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Recent Developments in Black Lung Litigation--Rebuttal of the Interim Presumption

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RECENT DEVELOPMENTS IN BLACK LUNG LITIGATION — REBUTTAL OF THE INTERIM PRESUMPTION

Recent black lung litigation has centered around rebuttal of the so-called "interim presumption."[1] A clear majority of the Benefits Review Board (hereinafter "Board") favors employers and denies benefits to coal miner claimants. This majority accords considerable weight to medical tests and physicians' opinions regarding a claimant's disability as rebuttal evidence.[2] Furthermore, the majority tends to construe the regulations narrowly and in favor of the employer.[3] A recurrent dissenting voice in Judge Miller argues that medical tests and physicians' opinions regarding a claimant's disability cannot, by themselves, rebut the interim presumption.[4] Moreover, he argues for construction of the regulations in a way that benefits claimants. Despite the strength of the Board's majority, two recent court of appeals decisions reversed the Board and have adopted the dissent's view, ordering the payment of benefits to claimants.[5]

Under the interim presumption a claimant is presumed totally disabled from pneumoconiosis if he has worked in coal mines for at least ten years and meets any one of five medical criteria.[6] The first is establishment of pneumoconiosis by X-ray, biopsy or autopsy.[7] Second, the claimant can establish chronic respiratory or pulmonary disease through ventilatory studies.[8] Third, the claimant can show impairment of the lungs' ability to transfer oxygen to the blood by blood gas tests.[9] Other medical evidence including a physician's opinion is the fourth criterion.[10] Finally, if the miner is deceased and no medical evidence is available, an affidavit from a survivor may demonstrate total disability at the time of the claimant's death.[11] Once the claimant satisfies one of the five medical criteria and is presumed totally disabled from pneumoconiosis, he is entitled to benefits unless the employer rebuts the interim presumption.

The methods of rebuttal are set forth in 20 C.F.R. section 727.203.[12] The employer can rebut the presumption by showing that the miner is, in fact, doing his usual or comparable work,[13] or that the claimant is able to do his usual

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[1] 20 C.F.R. § 727.203(a) (1982).
[2] *See infra* note 32 and accompanying text.
[3] *See infra* notes 34-36 and accompanying text.
[4] *See, e.g.*, Sykes v. Itmann Coal Co., 2 B.L. REP. (MB) 1-1089 (Miller, J., dissenting).
[5] *See infra* notes 40-43 and accompanying text.
[6] 20 C.F.R. § 727.203(a) (1982).
[7] *Id.* at § 727.203(a)(1).
[8] *Id.* at § 727.203(a)(2).
[9] *Id.* at § 727.203(a)(3).
[10] *Id.* at § 727.203(a)(4).
[11] *Id.* at § 727.203(a)(5).
[12] *Id.* at § 727.203(b)-(b)(4).
[13] *Id.* at § 727.203(b)(1).

or comparable work[14] or that his disability did not arise from coal mine work,[15] or that he does not have pneumoconiosis.[16]

The debate between the majority and dissent most frequently surfaces when the employer presents evidence that the claimant is able to do his usual or comparable work, a (b)(2) rebuttal case, or when the employer shows that the claimant's disability did not arise from coal mine work, a (b)(3) rebuttal case.[17] The argument in the (b)(2) cases concerns the weight given rebuttal evidence in the form of medical opinions and nonqualifying blood gas and ventilatory studies.[18] The (b)(3) cases dispute the construction given the "whole or in part" language of that subsection.[19]

In *Sykes v. Itmann Coal Co.*,[20] a physician's opinion based on nonqualifying ventilatory and blood gas tests concluded that the claimant did not suffer from respiratory or pulmonary impairment. The Board held that the physician's opinion could be used to rebut the interim presumption by demonstrating that the claimant is capable of his usual work.[21] The Board acknowledged that nonqualifying tests[22] by themselves cannot rebut the presumption, but a medical opinion based on these tests is relevant rebuttal evidence and must be considered by the administrative law judge (hereinafter "ALJ").[23] The Board reasoned that nonqualifying tests are subject to different expert interpretations. Disability is a medical determination which should be based on all medical evidence available to the examining physician.[24] Therefore, in *Sykes* the ALJ erred as a matter of law when he held that a physician's opinion based on nonqualifying studies was not competent rebuttal evidence.[25]

