Volume 83
Issue 4 *The National Coal Issue*

Article 7

June 1981

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CLOSING THE EVIDENTIARY GAP: A REVIEW OF CIRCUIT COURT OPINIONS ANALYZING FEDERAL BLACK LUNG PRESUMPTIONS OF ENTITLEMENT

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INTRODUCTION

Coal workers pneumoconiosis (CWP), perhaps the most insidious of hazards attendant to coal mining, was compensible under only a few state workers compensation programs until the last decade. As a result, in 1969, Congress enacted remedial legislation embodied in Title IV of the Federal Coal Mine Health & Safety Act[1] designed to afford benefits to disabled miners and to the survivors of deceased miners.

As with any seminal legislative effort, the 1969 Act was the product of numerous converging ideas, including the widely held belief that only 50,000 miners were disabled by CWP.[2] Also playing a major role in the focus of the 1969 Act was the feeling that the 50,000 potential beneficiaries of the federal black lung legislation consisted primarily of individuals no longer employed in the coal industry.[3] As a consequence, the thrust of the 1969 Act was to pay these existing claims with funds provided by the federal government[4] and thereby eradicate what was conceived as an aberational social problem characterized by the physical

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[1] 30 U.S.C. §§ 901-941 (1970) [hereinafter, the 1969 Act].

[2] H.R. REP. No. 761, 91st Cong., 1st Sess. 17-18 (1969).

[3] Kilcullen, *Compensation Benefits for Coal Miners Under the Federal Black Lung Program*, THE FEDERAL MINE SAFETY AND HEALTH ACT, 213 PRACTICING LAW INSTITUTE 159, 162 (1979).

[4] H.R. REP. No. 761 *supra* note 2 at 50-52.

and economic suffering of a relatively small number of miners. As a result, this initial legislation creating the federal black lung program vested administrative responsibilities in the Social Security Administration evidencing Congressional intent that the program be administered in an essentially non-adversarial setting. To reduce traditional evidentiary hurdles in establishing entitlement to benefits, the legislation created three statutory presumptions of entitlement.[5]

From these modest beginnings, amendments embodied in the Black Lung Benefits Act of 1972[6] and the Black Lung Benefits Reform Act of 1977[7] have expanded the initial program to a full-fledged workers compensation program which has awarded benefits to 500,000 miners and their dependents. The federal program is currently paying claims in amounts exceeding sixty million dollars per month.[7.1] Further, each of these amendments, finding its respective origin in the inadequacies of the earlier legislation, added an additional presumption of entitlement of benefits—thereby greatly liberalizing the mechanisms available for establishing total disability or death due to CWP.

This article will analyze those decisions of the circuit courts of appeals during the past decade which ruled upon the quantity and quality of medical evidence needed to invoke these statutory presumptions of entitlement. Although many of the cases discussed herein rule upon the propriety of administrative adjudications on claims filed prior to July 1, 1973, those cases have a present viability since they are based on the statutory presumptions of entitlement embodied in the regulations presently being utilized by the Department of Labor, Office of Workers Compensation Programs.[8] As a result, these decisions provide guidance to the Department of Labor and the Benefits Review Board in the course of adjudicating entitlement issues presented in pending and future claims.

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[5] *See* 30 U.S.C. §§ 921(c)(1)-921(c)(3) (1970).

[6] Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 [codified at 30 U.S.C. § 901] (amended 1978) [hereinafter cited as 1972 Amendments].

[7] Black Lung Benefits Reform Act of 1977 Pub. L. No. 95-239, 92 Stat. 95 (to be codified in scattered sections of 30 U.S.C.) [hereinafter cited as Reform Act].

[7.1] *Black Lung deficit at $1.1 billion*, Ky. Coal J., April, 1981, at 7, col. 1.

[8] *See, e.g.*, 20 C.F.R. §§ 718.302-718.306 (1980). The obligation to adjudicate claims filed after June 30, 1973 befalls the Secretary of Labor pursuant to 30 U.S.C § 925 (1976).

While not attempting to analyze every issue that may arise under these statutory presumptions, this article will analyze a variety of recurring problems present in establishing entitlement to these presumptions or, in the alternative, rebutting or defeating the operation of such presumptions. Initially, a discussion of the circuit court cases construing the presumptions embodied in the original 1969 Act will be undertaken followed by a treatment of the respective presumptions enacted as a result of both amendments to that Act. In this way, the rationale for, and necessity of, the presumptions contained in the amending legislation can best be understood.

I. THE 30 U.S.C. SECTION 921(c)(1) REBUTTABLE PRESUMPTION

A. Purpose

The presumption set forth in 30 U.S.C. section 921(c)(1)[9] originated in the Federal Coal Mine Health and Safety Act of 1969.[10] This presumption was created to enable a coal miner with at least ten years of coal mine employment to establish a causal relationship between his CWP and his coal mine employment when seeking federal black lung benefits.[11] While superficially, section 921(c)(1) appears to be a causality presumption relating chronic lung disease such as CWP to length of coal mine employment, the two regulations promulgated by the Secretary of Health, Education & Welfare (now Health & Human Services) have given this presumption a dual effect in black lung cases.

The first regulation provides that if the claimant was employed for ten or more years in a coal mine and is suffering

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[9] 30 U.S.C. § 921(c)(1) (1970) provides that: "... if a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more underground coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment ...."

[10] *See* note 1 *supra.*

[11] This statutory section was held constitutional in Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). The regulation, which implements 30 U.S.C. § 921(c)(1) appears at 20 C.F.R. § 410.416 (1980) and provides as follows:

> (a) If a miner was employed for 10 or more years in the Nation's coal mines, and is suffering or suffered from pneumoconiosis, it will be presumed, in the absence of persuasive evidence to the contrary, that the pneumoconiosis arose out of such employment.
>
> (b) In any other case, a miner who is suffering or suffered from pneumoconiosis, must submit the evidence necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines.

from CWP, it is presumed that the CWP was caused by the mine employment.[12] Conversely, if the claimant fails to establish the requisite years of employment in the mines, he must then establish the causal connection between his disability and his coal mine employment.[13] The second regulation affecting the section 921(c)(1) presumption is the so-called interim presumption.[14] This

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[12] *Id.* at § (a).

[13] *Id.* at § (b).

[14] 20 C.F.R. § 410.490 (1980) provides in pertinent part:

(b) *Interim Presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . .; or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease . . . as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
[miner's height in inches]	FEV_1	and MVV*
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more; and	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment . . . .

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumocuniosis arising out of such employment, as the case

provision arose out of congressional discontent with the backlog of claims.[15]

In 1972, apparently dissatisfied with the manner in which the Secretary of HEW was processing claims for black lung benefits, Congress enacted several liberalizing amendments affecting the administration of section 921(c)(1).[16] The legislative history to the Black Lung Benefits Act of 1972 demonstrates Congress' desire to ensure that miners with less than fifteen years of coal mine employment, who suffer from simple CWP, would constitute "worthy cases" and thus be eligible for benefits under the amendments.[17]

In response to this congressional mandate, the Secretary issued a regulation embodying an interim presumption[18] with less stringent medical criteria. In order for a living miner to qualify for the interim presumption, his claim for benefits must have been filed prior to July 1, 1973.[19] Such a claimant can establish entitlement to benefits if a chest X-ray or lung biopsy establishes CWP or if pulmonary function studies meet certain medical criteria set forth in the regulations.[20] A miner with at least ten years of coal mine employment who meets the pulmonary function values set forth in the regulation is presumed to be

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may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of Presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work . . . or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work....

*"FEV_1" stands for one second forced expiratory volume and "MVV" stands for maximum volumtary ventilation. *See* 20 C.F.R. § 410.426(b) (1980). *See also* Lapp, *A Lawyer's Medical Guide To Black Lung Litigation, supra* this issue.

[15] For the Legislative History of the 1972 Amendments, *see* S. REP. No. 92-743, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2305-37 [hereinafter cited as 1972 Legislative History].

[16] 1972 Legislative History, *Id.* at 2305-06.

[17] *Id.* at 2317.

[18] *See* note 14 *supra* at § (b).

[19] *Id.*

[20] *Id.* at §§ (b)(1)(i), (ii).

totally disabled due to CWP.[21] Once the claimant has established entitlement to this interim presumption, it may be rebutted only by showing that the miner is doing his usual coal mine work, or comparable and gainful work, or "other evidence" establishes that he is able to engage in such work.[22]

Thus, under the 1972 Amendments, the section 921(c)(1) presumption assists an applicant for black lung benefits in two ways: (a) by establishing a causal connection between CWP and coal mine employment and (b) by providing an interim presumption for claims filed prior to July 1, 1973, utilizing less stringent entitlement criteria than that contained in the primary standards.[23]

B. The Interim Presumption

There are relatively few appellate cases which turn upon an interpretation of section 921(c)(1). This is apparently due to either the mechanical application of the interim presumption, or the ability of claimants to convince an administrative law judge (ALJ) that they have fifteen or more years of coal mining experience, thus entitling them to the more advantageous presumption set forth in 30 U.S.C. section 921(c)(4).[24] However, several appellate cases do provide an overview of the operation of this presumption.

Sullivan v. Califano[25] illustrates the ease with which the interim presumption can be mechanically applied. The claimant was an underground miner with approximately ten years of coal mine employment. Benefits were denied by both the ALJ and the Appeals Council; the denial was affirmed by the district court. On appeal to the Sixth Circuit, there was no contention that the X-ray evidence was sufficient under the interim presumption.[26] The only other basis to support an award of benefits was two pulmonary function studies; the first performed in January, 1973, the second in July, 1975.[27] While the second study

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[21] *Id.* at § (b)(3).

[22] *Id.* at § (c).

[23] *Compare* the standards of 20 C.F.R. § 410.490(b)(1)(ii) (1980) *with* the more stringent cirteria of 20 C.F.R. § 410.426(b) (1980).

[24] *See* text accompanying notes 152-191 *infra.*

[25] 617 F.2d 1215 (6th Cir. 1980).

[26] *Id.* at 1216.

[27] *Id.*

was performed two years after the jurisdictional cut-off date of June 30, 1973, the court nevertheless considered the later report on the strength of *Begley v. Mathews*,[28] which held that evidence adduced after the cut-off date may nevertheless be relevant in establishing the existence of a disability before that date.

