

PART VI

REGULATORY PRESUMPTIONS

A. 20 C.F.R. § 727.203 INTERIM PRESUMPTION IN GENERAL

In *Pittston Coal Group v. Sebben*, 109 S.Ct. 414, 12 BLR 2-89 (1988), the Court concluded that 20 C.F.R. §727.203 was more restrictive than the HEW regulations to the extent that 20 C.F.R. §727.203(a) did not permit invocation of the presumption without ten years of coal mine employment. Thus, in its remand Order in *Director, OWCP v. Broyles*, No. 87-1095 (a companion case), the Court ordered the Board to apply a criteria no more restrictive than Section 410.490 regarding the affirmative factors for invoking the presumption. *Sebben, supra*.

Subsequently, in *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991), the Court upheld the validity of the rebuttal methods provided by 20 C.F.R. §727.203(b)(3), (4), thus affirming the holding of the Third Circuit in *Bethenergy Mines, Inc. v. Director, OWCP*, 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989), and reversing the holding of the Fourth Circuit in *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990) and *Dayton v. Consolidation Coal Co.*, 895 F.2d 173, 13 BLR 2-307 (4th Cir. 1990). Based on the Court's decision in *Pauley*, the Board will apply Section 727.203 as written to claims where the claimant establishes ten or more years of coal mine employment. Where the miner establishes less than 10 years of coal mine employment, claimant can avail themselves of the presumption of total disability due to pneumoconiosis pursuant to the criteria in Section 410.490(b), by establishing that this pneumoconiosis arose from coal mine employment. This presumption may be rebutted by any one of the available methods contained at 20 C.F.R. §727.203(b). *Phipps v. Director, OWCP*, 17 BLR 1-39 (1992).

DIGESTS

In light of the fact that the language of the Act does not preclude the regulations found at 20 C.F.R. §727.203(a), and the legislative history does not disclose a contrary intent on the part of Congress, the Section 727.203(a) interim presumptions are valid. *Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358 (7th Cir. 1985).

All like-kind evidence must be weighed prior to invocation. While one item can establish invocation, it does not compel invocation. Invocation must be established by a preponderance of the evidence. *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

A claimant invoking Section 727.203(a) need not demonstrate that his pneumoconiosis is employment-related. Section 727.203(a) does not require proof of the presence of pneumoconiosis or a totally disabling respiratory impairment, affording significant evidentiary advantages to the black lung claimant not otherwise available under the statutory presumptions. **Peabody Coal Co. v. Director, OWCP**, 778 F.2d 358 (7th Cir. 1985).

The digests that follow are presented in five groups, covering the subsections of the Section 727.203(a) presumptions:

1. SECTION 727.203(a)(1)

Section 727.203(a)(1) is valid. **Kaiser Steel Corp. v. Director, OWCP**, 757 F.2d 1078, 7 BLR 2-150 (10th Cir. 1985); **Alabama By-Products Corp. v. Killingsworth**, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); **Jones v. The New River Co.**, 3 BLR 1-199 (1981).

Invocation pursuant to subsection (a)(1) precludes rebuttal pursuant to subsection (b)(4). **Mullins, supra**. See also **Freeman United Coal Mining Co. v. OWCP [Forsythe]**, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994).

The Seventh Circuit remanded this case for reconsideration where the ALJ had relied on **Stapleton** and **Kuehner. Old Ben Coal Co. v. Director, OWCP [Mitchell]**, 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995).

The Sixth Circuit clarified its holding in **Woodward v. Director, OWCP**, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), noting that the legal error therein was exclusion of earlier positive readings from consideration, relying solely on largely negative readings of x-rays taken later. Here, the Court noted that the ALJ did not exclude earlier x-rays from consideration but rather found them outweighed. The Court also stated that "**Woodward** teaches that administrative fact finders must not rely solely on the quantity of readings on one side or the other, 'without reference to a difference in the qualifications of the experts'...[and] that the APA directs agencies to provide for the exclusion of 'unduly repetitious evidence'." **Stanton** at 19 BLR 2-280. As the ALJ considered quantity of the evidence in light of the qualifications of the readers, his crediting of the negative x-rays was upheld. **Staton v. Norfolk & Western Railway Co.**, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

The Fourth Circuit remanded this case to the ALJ for a reweighing of the evidence at Section 727.203(a)(1) "because the ALJ's opinion does not reveal whether he thought the evidence to be equally probative, or, for his purposes, *at least* equally probative" when he applied the true doubt rule. Under **Ondecko**, therefore, the ALJ must determine if the evidence is equally probative, and therefore insufficient to meet claimant's burden. **LeMaster v. Imperial Colliery Co.**, 73 F.3d 358, 20 BLR 2-20 (4th

Cir. 1995).

The Seventh Circuit, in reviewing the Board's affirmance of the ALJ's finding of invocation at Section 727.203(a)(1), held that the ALJ 1) adequately provided a basis for relying on the five most recent x-ray interpretations by citing to Board precedent for the latest evidence rule; 2) noted the negative as well as positive readings in this group; 3) did not impermissibly rely on a "nose count" in violation of the holding in **Sahara Coal Co. v. Fitts**, 39 F.3d 781, 782, 18 BLR 2-384 (7th Cir. 1994) because he considered the conclusions and qualifications of the readers. **Ziegler Coal Co. v. Kelley**, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997).

The Seventh Circuit affirmed the administrative law judge's award of benefits under 20 C.F.R. Part 727. The Seventh Circuit held that the administrative law judge, in finding invocation under 20 C.F.R. §727.203(a)(1), permissibly accorded greater weight to the x-ray readings rendered by physicians with superior radiological credentials. The Seventh Circuit also held that the administrative law judge, in finding that employer failed to establish rebuttal under 20 C.F.R. §727.203(b)(3), permissibly discounted Dr. Tuteur's opinion on disability causation because Dr. Tuteur did not believe that the miner had pneumoconiosis, and permissibly found Dr. Myers' opinion to be too equivocal to carry employer's burden. The Seventh Circuit reversed the administrative law judge's onset determination based on the date of filing pursuant to 20 C.F.R. §725.503, and held that where, as in the instant case, the miner temporarily returns to work subsequent to the date of filing, the proper course is to award benefits suspended during the period of coal mine employment pursuant to 20 C.F.R. §725.503A (now codified at 20 C.F.R. §725.504). The Seventh Circuit rejected employer's argument that the sixteen-year delay in adjudicating this claim deprived employer of its right to due process. The court noted that employer received notice of, and participated in, all proceedings since the 1978 filing of the claim. Further, the court detected no prejudice to employer despite this delay. **Amax Coal Co. v. Director, OWCP [Chubb]**, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002).

2. SECTION 727.203(a)(2)

Section 727.203(a)(2) is valid. **Peabody Coal Co. v. Director, OWCP**, 778 F.2d 358 (7th Cir. 1985); **Kaiser Steel Corp. v. Director, OWCP**, 757 F.2d 1078, 7 BLR 2-150 (10th Cir. 1985); **McCluskey v. Ziegler Coal Co.**, 2 BLR 1-1248 (1981).

The cause of the diminished pulmonary function study results is a factor to consider prior to invocation, citing to **Mullins, supra**, and **Casella v. Kaiser Steel Corp.**, 9 BLR 1-131, 1-134 (1986). **Twin Pines Coal Co. v. USDOL**, 854 F.2d 1212, 11 BLR 2-198 (10th Cir. 1988).

Invocation of the interim presumption pursuant to subsection (a)(2) requires a finding as to whether the studies are both conforming and qualifying. See ***Twin Pines Coal Co. v. United States Dep't of Labor***, 854 F.2d 1212, 11 BLR 2-198 (10th Cir. 1988); ***Zeigler Coal Co. v. Sieberg***, 839 F.2d 1280, 11 BLR 2-80 (7th Cir. 1988); ***Saginaw Mining Company v. Ferda***, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989).

When considering the validity and reliability of qualifying and conforming pulmonary function studies, the ALJ may not consider opinions of non-examining physicians which are based on factors outside Sections 410.430 and 718.103. These opinions may be considered, however, at rebuttal. ***Wiley v. Consolidated Coal Co.***, 892 F.2d 490, 13 BLR 2-214 (6th Cir. 1989), *modified*, 915 F.2d 1076, 14 BLR 2-89 (6th Cir. 1990).

Non-conforming tests may not be used to discredit other potentially qualifying studies. ***Wiley***, *supra*.

