 Id. at 885-86.
50 Id. at 885.
51 Id. at 887.
roduced during the first session of the 95th Congress. However, by this time, the DOL had withdrawn its support for the interim presumption. It is probable that the DOL's support was withdrawn because the SSA had "finally made it clear to the [DOL] that the interim presumption was scientifically [and medically] invalid." Furthermore, the SSA had applied the interim standards as an "irrebuttable" presumption, which allowed the approval of large numbers of marginal claims with a minimum of effort. This is supported by a 1980 General Accounting Office report which found that 88.5 percent of all claims reviewed and approved by SSA contained no evidence of total disability or death as a result of pneumoconiosis.

The belief that the interim presumption had been applied by the SSA in such a way as to make it appear irrebuttable concerned both the House and Senate conferees. To alert the DOL that it was not to follow the SSA's incomplete claims review procedures, the conference report mandated the consideration of all relevant medical evidence.

The statute required that the standard developed by the DOL could not be more restrictive than the interim standards developed by the SSA. However, the SSA presumption was "susceptible to dual interpretation—as written and as applied." To correct this problem, the conference report also stressed that the DOL was to develop criteria using the SSA presumption "as written" for a guide.

The Black Lung Benefits Reform Act of 1977, signed into law on March 1, 1978, was the result of a compromise of the positions advanced by various interest groups. The DOL recommended that the President approve the bill. Its concerns over the inappropriateness of the interim presumption's use had been reduced by

32 Solomons, supra note 4, at 889.
33 Id. at 889-90.
34 Id.
35 Comptroller Gen. of the U.S., Report to the Congress, Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability (July 28, 1980) cited in Solomons, supra note 4, at 897 (However, the GAO report declared it to be the result of following the requirements of the legislation.).
37 Solomons, supra note 4, at 893 (citing 30 U.S.C. § 902(f)(2) (Supp. II 1978)).
38 Id.
39 Id.
40 Id.
41 Id.
the directive that all "relevant evidence be considered." in an effort to comply with the amendments, the secretary issued his own version of the interim presumption.

D. The Interim Presumption of the Department of Labor

The labor department's version of the interim presumption expanded the scope of qualifying evidence to include arterial blood gas studies and other medical evidence, including documented medical opinions establishing total disability due to respiratory impairment. The expansion was primarily necessitated by the broadened meaning of pneumoconiosis under the 1977 amendments to include any respiratory or pulmonary impairment caused by coal mine employment.

The labor department rebuttal provisions required the adjudicator to consider all relevant medical evidence. While the SSA rebuttal provisions did not prohibit consideration of all relevant medical evidence, "Congress made it clear that the [DOL] was not to follow the suspected SSA practice of ignoring [it]. . . . Like their SSA counterparts, labor rebuttal clauses 1 and 2 both cross reference 20 C.F.R. § 410.412(a)(1) of the SSA permanent criteria." Rebuttal clauses 3 and 4 have no SSA counterpart.

Rebuttal is permitted if it is established under rebuttal clause 3 "that the total disability or death of the miner did not arise in whole or in part out of coal mine employment" or under rebuttal clause 4 if it is established that the miner does not have pneumoconiosis. The plain language of rebuttal clause 3 precludes rebuttal of the presumption ("total disability" due to pneumoconiosis) invoked under the regulation unless it is established that no part of the total disability, "however insignificant, is related to coal mine employment."

E. Case Law Development of the Interim Presumption

The DOL's administration of claims under its version of the interim presumption appears to be quite different than the SSA's perfunctory review of Part

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64 See generally 20 C.F.R. § 727.203 (1980).
66 Id. at § 727.203(a)(4), cited in Solomons, supra note 4, at 898.
67 United States Steel Corp. v. Gray, 588 F.2d 1022 (5th Cir. 1979); Cf. Solomons, supra note 4, at 898 ("It is not unreasonable to suggest that the expansion was adopted for administrative convenience. . . .")
68 Solomons, supra note 4, at 900.
69 Id.
70 20 C.F.R. §§ 727.203(b)(3)-(4). Id.
71 Solomons, supra note 4, at 901.
B benefit claims. The development of case law subsequent to the 1978 amend-
ment supports this conclusion.