At the administrative level, the Secretary of HEW had evaluated the 1975 pulmonary function study and had concluded that the results were based upon inconsistent effort by the claimant. Therefore, the 1975 study would not support an award. The Sixth Circuit concluded that this finding was supported by substantial evidence and affirmed the denial of benefits.[29] Thus, *Sullivan* demonstrates how medical evidence can be mechanically analyzed to deny benefits under the interim presumption.

On the other hand, *Dickson v. Califano*[30] demonstrates the manner in which the mechanistic approach of the interim presumption aids claimants in establishing entitlement. In support of his claim, Dickson introduced pulmonary function studies and a report from a board certified radiologist who had interpreted the claimant's chest X-rays as positive for CWP.[31] However, the claimant failed to convince the ALJ that he had at least ten years of coal mine employment. As a result, the ALJ, the Appeals Council, and the district court all denied the claimant the benefit of the interim presumption.

The manner in which the Sixth Circuit resolved the issue of length of employment is instructive. While the ALJ gave considerable weight to Dickson's annual wages during periods when wages were low,[32] the Sixth Circuit tallied the claimant's calendar quarters of employment. Finding, from Social Security wage records,[33] forty-three calendar quarters of employment, the court ruled that ten years of mine employment had been demonstrated.[34]

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[28] 544 F.2d 1345 (6th Cir. 1976). *cert. denied* 430 U.S. 985 (1977).

[29] 617 F.2d at 1216.

[30] 590 F.2d 616 (6th Cir. 1979).

[31] *Id.* at 621-22.

[32] *Id.* at 620.

[33] 42 U.S.C. § 405(c)(1)(A) (1970), which defines one year for HEW purposes.

[34] 590 F.2d at 618-21. At no time did the Court express an opinion as to the minimal amount of earnings a miner has to prove during each quarter for which he is given credit for coal mine employment.

Once it was determined that Dickson's coal mine employment was sufficient to entitle him to the interim presumption, the court next concluded that he suffered from a chronic lung disease.[35] The claimant's medical evidence was analyzed in light of the interim presumption.[36] Of the three sets of pulmonary function studies introduced, only the one conducted in 1975 would have qualified the claimants for benefits. While this test would have justified an award of benefits subsequent to 1975,[37] it was not proof positive of disability prior to July 1, 1973.[38] However, Dickson's X-ray evidence provided a basis for awarding benefits prior to 1975.

The chest X-ray interpreted as positive by a board certified radiologist was held sufficient to entitle the claimant to benefits under the interim presumption, notwithstanding subsequent negative interpretations. In so holding, the court retroactively applied section 5 of the Black Lung Benefits Reform Act of 1977.[39] That section prohibits the Secretary of Labor from rereading an X-ray initially interpreted as positive for CWP if: the X-ray is of readable quality, there is no evidence of fraud, and other evidence demonstrates that the claimant suffers from a pulmonary or respiratory impairment.[40] As a consequence, the

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[35] *Id.* at 622.

[36] *See* note 14 *supra.*

[37] 590 F.2d at 621.

[38] *See* Begley v. Mathews, 544 F.2d 1345 (6th Cir. 1976), *cert. denied* 430 U.S. 985 (1977). A remand would have been necessary to make this determination. *See, e.g.* Zielinski v. Califano, 580 F.2d 103 (3rd Cir. 1978); Paluso v. Mathews, 573 F.2d 4 (10th Cir. 1978); Ingram v. Califano, 547 F.2d 904 (5th Cir. 1977).

[39] Reform Act, *supra* note 7 at § 5. This section provides in part:

> . . . In any case in which there is other evidence that a miner has a pulmonary or respiratory impairment, the Secretary shall accept a board certified or board eligible radiologist's interpretation of a chest roentgenogram which is of a quality sufficient to demonstrate the presence of pneumoconiosis submitted in support of a claim for benefits under this title if such roentgenogram has been taken by a radiologist or qualified technician, except where the Secretary has reason to believe that the claim has been fraudulently represented. In order to insure that any such roentgenogram is of adequate quality to demonstrate the presence of pneumoconiosis, and in order to provide for uniform quality in the roentgenograms, the Secretary of Labor may, by regulation, establish specific requirements for the techniques used to take roentgenograms of the chest . . . .

[40] *Id.*

subsequent negative interpretation rendered by a radiologist chosen by the Secretary of HEW was discredited by the court in Dickson.[41]

Having determined claimant was entitled to the benefit of the interim presumption, the court examined whether the evidence of record was sufficient to rebut the presumption.[42] As provided in the interim presumption, rebuttal may only be achieved by discounting the evidence of disability.[43] Since the ALJ had conceded that Dickson was disabled,[44] this was a moot point.

In summary, the court in *Dickson* went to great lengths to find a basis on which to support an award of benefits. Indeed, the court was eager to apply the 1977 Reform Act retroactively to this pending Part B claim which was originally filed in 1971.[45] While retroactive application of the Reform Act to a pending Part B case has been severely criticized,[46] *Dickson's* "a single X-ray" theory, nevertheless, represents a literal interpretation of the precise language employed in the interim presumption.

A simpler illustration of entitlement to benefits resulting from the operation of the interim presumption is *Whitman v. Califano*.[47] Seeking entitlement to the interim presumption, a miner with twenty-four years of underground coal mining ex-

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[41] For criticism by claimants of the Secretary of HEW's practice of rereading chest X-ray films, *see*, Hill v. Califano, 592 F.2d 341, 345 (6th Cir. 1979); for judicial criticism *see* Stewart v. Mathews, 412 F. Supp. 235, 238 (W.D. Va. 1975). It should be noted that in the writer's experience, X-ray readers chosen by the Secretary of HEW seldom, if ever, made any comment on the form provided by the Secretary which requested an explanation as to why another physician interpreted the same chest X-ray positive and the reviewing physician interpreted the X-ray film negative.

[42] 590 F.2d at 623.

[43] *Id. See* note 14 at §§ (c)(1), (2) *supra*.

[44] 590 F.2d at 621.

[45] *Id.* at 618. Part B claims are those claims for benefits filed on or before Dec. 31, 1973.

[46] *Compare* Miniard v. Califano, 618 F.2d 405 (6th Cir. 1980) (supporting retroactive application of the 1977 amendments), *with* Freeman v. Califano, 600 F.2d 1057 (5th Cir. 1979); Yakim v. Califano, 587 F.2d 149 (3rd Cir. 1978), and Treadway v. Califano, 584 F.2d 48 (4th Cir. 1978) (criticizing retroactive application of the 1977 amendments).

[47] 617 F.2d 1055 (4th Cir. 1980).

perience introduced two chest X-rays that had been initially interpreted by "B" readers[48] as positive for CWP. When the Secretary of HEW had the same filmes re-read by other "B" readers, the X-rays were interpreted as negative.[49] The claimant then submitted positive reports by still another "B" reader who had re-read the same films.[50]

In addition, three examining physicians found a pulmonary impairment. However, a board certified internist employed by the Secretary of HEW reviewed the tests conducted by one examining physician and concluded that the tests showed no pulmonary impairment. After considering this evidence, the ALJ denied benefits as a result of conflicting X-ray interpretation, the failure of timely pulmonary function studies to produce qualifying results, and the failure of other evidence to indicate a totally disabling respiratory impairment.[51]

On appeal, the Fourth Circuit determined that, since Whitman had filed a claim prior to July 1, 1973, he was entitled to benefits if he satisfied the interim presumption.[52] In setting up a program under which physicians read and interpreted chest

[48] 42 C.F.R. §§ 37.51-.52 (1980) set up a hierarchy of proficiency for physicians who desire to be certified by the Social Security Administration as readers of coal miners' X-rays. A physician desiring to be certified as a first or "A" reader must submit six sample X-rays two of which he shall have diagnosed as showing no pneumoconiosis, two showing simple pneumoconiosis and two showing complicated pneumoconiosis. In addition, such physician must have completed a course in examining coal miners' X-rays specified by the Social Security Administration.

To attain the status of a final or "B" reader, additional proficiency above that required for an "A" reader must be demonstrated by taking and passing a specifically designed proficiency examination. Thus these regulations provide that the interpretation of a "B" reader is final and controlling over an "A" reader's interpretation.

[49] The practice of having "B" readers reread the X-rays initially interpreted positive by "A" readers was highly condemned as "administrative one upsmanship" in a variety of forums. *See, e.g.*, Stewart v. Mathews, 412 F. Supp. 235 (W.D. Va. 1975). This practice, however, was held not to violate due process per se in Hill v. Califano, 592 F.2d 341, 344-45 (6th Cir. 1979). Nevertheless, 30 U.S.C. § 923(b) (1979) now provides that a board certified or board eligible radiologist's determination that an X-ray shows CWP is binding on the Secretary in the absence of fraud if coupled with "other evidence that [the] miner has a pulmonary or respiratory impairment . . . ."

[50] 617 F.2d at 1055-56.

[51] *Id.*

[52] *Id.*

X-ray films for use in black lung cases, the Secretary promulgated the regulations providing for final readers of X-rays who are labelled "B" readers.[53] The regulations provide that if a "B" reader initially interprets a chest X-ray film to reveal CWP, this interpretation is final and binding upon the Secretary of HEW.[54] Although this system of classification of X-ray readers has come under attack by claimants,[55] the court in *Whitman* approved this classification.[56] Since this classification system does not provide for a hierarchy of "B" readers, the court ruled the Secretary must accept the first "B" reader's interpretation.[57] Therefore, since the first "B" reader's positive interpretation established Whitman's entitlement to the interim presumption, and there was no evidence in the record by which the Secretary could rebut the presumption, Whitman was awarded benefits.[58]

C. Establishing Years of Coal Mine Employment

While *Sullivan*,[59] *Dickson*,[60] and *Whitman*[61] deal with the interim presumption, *Cantrell v. Califano*,[62] involves a claimant's attempt to utilize the section 921(c)(1) presumption to establish a causal link between CWP and coal mine employment. Cantrell's only mining employment was during an eight year period between 1934 and 1942. From 1942 to 1959, he worked in various non-mining jobs where he was exposed to "coal, coke, charcoal and lime."[63] X-rays introduced in support of his claim had been interpreted as positive for CWP, and the ALJ who heard the evidence awarded benefits. However, in reversing the award, the Appeals Council found that the claimant's non-mining jobs are known to have precipitated black lung diseases such as CWP.[64] Since Cantrell had fewer than ten years employment in

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[53] *See* note 48 *supra*.

