ANOTHER GASP AT PART B BLACK LUNG BENEFITS: THE SIXTH CIRCUIT EXPANDS AND INTERPRETS ITS PRIOR DECISIONS

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INTRODUCTION

As the title to this article foretells, every black lung decision decided and reported by the United States Sixth Circuit Court of Appeals between October, 1979, and October, 1980, required the court to rule on the propriety of district court denials of black lung benefits rendered pursuant to Part B of Subchapter IV of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act),[1] as amended (Reform Act).[2] This fact may seem somewhat anomalous in light of the June 30, 1973, cutoff date for filing Part B claims with the Social Security Administration.[3] Nevertheless, delayed judicial review is but one by-product of the monumental federal black lung program which, although barely a decade old, has awarded benefits to approximately 500,000 miners and their dependents and is currently paying claims exceeding two billion dollars annually.

Thus, while each of these cases involves a claim more than six years old, the decisions themselves have a present viability. Each decision rules upon the quantity and quality of medical evidence needed to invoke the statutory presumptions of entitlement to benefits found in the black lung legislation.[4] In addition, these pre-

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1. Pub. L. No. 91-173, 83 Stat. 742 (1969) (codified in scattered sections of 15 U.S.C. & 30 U.S.C.); *see* 30 U.S.C. §§ 921-31 (Supp. III 1979).

2. The original 1969 Act was substantially amended by the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972), and the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1976) (codified in scattered sections of 30 U.S.C.).

3. 30 U.S.C. §§ 902(c), 925(a)(1). Claims filed after June 30, 1973, must be filed with the Secretary of Labor. *See also* Arnold v. Secretary of HEW, 567 F.2d 258, 258 n.1 (4th Cir. 1977) & note 5 & accompanying text *infra*.

4. *See* 30 U.S.C. §§ 921(c)(1)-(5). In view of the fact that many claims were filed by spouses and dependents of deceased miners, testimony from the miner himself in support of his claim is often lacking. As a consequence, these presumptions are designed to assist all claimants in establishing entitlement to benefits under the Act. Thus, they form the back-

sumptions are embodied in regulations presently being utilized by the Department of Labor, Office of Workers' Compensation Programs.[5] Accordingly, these cases rule not only upon the propriety of prior adjudications but also provide direction to the Department of Labor and the Benefits Review Board in the course of adjudicating entitlement issues presented in pending and future claims.

While the recent decisions of the Sixth Circuit do not address the full scope of evidentiary issues which may arise in prosecuting black lung claims, they nevertheless analyze a variety of recurring proof problems present in establishing black lung claims. Initially, this article will analyze *Carroll v. Califano*,[6] which involves the use of autopsy evidence. That analysis is followed by discussion of the Sixth Circuit decisions involving the claims of living miners and the use of x-ray and ventilatory study evidence. In this way, the court's perspective on the varying effects of these types of evidence may best be understood.

THE DECISIONS

A. *Carroll v. Califano*

The Sixth Circuit's decision in *Carroll v. Califano* represents a strict constructionist approach to presumptions of entitlement to benefits. It also indicates the court's disinclination to retroactively apply portions of the 1977 Reform Act, at least in cases involving the claims of deceased miners.

The original claimant, Millard Carroll, a coal miner for forty-four years, retired from coal mining in 1970, four days before his sixty-fifth birthday. On January 27, 1972, Carroll filed his application for black lung benefits alleging a disability which he described as "[t]ightness in lungs—difficulty breathing—short winded."[7]

The Social Security Administration, both on initial review and upon reconsideration, determined that Carroll had failed to

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bone of the present federal black lung benefits program. *See* McClaugherty & Query, *Federal Black Lung Claims Administration Under the Black Lung Benefits Reform Act of 1977*, in PROCEEDINGS OF THE FIRST ANNUAL INSTITUTE OF THE EASTERN MINERAL LAW FOUNDATION (Matthew Bender, 1980).

5. *See, e.g.*, 20 C.F.R. §§ 718.302-.306 (1980). The obligation to adjudicate claims filed after June 30, 1973, befalls the Secretary of Labor pursuant to 30 U.S.C. § 925.

6. 619 F.2d 1157 (6th Cir. 1980).

7. *Id.* at 1159. By filing in 1972, Carroll's claim was thus adjudicated under Part B. *See* text accompanying note 3 *supra*.

demonstrate the existence of pneumoconiosis (CWP) or a totally disabling chronic lung impairment arising out of coal mine employment.[8]

At the hearing, Carroll submitted both lay testimony and medical evidence to support his claim for benefits. The only lay testimony in support of the claim came from Carroll, who testified that he left his last coal mining job as a foreman since he was unable to work because of difficulty in breathing, shortness of breath and lack of endurance. He also stated that these conditions had progressively worsened since leaving coal mine employment and, as a result, he had not engaged in any work since 1970.[9] The medical evidence supporting Carroll's claim consisted of pulmonary function studies, chest x-rays, and, since Carroll died during the pendency of the proceedings, an autopsy.[10]

The first pulmonary function study, conducted on September 19, 1972, yielded values which were insufficient to invoke the interim presumption of entitlement based upon medical criteria provided by regulation.[11] One of the values yielded by this study fell within the medical criteria for entitlement employed in this regulatory presumption while the second value exceeded such criteria. Since both values did not fall within the stated criteria, the interim presumption could not be afforded.[12]

The second pulmonary function study, conducted on December 27, 1974, yielded values which would have entitled the claimant to the benefit of the interim regulatory presumption but for the physician's failure to include descriptive statements detailing the manner in which the test was conducted.[13] Since 20 C.F.R. section 410.430 mandates such description, the Administrative Law Judge (ALJ) did not consider this latest pulmonary function study.[14] On

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8. 619 F.2d at 1159.