The dissent in *Sykes*, however, argued that the ALJ did indeed consider the physician's opinion, but he merely exercised his discretion and found the physician's opinion was not sufficient to rebut the interim presumption.[26] The language of the ALJ's decision and order supports this view.[27] The majority of the Board reversed the ALJ's decision on the grounds of the treatment given

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[14] *Id.* at § 727.203(b)(2).

[15] *Id.* at § 727.203(b)(3).

[16] *Id.* at § 727.203(b)(4).

[17] *See supra* notes 12 and 13.

[18] *See, e.g.*, Sykes v. Itmann Coal Co., 2 B.L. REP. (MB) 1-1089 (1980).

[19] Jones v. New River Co., 3 B.L. REP. (MB) 1-199 (1981).

[20] 2 B.L. REP. (MB) 1-1089 (1980).

[21] *Id.* at 1-1101.

[22] *See id.* at 1095, n.4. (Nonqualifying tests do not show a degree of respiratory or pulmonary impairment sufficient for invocation of the interim presumption of disability.)

[23] *Id.* at 1-1097.

[24] *Id; see also* Wetherill v. Green Constr. Co., 5 B.L. REP. (MB) 1-248, 257, n.7 (1982) (Board notes that if nonqualifying tests were not permitted to contribute to a physician's opinion there would be the anomalous result that an opinion based on less evidence would carry greater weight than an opinion that considered all available evidence.)

[25] 2 B.L. REP. (MB) at 1-1098.

[26] *Id.* at 1-1103 (Miller, J., concurring and dissenting).

[27] The ALJ found that the physician's report did not "affirmatively establish the ability . . . required by § 727.203(b)." *Id.* at 1-1102.

the physician's opinion.[28] Since the decision and order shows that the ALJ did not actually find the physician's opinion incompetent yet the Board reversed anyway, the conclusion is that the majority gives great weight to such opinions and nonqualifying tests.[29]

In *Sykes*, the dissent also contended that medical opinions alone are never sufficient to rebut the interim presumption in a (b)(2) case.[30] Rebuttal in a (b)(2) case requires a showing that the claimant is *able* to do his usual coal mine work or comparable gainful work.[31] Work ability must be specifically addressed; it cannot be determined in the abstract from medical opinions.[32] Moreover, the employer must also show that other gainful work is available near the claimant's home and that he has a reasonable chance of being hired.[33]

The Board has disagreed in decisions involving (b)(3) rebuttal cases on two issues. The first issue concerns evidentiary standards on rebuttal, whereas the second issue deals with the construction of subsection (b)(3).

The Board is divided over what standard of certainty a physician's opinion must meet to rebut the interim presumption under (b)(3). The majority held that a physician's opinion must be within a reasonable degree of medical certainty only when smoking is another possible cause of disability.[34] The dissent responded that regardless of the method of rebuttal or the underlying facts, a physician's opinion must always be within a reasonable degree of medical certainty if it is to be given weight on rebuttal.[35]

The debate over the construction of subsection (b)(3) involves the "whole or in part language." The majority strikes the language entirely.[36] The rationale is that the language places an unfair burden of proof on the employer insofar as the presumption remains intact if *any part* of the claimant's disability arose from coal mine employment.[37] Therefore, under the Board's current view, the presumption is rebutted if the claimant's total disability is not solely attributable to coal mine employment.[38]

The dissent argues that the majority's construction of the "whole or in part" language of (b)(3) is contrary to the purpose of the Federal Coal Mine Health & Safety Act.[39] Judge Miller cited case law, analogous statutes and leg-

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[28] *Id.* at 1-1098.

[29] *See* Hatcher v. Consolidation Coal Co., 5 B.L. REP. (MB) 1-133, 139 n.4 (1982) (Board argues that nonqualifying tests do not establish an affirmative inference of no disability, but the evidence must be considered).