[54] *Id.*

[55] *See, e.g.*, Vintson v. Califano, 592 F.2d 1353 (5th Cir. 1979); Hill v. Califano, 592 F.2d 341 (6th Cir. 1979).

[56] 617 F.2d at 1057.

[57] *Id.*

[58] *Id.*

[59] 617 F.2d 1215 (6th Cir. 1980).

[60] 590 F.2d 616 (6th Cir. 1979).

[61] 617 F.2d 1055 (4th Cir. 1980).

[62] 578 F.2d 549 (4th Cir. 1978).

[63] *Id.* at 551.

[64] *Id.*

the coal mines, he had the burden of establishing the causal connection between his CWP and his coal mine employment.[65]

On appeal, the claimant failed to submit any evidence that contradicted the Appeals Council's finding that his non-mining job could cause diseases such as CWP. Thus, despite a finding that Cantrell suffered from CWP, he failed to establish a causal relationship between his CWP and his coal mine work. Accordingly, the court affirmed the denial of benefits and based its holding on this failure.[66] Thus, in many cases a finding of at least ten years of coal mine employment is crucial since this finding is the *sine qua non* of entitlement to the section 921(c)(1) presumption.

For those miners employed after passage of the Social Security Act in 1935,[67] for better or worse as the case may be, the miner's wage records play an important role in establishing his coal mine employment. In fact, when an individual's Social Security wage records are blank as to a period of time the individual claims to have worked for an employer, the records are "presumptive evidence"[68] that no such wages were paid for the period in question. The question then arises as to both the amount and kind of proof an individual must introduce to substantially dispute the presumptive validity of the Social Security wage records.[69]

[65] 20 C.F.R. § 410.416(b) (1980). *See* notes 11-14 *supra* and accompanying text.

[66] 578 F.2d at 551. A similar case which stands for the same proposition is Beck v. Mathews, 601 F.2d 376 (9th Cir. 1978), in which the claimant could not prove 10 years of coal mine employment. In addition, he had worked about 20 years in a foundry.

[67] *See, e.g.*, 42 U.S.C. §§ 405-32 (1976).

[68] *Id.* § 405(c)(4)(B).

[69] Breeden v. Weinberger, 493 F.2d 1002 (4th Cir. 1971) held that a claimant seeking Social Security disbility benefits need only prove her case by preponderance of the evidence. In so doing, the court noted that Congress obviously did not intend to penalize wage earners for the carelessness or dishonesty of their employers. Moreover, the claimant offered other valid reasons for the absence of entries in her wage records. Some of her employers were no longer in business, and some employers had previously discarded old records.

The claimant's proof of employment consisted of testimony and affidavits of friends, relatives, co-workers and the wife of a former employer. While the ALJ rejected this evidence based on "his distrust for the testimony of 'friends and kinfolks;' " the court stated that "neither the statute, the regulations, nor common sense disqualifies [relative and friends] from testifying." Furthermore, the court noted that the statute and regulations did not require witnesses to establish exact amounts and dates. For other cases discussing this presumption regarding social security wage records, *see Annot.*, 28 A.L.R. FED. 395 (1976).

Contesting the validity of Social Security wage records is addressed in *Maxey v. Califano*.[70] The claimant alleged fifteen years of coal mine employment, but his Social Security wage records revealed only two years of such employment. In support of his claim, Maxey submitted four affidavits of fellow workers at his hearing before the ALJ. The ALJ evaluated only one of the affidavits and found that the affiant alleged working with the claimant regularly during a certain period when the claimant testified he had worked only on a sporadic basis.[71] Because of this inconsistency the ALJ denied benefits.

The claimant then requested a review by the Appeals Council and submitted affidavits of five additional fellow workers. The Appeals Council upheld the denial of benefits without any evaluation of the affidavits regarding claimant's coal mine employment.

On appeal to the Fourth Circuit, the court remanded the case for further proof, since the Secretary of HEW had the obligation to "consider all relevant evidence."[72] Since the Appeals Council had failed to evaluate the affidavits and to provide a reason for disregarding them, the court refused to uphold the denial of benefits.

As a subsidiary point, the court, in a footnote,[73] criticized the Secretary's apparent misinterpretation of 20 C.F.R. section 410.416(b) which requires that a miner submit evidence to establish that his CWP arose out of coal mine employment where he has less than ten years of employment in the mines.[74] Since Maxey failed to establish at least ten years of coal mine employment, the Secretary *presumed* that the causal connection between coal mining and a chronic lung condition could not be established. The court rejected this interpretation stating that there was absolutely no support for this view. The court noted that when a claimant has less than ten years of coal mine employment his other employment history is indeed probative. If he had worked in a dusty environment which could have precipitated a chronic lung disease such as CWP, this factor could

[70] 598 F.2d 874 (4th Cir. 1979).

[71] *Id.* at 876.

[72] *Id. citing* Arnold v. Sec'y, HEW, 567 F.2d 258, 259 (4th Cir. 1977).

[73] *Id.* at 876 n.3.

[74] *See* note 11 *supra.*

serve to defeat his claim, as occurred in *Cantrell.*[75] On the other hand, if non-mining employment did not expose him to dusty conditions, this would support an argument that his breathing problem was related to his coal mining.

D. Who is a Miner?

A final issue arising within the context of the section 921(c)(1) presumption concerns the identity of claimants—to whom does the term "coal miner" apply? This issue was addressed in *Freeman v. Califano.*[76] Although the ALJ conceded that the claimant's disability was due to CWP, he found that Freeman had not proved that his disability was due to coal mine employment. In other words, the causal connection between his CWP and his coal mine employment was lacking;[77] thus, benefits were denied.

While Freeman had engaged in actual coal mining for only five years, he alleged six additional years of employment by a railroad in the vicinity of a coal mine. If his railroad work qualified, he would be entitled to the presumption of causation embodied in the regulations.[78]

The ALJ ruled that *only* underground coal mining was covered by the Act; therefore, railroad work which was all above ground could not be included. This analysis was prompted by the original thrust of the 1969 Act, but the 1972 Black Lung Benefits Act deleted the word "underground", making the ALJ's interpretation clearly erroneous.[79]

The district court affirmed denial of benefits on other grounds. Although the district court's rationale is unclear, it apparently attached some significance to the claimant's employment by a railroad at a time he claimed exposure to coal dust.[80] However, the Fifth Circuit found no support in either the Act or regulations for this restrictive view. While recognizing that railroad work is not the same as "extracting" or "preparing" the

[75] 578 F.2d 549 (4th Cir. 1978). *See* text accompanying notes 62-66.
[76] 600 F.2d 1057 (5th Cir. 1979).
[77] *See* note 11 *supra.*
[78] *Id.*
[79] 600 F.2d at 1059. *See also* 1972 Legislature History, *supra* note 15 at 2326.
[80] 600 F.2d at 1060.

coal, the court noted a recent trend liberalizing the definition of a coal miner.[81] For example, a coal truck driver with fourteen years experience hauling coal from the point of extraction to a tipple,[82] a clerical employee who at times relayed orders from the office to miners at the tipple,[83] and an employee who repaired mining equipment in the coal company's shop[84] had all been found to be "miners" within the meaning of the Act.

Although the court held that it was error to deny the claim, the case was remanded to determine the nature of the claimant's work as a railroad employee in the proximity of a coal mine.[85]

In conclusion, although the presumption set forth in section 921(c)(1) has spawned few appellate cases, those cases speak to both aspects of the presumption. The interim criteria contained in the regulations in most cases permits only a mechanical analysis of the medical evidence as seen in *Sullivan.*[86] Medical evidence either meets the interim criteria or it fails to do so. Absent contesting the arbitrary rejection of medical evidence as in *Dickson*[87] or *Whitman,*[88] there is little else the claimant can do to establish entitlement to benefits under this presumption.

On the other hand, the regulation providing a causal relationship between CWP and coal mine employment, given a work history of at least ten years, provides an opportunity to invoke the presumption by establishing the requisite length of coal mine employment. *Maxey*[89] suggests that even when a claimant is confronted with an adverse Social Security earning record, the claimant's testimony and co-worker's affidavits are admissible as "other relevant evidence." In addition, documentary proof such as company records, tax records, union records, union dues records, birth certificates, marriage records, U.S. Census records, pay records, and similar data may provide suffi-

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[81] *Id.*
[82] Roberts v. Weinberger, 527 F.2d 600 (4th Cir. 1975).
[83] Adelsberger v. Mathews, 543 F.2d 82 (7th Cir. 1976).
[84] Skipper v. Mathews, 448 F. Supp. 300 (M.D.PA. 1977).
[85] 600 F.2d at 1060.
[86] 617 F.2d 1215 (6th Cir. 1980).
[87] 590 F.2d 616 (6th Cir. 1979).
[88] 617 F.2d 1055 (4th Cir. 1980).
[89] 598 F.2d 874 (4th Cir. 1979).

cient evidence to entitle the claimant to the benefit of the presumption.

II. THE 30 U.S.C. SECTION 921(c)(2) REBUTTABLE PRESUMPTION

A. Purpose

Another of the original presumptions established by Congress in 1969[90] was designed to aid survivors in establishing entitlement to benefits. Section 921(c)(2) provides that if the deceased miner had worked for at least ten years in underground coal mines, and died from a respirable disease, that disease is presumed to be CWP.[91] For survivors of miners who died prior to January 1, 1974, the interim presumption applies.[92] This interim presumption may be rebutted by the Secretary of HEW under section 921(c)(2) in the same manner in which it is rebutted in a living miner's claim under section 921(c)(1).[93]

For survivors of miners who died as a result of CWP after January 1, 1974, three regulations govern entitlement. The first provides that if the decedent was employed for at least ten years in coal mining and suffered from CWP, it is presumed that his CWP arose from coal mine employment.[94] Conversely, if the survivors are unable to establish at least ten years of coal mine employment by the decedent, they bear the burden of establishing a causal relationship between his CWP and his coal mine employment.[95]

A widow, seeking to establish entitlement, also has the benefit of a regulation which establishes a rebuttable presumption of total disability due to CWP on the basis of medical evidence.[96]

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[90] 30 U.S.C. § 921(c)(2) (1970) provides: "If a deceased miner was employed for ten years or more in one or more underground coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis."