In a Part 727 case, the Part 718 quality standards apply to pulmonary function studies performed after March 31, 1980. ***Wiley***, *supra*.

3. SECTION 727.203(a)(3)

Section 727.203(a)(3) is valid. ***Martino v. United States Fuel Co.***, 6 BLR 1-33 (1983); ***Robertson v. Alabama By-Products Corp.***, 7 BLR 1-793 (1985).

The Court citing, ***Mullins***, *supra*, held that all evidence relevant to subsection (a)(3) should be considered at the invocation stage. Regarding the issue of altitude, the court held that the adjusted tables found at 20 C.F.R. Part 718, Appendix C, are not incorporated into Part 727. However, the court noted:

We agree that altitude may skew results to some extent, and that, therefore, altitude is a proper consideration of the ALJ, but we reject the notion that we may not use the Appendix C tables for comparative purposes. These tables reflect the Department of Labor's best estimate of the extent to which altitude may affect blood gas tests in the black lung context. While we are not bound by them in our decision making, we look to them for guidance.

Big Horn Coal Co. v. Director, OWCP, 897 F.2d 1045, 13 BLR 2-372 (10th Cir. 1990). See also ***Temple v. Big Horn Coal Co.***, 14 BLR 1-142 (1990).

DIGESTS

The Seventh Circuit held that on invocation under Section 727.203(a)(3), the administrative law judge improperly imposed on employer the burden to invalidate a

1984 blood gas study with qualifying values once employer's experts raised questions about its validity. The Court held that once employer introduced evidence questioning the validity of the results, claimant has the burden to prove the validity of the study by a preponderance of the evidence. The presumption should only be invoked if the ALJ finds that it is more likely than not that the 1984 study was valid. **Peabody Coal Co. v. Director, OWCP [Goodloe]**, 116 F.3d 207, 21 BLR 2-140 (7th Cir. 1997), *rev'g and remanding*, 19 BLR 1-91 (1995).

The Seventh Circuit affirmed the administrative law judge's finding of invocation based on the 1984 qualifying blood gas study notwithstanding questions raised by employer's experts concerning its validity, where the conducting laboratory validated the test to the examining physician's satisfaction and the miner's observed conditions corroborated the test results. **Peabody Coal Co. v. Estate of J.T. Goodloe**, 299 F.3d 666, 22 BLR 2-483 (7th Cir. 2002).

4. SECTION 727.203(a)(4)

This regulation's validity has not been specifically addressed by the courts or the Board except generally in **Peabody Coal Co.**, *supra*. See item J - 3 above.

Invocation pursuant to subsection (a)(4) does not preclude rebuttal pursuant to subsections (b)(1) and (b)(2). **Mullins**, *supra*, n. 26.

Invocation pursuant to subsection (a)(4) may be rebutted under subsection (b)(4) with evidence "different in kind," or with the same evidence if rebuttal is based on the cause of the miner's pneumoconiosis **Keeling v. Peabody Coal Co.**, 984 F.2d 857, 17 BLR 2-38 (7th Cir. 1993).

No need to establish that the cause of total disability is due to coal mine employment to invoke pursuant to subsection (a)(4). **Mullins**, *supra*, n.18.

5. SECTION 727.203(a)(5)

While the validity of this regulation has never been addressed by the courts or the Board, the Board found it to be presumptively valid in **Gessner v. Director, OWCP**, 11 BLR 1-1 (1987).

Where medical evidence exists regarding the issue of miner's pulmonary condition, subsection (a)(5) is not available. **Coleman v. Director, OWCP**, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987).

Consideration of the lay evidence under subsection (a)(5) is available where the medical evidence of record is insufficient to establish total disability or lack thereof under subsection (a)(1)-(4). ***Dempsey v. Director, OWCP***, 611 F.2d 1154, 9 BLR 2-226 (7th Cir. 1987); ***Hillibush v. U. S. Department of Labor***, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988); ***Collins v. Old Ben Coal Co.***, 861 F.2d 481 (7th Cir. 1988); ***Koppenhaver v. Director, OWCP***, 864 F.2d 287, 12 BLR 2-103 (3d Cir. 1988); ***Cook v. Director, OWCP***, 901 F.2d 29, 13 BLR 2-427 (4th Cir. 1990); ***Pekala v. Director, OWCP***, 13 BLR 1-1 (1989).

When considering the severity of the deceased miner's respiratory impairment the ALJ may consider the miner's work history and the fact that he had continued to work until his death. ***Pendleton v. Director, OWCP***, 882 F.2d 101, 12 BLR 2-411 (4th Cir. 1989).

PART VI

REGULATORY PRESUMPTIONS

B. REBUTTAL OF THE INTERIM PRESUMPTION

1. SECTION 727.203(b)(1), (b)(2) REBUTTAL

The validity of these regulations has not been specifically addressed by the courts or the Board.

a. Total disability is without regard to cause

- *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162, n.5, 9 BLR 2-1, 2-6, n.5 (3d Cir. 1986);
- *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987);
- *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987);
- *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987);
- *Martin v. Alabama By-Products Corp.*, 864 F.2d 1555, 12 BLR 2-170 (11th Cir. 1989).

b. Rebuttal can not be established on the basis of no impairment

- *Sykes, supra*;
- *Wright v. Island Creek Coal Co.*, 824 F.2d 505, 10 BLR 2-185 (6th Cir. 1987);
- *Freeman United Coal Mining Co. v. Benefits Review Board*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990);
- *Gonzales v. Director, OWCP*, 869 F.2d 776, 12 BLR 2-192 (3d Cir. 1989).

c. Total disability from a respiratory standpoint

An ALJ's finding that the miner does not have a disabling respiratory impairment is equivalent to a finding that the miner can perform his usual coal mine work where there is no evidence of any other impairment. **Neace v. Director, OWCP**, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989), *affirmed on reh'g*, 877 F.2d 495 (6th Cir. 1989); **Bartley v. L & M Coal Co.**, 901 F.2d 1311, 13 BLR 2-414 (6th Cir. 1990).

Sections 727.203(b)(1) and 727.205(b) apply only to living miners' cases. **Farmer v. Rogers**, 839 F.2d 269, 11 BLR 2-53 (6th Cir. 1988).

At rebuttal, the ALJ must discuss not only medical evidence that would qualify to invoke the interim presumption, but all medical evidence, including examinations and tests that were not conducted in compliance with the regulations and therefore would not be sufficient to invoke the interim presumption. **Saginaw Mining Company v. Ferda**, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989).

For purposes of subsections (b)(1) and (b)(2), the "usual coal mine employment" phrase was not meant to encompass only mining tasks that the claimant had at one time or another performed. Rather, the phrase was meant to insure that a presumption of disability would not be rebutted by a situation in which a claimant: (i) obtains only "make work" or sporadic mining jobs; (ii) makes only marginal earnings; (iii) performs poorly due to his health; or (iv) through extraordinary physical effort, continues to work in mines to insure survival during the pendency of his claim. **Meyer v. Zeigler Coal Co.**, 894 F.2d 902, 13 BLR 2-285 (7th Cir. 1990).

Rebuttal may be based on proof that claimant has no totally disabling pulmonary or respiratory impairment. **Mitchelson v. Director, OWCP**, 880 F.2d 265, 12 BLR 2-399 (10th Cir. 1989). See **Maddaleni v. Pittsburg & Midway Coal Mining Co.**, 14 BLR 1-135 (1990).

The cause of the miner's disability is irrelevant to rebuttal under subsection (b)(2). **Robbins v. Jim Walter Resources, Inc.**, 898 F.2d 1478, 13 BLR 2-400 (11th Cir. 1990).

The relevant inquiry under subsections (b)(1) and (b)(2) is the severity of claimant's disability on the date of the hearing. **Cooley v. Island Creek Coal Co.**, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); **Freeman United Coal Co. v. Benefits Review Board**, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990).

The Seventh Circuit held that a miner who has pneumoconiosis but is disabled by a condition occurring during coal mine employment unrelated to pneumoconiosis cannot be considered totally disabled due to pneumoconiosis. Here, the miner established invocation of the interim presumption pursuant to Section 727.203(a)(1) by virtue of the

existence of pneumoconiosis. The Court held that rebuttal of this presumption had been established pursuant to Section 727.203(b)(2), as the evidence established that the miner's inability to work was due to a back injury, even though it was undisputed that the back injury occurred during coal mine employment. **Freeman United Coal Mining Co. v. Foster**, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994).