The constitutionality of the SSA presumption was upheld by the United States
Supreme Court in *Usery v. Turner Elkhorn Mining Co.* The Third, Seventh,
and Eleventh Circuits, relying primarily on *Usery*, have rejected similar consti-
tutional challenges to the interim presumptions promulgated by the DOL.

Several prior cases interpreting the presumption have imposed artificial limits
severely restricting rebuttal. In *Hampton v. United States Department of Labor
Benefits Review Board*, the Fourth Circuit held that once the interim presumption
is triggered, the miner’s failure to satisfy the other tests under 20 C.F.R. section
727.203(a)(1)-(4) does not rebut the interim presumption. In *Whicker v. United
States Department of Labor Benefits Review Board*, the Fourth Circuit made it
clear that while “[n]onqualifying test results may be part of this [rebuttal inquiry,
... they cannot be used as the principle or exclusive means of rebutting an interim
presumption of pneumoconiosis ... [under] the applicable regulation.”

In *Whicker*, the interim presumption was invoked under 20 C.F.R. section
727.203(a)(1) after the ALJ weighed the negative X-rays against the positive X-
rays and found that the positive X-rays and the attached radiology reports had
established that Whicker had pneumoconiosis. The ALJ denied benefits, however,
because he found that the presumption had been rebutted by the various medical
opinions disputing the cause and severity of the impairment and the nonqualifying
ventilatory function tests and arterial blood gas studies. The *Whicker* court held
that the ALJ’s reliance on the ventilatory function tests and blood gas studies
was impermissible and ordered the award of benefits.

*Stapleton* expressly overrules *Whicker*. However, in view of the fact that the
*Whicker* court refused to allow the best method of detecting and evaluating a
coal mine dust related impairment (the blood gas study) to rebut the least effective
(the X-ray), it was probably “bad law” from its conception. Continuing to

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72 See Solomons, supra note 4, at 898.
73 Cf. Solomons, supra note 4, at 902 (“While many SSA denials were litigated in the federal
courts there has been very little useful precedent flowing from this litigation.”).
74 *Usery*, 428 U.S. 1.
75 *Peabody Coal Co.*, 778 F.2d 358; *Alabama By-Products*, 733 F.2d at 1516-18.
76 *Hampton*, 678 F.2d at 308.
77 *Whicker*, 733 F.2d at 349 (citation omitted).
78 Id. at 348.
79 Id.
80 “One initial concern expressed by those evaluating the early application of the black
lung benefits provisions was the lack of adequate facilities for conducting blood gas or
exercise tolerance test. Since this is the one best calculated to detect and evaluate a coal
mine dust related impairment the infrequency of its use...was particularly disturbing.”
Solomons, supra note 4, at 877. Furthermore, Congress believed the backlog of claims could
not wait until sufficient numbers of these testing facilities had been established, and man-
dated that claims be evaluated in light of this reality by the adoption of interim evidentiary
rules and interim disability evaluation criteria. *Id.* at 878.
adhere to it would be contrary to the relevant evidentiary standards of 20 C.F.R. section 727.203(b) and Stapleton.\textsuperscript{81}

The plain language of rebuttal clause 3 is clearly in conflict with the Act.\textsuperscript{82} In \textit{United States Steel Corp. v. Gray},\textsuperscript{83} the Fifth Circuit ruled that under the interim standards established by the SSA for adjudicating Part B claims, the regulations\textsuperscript{84} required "as a condition of entitlement that pneumoconiosis be the 'primary' cause of disability."\textsuperscript{85} Rebuttal of total disability due to pneumoconiosis under the plain language of (b)(3) is allowed when "[t]he evidence established that the total disability did not arise in whole or in part out of coal mine employment."\textsuperscript{86}

The validity of rebuttal clause 3 was successfully challenged in \textit{Jones v. New River Co.}\textsuperscript{87} as being inconsistent with 30 U.S.C. section 901, which requires the payment of benefits only when the claimant is totally disabled and pneumoconiosis is the primary reason. The criteria adopted by SSA for determining total disability under the statute support the \textit{Jones} analysis.\textsuperscript{88}