9. *Id.*

10. *Id.* at 1161.

11. *Id.* at 1159, 1160 n.4. *See* 20 C.F.R. § 410.490(b)(1)(ii) (1980). Section 410.490(b)(1)(ii) lists *minimum* values or criteria for forced expiratory volume (FEV) and maximum voluntary ventilation (MVV) based upon the height of the miner.

12. The express language of 20 C.F.R. § 410.490(b)(1)(ii) specified that both criteria cannot be exceeded in one test before the presumption applies. *See* Hill v. Heinberger, 430 F. Supp. 332, 335 (E.D. Tenn. 1976), *aff'd sub nom.*, Hill v. Califano, 592 F.2d 341 (6th Cir. 1979). *See also Carroll*, 619 F.2d at 1160 n.4.

13. 619 F.2d at 1161.

14. *Id.*

review, the Appeals Council ruled that the failure of Carroll's physician to provide the information required by 20 C.F.R. section 410.430 precluded receiving such a test as evidence in support of the claim. Further, the test was performed nearly eighteen months after the Social Security Administration transferred jurisdiction of the black lung benefits program to the Department of Labor and was thus considered insufficient evidence of disability as of June 30, 1973.[15]

Subsequently, Carroll procured the information required by 20 C.F.R. section 410.430 in the form of a letter from the physician who conducted the December, 1974, pulmonary function study, and sought judicial review, arguing that the letter validating the 1974 pulmonary function study might have caused the Appeals Council to invoke the interim regulatory presumption in his favor.[16] The district court overruled claimant's motion for remand and entered summary judgment for the Social Security Administration.[17]

As a consequence, the propriety of the district court's refusal to remand was raised in the Sixth Circuit Court of Appeals, which noted that 30 U.S.C. § 923(b) allows for a remand for the taking of additional evidence upon a showing of good cause.[18] By this time, however, Carroll had died and the autopsy evidence had ultimately been interpreted as negative for CWP.[19] Thus, citing its earlier decision in *Roberts v. Weinberger*,[20] the Sixth Circuit ruled *inter alia* that where there is no reasonable chance that the Appeals Council would reach a different conclusion, notwithstanding newly submitted evidence, good cause for a remand has not been shown.[21] The court ruled that even if the letter from Carroll's physician fulfilled the requirements of 20 C.F.R. section 410.430, thus invoking the

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15. *Id.* at 1161 n.5. *See also* note 5 *supra*. *But see* Begley v. Mathews, 544 F.2d 1345, 1353-54 (6th Cir. 1976), *cert. denied*, 430 U.S. 985 (1977) (medical evidence accumulated subsequent to June 30, 1973, is relevant to determine claimant's condition before July 1, 1973).

16. 619 F.2d at 1161.

17. *Id.* at 1161-62.

18. *Id.* at 1162. 30 U.S.C. § 923(b) incorporates by reference 42 U.S.C. § 405(g) (1976), which "permits remanding to the Secretary for taking additional evidence *upon a showing of good cause.*" 619 F.2d at 1162.

19. *See* text accompanying notes 42-46 *infra*.

20. 383 F. Supp. 230 (E.D. Tenn. 1974), *aff'd*, 487 F.2d 1403 (6th Cir. 1973).

21. 619 F.2d at 1162.

interim presumption in his favor, the findings of the autopsy performed subsequent to Carroll's death would have conclusively rebutted this presumption of entitlement.[22] Thus, the district court properly declined to remand for further analysis by the Social Security Administration.

One other argument could have been raised by the claimant, with respect to this latest pulmonary function study, even though pulmonary function studies failed to satisfy the technical requirements of 20 C.F.R. section 410.430. The Benefits Review Board has ruled that such studies may nevertheless be considered "other relevant evidence" for purposes of demonstrating that the miner suffers from a totally disabling chronic respiratory or pulmonary impairment arising out of coal mine employment[23] or for purposes of demonstrating totally disability once CWP has been shown.[24] It is likely, however, that the claimant would have failed in this case to demonstrate either a totally disabling chronic respiratory or pulmonary impairment, or even total disability, since the favorable medical and lay testimony available to the claimant could hardly have been deemed to be "substantial" within the meaning of *Richardson v. Perales.*[25] Accordingly, such evidence would not have been sufficient to support an award of benefits.