The Seventh Circuit remanded this case for reconsideration where the Board, relying on **Wetherill** dicta, had vacated the ALJ's finding of rebuttal that claimant did not suffer from any disabling respiratory impairment. The Court noted that they "repudiated our previous Wetherill dicta and held that a miner whose pneumoconiosis was not disabling and who could have worked except for workrelated back injury was not totally disabled by pneumoconiosis and was not entitled to benefits" in **Freeman United Coal Mining Co. v. Foster**, 30 F.3d 834 (7th Cir. 1994). **Old Ben Coal Co. v. Director, OWCP [Mitchell]**, 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995)

The Sixth Circuit rejected employer's argument that **Pauley v. Bethenergy Mines, Inc.**, 501 U.S. 680 (1991) overrules **York v. Benefits Review Board**, 819 F.2d 134 (6th Cir. 1987), citing to **Youghiogheny & Ohio Coal Co. v. Webb**, 49 F.3d 244, 249 n.7 (6th Cir. 1995). **Peabody Coal Co. v. Greer**, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995).

The Seventh Circuit rejected employer's argument that the widow's testimony in this case, that the miner had worked, on the average, five days per week until his hospitalization and death, established rebuttal at Section 727.203(b)(1). The Court noted that this testimony did not establish that the miner was able to perform his UCME. "Rebuttal of the presumption that the coal worker was disabled requires evidence, not mere argument." **Freeman United Coal Mining Co. v. Hunter**, 82 F.3d 764, 20 BLR 2-199, 2-210 n.3 (7th Cir. 1996).

The Sixth Circuit held that employer was entitled to submit new evidence under 20 C.F.R. §727.203(b)(2), (3) following the issuance of **York v. Benefits Review Board**, 819 F.2d 134 (6th Cir. 1987). The Sixth Circuit, applying the holdings in **Harlan Bell Coal Co. v. Lemar**, 904 F.2d 1042 (6th Cir. 1990) and **Peabody Coal Co. v. Greer**, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995), held that "when an employer rebuts the interim presumption under the pre-**York** standard applicable to 727.203(b)(2), but not under the post-**York** standard, the BRB commits a manifest injustice if it refuses to allow the employer to present new evidence to the ALJ that the employer believes will establish rebuttal either under the post-**York** standards applicable to 727.203(b)(2) or another regulatory subsection." The Court, reacting strongly to what they termed the Board's "apparent reluctance" to remand this case to allow employer to present new evidence reasoned that employer, prior to the issuance of **York**, had no reason to attempt to satisfy the subsection (b)(3) standard as it "was more difficult to satisfy than (b)(2)." Therefore, forcing employer to abide by its pre-**York** election to rebut primarily under (b)(2) created a "manifest injustice." The Court, in reaching this decision, rejected claimant's arguments that this issue was not properly before them, noting that the ALJ's

issuance of an *sua sponte* order stating he would not accept any new evidence reasonably foreclosed employer from offering new evidence, that claimant never objected to employer's subsequent and repeated requests to submit new evidence, and that the Board's consideration of this issue below now made it reviewable on appeal. ***Cal-Glo Coal Co. v. Yeager***, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997).

DIGESTS

The Seventh Circuit noted in dicta that on remand, if invocation is established again under Section 727.203(a)(3), the administrative law judge should consider the Court's decision in employer's argument that the rationale of the Seventh Circuit in ***Freeman United Coal Mining Co. v. Foster***, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995) and its detailing of their interpretation of ***Wetherill v. Director, OWCP***, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987). The Court noted that in *Foster*, "we held that the cross-reference in (b)(2) 'invites us to consider not only the miners ability to do his old job but also whether inability to work is traceable to coal dust'...we repudiated our previous *Wetherill* dicta and held that a miner whose pneumoconiosis was not disabling and who could have worked except for work related back injury was not totally disabled by pneumoconiosis and was not entitled to benefits." ***Peabody Coal Co. v. OWCP [Goodloe]***, 116 F.3d 207, 21 BLR 2-140 (7th Cir. 1997), *rev'g and remanding*, 19 BLR 1-91 (1995).

The Sixth Circuit held that employer was entitled to submit new evidence under 20 C.F.R. §727.203(b)(3) following the issuance of ***York v. Benefits Review Board***, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987), but affirmed the administrative law judge's refusal to allow additional evidence at Section 727.203(b)(2) as employer had not met the less rigorous pre-*York* standard thereunder. The Sixth Circuit, applying the holdings in ***Harlan Bell Coal Co. v. Lemar***, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990), ***Peabody Coal Co. v. Greer***, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995) and ***Cal-Glo Coal Co. v. Yeager***, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997), held that employer "should be allowed to present evidence based on the post-*York* standards, as such evidence is necessary to prepare an adequate defense. However, the new evidence should only be allowed to establish rebuttal pursuant to (b)(3). Because (b)(2) rebuttal was never established prior to *York*, [employer] cannot be allowed to submit new evidence to satisfy a more rigorous standard." Dissenting in part, Circuit Judge Ryan, however, noted that contrary to the reasoning of the majority that employer "could not have been expected" to argue no respiratory impairment under (b)(2) and then argue that the supposedly non-existent respiratory impairment was not caused, in whole or in part, by the employment under (b)(3), that here employer did pursue both sections of rebuttal. "The record clearly shows that Peabody consistently and vigorously pursued (b)(2) and (b)(3) rebuttal simultaneously; at every stage, and in every appeal...." Because of this, and Peabody's failure to enunciate what it would have done differently, or what it would do differently on remand, Judge Ryan would have affirmed the denial to

reopen the record under Section 727.203(b)(3). **Peabody Coal Co. v. White**, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998)(Ryan, CJ., concurring in part and dissenting in part); see also **Peabody Coal Co. v. Ferguson**, 140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998) (Ryan, CJ., concurring).

The Sixth Circuit held that employer was entitled to submit new evidence under 20 C.F.R. §727.203(b)(3) following the issuance of **York v. Benefits Review Board**, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987), noting that the Board's previous remand for submission of new evidence under Section 727.203(b)(2) was unnecessary as the administrative law judge's previous finding that rebuttal thereunder was not established precluded rebuttal under the more rigorous post-**York** subsection (b)(2) standard. The Circuit, applying the holdings in **Harlan Bell Coal Co. v. Lamar**, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990), **Peabody Coal Co. v. Greer**, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995) and **Cal-Glo Coal Co. v. Yeager**, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997), held that employer should be allowed to present evidence under subsection (b)(3), however, based on the post-**York** standards. The court reasoned that the litigation strategies changed, focusing employer's defense on subsection (b)(3) in the wake of the more stringent subsection (b)(2) standards post-**York**. Circuit Judge Ryan noted that " this case is directly and completely controlled by this court's decision in **Peabody Coal Co. v. White**, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998)(Ryan, CJ., concurring in part and dissenting in part). **Peabody Coal Co. v. Ferguson**, 140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998)(Ryan, CJ., concurring).

d. Comparable and Gainful Work

Rebuttal under Section 727.203(b)(1) requires a finding that a miner is doing work comparable to his usual coal mine work; Section 727.203(b)(2) rebuttal requires a finding that the miner is capable of doing such work. The distinction between the two sections is obvious. A claimant might not be working at all at the time of his hearing, yet is capable of working. Similarly, a claimant might be working at the time of his hearing at a job not comparable to his usual coal mine work, yet be found able to do comparable work. It would thus appear the Section 727.203(b)(2) rebuttal is normally considered after it is determined that Section 727.203(b)(1) rebuttal is not available. **Bowling v. Director, OWCP**, 920 F.2d 342, 14 BLR 2-125 (1990).

In determining the availability of such work for a non-working miner, the Board announced "the reasonable opportunity to be hired" test in **Fletcher v. Central Appalachian Coal Co.**, 1 BLR 1-980 (1978), affirmed 3 BLR 1-10 (1981). The court, however, rejected the Board's use of the "reasonable opportunity to be hired" test in determining whether claimant could do comparable and gainful work. See **Fletcher v. Central Appalachian Coal Co.**, 679 F.2d 1086, 4 BLR 2-92 (4th Cir. 1982). The "reasonable opportunity to be hired" test, the court stated, "could be construed as requiring that the operator be successful as an employment agency to find the claimant

a job" and ruled that Congress did not intend such a result. Benefits are to be based on an inability to work due to disability not due to unemployment. The proper inquiry is whether "in light of the impairment, age, education, and work experience or skills of the miner, he is unable to engage in any comparable and gainful work that is available to him in the immediate area of his residence." **See also Shamrock Coal Co. v. Lee**, 751 F.2d 187, 7 BLR 2-96 (6th Cir. 1985).

