

PART II

DEFINITIONS

D. PNEUMOCONIOSIS

Section 402(b) of the Act defines pneumoconiosis as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. §902(b). The Act's implementing regulations further define the term, providing specific examples of conditions that are to be considered pneumoconiosis for purposes of the Act. See 20 C.F.R. §§410.110(o), 718.201, 727.202.

CASE LISTINGS

[Fifth Circuit held Board should have applied definition of pneumoconiosis in effect when hearing was held rather than the definition as amended by the 1978 Act] ***United States Steel Corp. v. Gray***, 588 F.2d 1022, 1030, 1 BLR 2-168, 2-174-175 (5th Cir. 1979).

[claimant's pulmonary condition of bronchial asthma, bronchitis, and advanced emphysema constituted diagnosis of pneumoconiosis under Act as it arose out of coal dust exposure in coal mine employment] ***Robinson v. Director, OWCP***, 1-795, 1-797 (1981); see generally ***Ovies v. Director, OWCP***, 3 BLR 1-609, 1-616-621 (1981).

[anthracosisanthro-silicosis in 20 C.F.R. §727.202 is a misprint that contains two words, anthracosis and anthro-silicosis, each pneumoconiosis] ***Husk v. Sewell Coal Co.***, 4 BLR 1-7, 1-10 (1981); see also ***Sturms v. Badger Coal Co.***, 4 BLR 1-208, 1-210 n.1 (1981).

[respiratory condition due in some measure to "industrial bronchitis" arising from coal mine employment is pneumoconiosis] ***Dalton v. Eastern Associated Coal Corp.***, 5 BLR 1-517, 1-519 (1983).

[physician's conclusion that claimant has no pneumoconiosis but has bronchitis "probably secondary to dust exposure" meets broad definition of pneumoconiosis in Section 727.202] ***Tokarcik v. Consolidation Coal Co.***, 6 BLR 1-666, 1-668 (1983).

[diagnosis of emphysema as obstructive pulmonary disease and related to dust exposure in coal mine employment is pneumoconiosis] ***Heavilin v. Consolidation***

Coal Co., 6 BLR 1-1209, 1-1212 (1984); see **Bray v. Director, OWCP**, 6 BLR 1-400, 1-403 (1983).

[Tenth Circuit held pneumoconiosis broadly defined under Section 727.202 to include conditions caused by all kinds of dust in a coal mining operation, not just coal dust] **Morrison-Knudsen Co., Inc. v. Schaechterle**, No. 83-1777 (10th Cir. Oct. 9, 1984) (unpublished).

[tracheobronchitis not condition included within the definition of pneumoconiosis] **Adamson v. Director, OWCP**, 7 BLR 1-229 (1984).

DIGESTS

The Eleventh Circuit held that pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment." **Brown v. Director, OWCP**, 851 F.2d 1569, 11 BLR 2-192, 2-195 (11th Cir. 1988), *appeal dismissed*, 864 F.2d 120 (11th Cir. 1989)(quoting Section 402(b) of the Act); **Stomps v. Director, OWCP**, 816 F.2d 1533, 1535, 10 BLR 2-107, 2-108 (11th Cir. 1987)(quoting Section 402(b) of the Act).

Bronchitis can only be attributable to pneumoconiosis where it is shown to arise from the coal mine experience. **Brown**, *supra*, at 2-196; see **Pavesi v. Director, OWCP**, 758 F.2d 956, 964-965, 7 BLR 2-184, 2-198 (3d Cir. 1985).

The Board has held that pneumoconiosis as defined in Section 727.202 includes any chronic pulmonary disease resulting in a respiratory or pulmonary impairment significantly related to or significantly aggravated by dust exposure in coal mine employment. **Biggs v. Consolidation Coal Co.**, 8 BLR 1-317, 1-322 (1985).

Only diseases arising out of exposure to *coal dust* are anticipated and covered under the definition of pneumoconiosis in 20 C.F.R. §727.202. The Board holds that a disease caused by welding fumes or sand dust generated from the welding machine used by claimant in his covered coal mine employment is not compensable under the Act. **Crow v. Peabody Coal Co.**, 11 BLR 1-54, 1-56 (1988)(Ramsey, C.J., concurring).