After failing to convince the Sixth Circuit Court of Appeals of entitlement by using the 1974 pulmonary function study, the claimant ingeniously attempted to demonstrate entitlement by using the nonqualifying 1972 study and urging expansion of the court's earlier decision in *Begley v. Mathews.*[26] In *Begley,* the court held that for the claimant to be entitled to benefits under Part B, the disability must be shown to have existed on or before June 30,

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22. *Id.* at 1162-63. *See* text accompanying notes 42-48 *infra.*

23. Shresburg v. Jewell Ridge Coal Co., 9 BRBS [Benefits Review Board Service] 83, BRB No. 77-284 BLA (Feb. 28, 1978). [The Benefits Review Board is a quasi-judicial panel of three members. The Board has exclusive appellate jurisdiction over decisions of Administrative Law Judges arising under the Black Lung Benefits Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1976). For the statement of organization of the Benefits Review Board see 20 C.F.R. § 801.1 *et seq.* (1980).] *See* 20 C.F.R. § 410.414(c) (1979).

24. 20 C.F.R. § 410.426(b) (1979).

25. Richardson v. Perales, 402 U.S. 389 (1971), holds that substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 401, *quoting* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

26. 544 F.2d 1345.

1973.[27] Further, due to the progressive character of CWP, evidence adduced *after* June 30, 1973, may be relevant in showing entitlement before July 1, 1973.[28]

The claimant in *Carroll* urged that the progressive character of the disease, when coupled with the one value reported on the September, 1972, test that fell within the criteria necessary for the invocation of the interim presumption, made it reasonable to assume that Carroll's condition would have deteriorated sufficiently between September, 1972, and July 1, 1973, to presume disability before the latter date.[29] In support of this contention, claimant pointed to the December, 1974, results which would have entitled him to the benefit of the interim presumption but for the failure of such test to comply with the technical requirements of 20 C.F.R. section 410.430.[30]

The court noted that the thrust of claimant's argument required a judgment that even though CWP had not been documented, the Secretary should presume that medical values revealed by a given pulmonary function study will gradually worsen, compelling the conclusion that the miner will be disabled by CWP at sometime in the future. In rejecting this reasoning, the *Carroll* opinion quoted with approval the Fourth Circuit court's decision in *Talley v. Mathews,*[31] wherein it stated:

> Those who submitted claims prior to the onset of their disability in order to qualify for the more lenient standards may not measure against those standards the state of their health at some undetermined point in the future. Such a result would cut against Congressional intent in directing promulgation of the interim adjudicatory standards, which was to facilitate processing of the then existing backlog of black lung claims, within the framework of a statutory scheme that envisioned a federal role of limited duration.[32]

Thus, at least with respect to pulmonary function studies, *Carroll* stands for the proposition that technical evidentiary quality standards will be strictly adhered to.

The x-ray evidence submitted in support of Carroll's claim of

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27. *Id.* at 1352-53.
28. *Id.* at 1355.
29. 619 F.2d at 1163.
30. *Id.* at 1164. *See* notes 11 & 12 *supra.*
31. 550 F.2d 911 (4th Cir. 1977).
32. 619 F.2d at 1164, *quoting* 550 F.2d at 917-18.

entitlement consisted of two x-rays taken prior to June 30, 1973. The first was uniformly read as negative for CWP by three physicians while the second chest x-ray, taken on June 25, 1973, was read as positive for CWP by two physicians, one of whom was a certified "A" reader of coal miners' x-rays.[33] This latter x-ray was subsequently re-read as negative for CWP by two physicians who were certified "B" readers.[34]

This was essentially the situation presented in *Dickson v. Califano*,[35] where the court held the claimant entitled to the benefit of the interim regulatory presumption on the basis of one positive x-ray reading, notwithstanding subsequent negative readings rendered by a certified reader chosen by the Secretary of HEW.[36] In so ruling, the court retroactively applied one of the provisions of the Reform Act, 30 U.S.C. section 923(b).[37] This provision prohib-

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33. 619 F.2d at 1160; Administrative Record at 27-28, Carroll v. Califano, 619 F.2d 1157 [hereinafter cited as *Carroll* Record].

34. 42 C.F.R. §§ 37.51-.52 (1973) 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 either: 1) 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; or, 2) complete a course in examining coal miners' x-rays specified by the Social Security Administration. *Id.* § 37.51(a).

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. *Id.* § 37.51(b). When two readers are in disagreement, additional interpretations are obtained from a panel of "B" readers. *Id.* § 37.52(a).

The practice of having "B" readers re-read 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, 238 (W.D. Va. 1975). This practice, however, was held not to violate due process *per se* in Hill v. Califano, 592 F.2d at 344-45. Nevertheless, 30 U.S.C. § 923(b) 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 it is taken by a radiologist or qualified technition and coupled with "other evidence that [the] miner has a pulmonary or respiratory impairment. . . ." *Id.*

35. 590 F.2d 616 (6th Cir. 1978).

36. *Id.* at 622.