The Sixth Circuit reversed ALJ's finding that claimant's present job as a foreman in a steel and wire factory is comparable under Section 727.203(b)(1) to his former coal mine work of loading and shoveling coal underground. The test is not whether the present job is better, from an economic standpoint, than the former coal mine work. (The jobs are being compared to determine health impairment, not earning capacity.) The test is whether the skills and abilities in the present job are comparable to the duties in the former mine work, in order to determine whether the claimant is physically sound. **Ratliff v. Benefits Review Board**, 816 F.2d 1121, 10 BLR 2-76 (6th Cir. 1987). [This test has also been adopted by the Tenth Circuit. **Big Horn Coal Co. v. Director, OWCP**, 897 F.2d 1050, 13 BLR 2-372 (10th Cir. 1990).]

In the Third Circuit, the test of comparability at Section 727.203(b)(1) involves the relevant factors of relative compensation, working conditions, levels of exertion, educational requirements, location of employment, and skills and abilities required. Compensation is the prime criterion of comparability in that, if present wages are lower, it is unlikely that employment is comparable. **Echo v. Director, OWCP**, 744 F.2d 327, 6 BLR 2-110 (3d Cir. 1984); *see also Fidler v. Director, OWCP*, No. 83-3702 (3d Cir., Mar. 29, 1989) (unpub.) [*Echo* is applied to Part 718].

The proper legal standard in the Fourth Circuit for comparing employment [in a determination of comparable employment] should include a range of factors, with no single factor assuming paramount importance as a matter of law. The range of factors may include compensation, skills and abilities required, levels of exertion, status, responsibility, working conditions and work location - the weight to be assigned a given factor in a particular case is within the province of the fact finder. **Harris v. Director, OWCP**, 3 F.3d 103, 18 BLR 2-1 (4th Cir. 1993).

The Seventh Circuit discussed Echo and **Ratliff, supra**, and ruled that the statute requires job comparability, not identity, and that ALJ should consider comparability in skills, abilities, status, responsibility, and pay. **Pate v. Director, OWCP**, 834 F.2d 675, 10 BLR 2-339 (7th Cir. 1987).

PART VI

REGULATORY PRESUMPTIONS

B. REBUTTAL OF THE INTERIM PRESUMPTION

2. SECTION 727.203(b)(3) REBUTTAL

This regulation is valid. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 2524, 15 BLR 2-155 (1991). See also *Carozza v. United States Steel Corp.*, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984); *Patrich v. Old Ben Coal Co.*, 926 F.2d 1482, 15 BLR 2-26 (7th Cir. 1991) and cases cited therein.

In *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991), the U.S. Supreme Court upheld the validity of the rebuttal methods provided by 20 C.F.R. §727.203(b)(3), (4), thus affirming the holding of the United States Court of Appeals for the Third Circuit in *Bethenergy Mines, Inc. v. Director, OWCP*, 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989), and reversing the holding of the United States Court of Appeals for the Fourth Circuit in *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990) and *Dayton v. Consolidation Coal Co.*, 895 F.2d 173, 13 BLR 2-307 (4th Cir. 1990).

The Sixth Circuit held that employer was entitled to submit new evidence under 20 C.F.R. §727.203(b)(3) following the issuance of *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987), but affirmed the administrative law judge's refusal to allow additional evidence at Section 727.203(b)(2) as employer had not met the less rigorous pre-*York* standard thereunder. The Sixth Circuit, applying the holdings in *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990), *Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995) and *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997), held that employer "should be allowed to present evidence based on the post-*York* standards, as such evidence is necessary to prepare an adequate defense. However, the new evidence should only be allowed to establish rebuttal pursuant to (b)(3). Because (b)(2) rebuttal was never established prior to *York*, [employer] cannot be allowed to submit new evidence to satisfy a more rigorous standard." Dissenting in part, Circuit Judge Ryan, however, noted that contrary to the reasoning of the majority that employer "could not have been expected" to argue no respiratory impairment under (b)(2) and then argue that the supposedly non-existent respiratory impairment was not caused, in whole or in part, by the employment under (b)(3), that here employer did pursue both sections of rebuttal. "The record clearly shows that Peabody consistently and vigorously pursued (b)(2) and (b)(3) rebuttal simultaneously; at every stage, and in every appeal..." Because of this, and Peabody's failure to enunciate what it would have done differently,

or what it would do differently on remand, Judge Ryan would have affirmed the denial to reopen the record under Section 727.203(b)(3). **Peabody Coal Co. v. White**, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998)(Ryan, CJ., concurring in part and dissenting in part). See also **Peabody Coal Co. v. Ferguson**, 140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998) (Ryan, CJ., concurring).

The Sixth Circuit held that employer was entitled to submit new evidence under 20 C.F.R. §727.203(b)(3) following the issuance of **York v. Benefits Review Board**, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987), noting that the Board's previous remand for submission of new evidence under Section 727.203(b)(2) was unnecessary as the administrative law judge's previous finding that rebuttal thereunder was not established precluded rebuttal under the more rigorous post-**York** subsection (b)(2) standard. The Circuit, applying the holdings in **Harlan Bell Coal Co. v. Lamar**, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990), **Peabody Coal Co. v. Greer**, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995) and **Cal-Glo Coal Co. v. Yeager**, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997), held that employer should be allowed to present evidence under subsection (b)(3), however, based on the post-**York** standards. The court reasoned that the litigation strategies changed, focusing employer's defense on subsection (b)(3) in the wake of the more stringent subsection (b)(2) standards post-**York**. Circuit Judge Ryan noted that " this case is directly and completely controlled by this court's decision in **Peabody Coal Co. v. White**, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998)(Ryan, CJ., concurring in part and dissenting in part). **Peabody Coal Co. v. Ferguson**, 140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998) (Ryan, CJ., concurring).

a. Third Circuit

Bernardo v. Director, OWCP, 790 F.2d 351, 353, 9 BLR 2-26, 2-29 (3d Cir. 1986):

The (b)(3) provision for rebuttal is concerned with the source of disability. In **Jones**, the Board erred in construing Section 727.203(b)(3) as related to the degree of disability, *i.e.*, total, that must arise from coal mine employment. See **Jones** at 1-208 - 1-209. That aspect of **Jones** has been overruled by every circuit which has considered it, including this one. See **Carozza v. United States Steel Corp.**, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984).

Carozza v. United States Steel Corp., 727 F.2d 74, 78, 6 BLR 2-15, 2-21 (3d Cir. 1984):

[A]s Judge Miller points out in his dissent in **Van Nest v. Consolidation Coal Company**, 3 BLR at 1-538 (1981), the majority has misread the regulation, for [w]hen viewed in proper context, "arises in whole or in part" can only mean arises in whole or arises in part. It is simply without

support to infer, as do my colleagues, that "in part" applies to disability rather than causation.... The "in part" language plainly refers to, and modifies, causation (arising out of coal mine employment), not the extent of disability.

Judge Miller's reading of the regulation is clearly correct. It does not permit the award of benefits for partial disability, but only for total disability of which pneumoconiosis is a contributing cause.

Cort v. Director, OWCP, 996 F.2d 1549, 17 BLR 2-166 (3d Cir. 1993). Rebuttal pursuant to subsection (b)(3) cannot be satisfied by proof that a claimant is not disabled or impaired. At subsection (b)(3) one must accept the assumption that the claimant is totally disabled and proceed to address the source of the disability.

DIGESTS

The Third Circuit reversed the ALJ's finding of rebuttal under Section 727.203(b)(3) where he relied on the testimony of a physician who was not able to substantiate a diagnosis of pneumoconiosis. The Court relied on the physician's request for additional testing to ascertain relationship between disability and coal dust exposure to establish that the physician was "uncertain" regarding the cause of disability, therefore rendering his opinion inadequate to meet a burden to "rule out" CWP as a contributing factor in claimant's disability. **Plesh v. Director, OWCP**, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995).

b. Fourth Circuit

Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 123, 7 BLR 2-72, 2-78 (4th Cir. 1984):

Pneumoconiosis contracted during coal mine employment must be a causative factor in the miner's total disability, but it need not be the exclusive causative factor rendering the claimant totally disabled in order to be compensable under the Black Lung Act.

The underscored language makes it plain that employer must rule out the causal relationship between the miner's total disability and his coal mine employment in order to rebut the interim presumption.