[91] *Id.*

[92] *See* note 14 *supra.*

[93] *See* text accompanying note 22 *supra. See also* Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975).

[94] 20 C.F.R. § 410.456(a) (1980).

[95] *Id.* § (b).

[96] 20 C.F.R. § 410.454 (1980).

Finally, there is a presumption which is unique to survivors' claims which presumes that death was due to CWP in the case of a miner with ten years of coal mine employment whose death is attributed to a respirable disease.[97] Interpretation of these presumptions has turned on several issues, including the effect on the deceased miner's employment at the time of his death, and whether a death certificate constitutes substantial evidence to defeat a widow's claim.

B. Effect of Miner's Employment at Death

Farmer v. Weinberger,[98] illustrates that many widows are unable to prove that their miner husbands died from a respirable disease where the miner was employed at the time of his death. The widow of a thirty-two year old miner who had ten to fifteen years of coal mine experience filed a claim for benefits after his death. The decedent had complained of chest pains and shortness of breath for approximately two years prior to his death.[99] Approximately nine months before his death, the miner underwent a pre-employment physical examination which disclosed CWP. Although he was advised not to return to underground coal mining, he nevertheless was hired by a coal company and was working five nights a week at the time of his death.[100] The miner died after returning home from work, and the death certificate listed the cause of death as a coronary occlusion.[101] At the hearing, the ALJ held that while the miner suffered from CWP, the interim presumption of disability or death due to CWP was rebutted since he was employed as a miner at the time of his death.[102]

On appeal to the Sixth Circuit, claimant countered this finding by arguing that a miner can be totally disabled and continue working from sheer determination. In ruling on the merits of claimant's argument, the court noted that Social Security Ruling 73-36[103] provides that where there is ". . . sporadic work, poor

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[97] 20 C.F.R. § 410.462 (1980).
[98] 519 F.2d 627 (6th Cir. 1975).
[99] *Id.* at 628.
[100] *Id.* at 628 n.2.
[101] *Id.* at 629.
[102] *Id. See also* text accompanying notes 19-22 *supra*.
[103] Social Security Ruling 73-36 (1973).

performance, and marginal earnings. . ." continued employment might not preclude a finding of total disability.[104] Work that fits these categories is not deemed "comparable and gainful" work and therefore does not suffice to rebut this presumption.[105] Confronted with this argument, the court reviewed the ALJ's decision and determined that he had inquired into this area in his decision. Since he had found that the work was not sporadic, the performance not poor, and the earnings not marginal, remand was not necessary.[106]

Employment at the time of death may also prevent a survivor from establishing entitlement to the rebuttable presumption of disability or death due to CWP. In *Adkins v. Weinberger*,[107] a widow filed a claim for survivor's benefits based upon her husband's twenty-eight years of coal mine employment. He was employed in the mines until his death. Although his family physician had treated him for shortness of breath, there were no X-rays available; the physician did not mention disability due to a respiratory impairment, and the miner had not been ill before he died.[108] The death certificate signed by the physician listed the cause of death as "acute coronary thrombosis."[109] Benefits were denied for two reasons. First, since the miner was employed, the ALJ found that the miner was not disabled. Second the medical evidence, including the death certificate, convinced the ALJ that CWP was not the cause of death.[110] Moreover, on appeal, the court found these same facts prevented the claimant from establishing entitlement under the section 921(c)(4) statutory rebuttable presumption. Although the decedent had in excess of fifteen years of coal mine employment, there was no evidence of a *totally* disabling *respiratory* impairment.[111]

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[104] 519 F.2d at 633.

[105] *See, e.g.*, Armstrong v. Califano, 599 F.2d 1282 (3rd Cir. 1979); Everly v. Califano, 582 F.2d 1352 (4th Cir. 1978); Hanna v. Califano, 579 F.2d 67 (10th Cir. 1978).

[106] 519 F.2d at 633.

[107] 536 F.2d 113 (6th Cir. 1976).

[108] *Id.* at 115-116.

[109] *Id.*

[110] *Id.* at 114.

[111] *Id.* at 117. *See also* Jackson v. Weinberger, 532 F.2d 1059 (6th Cir. 1976) holding that the widow of a working miner was not entitled to the § 921(c)(4) presumption.

In some cases, continued employment at the time of death will not preclude an award of benefits. In *Everly v. Califano*,[112] the miner had worked for twenty years in coal mines prior to his death. Most of his medical records had been destroyed; and his death certificate listed the cause of death as "a myocardial infarction and arteriosclerotic heart disease."[113] At the hearing, his widow testified concerning his breathing problems and the nurse who had cared for him testified that she had administered injections to relieve his chest pains and assist his breathing. However, as a result of his continued employment, the ALJ found that the miner was not disabled at the time of his death.[114]

On appeal, the Fourth Circuit reviewed the record and found that the deceased's Social Security records revealed a decline in earnings. In addition, since he had encountered difficulty in performing his usual work, his employer had given the deceased a less strenuous job on a tipple.[115] Relying upon the testimony of the nurse who had cared for the miner and his declining earnings records, the court held that the claimant was entitled to the rebuttable presumption set forth in the regulations.[116] Moreover, there was insufficient medical evidence to rebut the presumption.[117] Thus, since the claimant had been employed for twenty years in coal mining, there was no question that his respirable disease was CWP arising out of his mining employment.[118]

C. *CWP Presumed from Death Attributed to a Respirable Disease*

Smakula v. Weinberger[119] is illustrative of the manner in which a claimant demonstrates entitlement to the presumption of death due to CWP, given ten years of coal mine employment, and upon proof of death due to a respirable disease. In *Smakula*, a widow filed a claim for benefits alleging that her husband had worked in coal mines for forty years. While the ALJ awarded benefits, the Appeals Council and the district court denied them.

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[112] 582 F.2d 1352 (4th Cir. 1978).
[113] *Id.* at 1353.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 1354.
[118] *Id.*
[119] 572 F.2d 127 (3rd Cir. 1978).

In its discussion of the appeal, the Third Circuit noted that there are three circumstances which relate to the invocation of this presumption. First, if the cause of death is "medically ascribed to a chronic lung disease"[120] death is ascribed to CWP. Second, if death is due to multiple causes and the miner suffered from CWP, death is ascribed to CWP when it is "not medically feasible" to distinguish which disease caused death *or* the degree to which each disease attributed to death.[121] Finally, if the medically ascribed cause of death is not reasonably consistent with CWP, death will not be ascribed to CWP.[122]

Claimant was unable to establish entitlement under the first circumstance since death was not medically ascribed to a chronic lung disease.[123] Moreover, the second circumstances was not applicable either. With regard to whether the evidence fell within the third circumstance, the court held that it is "not medically feasible" to distinguish between CWP and another cause of death where all the evidence suggests the influence of a respirable disease, but it is not possible to specifically state how much each disease contributed to the miner's death.[124] Since Smakula had a medical history of respiratory impairment, the influence of a respirable disease was present. Further, since no physician had ever attributed his respiratory problem to a heart ailment, it was impossible to specifically state the degree to which either the heart ailment or the respiratory problem contributed to death. Thus the regulation reciting the third circumstance was satisfied and benefits were awarded.[125]

The difficulty of proving death due to a respirable disease when the death certificate lists another cause or other causes of death is presented in *Craig v. Weinberger*.[126] The evidence showed that a miner suffered a heart attack and died as he was

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[120] *See, e.g.*, 20 C.F.R. § 410.462(b) (1980).

[121] *Id.*

[122] 572 F.2d at 130.

[123] *Id.* at 132.

[124] *Id.*

[125] *Id.* at 133. For a case illustrating the inability of a widow to demonstrate death due to a respirable death, *see* Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975) and text accompanying note 98 *supra*. *See also* Wallace v. Mathews, 554 F.2d 299 (6th Cir., 1977); Seacrist v. Weinberger, 538 F.2d 1054 (4th Cir., 1976); Felthager v. Weinberger, 529 F.2d 130 (10th Cir., 1976).

[126] 522 F.2d 394 (6th Cir. 1975).

getting ready to leave for work. The death certificate, which was signed by a physician who had never treated the miner and who did not perform an autopsy, assigned the immediate cause of death to coronary thrombosis. However, the medical evidence also established, within the realm of medical probability, that the fatal heart attack was "brought on" by CWP.[127] As a result, the ALJ found that CWP was "a significant contributing cause of death. . ." and awarded benefits.[128] However, the Appeals Council reversed the award and the district court affirmed the Appeals Council.

The Court of Appeals for the Sixth Circuit stated that the only evidence supporting the denial of benefits consisted of the death certificate. The physician who signed the certificate gave no reason for his determination concerning the cause of death. However, the death certificate did reveal the number "4201" in a space reserved for other contributing causes of death, so the court remanded the case for a hearing to determine the meaning of this number.[129] The court further stated that, except for the possibility that "4201" might be relevant to a denial of benefits, the claimant would have been entitled to an award of benefits "because the only evidence to support the Secretary's contrary decision is a negative inference that could be drawn from the death record that does not mention a lung disorder."[130]

The Third Circuit has also held a widow entitled to remand based in part on the issue of death certificate causes of death, as evidenced in *Zielinski v. Califano*.[131] Zielinski filed his claim in 1971, but he was denied benefits based upon conflicting X-ray reports, and hospital records revealing cirrhosis of the liver. The ALJ's denial of benefits was affirmed by the Appeals Council and the district court. While appeal was pending, the claimant died. His death certificate listed the immediate cause of death as cirrhosis of the liver and a contributing cause as "anthracosilicosis." Furthermore, an autopsy confirmed anthracosilicosis.[132]

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[127] *Id.* at 395.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] 580 F.2d 103 (3rd Cir. 1978).
[132] *Id.* at 105.