37. Reform Act, Pub. L. No. 95-239 § 5; *see* note 2 *supra*. *See also* Stephens, *The Continuing Saga of Part B Black Lung Benefits: A Review of Recent Decisions from the Sixth Circuit*, 1980 DET. COLL. L. REV. 5, 18-23 & accompanying notes. Retroactive application of various provisions of the Reform Act to pending Part B cases is suspect in light of Treadway v. Califano, 584 F.2d 48, 51 (4th Cir. 1978), and Yakim v. Califano, 587 F.2d 149, 150 (3d Cir. 1978). *See also* Moore v. Califano, 633 F.2d 727 (6th Cir. 1980), wherein the Sixth Circuit Court of Appeals, in a well-documented opinion, declined retroactive application of the re-reading prohibition of the Reform Act. *Id.* at 735. Nevertheless, regulations issued by the Secretary of Labor would have allowed such application in this case. *See* 20 C.F.R. § 727.404

its re-reading an x-ray interpreted as positive for CWP by a board-certified or board-eligible radiologist in any case where there is other evidence of a pulmonary or respiratory impairment unless the Secretary has reason to believe the claim has been fraudulently represented.[38] Claimant thus had one x-ray read as positive for CWP and pulmonary function studies which, while not qualifying for the invocation of the interim presumption, nevertheless constituted "other evidence of a pulmonary or respiratory impairment."[39] Under the rationale of *Dickson,* the Reform Act's prohibition on re-reading x-rays could have been retroactively applied to Carroll's initially positive x-ray reading to afford entitlement under the interim presumption. This is particularly true since the only two physicians who examined Carroll found evidence of restrictive pulmonary disease.[40] Nevertheless, the court in *Carroll* made no mention of its prior holding in *Dickson.*

Moreover, the Reform Act also mandates acceptance of an autopsy report concerning the presence and state of advancement of CWP unless the Secretary has good cause to believe that the autopsy report is not accurate or that the condition of the miner is being fraudulently misrepresented.[41] Thus, *Dickson's* retroactive application of the re-reading prohibition embodied in 30 U.S.C. section 923(b) could have been applied to the autopsy evidence submitted in *Carroll.*

The autopsy performed on the date Carroll died, May 9, 1975, while concurring with the death certificate attributing death to generalized peritonitis and gangrene of the sigmoid colon, also indicated the presence of "pneumoconiosis (anthracosis)."[42] While these findings would not have been sufficient to support a finding of death due to CWP and afford entitlement to benefits under the

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(1980).

38. 30 U.S.C. § 923(b). The Fifth Circuit has construed the re-reading prohibition embodied in 30 U.S.C. § 923(b) to apply only to x-rays initially read positive for CWP by a board-certified radiologist unless the Secretary believes the claim was fraudulently represented. Vintson v. Califano, 592 F.2d 1353, 1359 (5th Cir. 1979).

39. 30 U.S.C. § 923(b). *See* text accompanying notes 19-20 *supra.*

40. *Carroll* Record at 26.

41. 30 U.S.C. § 923(b). By its express terms, this prohibition against re-reading x-rays or autopsy reports is directed to the government agencies responsible for adjudicating claims and not responsible operators indentified pursuant to 20 C.F.R. §§ 725.490-.495 (1979). *See also* 20 C.F.R. § 718.202(a)(1)(i) (1979).

42. 619 F.2d at 1161; *Carroll* Record at 120.

permanent Social Security Administration regulations,[43] they seem to establish Carroll's entitlement to benefits under the interim presumption which is afforded where "[an] autopsy establishes the existence of [CWP]."[44]

The Appeals Council, however, submitted the autopsy slides for further examination by a board-certified pathologist who noted that, although the slides disclosed a certain amount of anthracotic pigment, the amount of such pigment present was "no more than would be expected of a city dweller."[45] As a consequence, he ultimately concluded that the tissue samples did not represent either complicated or uncomplicated CWP.[46] Based upon this subsequent examination of the tissue samples, the Appeals Council ruled that the autopsy did *not* establish the existence of CWP.[47] Accordingly, the interim presumption could not be invoked in Carroll's favor on the basis of the autopsy evidence. These findings were ultimately confirmed by the district court and the Sixth Circuit, Judge Keith noting that "[t]he pathologist's report that Carroll's pulmonary tissue indicated neither simple nor complicated pneumoconiosis conclusively *rebuts* any presumption which may have arisen."[48]

Thus, to the extent that *Dickson* ruled that a single positive x-ray entitled the claimant to the benefit of the interim presumption, the Sixth Circuit declined in *Carroll* to extend *Dickson* to hold that a single autopsy showing the existence of CWP establishes en-

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43. *See* 20 C.F.R. § 410.450 (1979).

44. 20 C.F.R. § 410.490(b)(1)(i).

45. 619 F.2d at 1161.

46. *Id.*

47. *Id.*

48. *Id.* at 1164 (emphasis added). The reading of the tissue samples yielded findings which would have *precluded the interim presumption from arising.* Technically, these findings would not have been sufficient to *rebut* the interim presumption if it had been afforded on the basis of the initial pathologist having noted the existence of bilateral CWP. With respect to rebuttal of the interim presumption, 20 C.F.R. § 410.490(c) provides:

> (c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:
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> (1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (*see* § 410.412(a)(1)), or
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> (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 (*see* § 410.412(a)(1)).