Phillips v. Jewell Ridge Coal Co., 825 F.2d 408 (table), 10 BLR 2-160 (4th Cir. 1987):

The Fourth Circuit has considered carefully the employer's obligation under this code section. **Bethlehem Mines Corp. v. Massey**, 736 F.2d

120, 122-25 (4th Cir. 1984). The employer must rule out the causal relationship between the miner's total disability and his coal mine employment in order to rebut the interim presumption. In **Massey** the court examines the intent of the Black Lung Act and states: "The reality of coal mine employment is such that many physical and environmental factors may converge to produce a totally disabling respiratory or pulmonary impairment." **Massey**, 736 F.2d at 124. The court goes on to note that in those cases in which the combined effect of several disease disable the miner, the employer cannot meet its burden of proof by focusing solely on the disabling potential of the miner's pneumoconiosis. The employer must establish that the miner's primary condition was not aggravated to the point of total disability by prolonged exposure to coal dust. **Massey**, 736 F.2d at 124.

Cox v. Shannon-Pocahontas Mining Co., 6 F.3d 190, 18 BLR 2-31 (4th Cir. 1993).

A medical report that finds that the miner's coal mine employment did not contribute to his cardiac disease or his diabetes does not rule out a causal relationship between the miner's disability and his coal mine employment. Moreover, the statement that the miner was not totally disabled due to his pulmonary impairment alone is not sufficient to establish (b)(3) rebuttal.

DIGESTS

The Fourth Circuit confirmed the **Marcum** rule regarding rebuttal pursuant to Section 727.203(b)(3), *i.e.*, a finding of no pulmonary impairment is sufficient to rule out any connection between coal mine employment and the miner's total disability. The Court included, however, specific language regarding how the **Marcum** rule was to be applied: (1) the **Massey** "rule out" standard is the law of the circuit, and a "mere citation" to **Marcum** is not conclusive; (2) a medical opinion must state without equivocation that the miner suffers no respiratory or pulmonary impairment of any kind with such opinions being more persuasive if the actual cause(s) of the disability are provided by the physician; (3) application of **Marcum** is limited to cases where the interim presumption is invoked under Section 727.203(a)(1), (4). A diagnosis of no respiratory impairment is suspect and cannot satisfy the **Massey** standard if the physician also diagnosed no pneumoconiosis. The Court continued that the opinion of a miner's treating physician, even if s/he is not as highly qualified as other physicians of record, is entitled to "great, though not necessarily dispositive" weight. **Grigg v. Director, OWCP**, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).

The Fourth Circuit applied the standard in **Bethlehem Mines Corp. v. Massey**, 736 F.2d 120 (4th Cir. 1984), and held that under **Grigg v. Director, OWCP**, 28 F.3d 416 (4th Cir. 1994), the ALJ's finding of rebuttal at Section 727.203(b)(3) cannot stand

because two of the three physicians he relied on premised their opinions of no respiratory impairment on a belief that claimant did not have pneumoconiosis, and the interim presumption was invoked by stipulation at 727.203(a)(1). No physician relied on diagnosed "without equivocation that claimant suffered no respiratory or pulmonary impairment of any kind." As there was no other evidence supportive of rebuttal at subsection (b)(3) and the three opinions relied on by the ALJ do not suffice under **Massey** and under **Grigg's** erroneous premise holding the denial of benefits was reversed and benefits awarded. **Curry v. Beatrice Pocahontas Coal Co.**, 67 F.3d 517, 523-524, 20 BLR 2-1 (4th Cir. 1995)(Luttig, J., dissenting), *rev'g* 18 BLR 1-59 (1994).

The Fourth Circuit distinguishes its prior holding in **Warth v. Southern Ohio Coal Co.**, 60 F.3d 173, 174, 19 BLR 2-265 (4th Cir. 1995), "caution[ing] ALJs not to rely on medical opinions that rule out coal mine employment as a causal factor based on the erroneous assumption that pneumoconiosis causes a purely restrictive form of impairment, thereby eliminating the possibility that coal dust exposure also can cause COPD." The Court upheld the crediting of reports under Section 727.203(b)(3) that "merely opined that Stiltner *likely* would have exhibited a restrictive impairment in addition to COPD if coal dust exposure were a factor," noting that the diagnosis was based on a thorough review of all medical evidence rather than an erroneous assumption. The dissent contends that the majority has so narrowly construed **Warth** that it in effect overrules the case. **Stiltner v. Island Creek Coal Co.**, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996)(Williams, J., dissenting).

The Fourth Circuit remanded this case for reconsideration of Section 727.203(b)(3) in light of **Grigg v. Director, OWCP**, 28 F.3d 416, 419-20, 18 BLR 2-299 (4th Cir. 1994), holding that while the Board was correct that respondent must "rule out the causal relationship between the miner's total disability and his coal mine employment," it is unclear whether the ALJ will again find invocation at (a)(1). If so, the ALJ must determine whether any opinion relied on at (b)(3) is based on the contrary or "erroneous finding" of no pneumoconiosis. **LeMaster v. Imperial Colliery Co.**, 73 F.3d 358, 20 BLR 2-20 (4th Cir. 1995).

The Fourth Circuit, in a general substantial evidence affirmance of the ALJ's finding of rebuttal at Section 727.203(b)(3), relying on **Grigg v. Director, OWCP**, 28 F.3d 416, 419-20, 18 BLR 2-299 (4th Cir. 1994), notes that the ALJ properly credited employer's two medical reports as "these reports leave no doubt that the physicians' opinions regarding the existence of pneumoconiosis were entirely independent of their findings regarding the presence and cause of respiratory impairment." **Lambert v. Itmann Coal Co.**, 70 F.3d 112, 20 BLR 2-119 (4th Cir. 1995).

The Fourth Circuit applied the rationale in **Warth v. Southern Ohio Coal Co.**, 60 F.3d 173, 174, 19 BLR 2-265 (4th Cir. 1995), agreeing with the Board's affirmance of the administrative law judge's finding that employer did not meet its burden under Section 727.203(b)(3). Noting that the administrative law judge's weighing of the medical

opinions at Section 727.203(b)(3) was supported by substantial evidence, the Court rejected employer's reliance on Dr. Renn's opinion that pneumoconiosis categorically excludes obstructive impairments. See 30 U.S.C. §902(b); 20 C.F.R. §718.201. **Badger Coal Co. v. Director, OWCP [Kittle]**, 83 F.3d 414, 20 BLR 2-265 (4th Cir. 1996).

The Sixth Circuit held that employer was entitled to submit new evidence under 20 C.F.R. §727.203(b)(2), (3) following the issuance of **York v. Benefits Review Board**, 819 F.2d 134 (6th Cir. 1987). The Sixth Circuit, applying the holdings in **Harlan Bell Coal Co. v. Lemar**, 904 F.2d 1042 (6th Cir. 1990) and **Peabody Coal Co. v. Greer**, 62 F.3d 801, 19 BLR 2-235 (4th Cir. 1995), held that "when an employer rebuts the interim presumption under the pre-**York** standard applicable to 727.203(b)(2), but not under the post-**York** standard, the BRB commits a manifest injustice if it refuses to allow the employer to present new evidence to the ALJ that the employer believes will establish rebuttal either under the post-**York** standards applicable to 727.203(b)(2) or another regulatory subsection." The Court, reacting strongly to what they termed the Board's "apparent reluctance" to remand this case to allow employer to present new evidence reasoned that employer, prior to the issuance of **York**, had no reason to attempt to satisfy the subsection (b)(3) standard as it "was more difficult to satisfy than (b)(2)." Therefore, forcing employer to abide by its pre-**York** election to rebut primarily under (b)(2) created a "manifest injustice." The Court, in reaching this decision, rejected claimant's arguments that this issue was not properly before them, noting that the ALJ's issuance of an *sua sponte* order stating he would not accept any new evidence reasonably foreclosed employer from offering new evidence, that claimant never objected to employer's subsequent and repeated requests to submit new evidence, and that the Board's consideration of this issue below now made it reviewable on appeal. **Cal-Glo Coal Co. v. Yeager**, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997).