The Eleventh Circuit held that the administrative law judge's determination of pneumoconiosis was supported by substantial evidence in the form of an autopsy report that indicated nodules of anthracosis and fibrosis. **McClendon v. Drummond Coal Co.**, 861 F.2d 1512, 1514, 12 BLR 2-108, 2-109 (11th Cir. 1988).

The Third Circuit held that the legal definition of pneumoconiosis pursuant to Section 727.202 encompasses a wider range of afflictions than does the more restrictive medical definition of coal workers' pneumoconiosis. **Kline v. Director, OWCP**, 877 F.2d 1175, 1178, 12 BLR 2-346, 2-352 (3d Cir. 1989); **Pavesi v. Director, OWCP**, 758

F.2d 956, 965, 7 BLR 2-184, 2-198 (3d Cir. 1985).

Anthracosis is included within the definition of pneumoconiosis at 20 C.F.R. §727.202. **Bueno v. Director, OWCP**, 7 BLR 1-337, 1-340 (1984). Whether anthracosis of the hilar lymph nodes is also included is a finding of fact to be made by the administrative law judge based on the evidence. **Bueno**, *supra*; see **Mangus v. Director, OWCP**, 882 F.2d 1527, 13 BLR 2-9, 2-20-21 (10th Cir. 1989).

Where employer was confronted with the difficult burden of establishing rebuttal under Section 411(c)(5) of the Act, and in light of the fact that employer did not challenge that the miner's work with asbestos insulation pipe coverings was covered coal mine employment, the Board affirmed the administrative law judge's determination that the miner's lung cancer, if caused by his asbestos exposure during coal mine employment, in this case, constituted pneumoconiosis under the Act. **Pershina v. Consolidation Coal Co.**, 14 BLR 1-55 (1990)(*en banc*).

Where complicated pneumoconiosis is established, the insurance carrier at the time of establishment of complicated pneumoconiosis is responsible for payment of benefits, regardless of continued coal mine employment and subsequent change of employer's insurance carrier. **Swanson v. R. G. Johnson Co.**, 15 BLR 1-49 (1991).

In accord with **Pershina v. Consolidation Coal Co.**, 14 BLR 1-55 (1990) (*en banc*), the Board held that a chronic dust disease arising out of coal mine employment in an underground coal mine, if caused by asbestos exposure during coal mine employment, constitutes pneumoconiosis as defined at 20 C.F.R. §718.201. The Board distinguished this case from the Eleventh Circuit's holding in **William Brothers, Inc. v. Pate**, 833 F.2d 261, 10 BLR 2-333 (11th Cir. 1987), and the Tenth Circuit's **Bridger Coal Co. v. Director, OWCP [Harrop]**, 927 F.2d 1150, 15 BLR 2-47 (10th Cir. 1991), on the basis that, in the instant case, the miner was engaged in coal extraction and was exposed to coal dust in an underground coal mine, during which time he was also exposed to asbestos. In **Pate** and **Harrop**, however, the miners were construction workers whose employment occurred at mine sites not yet operational. **Shaffer v. Consolidation Coal Co.**, 17 BLR 1-56 (1992).

The aggravation of a pulmonary condition by dust exposure in coal mine employment must be significant and permanent in order to constitute "legal" pneumoconiosis as defined at 20 C.F.R. §718.201. Thus, medical opinions which diagnose only a temporary worsening of pulmonary symptoms upon exposure to coal dust, but no permanent effect, cannot support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4). **Henley v. Cowan & Co., Inc.**, 21 BLR 1-147 (1999).