Accordingly, proof of death due to causes other than CWP is not sufficient to rebut the interim presumption.

titlement to benefits. In part, this may have been due to the express language of 30 U.S.C. section 923(b), which allows the Secretary to reject an autopsy report if, for good cause, he believes that it is not accurate.[49] While the initial autopsy included bilateral CWP in the final anatomic diagnosis, the gross autopsy description of Carroll's lungs indicated the absence of any pneumonic consolidations.[50] Therefore, "good cause" probably existed for rejecting this initial autopsy in favor of the subsequent re-reading of the tissue samples by the certified pathologist. As a consequence, *Carroll* may not have presented facts sufficient to warrant an extension of *Dickson* to establish entitlement based upon a single autopsy.

Despite the Sixth Circuit's position in *Carroll,* the Court of Appeals for the Third Circuit has given credence to the "single autopsy" theory. In *Zielinski v. Califano,*[51] decided in the same year as *Dickson,* the Third Circuit ordered a remand to the district court for a reconsideration of evidence contained in the claimant's death certificate.[52] The death certificate identified cirrhosis of the liver as the immediate cause of death but also listed anthracosilicosis as a significant condition contributing to death although not related to the immediate cause of death.[53] Noting that this death certificate, if prepared after an autopsy, could very well entitle the claimant to the benefit of the interim presumption,[54] the court ordered a remand to allow the district court to consider whether the evidence gleaned from the death certificate prepared in 1977 could have demonstrated a totally disabling pulmonary or respiratory impairment as of June 30, 1973, due to the progressive nature of the disease.[55]

While an autopsy is the most credible diagnostic tool for determining the existence of CWP,[56] few cases have ruled on entitle-

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49. *See* text accompanying note 41 *supra.*

50. *Carroll* Record at 121.

51. 580 F.2d 103 (3d Cir. 1978).

52. *Id.* at 107.

53. *Id.* at 105.

54. *See* text accompanying note 40 *supra.*

55. 580 F.2d at 107; *See also* Begley v. Mathews, 544 F.2d 1345, & text accompanying notes 22-24 *supra.*

56. *See, e.g.,* King v. United Sstates Steel Corp., 8 BRBS 959, BRB No. 77-529 BLA (June 30, 1978), wherein the Benefits Review Board upheld a hearing officer's determination that a negative autospy report should preponderate over an x-ray showing complicated

ment demonstrated by autopsy or biopsy evidence.[57] The Sixth Circuit court in *Carroll* appeared reluctant to test the uncharted waters of autopsy reports and made no mention of the possibility of retroactively applying 30 U.S.C. Section 923(b) to allow for acceptance of initial autopsy reports. As a consequence, Carroll's claim for benefits was denied under a strict constructionist approach untempered by the Reform Act and its liberalizing provisions.[58]

B. *Miniard v. Califano*

Miniard v. Califano[59] squarely contradicts *Carroll* on retroactive application of the Reform Act to a Part B case. Reversing the district court, *Miniard* is the most liberal interpretation rendered by the Sixth Circuit court to date regarding the quality and quantity of medical evidence necessary to demonstrate entitlement.

Claimant Miniard filed an application for black lung benefits on March 6, 1970. Miniard's continuing employment in the mines resulted in an initial decision denying the claim. In controverting that initial decision, Miniard requested and obtained a hearing before an ALJ who again denied benefits.[60]

At the hearing, Miniard testified to previous coal mine employment of approximately twenty-eight years with his last work being performed on June 8, 1973, just three weeks prior to the closing date for filing Part B claims.[61] In addition to recounting the usual symptoms of CWP,[62] Miniard stated that even though he could not

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CWP, thus denying application of the 30 U.S.C. § 921(c)(3) irrebuttable presumption of CWP. 8 BRBS at 963.

57. *See, e.g.*, Luketich v. Director, 10 BRBS 549, BRB No. 77-304 (May 31, 1979); Drake v. Peabody Coal Co., 10 BRBS 484, BRB No. 78-310 (April 30, 1979); Winton v. Director, 10 BRBS 147, BRB No. 78-149 (March 21, 1979). 20 C.F.R. § 718.202(a)(2) (1980) now adds direction by providing that an autopsy report disclosing anthracotic pigment is not sufficient by itself to establish the existence of CWP.

58. It is submitted that the court's unwillingness to apply the 30 U.S.C. § 923(b) prohibition on re-reading x-rays in *Carroll* when it had applied § 923(b) in *Dickson*, 590 F.2d 616, and Miniard v. Califano, 618 F.2d 405 (6th Cir. 1980), *see* notes 55-103 & accompanying text *infra*, may have been born out of suspicion that Carroll's cessation of mining employment, 4 days before his 65th birthday, was due to a desire to retire rather than a disabling condition affected by employment.

59. 618 F.2d 405.

60. *Id.* at 406.

61. *Id. See* text accompanying note 3 *supra*.