The Fourth Circuit, relying on their holdings in **Grigg v. Director, OWCP**, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), and **Thorn v. Itmann Coal Co.**, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993), and **Bethlehem Mines Corp. v. Massey**, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), rejected employer's argument that three non-examining physicians' reports were adequate to establish rebuttal at Section 727.203(b)(3). The reports contained reviews of evidence gathered prior to the miner's death and concluded that there was no objective evidence of pneumoconiosis and that even if pneumoconiosis was assumed, there would be no disability related to it. The Court held that this evidence fell "well short of **Massey's** high standard" at Section 727.203(b)(3), and that **Thorn** and **Grigg** delineated "...a critical difference between evidence of no impairment, which can, if credited, rebut the interim presumption, and no evidence of impairment, which cannot." The administrative law judge's finding that employer lacked evidence to meet its burden under Section 727.203(b)(3) was therefore upheld. **Lane Hollow Coal Co. v. Director, OWCP [Lockhart]**, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

The Fourth Circuit holds that, while administrative law judge misapplied the standard for evaluating whether the evidence establishes rebuttal of the interim presumption under Section 727.203(b)(3) by requiring employer to show that claimant had no respiratory or pulmonary impairment without permitting rebuttal on the alternate ground that any impairment was not caused by coal mine employment, this error was harmless because evidence in this case was insufficient to rule out any causal relationship between the miner's total disability and his coal mine employment. **Consolidation Coal Company v. Borda**, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

c. Sixth Circuit

Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1120, 7 BLR 2-53, 2-65 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116, 105 S.Ct. 2357, 86 L.Ed 258 (1985):

If an employer is able to prove that pneumoconiosis played no part in causing a miner's disability, then the employer has satisfied the requirements of Section 727.203(b)(3). Where, however, pneumoconiosis is a contributing cause to a miner's total disability, he is conclusively entitled to benefits.

Warman v. Pittsburg & Midway Coal Mining Co., 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988):

The Board in holding that the ALJ's decision was supported by substantial evidence, noted that, "rebuttal in this case is predicated on a lack of causation, not the absence of total disability." However, the Board also stated that, "Dr. Anderson's finding of no functional disability arising out of coal mine employment may support rebuttal pursuant to subsection (b)(3) under the Sixth Circuit's standard" (citing **Gibas**, *supra*, as authority). This construction of our decision in **Gibas** is incorrect.

Roberts v. Benefits Review Board, 822 F.2d 636, 639, 10 BLR 2-153, 2-157 (6th Cir. 1987):

Section (b)(3) requires the employer to establish that the disability did not arise "in whole or in part" from the claimant's coal mine employment. The ALJ ignored the "in part" aspect of (b)(3), citing **Jones v. New River Co.**, which held the "in part" language of the regulations invalid because it was repugnant to the statute. But **Gibas v. Saginaw Mining Co.**, 748 F.2d 1112 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985), expressly rejected **Jones**, holding that the Review Board was mistaken and that the regulations are valid. *Id.* at 1120. **Gibas** reinstated the regulations, holding:

"If an employer is able to prove that pneumoconiosis played no part in causing a miner's disability, then the employer has satisfied the requirements of Section 727.203(b)(3). Where, however, pneumoconiosis is a contributing cause to a miner's total disability, he is conclusively entitled to benefits [citing authority]."

Id. See also **Ramey**, 755 F.2d at 490-92. Thus, the ALJ erred in interpreting and applying (b)(3). This Court has carefully considered and clearly rejected the argument that (b)(3) rebuttal requires only a showing that the claimant was not disabled wholly by pneumoconiosis.

d. Seventh Circuit

Noting statements, arguably to the contrary, made by the court in **Meyer v. Zeigler Coal Co.**, 894 F.2d 902, 13 BLR 2-285 (7th Cir. 1990) and **Taylor v. Peabody Coal Co.**, 892 F.2d 503, 11 BLR 2-43 (7th Cir. 1989), *reh'g denied*, 14 BLR 2-79 (1990), the court construed Section 727.203(b)(3) as one of the three means of rebuttal available under Section 727.203(b). **Patrich v. Old Ben Coal Co.**, 926 F.2d 1482 (7th Cir. 1991). Note: The decision of the U.S. Supreme Court in **Pauley**, *supra*, resolves the question of the validity of Section 727.203(b)(3) rebuttal in the affirmative, and upholds the validity of the fourth rebuttal method, provided by Section 727.203(b)(4). The Court, citing **Patrich**, noted in **Pauley** that the Seventh Circuit had upheld the validity of rebuttal pursuant to Section 727.203(b)(3). **Pauley**, slip op. at 13, n.5.

The Seventh Circuit held in **Wetherill v. Director, OWCP**, 812 F.2d 376, 380, 9 BLR 2-239, 243 (7th Cir. 1987):

Paragraph (b)(3), which states in part that "the total disability . . . did not arise in whole or in part out of coal mine employment," enables an employer to rebut the interim presumption by proving that the miner's pneumoconiosis was not a contributing cause of his total disability. **Kertesz**, 788 F.2d at 162 n.5, 163; **Ramey**, 755 F.2d at 486 n.3, 491-492; **Gibas v. Saginaw Mining Co.**, 748 F.2d 1112, 1120 (6th Cir. 1984), *certiorari denied*, 471 U.S. 1116; **American Coal Co. v. Benefits Review Board**, 738 F.2d 387, 391 (10th Cir. 1984); **Bethlehem Mines Corp. v. Massey**, 736 F.2d 120, 123-124 (4th Cir. 1984). Thus in **Ramey** the Sixth Circuit held that the employer successfully rebutted the interim presumption because "the ALJ found that [the claimant's] cardiac condition was the sole cause of his total disability" and his pneumoconiosis was not a "contributing cause." 755 F.2d at 491-492. This interpretation of the (b)(3) rebuttal provision is consistent with the statutory definition of the term "total disability" wherein it is stated that the "regulations shall provide that a miner shall be considered totally disabled

when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those" of his former mining employment. 30 U.S.C. §902(f)(1)(A)(emphasis added). Similarly, the regulations define "total disability" in a manner that requires pneumoconiosis to be a contributing cause of the disability: "a miner shall be considered totally disabled if pneumoconiosis . . . prevents or prevented the miner" from engaging in coal mining work or comparable and gainful work. 20 C.F.R. §718.204(b). This definition is made applicable to paragraph (b)(3) by 20 C.F.R. §§727.3, 725.101(21). In the present case, Green argued that the relevant medical evidence proved that Wetherill's pneumoconiosis was not a contributing cause of his total disability, which instead was caused by his arteriosclerotic heart disease. Therefore, rebuttal paragraph (b)(3) is the correct provision for evaluating the ALJ's ruling that Green failed to rebut the interim presumption.

See also **Peabody Coal Co. v. Helms**, 859 F.2d 486 (7th Cir. 1988); **Freeman United Coal Co. v. Benefits Review Board**, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990); **Amax Coal Co. v. Beasley**, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992).

DIGESTS

The Seventh Circuit held that rebuttal had been established pursuant to subsection (b)(3) where the miner had become totally disabled in 1971 by a stroke that was not caused by exposure to coal dust and where there was no evidence establishing a nexus between this 1971 stroke and the respiratory condition established by the 1979 pulmonary function studies [subsection (a)(2) invocation had been established by pulmonary function tests taken in 1979]. **Peabody Coal Co. v. Vigna**, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994).

The Seventh Circuit remanded this case for reconsideration for application of the recent rulings in **Freeman United Coal Mining Co. v. Benefits Review Board**, 912 F.2d 164, 172 (7th Cir. 1992) and **Amax Coal Co. v. Beasley**, 957 F.2d 324 (7th Cir. 1992). The Court reiterated its current (b)(3) standard, stating that "although we have previously noted that an employer must show that pneumoconiosis "was in no way related to the claimant's disability," [**Freeman** at 172], we more recently stated that "this does not mean that the employer must prove its rebuttal case beyond a reasonable doubt. Rather, the employer need only rule out CWP as a contributing cause by a preponderance of the evidence." [**Beasley** at 327]." **Old Ben Coal Co. v. Director, OWCP [Mitchell]**, 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995).