The Fourth Circuit recognized that Section 718.201 encompasses a wide variety of conditions; including diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nonetheless been made worse

by coal dust exposure. The Fourth Circuit held that the plain language of Section 718.201 demands that these diseases result in some sort of respiratory or pulmonary impairment before they can be considered “pneumoconiosis.” **Clinchfield Coal Co. v. Fuller**, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

However, the Fourth Circuit noted that Section 718.201 also includes diseases that are or can be caused by coal dust inhalation. Any “chronic dust disease of the lung and its sequelae...arising out of coal mine employment” will qualify. Examples include “coal workers’ pneumoconiosis” and “anthracosis.” The Fourth Circuit noted that Section 718.201 nowhere requires these coal dust-specific diseases to attain the status of an “impairment” to be classified as “pneumoconiosis.” The Fourth Circuit held that the definition is satisfied whenever one of these diseases is present in the miner at a detectable level; whether the particular disease exists to such an extent as to be compensable is a separate question. **Clinchfield Coal Co. v. Fuller**, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

In an *en banc* decision, the majority held that the administrative law judge properly determined that the biopsy findings, which include diagnoses of “subpleural fibrosis with anthracosis” and “perivascular anthracosis,” with associated disease process, fall within the regulatory definition of “pneumoconiosis” provided at 20 C.F.R. §718.201, notwithstanding the fact that there is no medical evidence linking these diagnoses to claimant’s coal mine employment. The majority thereby adopted the Director’s position that the etiology of claimant’s conditions diagnosed on biopsy is properly considered not pursuant to the regulation at 20 C.F.R. §718.202(a), but pursuant to the regulation at 20 C.F.R. §718.203. The majority also held that the administrative law judge’s determination that the biopsy findings support a finding of the existence of pneumoconiosis, is consistent with the decision of the United States Court of Appeals for the Fourth Circuit in **Clinchfield Coal Co. v. Fuller**, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). **Hapney v. Peabody Coal Co.**, 22 BLR 1-104 (2001)(*en banc*)(SMITH and DOLDER, Administrative Appeals Judges, dissenting in part and concurring in part).

Judges Smith and Dolder, for the minority, agreed with employer’s contention that the administrative law judge committed reversible error in determining that the biopsy findings establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2). In the absence of any medical evidence affirmatively linking the biopsy findings with claimant’s coal mine employment, the diagnoses of “anthracosis” cannot constitute “pneumoconiosis” within the meaning of the Act and implementing regulations. 30 U.S.C. §902(b); 20 C.F.R. §§718.201, 718.202(a), (a)(1) and (b). The minority thus indicated that the Director’s interpretation of the regulations, namely that the etiology of claimant’s conditions diagnosed on biopsy is properly considered not pursuant to the regulation at 20 C.F.R. §718.202(a) but pursuant to the regulation at 20 C.F.R. §718.203, is not reasonable in this instance and does not merit the deference accorded it by the majority. The minority disagreed with the majority’s conclusion that the

administrative law judge's finding, that the diagnoses of "anthracosis" made on biopsy support a finding of the existence of pneumoconiosis, is supported by the Fourth Circuit's decision in **Fuller**, as the court did not reach the issue *sub judice*. **Hapney v. Peabody Coal Co.**, 22 BLR 1-104 (2001)(*en banc*)(SMITH and DOLDER, Administrative Appeals Judges, dissenting in part and concurring in part).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(a)(2), which expands the definition of pneumoconiosis to include both chronic restrictive or obstructive pulmonary disease arising out of coal mine employment, is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 862, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), stating that pneumoconiosis is recognized as a latent and progressive disease, is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 863, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), setting forth the definition of pneumoconiosis, should be narrowly construed to state that pneumoconiosis *can* be a progressive and latent disease, not that it is always, or typically, a latent or progressive disease. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 869, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The Sixth Circuit held that the administrative law judge's explanations for crediting the opinions of Drs. Broudy and Fino and discounting the contrary opinion of Dr. Rasmussen, to find the medical opinions insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), were not supported by substantial evidence. The administrative law judge credited the opinions of Drs. Broudy and Fino over the contrary opinion of Dr. Rasmussen because he found that Dr. Rasmussen relied on an incomplete medical record in that he diagnosed only clinical pneumoconiosis by x-ray, whereas Drs. Broudy and Fino relied on comprehensive documentation in reaching their conclusions that claimant did not have pneumoconiosis. The administrative law judge also found that Dr. Fino had excellent professional qualifications. The Sixth Circuit held that the administrative law judge did not adequately explain his finding that Dr. Rasmussen's report did not support a finding of legal pneumoconiosis, where the record showed that Dr. Rasmussen relied on the results of his exercise blood gas study and diffusing capacity test to determine that claimant was suffering from a pulmonary disability. The Sixth Circuit also held that the Board's explanation that Dr. Rasmussen diagnosed clinical but not legal