62. A graphic description of the usual symptoms of the disease is found in Morris v.

adequately perform a day's work because of the need to sit down and rest, he continued to work to avoid economic hardship.[63] Significant among the reasons for the ALJ's denial of benefits was Miniard's testimony that he ceased work when his lawyer informed him that medical reports existed which showed CWP. As a result, the ALJ held that Miniard had not demonstrated total disability and denied benefits.[64]

The medical evidence submitted by Miniard consisted of seven readings of three chest x-rays and one general report by an examining physician. A chest x-ray taken on February 24, 1971, was uniformly read as negative for CWP. The second chest x-ray, taken on May 19, 1972, was read as negative for CWP but was interpreted as revealing fibroid extremes on discs of atelectasis of the left costophrenic angle.[65]

The most disputed chest x-ray was taken on May 26, 1973, by a board-certified radiologist who interpreted the film as positive for CWP. A second reading by a radiologist confirmed this diagnosis. Nevertheless, a third reading by a board-certified radiologist and "B" reader[66] of x-rays was rendered at the behest of the Appeals Council and concluded that this film was negative for CWP, although it did disclose an enlarged heart abnormality.[67]

In addition, a general practitioner personally examined the claimant on May 26, 1973, for complaints of shortness of breath, coughing and chest pains on the left side. A physical examination yielded findings including inspiratory squeaks, bronchial breathing sounds and other concomitant abnormalities. Based on this physical examination, including the disputed chest x-ray film revealing hilar calcifications and increased nodularity in both lung fields, the physician diagnosed CWP, chronic bronchitis, and chronic airway disease, as well as hypertension, arrhythmia and cardiomegaly.[68]

In reversing the district court's denial of benefits, the Sixth Circuit court premised its finding of Miniard's entitlement to benefits on two grounds: first, Miniard qualified for the benefit of the in-

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Mathews, 557 F.2d 563, 568 (6th Cir. 1977).

63. 618 F.2d at 407.
64. *Id.*
65. *Id.*
66. *See* note 34 *supra.*
67. 618 F.2d at 407.
68. *Id.* at 408.

terim regulatory presumption;[69] and second, the rebuttable presumption afforded him by 30 U.S.C. § 921(c)(4).[70] This presumption arises where, notwithstanding the existence of an x-ray interpreted as negative for complicated pneumoconiosis, other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment in a miner with at least fifteen years of coal mine employment. Rebuttal is established by proof (a) that a miner does not or did not have CWP, or (b) that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in the coal mine.[71]

The court noted that the claimant qualified for the benefit of the interim presumption on the basis of the three positive readings of the May 26, 1973, x-ray notwithstanding the fact that this x-ray was subsequently re-read as negative.[72] In so holding, the court precisely paralleled the analysis it had rendered in *Dickson v. Califano,* which retroactively applied the Reform Act to afford entitlement on the basis of a single x-ray read by a board-certified radiologist as indicative of CWP coupled with other evidence of a pulmonary or lung disorder.[73] The medical evidence submitted by Miniard comported with these requirements: the May 26, 1973, x-ray was initially interpreted positive by a board-certified radiologist and the general practitioner's findings of chronic bronchitis and chronic obstructive airway disease certainly provided "other evidence . . . of a . . . pulmonary or respiratory impairment."[74]

On the basis of the subsequent negative interpretation of the May 26, 1973, x-ray, the Appeals Council[75] and the district court[76]

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69. *Id.* at 409-10. *See* notes 33-44 & accompanying text *supra.*

70. 30 U.S.C. § 921(c)(4) provides in relevant part:

> [I]f a minor was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such minor is totally disabled due to pneumoconiosis [CWP], or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis.

Id.

71. *Id.*

72. 618 F.2d at 410.

73. *Compare* 618 F.2d at 410 *with* 590 F.2d at 622. *See* Stephens, *supra* note 37. *But see* Moore v. Califano, 633 F.2d 727 & discussion of *Moore* at note 37 *supra.*

74. 618 F.2d at 408-09.

75. Record at 5, Miniard v. Califano, 618 F.2d 405 [hereinafter cited as *Miniard* Record].

76. Brief for Appellant at 27.

ruled that plaintiff had failed to establish the existence of CWP by x-ray evidence and thus the interim presumption could not be afforded. Further, both the Appeals Council[77] and the district court[78] gave weight to Miniard's election to leave mining employment after receiving a letter from his attorney indicating that the medical evidence supported his claim of CWP. Obviously, this fact was interpreted as diminishing Miniard's claim of total disability. The interim presumption, once afforded, can be rebutted only by demonstrating that the claimant is in fact doing his usual coal mine work or comparable and gainful work or other evidence establishes that the individual is able to do his usual coal mine work or comparable gainful work.[79]

On appeal, the Sixth Circuit Court of Appeals held that the Social Security Administration had failed to successfully rebut the interim presumption.[80] The court held that by his own testimony, Miniard had established that the work he was performing as of June 8, 1973, was not "his usual coal mine work" nor was it "comparable and gainful work"[81] since he was "unable to 'hold out' long enough to 'keep up' with his co-workers and that he was unable to perform his duties in the manner in which they should be performed and as he had performed them in the past."[82]

To support its finding that Miniard's poor performance prevented his latest work from being characterized as usual or comparable and gainful coal mine work, the court could have relied on prior holdings from the Third,[83] Fourth,[84] and Tenth[85] Circuits, not to mention its own prior holdings in *Farmer v. Mathews*[86] and *Farmer v. Weinberger*,[87] all of which validate Social Security Ruling 73-36. That Ruling provides that the interim presumption is not rebutted if the miner's employment is characterized by "spo-