The issue presented to the Third Circuit was whether or not the case should have been remanded to HEW in light of additional evidence relating to CWP which had been submitted in support of the claimaint's motion for summary judgment at the district court level. The district court had refused to remand the case, since it found that there was no demonstration that the medical reports obtained in 1974 and 1975 related to the miner's condition on or before July 1, 1973.[133] The Third Circuit held that the district court erred in refusing to remand the case in view of the progressive, irreversible nature of CWP. Accordingly, remand was ordered to enable the widow to present any additional medical evidence adduced after the hearing.[134]

Thus, while the section 921(c)(2) presumption appears on its face to be relatively simple to establish, case law suggests the contrary. Imprecise evidence contained in death certificates as well as a miner's employment at the time of his death may operate to thwart an award of benefits to survivors of a miner who may have actually died as a result of CWP.

III. THE SECTION 921(c)(3) IRREBUTTABLE PRESUMPTION

A. Generally

The irrebutable presumption afforded by section 921(c))3) had its origin in the 1969 Act[135] and provides entitlement to benefits for miners suffering from complicated pneumoconiosis, the most serious form of CWP. The presumption accrues to the benefit of a miner who is suffering or has suffered from a chronic dust disease of the lungs that meets certain diagnostic standards. To be considered complicated CWP, a chest X-ray must yield one or more large opacities (greater than 1 centimeter in diameter) or a biopsy or an autopsy must show massive lesions in the lung.[136] Once such medical evidence is adduced, the miner is irrebuttably presumed to be totally disabled due to complicated CWP, or to have died from CWP, as the case

[133] *Id.* at 106-107. *See* Begley v. Mathews, 544 F.2d 1345 (6th Cir. 1976), *cert. denied* 430 U.S. 985 (1977) and text accompanying note 28 *supra.*

[134] 580 F.2d at 107.

[135] *See* note 1 *supra.*

[136] 30 U.S.C. § 921(c)(3) (1979). Regulations implimenting this statute may be found at 20 C.F.R. § 410.414 (1980) and 20 C.F.R. § 410.458 (1980).

may be,[137] even if the miner is fully engaged in coal mine work or other comparable and gainful work.[138] Since this presumption is irrebuttable once invoked, the principle issue arising under this section is whether the medical evidence adduced is sufficient to afford the claimant the benefit of the presumption initially.[139]

The constitutionality of this irrebuttable presumption was ruled upon favorably by the Supreme Court in *Usery v. Turner Elkhorn Mining Co.*,[140] wherein the Court held that, as an operational matter, the effect of the "irrebuttable presumption" of total disability is to establish entitlement as a matter of right for miners who are clinically determined to be suffering from complicated CWP.[141] While noting that Congress could have simply provided for compensation as a matter of right rather than phrasing the language affording entitlement in terms of an irrebuttable presumption, the court held that since this statute deals with "purely economic matters," Congress' choice of language did not invalidate an otherwise permissible purpose and effect.[142]

B. Circuit Court Rulings

Although various procedural issues governing entitlement to benefits under the irrebuttable presumption have been ruled upon by the Benefits Review Board[143] there is a virtual dearth of

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[137] *Id.*

[138] *See, e.g.*, Mondragon v. C.F. & I. Steel Corp., 7 BRBS 202, BRB No. 77-221 BLA (Dec. 22, 1977); Kelley v. Brookside-Pratt Mining Co., 8 BRBS 907, BRB No. 78-224 BLA (June 30, 1978).

[139] *See* Smith, *Black Lung Benefits Reform Act of 1977—Complicated But Simple*, KY. BENCH & B., April 1979, at 20.

[140] 428 U.S. 1 (1976); *see* note 11 *supra.*

[141] *Id.* at 23.

[142] *Id.* at 24-25.

[143] *See, e.g.*, Fisher v. Bethlehem Mines Corp., 7 BRBS 914, BRB No. 77-151 BLA (Jan. 31, 1978) (no offset for earned wages when entitlement based on complicated CWP); Shultz v. Borgman Coal Co., 6 BRBS 286, BRB No. 76-368 BLA (June 30, 1977) (any evidence of complicated CWP must be analyzed by hearing officer and if rejected, legitimate reasons given). Even though complicated CWP is shown to exist, it must be established that such condition arose out of coal mine employment. *See*, 30 U.S.C. § 902(b) (1979); Carpenter v. Tennessee Consolidated Coal Co., 9 BRBS 268, BRB Nos. 77-395 BLA and 77-395 BLA-A (may 31, 1978). Frequently a miner may establish this fact by resort to the presumption embodied in 30 U.S.C. § 921(c)(1) (1976). *See* text accompanying notes 9-23 *supra.*

case law construing this presumption emanating from the circuit courts of appeals.[144] Nevertheless, a recent decision from the Third Circuit clarifies several issues.

In *Director, Office of Workers' Compensation v. North American Coal Corp.*, [145] the Third Circuit added authority to prior holdings of the Benefits Review Board[146] which adjudged a claimant entitled to benefits beginning with the month in which complicated CWP is diagnosed, notwithstanding continuing employment as a miner.[147]

In *North American*, the Director sued North American Coal Corporation for payment of disability benefits to its former employee, Kenneth Truitt.[148] Since an X-ray, taken some ten days before he began working for North American, revealed complicated CWP, he would have been irrebuttably presumed *totally* disabled before his employment began.[149] For that reason, the Board ruled that Truitt's disability could not have arisen while he worked for North American.

The Director petitioned for review in the Third Circuit arguing that a finding of total disability does not preclude North American's being liable for benefits because the employer may have been responsible for "aggravation" of the total disability.[150] However, the court dismissed the appeal, finding that this argument had not been raised during any of the agency proceedings which preceded the appeal and, thus should not be considered at this point absent unusual circumstances, which were not present here.[151] Accordingly, the issue of whether complicated CWP may

[144] Apparently, once reliable medical evidence is adduced, few litigabile issues arise in a case involving complicated CWP.

[145] 626 F.2d 1137 (3rd Cir. 1980).

[146] *See* cases cited in note 138, *supra.*

[147] 626 F.2d at 1139.

[148] *Id.* at 1138.

[149] *Id.*

[150] *Id.* at 1142. *See also* U.S. Steel Corp. v. Gray, 588 F.2d 1022 (5th Cir. 1979) wherein the court discounted the argument that emphysema "aggravated" by dust exposure qualifies as CWP under statutory definitions. *Id.* at 1026-27 n.3.

[151] 626 F.2d at 1143 *citing* Unemployment Compensation Commission of Territory of Alaska v. Aragon, 329 U.S. 143, 155 (1946) wherein it is stated: "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling and state the reasons for its action."

be "aggravated" for purposes of holding a subsequent employer liable for benefits remains unresolved.

During the past decade, the section 921(c)(3) irrebuttable presumption has ameliorated the economic hardship for miners suffering from the most advanced and progressive stage of CWP. The fact there have been few cases construing this section is a tribute to the precision with which it was drafted.

IV. THE SECTION 921(c)(4) REBUTTABLE PRESUMPTION

A. Legislative History

Unlike the irrebuttable presumption found in section 921(c)(3) which was part and parcel of the original black lung legislation enacted in 1969, the rebuttable presumption embodied in section 921(c)(4) was enacted as part of the 1972 amendments as a remedial effort designed to eliminate specific problems that had surfaced since 1969 in awarding benefits to disabled miners. Testimony before the Senate Committee on Labor & Public Welfare indicated that miners with disabling breathing impairments were being denied benefits. Although they were as severely, and often more severely, impaired than miners whose claims were being granted the "state of the art" precluded a definitive medical diagnosis of CWP.[152]

In view of the fact that 50% of all miners were denied benefits under the 1969 Act and since there was an absence of definitive medical conclusions, Congress felt a clear need to resolve doubts in favor of disabled miners and their survivors.[153] Section 921(c)(4) provides presumption of CWP for miners with respiratory or pulmonary disability, notwithstanding negative X-rays, if they have worked for fifteen years or more in a coal mine.[154]

Under this rebuttable presumption, a miner employed for fifteen years or more who is unable to qualify for the section

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[152] 1972 Legislative History, *supra* note 15 at 2312-13. The denial rate was in part attributable to overly restrictive interpretations of the 1969 Act rendered by the Social Security Administration.

[153] *Id.* at 2315.

[154] *Id.* Another section of the 1972 amendments prohibits the denial of benefits solely on the basis of a negative chest X-ray. 1972 Amendments, *supra* note 6 at § 4(f) [codified at 30 U.S.C. § 923(b) (1976)]. *See also* 20 C.F.R. § 410.414(c) (1980).

921(c)(3) irrebuttable presumption because of the existence of X-rays interpreted as negative for CWP, may nevertheless be entitled to a rebuttable presumption of total disability or death due to CWP if other evidence demonstrates a totally disabling respiratory or pulmonary impairment. Congress further provided that this presumption may be rebutted only by establishing (A) that the miner does not or did not have CWP, or (B) his respiratory or pulmonary impairment did not rise out of, or in connection with, employment in a coal mine.[155] Because this section is designed to expand the awarding of benefits,[156] and because it does so in very generalized terms, it is the most frequently litigated presumption of entitlement embodied in the federal black lung legislation. Following is a review of the issues that have arisen under this presumption and an analysis of their resolutions in the circuit courts.

B. Generally

As succinctly stated by the Sixth Circuit in *Gastineau v. Mathews*,[157] it is the function of the agencies administering the benefits programs, and not the courts', to resolve conflicts in medical evidence presented in black lung cases. Since the expertise of administering agencies is afforded great deference,[158] virtually all circuits deciding the issue have determined that the scope of review in black lung cases is confined to determining whether substantial evidence supports the agency's decision.[159]

This rebuttable presumption operates on the assumption that the claimant may have had negative X-ray interpretations regarding CWP,[160] and thus an X-ray read as positive for CWP is, obviously, not required to invoke the presumption. However,

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[155] 30 U.S.C. § 921(c)(4) (1976).

[156] *See* text accompanying note 16 *supra*.

[157] 577 F.2d 356, 358 (6th Cir. 1978).

[158] *Id.* at 358. This is the unanimous holding of all circuits deciding the issue. *See, e.g.*, Shrader v. Califano, 608 F.2d 114, 116 (4th Cir. 1979); Doss v. Califano, 598 F.2d 419, 422 (5th Cir. 1979).