Beginning with \textit{Carozza v. United States Steel Corp.},\textsuperscript{89} the \textit{Jones} analysis of rebuttal clause 3 has been widely rejected.\textsuperscript{90} The \textit{Carozza} court primarily relied on the presumption contained in 30 U.S.C. section 921(c)(4) to support its ruling.\textsuperscript{91} This presumption allows rebuttal of the presumption of a totally disabling respiratory or pulmonary impairment of a miner with fifteen years of coal mine employment invoked by evidence of a totally disabling respiratory or pulmonary impairment. Under this presumption, it must be established that the miner does not have pneumoconiosis or that the respiratory or pulmonary impairment did not arise from employment in the coal mine.\textsuperscript{92} The statute on which the \textit{Carozza} court relied, as well as the legislative history of the Act, simply does not support such a broad interpretation. The \textit{Carozza} ruling, however, is consistent with the plain language of the regulation.

\textsuperscript{81} See Stapleton, 785 F.2d at 466 (Widener, J., concurring in part, dissenting, in part).
\textsuperscript{82} Solomons, supra note 4, at 901.
\textsuperscript{83} \textit{United States Steel Corp.}, 588 F.2d 1022 (1979); see also Peabody Coal Co. v. Benefits Review Bd., 560 F.2d 797 (7th Cir. 1977).
\textsuperscript{84} 20 C.F.R. § 410.426(a).
\textsuperscript{85} \textit{United States Steel Corp.}, 588 F.2d at 1027.
\textsuperscript{86} 20 C.F.R. § 727.203(b)(3).
\textsuperscript{88} See 20 C.F.R. § 410.426.
\textsuperscript{89} Carozza v. United States Steel Corp., 727 F.2d 74, 78 (3d Cir. 1984).
\textsuperscript{90} Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 123 (4th Cir. 1984); \textit{Alabama By-Products}, 733 F.2d at 1516 n.10; Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1120 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); American Coal Co. v. Benefits Review Bd., 738 F.2d 387, 391 (10th Cir. 1984).
\textsuperscript{91} Carozza, 727 F.2d at 78.
\textsuperscript{92} Id.
The Carozza court and its followers generally have held that when a miner has worked in coal mines fifteen years or more and simple pneumoconiosis is present, rebuttal clause 3 is not satisfied even though the primary cause of the claimant's total disability (e.g., heart disease) is unrelated to the claimant's coal mine employment.  

The legislative history indicates that some of the Act's promoters would like to have made the black lung program a government sponsored pension program. However, the entire legislative history sufficiently reflects that Congress never intended the program to be operated in such a manner. The original and amended Act was designed to compensate claimants for total respiratory or pulmonary disability related to coal mine employment. If heart disease is the primary cause of the total disability, compensation under the Act is not allowed on the basis of the mere presence of pneumoconiosis.

Contrary to the purpose of the Act, a court following both Stapleton and Carozza would permit the presumption of total disability from pneumoconiosis to be invoked (as defined by the 1977 amendments) on the basis of a single X-ray, blood gas study, ventilatory study, or physician's opinion, and limit rebuttal to proof that the claimant is capable of working in the mines, is actually working in the mines, or has no pneumoconiosis.

In Kertesz v. Crescent Hills Coal Co., the Third Circuit appeared to have backed away from its holding in Carozza when it failed to reverse the BRB and award benefits. In Kertesz, the claimant had worked more than twenty-two years in the coal mines and, like the claimant in Carozza, had pneumoconiosis and was diagnosed as totally disabled by heart disease. However, the abandonment of Carozza was short lived, as the Third Circuit soon returned to its Carozza ruling in Bernardo v. Director, Office of Workers' Compensation.