77. *Miniard* Record at 5.
78. Brief for Appellant at 28.
79. *See* note 48 *supra*.
80. 618 F.2d at 410. *See* note 72 *supra*.
81. *See* note 48 *supra*.
82. 618 F.2d at 409.
83. Armstrong v. Califano, 599 F.2d 1282 (3d Cir. 1979).
84. Everly v. Califano, 582 F.2d 1352 (4th Cir. 1978); Collins v. Mathews, 547 F.2d 795 (4th Cir. 1976).
85. Hanna v. Califano, 579 F.2d 67 (10th Cir. 1978).
86. 584 F.2d 796 (6th Cir. 1978).
87. 519 F.2d 627 (6th Cir. 1975).

radic work, poor performance or marginal earnings."[88] Congress, in enacting the Black Lung Benefits Reform Act of 1977, codified this Ruling by providing that:

> . . . in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled.[89]

Rather than relying on the abundance of case authority to support its conclusion that Miniard's latest employment could not be characterized as usual, comparable or gainful, the court cited and retroactively applied the Reform Act's codification of the Ruling![90] The court thus buttressed the view adopted in *Dickson* that the provisions of the Reform Act should be retroactively applied to pending Part B cases.

Other Sixth Circuit decisions rendered during the same term as *Dickson* indicated the court's disinclination to retroactively apply the Reform Act.[91] On the strength of these decisions, the Social Security Administration petitioned the court for rehearing, arguing against retroactive application of the Reform Act.[92] The Sixth Circuit, without published opinion, denied the petition on May 12, 1980.[93] Thus *Miniard* affirms that the Sixth Circuit Court of Appeals will view pending Part B cases of living miners in light of the Reform Act notwithstanding contra authority, including its own prior decisions.[94]

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88. Social Security Ruling 73-36 (1973).

89. Reform Act, Pub. L. No. 95-239, § 2(c) (codified at 30 U.S.C. § 902(f)(1)(B)(ii) (Supp. III 1979)). As explained in the legislative history accompanying these amendments:

> [A] claim for benefits under part B may not be denied solely on the basis of employment as a miner if (1) the location of such employment has recently been changed to a mine area having a lower concentration of dust particles; (2) the nature of such employment has been changed so as to involve less rigorous work; or (3) the nature of such employment has been changed to employment which receives substantially less pay.

H.R. REP. No. 864, 95th Cong., 2d Sess. 2, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 275.

90. 618 F.2d at 409.

91. *See* Back v. Califano, 593 F.2d 758, 763 (6th Cir. 1979); Hill v. Califano, 592 F.2d 341, 346 (6th Cir. 1979), *citing* Treadway v. Califano, 584 F.2d 48 (4th Cir. 1978).

92. Petition for Rehearing at 4, Miniard v. Califano, 618 F.2d 405.

93. 618 F.2d 405.

94. *See* notes 91-92 & accompanying text *supra*. The application of various provisions of the Reform Act appears in part to be at the urging of Chief Judge Edwards, by virtue of his

The Sixth Circuit court also ruled that Miniard was entitled to the benefit of the rebuttable presumption of total disability due to CWP afforded by 30 U.S.C. section 921(c)(4) and the implementing regulations.[95] This ruling clarifies the methods of demonstrating entitlement to this presumption as expoused in *Ansel v. Weinberger*[96] and *Singleton v. Califano.*[97]

Ansel held that where this presumption has been afforded partly on the basis of an examining physician's statement that the claimant was totally disabled for coal mine employment, mere negative x-ray interpretations or non-qualifying ventilatory studies are not sufficient evidence to rebut it. As a consequence, once afforded on this basis, the presumption can be rebutted only by a medical opinion that the claimant does not have CWP.[98]

Singleton provides a corollary to *Ansel* holding that negative x-rays and pulmonary function studies, standing alone, do not suffice to deny a claimant the benefit of the presumption where a treating physician concludes that the claimant is permanently and totally disabled from coal mine employment due to chronic lung disease.[99] Thus, while negative test results alone can neither rebut the presumption nor deny its operation where it has been afforded on the basis of an opinion from an examining physician, a medical opinion based upon negative test results could suffice to preclude the operation of, or in the alternative rebut, this presumption.[100]

The general practitioner who examined Miniard on May 26, 1973, diagnosed conditions indicating respiratory or pulmonary impairment but did not render an opinion about the degree of claimant's disability, if any, resulting from such conditions. This fact and the subsequent negative re-reading of claimant's May 26, 1973, x-ray, coupled with Miniard's continued employment for more than three years after filing his claim, persuaded the ALJ and the

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having authored the opinion in *Dickson*, 544 F.2d 1345, and his participation on the panel in *Miniard. But see* Moore v. Califano, 633 F.2d 727 & the discussion of *Moore* at note 37 *supra.*

95. *See* 20 C.F.R. § 410.414(b) (1979) & text accompanying note 70 *supra.*

96. 529 F.2d 304 (6th Cir. 1976).