[159] *Id. See also* Seacrist v. Weinberger, 538 F.2d 1054, 1056-57 (4th Cir. 1976); Blalock v. Richardson, 483 F.2d 773 (4th Cir. 1972).

[160] District Court opinions have split over whether an X-ray read as negative for complicated CWP is *required* before a claimant is entitled to rely on the § 921(c)(4) rebuttable presumption. *Compare* Marlow v. Mathews, 412 F. Supp. 925 (E.D. Tenn. 1976) *with* Cosand v. Sec'y, HEW, 408 F. Supp. 263 (E.D. Mich. 1976).

the presumption does not arise unless and until "other evidence" demonstrates the existence of a totally disabling chronic respiratory or pulmonary impairment. The Fifth Circuit has ruled that the phrase "other evidence" is to be given its ordinary meaning; the hearing officer may therefore take into account all relevant evidence in determing whether disabling CWP exists, including the claimant's own testimony.[161] In addition to a finding that the miner spent fifteen years or more in the mines, there must be a separate determination that the miner is suffering from a totally disabling respiratory or pulmonary impairment. As the Fourth Circuit ruled in *Phillips v. Mathews*,[162] fifteen years of employment in the mines, standing alone, creates no presumption, although long years of service in the mines is relevant in determining whether there is a totally disabling respiratory impairment.[163]

C. *Threshold Considerations in Establishing Entitlement Under the Rebuttable Presumption*

Initially, it should be noted that a claimant will never seek to establish entitlement under the section 921(c)(4) rebuttable presumption where the medical evidence of record is sufficient to afford entitlement under the so-called "interim" presumptions of entitlement afforded by regulations issued by the Secretary of HEW[164] or the Secretary of Labor.[165] However, medical test results not falling within the evidentiary criteria employed in those presumptions may still be indicative of a reduced ventilatory capacity and, as such, may constitute "other evidence" demonstrating the existence of a totally disabling respiratory or pulmonary impairment for purposes of the section 921(c)(4) rebuttable presumption.[166] In addressing the burden of persuasion resting on the claimant to prove entitlement under section

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[161] U.S. Steel Corp. v. Bridges, 582 F.2d 7 (5th Cir. 1978). This test was applied and the claimant's testimony was admitted in Henson v. Weinberger, 548 F.2d 695, 698-99 (7th Cir. 1977).

[162] 555 F.2d 1182 (4th Cir. 1977).

[163] *Id.* at 1183; *Accord*, Hale v. Mathews, 558 F.2d 710 (4th Cir. 1977).

[164] *See* text accompanying note 14 *supra*. *See, e.g.*, McConville v. Weinberger, 394 F. Supp. 1194 (W.D.Pa. 1975), *aff'd without published opinion*, 530 F.2d 964 (3rd Cir. 1976). *See e.g.*, 20 C.F.R. § 727.203 (1980).

[165] *Id.*

[166] This point was recognized in Hoffman v. Califano, 450 F. Supp. 1313, 1324 (E.D. Pa. 1978).

921(c)(4), the Fourth Circuit explained in *Petry v. Califano*[167] that the claimant must establish both fifteen years of mine employment and adduce by a preponderance of evidence, other than X-rays, biopsy, or autopsy reports, the existence of a totally disabling chronic respiratory impairment.[168] The Third Circuit has made clear, however, that once a totally disabling respiratory or pulmonary impairment is demonstrated the claimant need not demonstrate a causal relationship between the impairment and "true" CWP.[169]

If the claimant is unable to establish either or both of these elements, the presumption fails and the claim should be denied insofar as it is based upon the presumption. However, if the two elements are established from all the evidence, then the burden of going forward with the evidence shifts to the party opposing entitlement and he must successfully rebut the presumption in the manner specifically outlined in the statute.[170] This analysis has been validated by the Sixth Circuit in the case of *Prokes v. Mathews*.[171]

D. Evidence Necessary to Establish Entitlement Under the Rebuttable Presumption

The testimony of the claimant as well as those knowledgeable about his condition, *i.e.* lay testimony, is recognized as falling within the purview of "other evidence" necessary to establish entitlement under the section 921(c)(4) presumption.[172] However, as held by the Seventh Circuit in *Peabody Coal Co. v. Director*,[173] entitlement to the presumption must be established from medical evidence and not lay testimony alone.[174] Moreover, in determining whether a claimant is totally disabled by a respiratory disease, primary consideration must be given to the

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[167] 577 F.2d 860 (4th Cir. 1978).

[168] *Id.* at 864. *See also* Barnette v. Califano, 585 F.2d 698 (4th Cir. 1978).

[169] Bethlehem Mines Corp. v. Warmus, 578 F.2d 59, 63 (3rd Cir. 1978).

[170] 577 F.2d at 864. *See also*, text accompanying note 155 *supra*.

[171] 559 F.2d 1057, 1060 (6th Cir. 1977). The Tenth Circuit has also accepted this analysis of the risk of non persuasion. *See*, Ohler v. Sec'y, HEW, 583 F.2d 501, 506 (10th Cir. 1978).

[172] See text accompanying note 161 *supra*; Bozwich v. Mathews, 558 F.2d 475, 477 (8th Cir. 1977); Ansel v. Weinberger, 529 F.2d 304, 309 (6th Cir. 1976).

[173] 581 F.2d 121 (7th Cir. 1978).

[174] *Id.* at 123.

medical severity of the disease.[175] For that reason, as stated by the Fourth Circuit, great reliance is placed upon the conclusions of a claimant's examining physician.[176]

Nevertheless, the precise mixture of lay and medical testimony necessary to give rise to the presumption has been the subject of much discussion by the circuit courts. In *Ansel v. Weinberger*,[177] the Sixth Circuit found that presumption invoked by testimony from the claimant's physician coupled with the lay testimony of the plaintiff, his wife, and a co-worker.[178] On a lesser evidentiary showing, the Seventh Circuit in *Henson v. Weinberger*,[179] afforded the presumption to a miner merely on the basis of his testimony coupled with that of his examining physician, stating "the testimony of Mr. Henson and Dr. Peters make out a *prima facie* case of a respiratory or pulmonary impairment, totally disabling from coal mine or comparable work."[180] The Eighth Circuit, following *Henson*, held the presumption to have been raised by the testimony of a physician, the claimant, and the claimant's wife.[181]

The most abbreviated showing of entitlement is found in the Sixth Circuit decision in *Prokes v. Mathews*.[182] Although the decision merely affirms the judgment of the district court granting summary judgment and remanding to the Social Security Administration for further proceedings, the Sixth Circuit indicated that the claimant might have been able to establish entitlement to the presumption merely on the basis of his own testimony coupled with a note from his physician.[183] The note stated that claimant suffered from bronchitis and pulmonary emphysema, but did not conclude that he was totally disabled. The court opined that if an additional note stated that the claimant was totally disabled "this would be significant evidence to

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[175] *Id.*

[176] *See, e.g.*, King v. Califano, 615 F.2d 1018, 1020 (4th Cir. 1980); Hubbard v. Califano, 582 F.2d 319, 323 (4th Cir. 1978). The Sixth Circuit views treating physicians' conclusions in the same manner. *See, e.g.* Caraway v. Califano, 623 F.2d 7 (6th Cir. 1980).

[177] 529 F.2d 304 (6th Cir. 1976).

[178] *Id.* at 309-10.

[179] 548 F.2d 695 (7th Cir. 1977).

[180] *Id.* at 698.

[181] Bozwich v. Mathews, 558 F.2d 475, 480 (8th Cir. 1977).

[182] 559 F.2d 1057 (6th Cir. 1977).

[183] *Id.* at 1059.

be considered in determining whether he was entitled to the presumption . . . "[184] Reading these rulings from the Sixth, Seventh and Eighth Circuits consistently, it appears that, at a minimum, the testimony of the claimant, coupled with that of his examining physician will give rise to section 921(c)(4) rebuttable presumption.[185]

Circuit Court rulings have also evidenced a divergence of opinion with respect to whether a physician must make an express finding of total disability in order to give rise to the presumption. Although earlier holdings from the Fourth[186] and Sixth[187] Circuits appear to support the notion that an affirmative finding of total disability must be made, a recent decision from the Sixth Circuit, *Miniard v. Califano*[188] discounts this view. On the strength of the claimant's testimony concerning constant coughing, shortness of breath, smothering and the inability to "hold out" all day, coupled with physicians' finding of pulmonary and respiratory impairments,[189] the court held that Miniard "presented sufficient evidence of chronic respiratory or pulmonary impairment to be considered totally disabled within the meaning of the statute."[190] While Miniard may indicate a trend within the Sixth Circuit, it remains to be seen whether the Fourth Circuit will abandon its requirement that a physician's statement concluding total disability is a necessary prerequisite to invocation of the section 921(c)(4) presumption.[191]

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[184] *Id.*

[185] In Hoffman v. Califano, 450 F. Supp. 1313 (E.D. Pa. 1978) the court analyzed these cases and came to the conclusion that testimony from an additional lay witness in addition to that of the miner and his physician would have been necessary to give rise to the presumption. *Id.* at 1328. This may not be a required result but merely a recognition that rarely does the living miner come to an eligibility hearing without the aid of at least one other lay witness.

[186] *See, e.g.*, Barnette v. Califano, 585 F.2d 698, 699 (4th Cir. 1978).

[187] Ansel v. Weinberger, 529 F.2d 304, 309 (6th Cir. 1976). Singleton v. Califano, 591 F.2d 383 (6th Cir. 1979) (rebuttable presumption afforded partly on the basis of an examining physician's conclusion of total disability).

[188] 618 F.2d 405 (6th Cir. 1980).

[189] *Id.* at 407-08.

[190] *Id.* at 409.

[191] In the event a treating physician fails to make an affirmative statement respecting the degree of claimants disability, the attorney for the claimant may wish to request the ALJ to submit interrogatories on this point to such physician. *Compare* Artrip v. Califano, 569 F.2d 1298 (4th Cir. 1978) (request denied) *with* Phillips v. Mathews, 412 F. Supp. 238 (W.D. Va. 1976) (request permitted).

E. Defeating the Operation of the Rebuttable Presumption

The Sixth Circuit's decision in *Singleton v. Califano*[192] demonstrates the mechanisms utilized by the Social Security Administration in denying the operation of the section 921(c)(4) rebuttable presumption.