The Seventh Circuit briefly reviewed their holdings in **Peabody Coal Co. v. Vigna**, 22 F.3d 1388, 18 BLR 1-215 (7th Cir. 1994), **Amax Coal Co. v. Rehmel**, 993 F.2d 600, 17 BLR 2-91 (7th Cir. 1993), **Shelton v. Director, OWCP**, 899 F.2d 690, 13 BLR 2-444

(7th Cir. 1990), and ***Patrich v. Old Ben Coal Co.***, 926 F.2d 1482, 15 BLR 2-26 (7th Cir. 1991) and concluded that “[i]f one pauses to reason through the words [of the holdings in these four cases], these tests are one and the same.” The Court rejected employer’s argument that the ALJ erred herein by relying on the standard enunciated in *Patrich* [“the evidence adduced by Respondent must demonstrate that the claimant’s total disability was caused entirely by an impairment other than pneumoconiosis”], which they found to be the same as the standard enunciated in *Vigna* [where the Court held that employer must demonstrate that a miner’s “total disability was not wholly or in part caused by exposure to coal dust” through a preponderance of evidence “that black lung disease was not a contributing cause of disability”]. The Court concluded that the ALJ had properly weighed Dr. Mohan’s opinion as insufficient to establish Section 727.203(b)(3) rebuttal as his diagnosis that claimant’s exposure to coal dust was a contributing cause, although a minor one, did not meet the standard “that a claimant’s disability must be caused by factors totally distinct from pneumoconiosis.” ***Ziegler Coal Co. v. Kelley***, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997).

The issue at Section 727.203(b)(3) is “whether, had it not been for pneumoconiosis, [the miner] would have been able to continue working in the mines.” Slip op. at 2. ***Peabody Coal Co. v. Director, OWCP [Durbin]***, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999).

The Seventh Circuit upheld the administrative law judge’s finding that employer’s rebuttal evidence failed to demonstrate that pneumoconiosis was in no way related to the miner’s disability, where the administrative law judge determined that Dr. Stewart never addressed whether coal dust was a contributing cause of the miner’s impairment, and the administrative law judge discounted Dr. Howard’s opinion, that the miner’s purely obstructive impairment was caused by smoking-related emphysema, because the physician failed to explain how 33 years of coal dust exposure did not contribute to the miner’s impairment, especially since emphysema comes within the legal definition of pneumoconiosis. ***Peabody Coal Co. v. Estate of J.T. Goodloe***, 299 F.3d 666, 22 BLR 2-483 (7th Cir. 2002).

The Seventh Circuit affirmed the administrative law judge’s award of benefits under 20 C.F.R. Part 727. The Seventh Circuit held that the administrative law judge, in finding invocation under 20 C.F.R. §727.203(a)(1), permissibly accorded greater weight to the x-ray readings rendered by physicians with superior radiological credentials. The Seventh Circuit also held that the administrative law judge, in finding that employer failed to establish rebuttal under 20 C.F.R. §727.203(b)(3), permissibly discounted Dr. Tuteur’s opinion on disability causation because Dr. Tuteur did not believe that the miner had pneumoconiosis, and permissibly found Dr. Myers’ opinion to be too equivocal to carry employer’s burden. The Seventh Circuit reversed the administrative law judge’s onset determination based on the date of filing pursuant to 20 C.F.R. §725.503, and held that where, as in the instant case, the miner temporarily returns to work subsequent to the date of filing, the proper course is to award benefits suspended during the period of coal mine employment pursuant to 20 C.F.R. §725.503A (now

codified at 20 C.F.R. §725.504). The Seventh Circuit rejected employer's argument that the sixteen-year delay in adjudicating this claim deprived employer of its right to due process. The court noted that employer received notice of, and participated in, all proceedings since the 1978 filing of the claim. Further, the court detected no prejudice to employer despite this delay. **Amax Coal Co. v. Director, OWCP [Chubb]**, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002).

Absent proof that the miner's other ailments caused his total disability prior to the onset of his pneumoconiosis, the Seventh Circuit held that the administrative law judge's determination that the miner's pneumoconiosis was the cause of his total disability was supported by substantial evidence. **Kennellis Energies v. Director, OWCP [Ray]**, 333 F.3d 822, 22 BLR 2-591 (7th Cir. 2003); **Peabody Coal Co. v. Vigna**, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994).

The Seventh Circuit held that, under the interim regulations, a miner cannot recover benefits if he is totally disabled by an unrelated, nonpulmonary condition, notwithstanding his probable pneumoconiosis. In this case, the record demonstrated that the miner's total disability was caused by his blindness in 1976, prior to his presumed disability due to pneumoconiosis. Because it was undisputed that the miner was forced to stop working because of blindness, not black lung disease, the Seventh Circuit held that recovery was precluded under 20 C.F.R. §727.203(b)(3). **Gulley v. Director, OWCP**, 397 F.3d 535, 23 BLR 2-242 (7th Cir. 2005).

The Seventh Circuit held that subsection (b)(3) rebuttal was not established, even if the miner was fired for stealing from employer, because the record reflected that the miner was disabled permanently by pneumoconiosis, and thus was incapable of working at *any* coal mine due to his pneumoconiosis. A physician's statement that the miner may be disabled because of back problems and coronary artery disease was also deemed insufficient to establish rebuttal, as the medical evidence demonstrated that the miner was permanently disabled due at least in part to pneumoconiosis. **Zeigler Coal Co. v. Director, OWCP [Griskell]**, 490 F.3d 609, 24 BLR 2-38 (7th Cir. 2007).

e. Eighth Circuit

In **Consolidation Coal Co. v. Smith**, 837 F.2d 321, 323, 11 BLR 2-37, 2-41 (8th Cir. 1988), the court applied an "in part" standard, stating:

Even though the doctors who submitted reports stated that the primary cause of death was myocardial disease, not one stated that [claimant's] anthracosis was not a contributing factor to his disability or death.

f. Ninth Circuit

Palmer Coking Coal Co. v. Director, OWCP, 720 F.2d 1054, 1058, 6 BLR 2-11, 2-13 (9th Cir. 1983):

[The opposing party] must produce sufficient evidence to rule out any causal link between the disability and the coal mine employment [to establish rebuttal under subsection (b)(3)].

g. Tenth Circuit

Rosebud Coal Sales Co. v. Weigand, 831 F.2d 926, 10 BLR 2-317 (10th Cir. 1987):

Section 727.203(b)(3) allows an employer to rebut an interim presumption "if the evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment." Rosebud asserts that the BRB erred in affirming the ALJ's literal interpretation of the regulation. Rosebud argues that the ALJ and BRB should have recognized rebuttal upon a showing that Weigand's disability did not arise in whole or in significant part out of his coal mine employment. See **Borgeson v. Kaiser Steel Corp.**, 8 BLR 1-312 (1985)(Decision and Order on Reconsideration *En Banc*).

The "significant part" test is wholly at odds with the decisions rendered by six courts of appeals, including this court, which apply Section 727.203(b)(3) as written, requiring that any relationship between the disability and coal employment be ruled out. **Kaiser Steel Corp. v. Director, OWCP (Sena)**, 757 F.2d 1078, 1083 (10th Cir. 1985); **Carozza v. U. S. Steel Corp.**, 727 F.2d 74, 78 (3d Cir. 1984); **Bethlehem Mines Corp. v. Massey**, 736 F.2d 120, 123 (4th Cir. 1984); **Gibas v. Saginaw Mining Co.**, 748 F.2d 1112, 1120 (6th Cir. 1984) *cert. denied*, 471 U.S. 1116 (1985); **Alabama By-Products v. Killingsworth**, 733 F.2d 1511, 1516 n.10 (11th Cir. 1984); **Palmer Coking Coal Co. v. Director, OWCP**, 720 F.2d 1054, 1058 (9th Cir. 1983).

In **Kaiser Steel Corp. v. Director, OWCP (Sena)**, 757 F.2d 1078, 1083, 7 BLR 2-150, 2-160 - 2-161 (10th Cir. 1985), the court stated that to establish rebuttal under subsection (b)(3), the opposing party must offer viable evidence ruling out pneumoconiosis as at least a contributing cause of the claimant's disability.

h. Eleventh Circuit

In *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1516 n.10, 6 BLR 2-59, 2-65 n.10 (11th Cir. 1984), the court adopted the **Carozza** holding that rebuttal established under subsection (b)(3) does not permit the award of benefits for partial disability, but only for total disability of which pneumoconiosis is a contributing cause.

PART VI
REGULATORY PRESUMPTIONS

B. REBUTTAL OF THE INTERIM PRESUMPTION

3. SECTION 727.203(b)(4) REBUTTAL

This regulation is valid. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 2524, 15 BLR 2-155 (1991).