In Sharpless v. Califano and Petry v. Califano, the Fourth Circuit held that the claimant must establish by a preponderance of the evidence all of the facts necessary to invoke the presumption. The Stapleton court has by implication overruled both Sharpless and Petry and expressly overruled Sanati, which held that the interim presumption could not be invoked under 20 C.F.R. section

91 Id. (primary disability-heart disease); Alabama By-Products, 733 F.2d at 1513 (primary disability-arterial hypertension); Gibas, 748 F.2d at 1114 (primary disability-heart disease).
92 Solomons, supra note 4, at 915.
93 See generally Id.
95 Id. at 160.
96 Bernardo v. Director, Office of Workers' Compensation, 790 F.2d 351, 353 (3d Cir. 1986).
98 Petry v. Califano, 860 F.2d 577 F.2d (4th Cir. 1978) (applying 20 C.F.R. § 410.414(b)).
727.203(a)(4) without weighing the qualifying physician's opinion against any other nonqualifying physician's opinion(s).\textsuperscript{101}

The \textit{Stapleton} court has rejected the widely followed evidentiary weighing requirement\textsuperscript{102} in holding that under the plain language of the regulation,\textsuperscript{103} the claimant can trigger the interim presumption of total disability due to pneumoconiosis with a single qualifying X-ray, a single set of qualifying ventilatory or blood gas studies, or the documented opinion of one physician and in holding that the weighing of other evidence is inappropriate until after the presumption has been invoked.\textsuperscript{104}

IV. \textbf{THE HOLDINGS AND THE SUPPORTING JUDGES}

The \textit{Stapleton} decision is confusing because the controlling opinion has not been crystallized. The court's holdings are presented in a piecemeal fashion throughout the four opinions of the court. The following summary is provided for clarity:

(1) The interim presumption under section 727.203(a)(1), (2), or (3) is invoked when there is credible evidence, obtained in accordance with the applicable regulatory standards, that a single qualifying X-ray, a single set of qualifying ventilatory studies, or a single set of qualifying blood gas studies indicates the presence of pneumoconiosis or chronic respiratory or pulmonary disease. This overrules \textit{Sanati}\textsuperscript{105} insofar as it holds that one qualifying opinion from a physician does not invoke the presumption under section 727.203(a)(4).

(2) The interim presumption under section 727.203(a)(4) is invoked by one qualifying physician's opinion which complies with the regulatory requirements.

(3) \textit{Stapleton} affirms \textit{Sanati}\textsuperscript{105} insofar as it holds that, absent a qualifying physician's opinion, the interim presumption is invoked under section 727.203(a)(4) by a preponderance of medical evidence other than X-rays, ventilatory studies, and blood gas studies weighed under the customary rules of evidence.

(4) Under 20 C.F.R. section 727.203(b), rebuttal of a presumption invoked under section 727.203(a) requires that all medical evidence, including nonqualifying X-rays, test results, and medical opinions, must be considered regardless of which section under (a) was originally used to invoke the presumption. This hold-

\textsuperscript{101} \textit{Sanit}, 713 F.2d at 482.
\textsuperscript{102} \textit{See} Evosevich, 789 F.2d 1021; \textit{Alabama By-Products}, 733 F.2d 1511; \textit{Peabody Coal Co.}, 778 F.2d 358; \textit{Engle v. Director, Office of Workers' Compensation}, 792 F.2d 63 (6th Cir. 1986); \textit{Orange}, 786 F.2d 724, \textit{Back}, 796 F.2d 169 (expressly rejecting the \textit{Stapleton} holding).
\textsuperscript{103} 20 C.F.R. § 727.203.
\textsuperscript{104} \textit{Stapleton}, 785 F.2d at 434-35.
\textsuperscript{105} \textit{Sanit}, 713 F.2d at 480.
\textsuperscript{106} \textit{Id.}
ing is limited only by 30 U.S.C. section 923(b), which prohibits the denial of a claim solely on the basis of one negative X-ray.

(5) Stapleton overrules Whicker\(^\text{107}\) and Hampton.\(^\text{108}\)

(6) The Stapleton court unanimously holds that interest shall begin to accrue on the award of black lung benefits thirty days after the first agency decision finding disability.