The first such mechanism is the use of negative X-ray interpretations and pulmonary function studies which are insufficient to afford entitlement to benefits under the interim presumptions of entitlement.[193] Since the landmark case of *Ansel*[194] the Sixth Circuit has held that such negative medical evidence is insufficient to demonstrate that a miner does not have CWP in the face of testimony from a claimant's examining physician that he is totally disabled from coal mine employment. Accordingly, in such a case, negative X-rays and non-qualifying pulmonary function studies are insufficient to rebut the section 921(c)(4) presumption.[195] Where the presumption has been afforded partly on the basis of a medical opinion, *Ansel* holds that is can only be rebutted by a medical opinion that the claimant does not have CWP.[196] Nevertheless, the Social Security Administration frequently argues that negative X-rays and non-qualifying pulmonary function studies, while insufficient to rebut the presumption, constitute "other evidence" which militates against a finding that a claimant has a totally disabling respiratory or pulmonary impairment. This analysis prevents a claimant from falling within the purview of the statutory presumption in the first place. The viability of this argument was laid to rest by the Sixth Circuit in *Singleton*.

As in *Ansel*, the Social Security Administration in *Singleton* relied upon negative X-rays and non-qualifying pulmonary function studies to counteract the diagnosis, rendered by the claimant's examining physician, which concluded that he suffered

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[192] 591 F.2d 383 (6th Cir. 1979).

[193] *See* text accompanying notes 164-65 *supra*.

[194] 529 F.2d 304 (6th Cir. 1976).

[195] *Id.* at 310. Indeed, the existence of negative X-rays is the premise upon which this statutory presumption is afforded.

[196] *Id. See also* Morris v. Mathews, 557 F.2d 563 (6th Cir. 1977). This holding of *Ansel* is uniform among the circuits that have ruled on this issue. *See, e.g.*, Petry v. Califano, 577 F.2d 860 (4th Cir. 1978); Gober v. Mathews, 574 F.2d 772 (3rd Cir. 1978); Bozwich v. Mathews, 558 F.2d 475 (8th Cir. 1977); Henson v. Weinberger, 548 F.2d 695 (7th Cir. 1977).

from a totally disabling respiratory or pulmonary impairment.[197] However, ruling that the examining physician's statement outweighed such negative test results, the Sixth Circuit held that the physician's conclusion constituted "other evidence" which *did* demonstrate a totally disabling pulmonary impairment, thus entitling Singleton to the benefit of the presumption.[198] In light of *Ansel*, the presumption, once afforded, could only be rebutted by a negative report from an examining physician, not merely negative test results. Therefore, Singleton's claim was properly remanded for an award of benefits.

A second mechanism utilized to defeat the operation of the rebuttable presumption was also considered by the court in *Singleton*. In weighing a claimant's evidence, ALJ's are influenced by Social Security Ruling 73-37 which provides that where X-rays or pulmonary function tests fail to meet the medical criteria required for application of the interim presumption,[199] there is an inference that the miner is not totally disabled. Thus, the Social Security Administration relies heavily on negative X-rays and nonqualifying pulmonary function studies while discounting the testimony of examining physicians in making a determination.

However, to interpret this ruling as allowing the exclusion of other relevant evidence whenever negative X-rays or nonqualifying pulmonary function studies are present is to convert to the "inference" allowed by the Ruling into a nonallowable presumption that the claimant is not disabled.[200] Such misplaced faith in this Ruling was criticized, but not invalidated, by the

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[197] 591 F.2d at 385.

[198] *Id.*

[199] *See* note 14 *supra*.

[200] 591 F.2d at 385, *citing* Social Security Ruling 73-37 (1973). The Sixth Circuit first encountered this Ruling in *Prokes*, wherein the ALJ had applied the Ruling, and based a denial of the application of the § 921(c)(4) presumption on the existence of negative X-ray interpretations and pulmonary function studies while ignoring evidence of total disability tendered by the claimant's treating physician. 559 F.2d at 1060. To this extent, *Singleton* is a carbon copy of *Prokes*. Thus, *Prokes* held that to the extent that the ruling "recognizes an inference which logically flows from consideration of proven facts, it does no violence to the Act." *Id.* at 1062. However, the use of the Ruling to limit the ability of a miner to establish entitlement to benefits by means of "other evidence" constitutes error and renders the § 921(c)(4) rebuttable presumption a nullity.

Court in *Singleton*.[201] Thus while the Sixth Circuit has joined the Third Circuit in criticizing Social Security Ruling 73-37,[202] the court continues to be besieged by cases where it is misapplied.[203] This deluge may ultimately cause the Sixth Circuit to join the Fourth[204] and the Eighth[205] Circuits in invalidating the Ruling in its entirety. As a consequence of *Ansel*, buttressed by *Singleton*, the operation of the section 921(c)(4) presumption can neither be denied, nor rebutted, by negative medical tests at least where a claimant alleges a totally disabling pulmonary impairment on the basis of a report from an examining physician.

The extent to which such negative evidence may be utilized as "other evidence" for purposes of this statutory presumption, even though it would not qualify the claimant for the benefit of the interim or statutory irrebuttable presumption, remains to be analyzed. The resolution of this issue may in part depend upon determining the point at which nonqualifying studies are no longer relevant to the issue of whether the claimant has a totally disabling pulmonary or respiratory impairment. A pulmonary function study may not yield test values low enough to qualify for the interim presumption, yet those values may be close enough to the criteria employed in that presumption to indicate a reduced ventilatory capacity. In such event, "negative" test results insufficient to afford a claimant the benefit of the interim presumption would tend to support the allegation that the claimant suffers from a totally disabling respiratory and pulmonary impairment. These "negative" test results constitute "other evidence" to support rather than defeat the application of the section 921(c)(4) rebuttable presumption to a claim.[206]

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[201] 591 F.2d at 385.

[202] *See* Gober v. Mathews, 574 F.2d 772, 777-78 (3rd Cir. 1978); Schaaf v. Mathews, 574 F.2d 157, 160 (3rd Cir. 1978).

[203] *See, e.g.* Caraway v. Califano, 623 F.2d 7 (6th Cir. 1980); Maddox v. Califano, 601 F.2d 920 (6th Cir. 1979); Cunningham v. Califano, 590 F.2d 635 (6th Cir. 1978).

[204] *See* Hubbard v. Califano, 582 F.2d 319, 325-26 (4th Cir. 1978).

[205] *See* Bozwich v. Mathews, 558 F.2d 475, 480 (8th Cir. 1977).

[206] Several courts have recognized this utility of "negative" test results. *See* Hoffman v. Califano, 450 F. Supp. 1313, 1324 (E.D.Pa. 1978); Henson v. Weinberger, 548 F.2d 695, 698-99 (7th Cir. 1977); Stefanowicz v. Mathews, 443 F. Supp. 109, 111-112 (E.D. Pa. 1977); Jeffries v. Mathews, 431 F. Supp. 1030, 1034 (E.D. Tenn. 1977).

Conversely, "negative" test results may so greatly exceed the test values employed in the interim presumption as to indicate the nonexistence of a totally disabling pulmonary or respiratory impairment. In that event, an inference that the miner is not suffering from a totally disabling respiratory or pulmonary impairment *can* logically be drawn and Social Security Ruling 73-37 appears applicable. Test results neither greatly exceeding, nor closely approximating, the test criteria employed in the interim presumption would seem to have little probative value.[207] To date, however, the circuit courts have declined to more precisely define the category of cases to which the Ruling is properly applied.

F. Rebuttal of the Presumption

The presumption afforded by section 921(c)(4) may be rebutted only by establishing that the miner does not or did not have CWP, or that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.[208]

Rebuttal by showing that the miner does not or did not have CWP was addressed by the Sixth Circuit in *Ansel*.[209] That court held that where the claimant has demonstrated entitlement to the presumption on the basis of a medical opinion indicating the existence of a totally disabling respiratory or pulmonary impairment, the presumption can be rebutted only by the production of a medical opinion that the claimant does not have CWP.[210] Since the opinions of treating physicians are afforded great weight,[211] it would appear that a medical opinion indicating the nonexistence of CWP would have to be based upon an examination of the claimant in order to be sufficiently probative to rebut the presumption.[212] Thus while *Ansel* rules that mere negative

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[207] *See* Hubbard, 582 F.2d at 321, wherein it is stated that inconclusive or contradictory results of X-rays inure to the benefit of neither party.

[208] *See* text accompanying note 155 *supra*.

[209] 529 F.2d 304 (6th Cir. 1976).

[210] *Id.* at 310.

[211] *See* note 179 and accompanying text *supra*.

[212] The Tenth Circuit, without deciding the issue expressed doubts as to whether the opinions of two physicians indicating the non existence of CWP would be sufficiently probative to rebut the presumption where neither physician examined the claimant and both opinions were based on an inconclusive autopsy. *See* Felthager v. Weinberger, 529 F.2d 130, 132-33 (10th Cir. 1976).

X-rays standing alone are insufficient to rebut the presumption, the Fifth Circuit has made clear that a medical opinion as to the nonexistence of CWP may properly be based upon negative X-rays and, despite *Ansel*, could suffice to rebut the presumption.[213]

To rebut the presumption by demonstrating that the totally disabling chronic respiratory or pulmonary impairment did not arise out of or in connection with coal mine employment, the Benefits Review Board has ruled that this finding must be made with a reasonable degree of medical certainty.[214] Thus, as explained by the Eighth Circuit, the mere possibility of an intervening cause is sufficient to rebut the section 921(c)(4) presumption.[215]

The Fourth Circuit has recently examined whether evidence that the claimant suffered from lung cancer will suffice to demonstrate that his totally disabling pulmonary or respiratory impairment did not arise out of or in connection with his coal mine employment. In *Clinchfield Coal Co. v. Fleming*,[216] the immediate cause of claimant's death was listed as lung cancer, but a subsequent autopsy disclosed "moderate anthracocis, bilateral (consistent with simple coal workers pneumoconiosis)."[217] The claimant's treating physician testified that CWP was the cause of the respiratory impairment that disabled Fleming, that such condition predisposed Fleming to lung cancer and that lung cancer was a mere contributing factor to death. Claimant's employer, Clinchfield, was unable to produce medical evidence that the claimant's CWP did *not* predispose him to lung cancer. Accordingly, the employer was precluded from demonstrating that the claimant's respiratory impairment did not arise out of his coal mine employment.[218]

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[213] U.S. Steel Corp. v. Gray, 588 F.2d 1022, 1027 (5th Cir. 1977). *But see* Putsakulish v. Califano, 448 F. Supp. 192, 196 (W.D. Pa. 1978) wherein the court held that a medical opinion based *only* upon a negative X-ray cannot rebut the presumption particularly where that opinion is based on an X-ray which other readers found unreadable.