The decision of the U.S. Supreme Court in *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991) reversed the decisions of the United States Court of Appeals for the Fourth Circuit in *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990) and *Dayton v. Consolidation Coal Co.*, 895 F.2d 173, 13 BLR 2-307 (4th Cir. 1990), which held that Section 727.203(b)(4) did not provide a valid means of establishing rebuttal. *Pauley* also stated that the Seventh Circuit court had not addressed the fourth method of rebuttal, citing *Patrich v. Old Ben Coal Co.*, 926 F.2d 1482 (7th Cir. 1991), although that court had upheld the method of rebuttal provided by Section 727.203(b)(3) in *Patrich. Pauley*, slip op. at 13, n.5. *But see Taylor v. Peabody Coal Co.*, 892 F.2d 503, 11 BLR 2-43 (7th Cir. 1989).

DIGESTS

To rebut, the party must establish by persuasive evidence that the miner has neither clinical pneumoconiosis nor presumed pneumoconiosis. *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); *Chastain v. Freeman United Coal Mining Co.*, 919 F.2d 485, 14 BLR 2-130 (7th Cir. 1990).

Rebuttal requires affirmative proof that pneumoconiosis does not and did not exist, not silence, as to whether the miner's severe lung condition is or is not pneumoconiosis. *Black Diamond Coal Mining Co. v. Benefits Review Board*, 758 F.2d 1532, 7 BLR 2-209, *reh'g denied*, 768 F.2d 1353 (11th Cir. 1985). See also *Kline v. Director, OWCP*, 877 F.2d 1175, 12 BLR 2-346 (3d Cir. 1989) which deals with negative inferences drawn from the evidence.

Subsection (b)(4) differs from subsection (b)(3) in that subsection (b)(4) permits rebuttal if the party opposing entitlement establishes that the miner's respiratory disorder is not

significantly related to coal mine employment since Section 727.202 requires the disorder to be significantly related to, or aggravated by, coal mine employment in order for it to be pneumoconiosis. **Tennessee Consolidated Coal Co. v. Crisp**, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989).

The **Blevins** test (see Part I, B.2.i above) is applicable to rebuttal under subsection (b)(4). **Chastain v. Freeman United Coal Mining Co.**, 919 F.2d 485, 14 BLR 2-130 (7th Cir. 1990).

The Fourth Circuit reserved the "never-or-sometimes" issue of whether Section 727.203(a)(1) invocation always precludes subsection (b)(4) rebuttal, and held that even if the "sometimes" view were adopted here [rebuttal based on evidence "different in kind from and of greater technical accuracy" than that used to invoke, demonstrating that the clinical pneumoconiosis established by the x-rays is not related to coal mine employment], that evidence does not "meet any of the limited bases for permitting (b)(4) rebuttal." The Court noted that two doctors based their opinions of no pneumoconiosis on negative rereadings of x-rays, which flatly contradict invocation at (a)(1) "based on the same type of evidence," and that neither opinion is based on "later-developed and more accurate diagnostic techniques...." **Curry v. Beatrice Pocahontas Coal Co.**, 67 F.3d 517, 523-524, 20 BLR 2-1 (4th Cir. 1995)(Luttig, J., dissenting), *rev'g* 18 BLR 1-59 (1994).

PART VI

REGULATORY PRESUMPTIONS

C. 20 C.F.R. §410.490 INTERIM PRESUMPTION (Claims filed prior to March 31, 1980)

1. MINERS WITH TEN OR MORE YEARS OF COAL MINE EMPLOYMENT

In *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988), the Supreme Court held that Section 727.203(a) violates Section 402(f) of the Act in that it disqualifies a class of claimants who were eligible for consideration under the Section 410.490 presumption. In its remand Order in *Director, OWCP v. Broyles*, No. 87-1095 (a companion case), the Supreme Court ordered the Board to apply a criteria no more restrictive than Section 410.490 regarding the affirmative factors for invoking the presumption. The Supreme Court declined to address the validity of the rebuttal methods contained in Section 727.203(b) based upon the respondent's concession that the methods are valid. With respect to Section 410.490, the Court further observed that:

To deal with a perceived inadequacy in facilities and medical tests, this interim HEW regulation established two classes of presumptions. First, under the presumption at issue here, a claimant could establish presumptive entitlement by showing that "[a] chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis" and that "[t]he impairment ... arose out of coal mine employment." §§410.490(b)(1)(i), (b)(2). The proof of causality required for this first presumption was to be established under §§410.416 or 410.456, both of which accorded a rebuttable presumption of causality to claimants with 10 years of mining service and also permitted claimants to prove causality by direct evidence. See §410.490(b)(2). The second presumption (drafted in a most confusing manner) enables a claimant to obtain presumptive entitlement by establishing specified scores on ventilatory tests if the miner had "at least 10 years of the requisite coal mine employment." §§410.490(b)(1)(ii), (b)(3). Both presumptions were rebuttable by a showing that the miner was working or could work at his former mine employment or the equivalent. §410.490(c). Miners unable to obtain either presumption had to proceed under the permanent HEW regulations. §410.490(e). The term of the interim regulation coincided with the term of the part B program, and expired after June 30, 1973, for claims filed by

living miners and after December 31, 1973, for survivors' claims. §410.490(b).

Sebben at 12 BLR 2-90; see also **Mullins v. Director, OWCP**, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); **Sharpless v. Califano**, 585 F.2d 664 (4th Cir. 1978).

The validity of 20 C.F.R. §727.203(b)(3) and (4), however were addressed by the Court in **Pauley v. Bethenergy Mines, Inc.**, 501 U.S. 680, 15 BLR 2-155 (1991), in which the Court held that subsections (b)(3) and (4) were valid methods of rebuttal of the presumption provided by 20 C.F.R. §727.203. In **Pauley** the Court affirmed the holding of the Third Circuit in **Bethenergy Mines v. Director, OWCP**, 890 F.2d 1299, 13 BLR 2-162 (3d Cir. 1989) that a finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(3) precluded entitlement to benefits pursuant to both 20 C.F.R. §727.203 and 20 C.F.R. §410.490. [The Court in **Pauley** also reversed the holding of the Fourth Circuit in **Taylor v. Clinchfield Coal Co.**, 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990) and **Dayton v. Consolidation Coal Co.**, 895 F.2d 173, 13 BLR 2-307 (4th Cir. 1990) which had found 20 C.F.R. §727.203(b)(3), (4) invalid.] Pursuant to the Court's holding in **Pauley**, where a claim is adjudicated pursuant to Section 727.203, it is not necessary to additionally adjudicate the claim pursuant to 20 C.F.R. §410.490.

2. MINERS WITH LESS THAN TEN YEARS OF COAL MINE EMPLOYMENT

In **Pittston Coal Group v. Sebben**, 109 S.Ct. 414, 12 BLR 2-89 (1988), the Court concluded that 20 C.F.R. §727.203 was more restrictive than the HEW regulations to the extent that 20 C.F.R. §727.203(a) did not permit invocation of the presumption without 10 years of coal mine employment. Thus, in its remand Order in **Director, OWCP v. Broyles**, No. 87-1095 (a companion case), the Court ordered the Board to apply a criteria no more restrictive than Section 410.490 regarding the affirmative factors for invoking the presumption. **Sebben, supra**. As all three cases addressed by the Court in **Pauley** involved claims where the miner had more than 10 years of coal mine employment, **Pauley** did not discuss the criteria to be applied to claims where the miner has less than 10 years of coal mine employment.

Subsequently, however, the Board held that where the miner has established less than ten years of coal mine employment, claimants may avail themselves of the presumption of total disability due to pneumoconiosis pursuant to the criteria in Section 410.490(b) by establishing the existence of pneumoconiosis by x-ray, autopsy or biopsy evidence, and by establishing that this pneumoconiosis arose out of coal mine employment. This presumption may be rebutted by any one of the available methods contained at 20 C.F.R. §727.203(b).

DIGESTS

(Applicable to all circuits)

Section 410.490 applies in survivors' cases. ***Farmer v. Weinberger***, 519 F.2d 627 (6th Cir. 1975).

The Section 410.490 presumption may not be invoked by lay testimony. ***Lloyd v. Mathews***, 413 F.Supp. 1161 (E.D. Pa. 1976).

X-rays are to be weighed prior to invocation. ***Riley v. National Mines Corp.***, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988); ***Staten v. Califano***, 598 F.2d 328 (4th Cir. 1979).

Failure to establish the cause of the miner's pneumoconiosis precludes invocation at Section 410.490. ***Grant v. Director, OWCP***, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988).

Where the evidence is insufficient to establish invocation pursuant to subsections (a)(1) and (a)(2) of Section 727.203, invocation pursuant to Section 410.490 is precluded. ***Slone v. Director, OWCP***, 12 BLR 1-92 (1988).

06/09