pneumoconiosis, was inaccurate as a matter of law because (1) Dr. Rasmussen's consideration of evidence, other than the x-ray, including a physical exam, diffusing capacity test, arterial blood gas studies, and claimant's personal and occupational histories, would have been sufficient alone to support a finding of legal pneumoconiosis; and because (2) even if Dr. Rasmussen diagnosed only clinical pneumoconiosis, as the Board concluded, such a diagnosis was necessarily legal pneumoconiosis where legal pneumoconiosis includes clinical pneumoconiosis. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

The Sixth Circuit held that the administrative law judge did not adequately explain his reasons for crediting the opinions of Drs. Broudy and Fino. The Sixth Circuit found "no rational explanation" for the administrative law judge's determination that Dr. Broudy's opinion was more credible than Dr. Rasmussen's opinion regarding the existence of pneumoconiosis, especially after the administrative law judge found that Dr. Broudy's report contained little rationale or explanation and that Dr. Rasmussen's report was well-reasoned. The Sixth Circuit noted, moreover, that what explanation Dr. Broudy did provide for his opinion that claimant did not have pneumoconiosis, directly supported Dr. Rasmussen's finding of pneumoconiosis based on the blood gas study results. With regard to Dr. Fino, the Sixth Circuit held that Dr. Fino's credentials were not necessarily superior to those of Dr. Rasmussen, where Dr. Fino was Board-certified in Internal Medicine and Pulmonary Disease and Dr. Rasmussen was Board-certified in Internal Medicine only but had extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis. The Sixth Circuit also determined that the record refuted the administrative law judge's finding that Dr. Fino reviewed Dr. Rasmussen's exercise blood gas study and diffusing capacity test results and had determined that they were not indicative of pneumoconiosis. The Sixth Circuit thus vacated the Board's decision affirming the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and the denial of benefits, and remanded the case to the administrative law judge for further consideration. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

The Seventh Circuit, on the merits of the claim, held that the administrative law judge did not err in relying on the weight of the medical opinion evidence at 20 C.F.R. §718.202(a)(4) to find the existence of pneumoconiosis established, where the weight of the x-ray evidence at 20 C.F.R. §718.202(a)(1) was negative. The Seventh Circuit also held, at 20 C.F.R. §718.202(a)(4), that the administrative law judge permissibly gave less weight to Dr. Selby's opinion, that claimant's worsening lung function could not be due to coal dust exposure because he was no longer working in or around coal mines, based on the court's holding that it conflicted with the regulatory provision at 20 C.F.R. §718.201(c) that pneumoconiosis can be latent and progressive. The Seventh Circuit also determined that Dr. Selby's statements, that coal mine employment "helped preserve [claimant's] lung function" and had a "positive effect on his health," were "contrary to the congressional findings and purpose central to the [Act]." ***Roberts & Schaefer Co. v. Director, OWCP [Williams]***, 400 F.3d 992, 23 BLR 2-302 (7th Cir.

2005).

The Tenth Circuit held that, under the plain language of the revised regulation at 20 C.F.R. §718.201(a)(2), proving that one suffers from a “chronic obstructive pulmonary disease” does not establish legal pneumoconiosis unless one is able to show that the condition arose out of coal mine employment. Thus, a claimant establishes the existence of legal pneumoconiosis only if he is able to prove, without the benefit of the rebuttable presumption at 20 C.F.R. §718.203, that his chronic pulmonary disease or respiratory or pulmonary impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. **Andersen v. Director, OWCP**, F.3d , BLR (10th Cir. 2006).

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