[30] 2 B.L. REP. (MB) at 1-1105 (Miller, J., dissenting).

[31] 20 C.F.R. § 727.203(b)(2) (emphasis added).

[32] 2 B.L. REP. (MB) at 1-1105 (Miller, J., dissenting).

[33] *Id.* at 1-1103; *see also*, Fletcher v. Central Appalachian Coal Co., 1 B.L. REP. 1-785, 9 B.R.B.S. (MB) (1978).

[34] VanNest v. Consolidation Coal Co., 3 B.L. REP. (MB) 1-526 (1982).

[35] *Id.* at 1-545 (Miller, J., dissenting).

[36] Jones v. New River Co., 3 B.L. REP. (MB) 1-99 (1981).

[37] *Id.*

[38] *VanNest*, 3 B.L. REP. at 1-529.

[39] 30 U.S.C. § 901 (1978).

islative history to support his view.[40] He maintained that the "whole or in part" language relates to the cause of disability, not to the amount of disability.[41] Hence, under the dissenting view, unless the employer shows that the claimant's disability is in no way attributable to coal mine employment, the presumption stands.

Notwithstanding the consistent Board majorities favoring employers and denying benefits to claimants, two recent court of appeals decisions reversed the Board and ordered the payment of benefits. These two decisions apparently adopt the position of the Board's dissenting voice. The first case is *Hampton v. Benefits Review Board*,[42] which comes from the Fourth Circuit. The Sixth Circuit case, an unpublished order, reversed the Board's decision in *VanNest*, and cited *Hampton* with approval.[43]

In *Hampton*, the Fourth Circuit held that once the interim presumption has been invoked under either subsections (a)(1), (a)(2), or (a)(3), evidence which fails to satisfy the criteria of another subsection is not sufficient to rebut the presumption.[44] The claimant in *Hampton* was entitled to the interim presumption because he had ten years of coal mine employment and his X-rays showed black lung disease. The employer rebutted with a physician's opinion based on nonqualifying blood gas and ventilatory tests. The court reasoned that since a claimant needs to satisfy only one of the five criteria to invoke the presumption, evidence of other nonqualifying tests could not rebut. Rebuttal based on nonqualifying tests is equivalent to forcing the claimant to meet more than one of the criteria.[45]

The *Hampton* and *VanNest* decisions reject the Board majority's position and adopt the dissenting view. The court in *Hampton* explicitly rejected the majority view that nonqualifying tests and physician opinions based on these tests can constitute sufficient rebuttal evidence. The court adopted the dissenting view that such evidence is never sufficient for rebuttal. The Sixth Circuit's reversal of *VanNest* implicity rejected the majority's construction of subsection (b)(3) and the lenient standard of medical certainty of physician opinions on rebuttal. By further implication, the Sixth Circuit adopted the dissent's view that all medical rebuttal evidence must be within a reasonable degree of medical certainty. Finally, the court implicitly adopted the dissent's construction of (b)(3) that the presumption is only rebutted if the employer shows the claimant's disability is unrelated to his coal mine employment. Consequently, despite the Board majority's consistent denial of benefits and favoring of employers, an emerging unwillingness to deny benefits at the court of appeals

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[40] *See, e.g.*, Clinchfield Coal v. Fleming, 606 F.2d 441 (4th Cir. 1979); 30 U.S.C. § 921(c)(4) (1976); S. REP. No. 209, 95th Cong., 1st Sess. 13-14 (1977).

[41] *VanNest*, 3 B.L. REP. at 1-534 (Miller, J., dissenting).

[42] Hampton v. Benefits Review Board, 678 F.2d 506 (4th Cir. 1982), 4 B.L. REP. (MB) 2-82 (1982).

[43] VanNest v. Consolidation Coal Co., Nos. 81-3411 and 81-3463 (1982), *rev'g* 3 B.L. REP. (MB) 1-526 (1982).

[44] 678 F.2d at 507, 4 B.L. REP. at 2-48-85.

[45] *Id.*

level may influence the Board to administrate the interim presumption more favorably towards claimants.

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