[214] *See, e.g.*, Blevins v. Peabody Coal Co., 9 BRBS 510, BRB No. 78-406 BLA (Dec. 29, 1978).

[215] Bozwich v. Mathews, 558 F.2d 475, 480 (8th Cir. 1977).

[216] 606 F.2d 441 (4th Cir. 1979).

[217] *Id.* at 442.

[218] *Id.*

In *Rose v. Clinchfield Coal Co.*,[219] on virtually the same facts as presented in *Fleming*, the court reversed a Benefits Review Board decision denying benefits. The Board found the claimant was not entitled to the section 921(c)(4) presumption because the survivor had failed to demonstrate any causal relationship between the miner's cancer and CWP or between cancer and his coal mine employment. As a result of the parties' agreement and the Board's finding that claimant's husband also suffered from CWP, the Fourth Circuit ruled that the respondent employer bore the burden of ruling out any cause of relationship between the miner's cancer and CWP; the claimant is not required to demonstrate such a causal relationship in order to show entitlement to the presumption. Since the only testimony presented was equivocal with respect to whether cancer could have arisen from previously existing CWP, the respondent employer did not carry its rebuttal burden and benefits were ultimately awarded.[220]

Thus, while *Ansel* fairly well settled the manner in which the nonexistence of CWP may be demonstrated, case law is still developing with respect to the manner in which the causal link between a demonstrated respiratory impairment and coal mine employment may be broken. If *Rose* and *Fleming* are an indication, one can surmise that the results in the cases will be as varied as the medical opinions on the issue of whether CWP predisposes one to lung cancer.

V. THE SECTION 921(c)(5) REBUTTABLE PRESUMPTION

A. Generally

Even after the 1972 amendments had been implemented, certain inequities remained. Many eligible widows did not receive the benefit payments envisioned by Congress because they could not meet the Act's strict criteria for eligibility. The Congress heard testimony that superhuman efforts were required to enable a widow to reconstruct the work records or medical records necessary to meet eligibility requirements.[221]

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[219] 614 F.2d 936 (4th Cir. 1980).

[220] *Id.* at 938-39.

[221] Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, House Committee on Education and Labor, Committee Print, February, 1979, (hereinafter, 1977 Legislative History) at 221.

Benefits were being denied because of an absence of medical records; because the miner's death certificate listed a disease other than pneumoconiosis as the cause of death; or because, in order to provide a means of support for his wife and children, the miner was still employed at the time of his death.[222] Congress therefore made a conscious effort to ease the survivors' burden in establishing entitlement by enacting the rebuttable presumption contained in section 921(c)(5).

Under this provision, survivors are presumed to be entitled to benefits if the miner had been employed for at least twenty-five years in one or more coal mines prior to June 30, 1971 and died on or before March 1, 1978.[223] This presumption may be rebutted only by establishing that, at the time of death, the miner was not partially or totally disabled by CWP.[224]

Since the presumption shifts the burden of proof from the survivors to those contesting the award, it has met with opposition from employers who are liable for benefit payments. Most often, the employer challenges the constitutionality of the presumption.[225] As yet there is no case law from the courts of appeals ruling on the constitutionality of this presumption. Presumptions in civil statutes involving economic legislation are tested for their constitutionality against the rational connection standard expounded in *Mobile Jackson & Kansas City Railroad v. Turnipseed.*[226] Thus, given a standard which requires only that

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[222] *Id.* at 1233-34. *See* text accompanying notes 98-118 *supra.*

[223] Reform Act, *supra* note 7 at § 3(a)(5) [codified at 30 U.S.C § 921(c)(5) (1979)].

[224] *Id.* Note that this section permits compensation for survivors of miners who were partially disabled. The regulations issued pursuant to this section are contained in 20 C.F.R. § 727.204 (1980) and provide that a miner will be considered partially disabled if he had a reduced ability to engage in his usual coal mine work or gainful work requiring comparable skills or abilities. *See also* 20 C.F.R. § 718.306 (1980) and for total disability 20 C.F.R. § 718.204(b) (1980).

[225] For an example of typical arguments raised by the employer, *see,* Employer's Brief in Sallie Williams, Widow of Martin Williams, Deceased v. South East Coal Co. and Director, OWCP, Benefits Review Board No. 80-609, BLA (*pending*).

[226] 219 U.S. 35, 37 (1910), where the court stated:

> . . . [T]hat a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed,

there be some rational connection between the fact proved (years of mine employment) and the ultimate fact presumed (partial or total diability due to CWP), this provision will ultimately be affirmed. Numerous studies of living miners have demonstrated that the probability of a coal miner contracting CWP increases sharply with the age of the miner and the number of years he is exposed to coal dust.[227] More reliable autopsy evidence confirms this relationship. Data collected from autopsies at the Appalachian Laboratory for Occupational Respiratory Diseases showed that 84% of the miners examined had CWP.[228] "When these autopsies were arranged by years worked underground, there was a sharp increase in the percentage of cases after fifteen years, with those with less than fifteen years underground showing 64% with CWP and those with more than fifteen years underground showing 88% with CWP."[229] Thus, a rational relationship being present, this presumption should pass the scrutiny of constitutional challenges.

B. Rebuttal of the Presumption

The presumption afforded survivors by section 921(c)(5) may be rebutted only by establishing that, at the time of his death, the miner was not either partially or totally disabled by CWP.[230] The regulations promulgated pursuant to this section clearly reflect the Congressional intent to provide benefits despite the existence of some adverse evidence.[231]

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and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

[227] *See, e.g.*, Hyatt, et al. "*Respiratory Disease in Southern West Virginia Coal Miners.*" 89 THE AMERICAN REVIEW OF RESPIRATORY DISEASE 387 (1964); Jacobson, "*Evidence of Dose-Response Relation of Pneumoconiosis, (2)*", 22 TRANSACTIONS OF THE SOCIETY OF OCCUPATIONAL MEDICINE 88 (U.K., 1972); Lainhart, et al. PNEUMOCONIOSIS IN APPALACHIAN, BITUMINOUS COAL MINERS, (1969); Morgan, et al. "*The Prevalence of Coal Workers Pneumoconiosis in U.S. Coal Miners*" 27 ARCHIVES OF ENVIRONMENTAL HEALTH 221 (1973), *cited in* 1977 Legislative History, *supra* note 221 at 189-90.

[228] 1977 Legislative History, *supra* note 221 at 184.

[229] *Id.*

[230] 30 U.S.C. § 921(c)(5) (1979).

[231] 20 C.F.R. § 727.204 (1980).

Once the survivor has proven that (a) the deceased miner was employed for at least twenty-five years prior to June 30, 1971, (b) the employment was in one or more coal mines,[232] and (c) death occurred prior to March 1, 1978, the burden shifts to the operator to establish by all relevant evidence[233] that the miner was not totally or partially disabled by CWP at the time of his death.

The burden of rebutting this presumption is a heavy one. The evidence must demonstrate either (a) that the miner's ability to perform his usual and customary work or "comparable and gainful work" was not reduced at the time of death, or (b) that the miner did not have CWP.[234] The task is made more difficult inasmuch as the regulations establish certain factors which, standing alone, are not sufficient to rebut the presumption.[235] Evidence that the deceased miner was employed in a coal mine at the time of death will not, alone, suffice.[236] Likewise, evidence pertaining to his level of earnings prior to death is insufficient, standing alone, to rebut the presumption.[237] Moreover, neither a chest X-ray interpreted as negative for CWP nor a death certificate which makes no mention of CWP will, alone, be adequate to overcome this presumption.[238]

While this regulation provides that any one of these factors considered by itself is insufficient evidence to rebut the section 921(c)(5) presumption, it does not provide guidance in predicting what will constitute sufficient evidence. That decision will be left to the courts.

CONCLUSION

While the cases decided by the circuit courts have settled a plethora of evidentiary issues, significant questions remain. Among these are the extent to which demonstrated lung cancer is sufficient to negate a causal connection between a totally

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[232] *See* discussion accompanying notes 81-84 *supra*.

[233] 20 C.F.R. § 727.205 (1980). All relevant evidence includes circumstances of employment and statements by the miner's spouse.

[234] 20 C.F.R. § 727.204(c) (1980).

[235] 20 C.F.R. § 727.204(c) (1980).

[236] *Id.*

[237] *Id.*

[238] *Id.*

disabling respiratory or pulmonary impairment and coal mine employment. In addition, the circuit courts will ultimately have to rule upon the constitutionality of the presumption employed in section 921(c)(5) as well as the amount and kind of evidence necessary to demonstrate partial disability due to CWP.

Although it can be argued that the availability of the various interim presumptions of entitlement obviated the necessity for relying on the statutory presumptions of entitlement to obtain benefits,[239] claims filed after March 30, 1980, are adjudicated under permanent medical standards without the benefit of any interim presumptions. The primary change accomplished by these permanent medical standards is to shift the burden back to the claimant to prove that he has CWP and that he as a totally disabling respiratory or pulmonary impairment as a result of that disease.[240] Thus the various circuit court decisions construing the statutory presumptions have a present viability notwithstanding the fact that most of those decisions rule upon claims filed prior to June 30, 1973.

As cases reviewed by the Benefits Review Board begin to undergo judicial scrutiny in the circuit courts, there will be further amplification of existing rulings on the statutory presumptions and resolution of issues yet to be raised.

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[239] *See, e.g.* J. McClaugherty and J. Query, "*Federal Black Lung claims Administration under the Black Lung Benefits Reform Act of 1977*", EASTERN MINERAL LAW FOUNDATION, PROCEEDINGS OF THE FIRST ANNUAL INSTITUTE (1980) at 12-7.

[240] *Id.* at 12-11.