V. THE COURT'S ANALYSIS

The conflicting opinions of both Judge Phillips and Judge Sprouse begin with a discussion of the judicial deference to be given to the DOL's interpretation of section 203 of its regulation. Both Judges agree on the general rule that deference is required unless the agency's interpretation is plainly erroneous, inconsistent with the regulation, or in excess of the authority delegated to the agency by Congress.\(^\text{109}\) However, they do not agree as to when the deference rule applies.\(^\text{110}\)

The majority of the court holds that the deference rule applies to the agency's interpretation of the presumption at the time it published the regulation. Judge Phillips disagrees and would apply the rule to the interpretation advanced in the agency's appellate petition.\(^\text{111}\)

Judge Sprouse finds support for the court's position in the Administrative Procedure Act. "Section 552(a) provides that an agency interpretation of general application shall not be binding unless it is published in the Federal Register."\(^\text{112}\) Judge Sprouse argues that giving deference to the interpretation advanced by the DOL as an appellant "is an ill-conceived application of the 'deference rule'"\(^\text{113}\) because it would "permit any agency in such a posture effectively to resolve appeals by its own action."\(^\text{114}\)

Judge Phillips agrees that agency interpretations advanced by litigants may be the least worthy of judicial deference, but finds no reason to conclude that

\(^{107}\) Whicker, 733 F.2d at 346.

\(^{108}\) Hampton, 678 F.2d 306.


\(^{110}\) Id. at 440, 449.

\(^{111}\) Id. at 440.

\(^{112}\) Section 552(a) also provides that:
A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used or cited as precedent by an agency against a party other than the agency only if [it has been indexed and published or a party has actual and timely notice of its terms.] Id. at 450-51.

\(^{113}\) Id. at 449.

\(^{114}\) Id. at 451.
the position advanced by the DOL in its petition "is not the agency's general position, nor that it is not 'consistently applied' by the agency in its base line administration of the regulation." In fact, the case law preceding Stapleton indicates that the BRB, appointed by the Secretary of Labor and relying heavily on the DOL for its daily operations, and the courts consistently have applied the weighing principle to the invocation of the presumption. As Judge Phillips notes, the primary and most critical purpose underlying the deference principle is to encourage uniform application of an agency's regulation.

An unfortunate consequence of failure to adhere to the deference principle, as Judge Phillips also states, "is the inevitable divergence of views and applications that will emerge in judicial interpretations from circuit to circuit." Judge Phillips' concern for the confusion that will be created by the failure of the court to adhere to the deference principle is well founded. The Sixth Circuit has already rejected the Stapleton decision, and the Third Circuit refused to address the issue.

Judge Phillips' deference argument would be highly persuasive absent a clear indication of congressional preference for the interpretation advanced by the majority, and the Labor Secretary's acknowledgment of the preference. Judge Phillips' interpretation of the mechanics of invoking the presumption and Judge Sprouse's insistence on affirming the restrictions on rebuttal found in Whicker and Hampton are contrary to legislative history and the statute. The majority position constructed by Judge Widener from the opinions of Judges Sprouse, Hall, and Phillips is consistent with both.

The presumption is merely a device allowing claims to be processed without the time consuming delays that result from the perceived deficiency of adequate

115 Id. at 440 n.1.
117 See supra note 10.
118 Stapleton, 785 F.2d at 440 n.2.
119 Id.
120 Back, 796 F.2d at 172.
121 Evosevich, 789 F.2d at 1023, n.2 ("In light of the conclusion we reach [rejection of petition for review after claim was denied] . . . we do not address the propriety of the presumptions here invoked" without the weighing of conflicting evidence.).
122 Id. at 465 (Widener, J., concurring in part, dissenting in part): [T]he Department cannot as has been requested by some, look for the single item of evidence which would qualify a claimant on the basis of the interim presumption, and ignore other previously obtained evidence. This does not mean that the single item of evidence which establishes the presumption is overcome by a single item of evidence which rebuts the presumption.
123 Id. (emphasis in original) (quoting Notice of Final Rulemaking under the Black Lung Benefits Reform Act of 1977, 43 Fed. Reg. 36,826 (1978)).
testing facilities.\textsuperscript{124} It permits an inference of critical facts which are not justified from a medical standpoint by the invoking evidence.\textsuperscript{125} The invalidity of the presumptions from a medical standpoint mandates that all relevant medical evidence must be considered in accordance with the statutory directive.\textsuperscript{126} As Judge Widener states:

I am of the opinion that the [statute], which for rebuttal, is untrammeled by any restrictive interpretation or regulation and provides that “[i]n determining the validity of claims under this part, all relevant evidence shall be considered . . .,” requires consideration of all of the relevant evidence on rebuttal in determining the ultimate issue. The statutory language is so construed in subsection (b) requiring consideration on rebuttal of “all relevant medical evidence.” “A more comprehensive word than ‘all’ cannot be found in the English language . . .,” and no reason is presented to give the word other than its ordinary meaning. I see no reason to impose artificial restrictions, as \textit{Whicker} and \textit{Hampton} have done, on the evidence available in finally deciding a claim.\textsuperscript{127}

Both Judges Hall and Sprouse acknowledge this requirement, yet their continued reliance on \textit{Whicker}, \textit{Hampton}, and other cases of that genre would make the rebuttable process an exercise in futility. Judge Widener’s all inclusive consideration of the relevant medical evidence in the rebuttal phase would not be allowed under Judge Hall’s analysis. Judges Hall and Sprouse would continue to adhere to the court’s holding in \textit{Whicker}\textsuperscript{128} that “[o]nce the presumption arises, the miner’s failure to satisfy the remaining tests does not rebut it.”\textsuperscript{129} In other words, once the interim presumption has been properly invoked under any one of the criteria specified under section 727.203(a), nonqualifying test results of a different type than those used to invoke the presumption cannot be used as the exclusive or principle means to rebut the presumption.

Using the analysis offered by Judges Hall and Sprouse, the claimant could trigger the presumption with a single X-ray, without being required to rebut any evidence that was not used to invoke the presumption. The statutory directive that claims for benefits under the Act shall not be denied solely on the basis of a chest X-ray\textsuperscript{130} would then make rebuttal extremely difficult, if not impossible. What would be the point in considering the other tests if the claimant is not required to satisfy them? Judge Widener’s majority opinion is a combination of the best of each of the opinions offered by Judges Phillips, Sprouse, and Hall.

\textsuperscript{124} Solomons, \textit{supra} note 4, at 877.
\textsuperscript{125} \textit{Id.} at 882-83.
\textsuperscript{126} 30 U.S.C. § 923(b) (Supp. II 1978).
\textsuperscript{127} \textit{Stapleton} 785 F.2d at 466-67 (citation omitted).
\textsuperscript{128} \textit{Whicker}, 733 F.2d 346.
\textsuperscript{129} \textit{Id.} at 348 (quoting \textit{Hampton}, 678 F.2d at 508).
VI. Conclusion

In view of the court's unanimous decision on the individual claims of Stapleton and Cornett and the decision to remand Ray's claim because of the procedural defect perceived by the majority in the ALJ's failure to invoke the presumption, the net impact of the court's holdings on future claims is not apparent. There is hope, however, in the majority's directive that all relevant evidence must be considered in the rebuttal process without restriction.

The primary problem facing the mine operator as a result of Stapleton is the manner in which the opinion is presented. In view of the fact that a single controlling opinion has not been presented, conflicting interpretations are the likely result. The triggering of the presumption should not add additional burdens to the defense if, as the court directs, all relevant evidence is considered without the imposition of "artificial restrictions." However, the court has not gone far enough in "overruling" those prior cases that have placed "artificial restrictions" on rebuttal.

In light of Carozza and other cases of its class, a more restrictive burden has been placed on the mine operator by Stapleton in attempting to rebut the interim presumption under section 727.203(b)(3). As discussed in this Comment, the plain language of rebuttal clause (3) clearly conflicts with congressional intent because it allows a claimant totally disabled by a condition unrelated to pneumoconiosis (e.g., heart disease) to receive benefits by a mere showing of simple pneumoconiosis.

At this time, the Stapleton decision is before the United States Supreme Court. Ultimately, the conflicting standards between the circuits hopefully will be resolved.

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