97. 591 F.2d 383 (6th Cir. 1979).

98. 529 F.2d at 310.

99. 591 F.2d at 385-86. Various district court opinions support this view. *See, e.g.,* Superak v. Califano, 450 F. Supp. 70, 77-78 (S.D.N.Y. 1978); Matney v. Califano, 444 F. Supp. 165, 168 (W.D. Va. 1978); Pike v. Mathews, 414 F. Supp. 848, 853 (E.D. Tenn. 1976).

100. *See* United States Steel Corp. v. Gray, 588 F.2d 1022, 1027 (5th Cir. 1979).

Appeals Council that Miniard had not demonstrated the existence of a totally disabling pulmonary or respiratory impairment and, accordingly, was not entitled to the benefit of the section 921(c)(4) presumption.[101] The district court affirmed these findings and distinguished *Ansel* where the claimant had been treated and hospitalized for a respiratory condition and the treating physician unequivocally stated that Ansel was totally disabled from a chronic respiratory or pulmonary disease.[102]

On appeal in the Sixth Circuit, the Social Security Administration again argued that *Ansel* was not controlling in the present case in light of the absence of an opinion on disability rendered by a treating physician.[103] Ample authority supported the contention of the Social Security Administration that a medical opinion respecting the degree of claimant's disability was necessary to invoke this presumption.[104] In spite of the absence of a medical opinion on disability, the appellate court held Miniard entitled to the benefit of the section 921(c)(4) presumption.[105]

As previously noted, the court cited 30 U.S.C. section 902(f)(1)(B)(ii), as amended by the Reform Act, for the proposition that Miniard's continued employment did not preclude a finding of total disability.[106] Furthermore, even in the absence of a medical opinion on disability, 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. . . ."[107] Finally, after presenting sufficient evidence, Miniard was entitled to the presumption having demonstrated in excess of 15 years of mining employment.[108]

Having afforded Miniard the benefit of the presumption, the court noted that it could only be rebutted by showing that the miner does not have CWP or that his respiratory or pulmonary

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101. *Miniard* Record at 5-6, 11-12.

102. Brief of Appellant at 27; *See Ansel*, 529 F.2d 304 at 305.

103. Brief of Defendant at 9.

104. In addition to *Ansel*, 529 F.2d 304, *see* Singleton v. Califano, 591 F.2d 383 (rebuttable presumption afforded partly on the basis of an examining physician's conclusion of total disability), and Barnette v. Califano, 585 F.2d 698, 699 (4th Cir. 1978) (absence of medical opinion on disability noted in denying the benefit of the presumption).

105. 618 F.2d at 409. For the relevant language of § 921(c)(4) see note 70 *supra*.

106. *See* text accompanying notes 67-68 *supra*.

107. 618 F.2d at 409.

108. *Id.*

impairment did not arise out of, or in connection with, employment in the coal mine. The only evidence tending to show that Miniard did *not* suffer from CWP consisted of negative x-rays which, standing alone, were insufficient to rebut the presumption. In addition, since there was no evidence that Miniard's impairment was a result of causes other than coal mine employment, rebuttal on that basis was also precluded.[109]

Philosophically, the court observed that "[t]he Act is remedial in nature and should be given a liberal construction. In the absence of *definitive medical conclusions* there is a clear need to resolve doubts in favor of the disabled miner or his survivors."[110] Accordingly, the opinion of the district court was reversed and the case remanded to the Secretary of Health, Education and Welfare (now, Health & Human Services) for an award of benefits.

In summary, *Miniard* greatly liberalizes the methods of demonstrating a living miner's entitlement to benefits. A living miner with at least fifteen years of coal mine employment can establish entitlement to benefits under the section 921(c)(4) presumption upon presenting a report from a treating physician indicating a respiratory or pulmonary impairment even where: first, x-rays are reread as negative for CWP; second, the physician does not offer an opinion respecting whether the claimant is disabled; and, third, no ventilatory studies are presented. Moreover, benefits may be awarded under the interim presumption by presenting a single x-ray read as positive for CWP by a board-certified or a board-eligible radiologist if coupled with other evidence of a pulmonary or respiratory impairment. To this extent, *Miniard* adds support to the rule espoused by the court in *Dickson.*

C. *Caraway v. Califano*

The evils resulting from overreliance on negative x-ray interpretations are no where better described than in *Caraway v. Califano,*[111] wherein the Sixth Circuit reversed the district court's denial of benefits and remanded for an award. The case also amplified the holdings of *Ansel v. Weinberger*[112] and *Singleton v.*

109. *Id. See* 20 C.F.R. § 410.414(c) (1979).
110. 618 F.2d at 410 (emphasis added).
111. 623 F.2d 7 (6th Cir. 1980).
112. 529 F.2d 304.

Califano[113] by illustrating the type of medical opinion that will be sufficient to rebut the section 921(c)(4) presumption where it has been afforded on the basis of findings by an examining physician.

Caraway filed his application for black lung benefits in 1970. After his claim had been denied, both initially and upon re-examination, by the Social Security Administration, Caraway requested a hearing before an ALJ.[114] At the hearing, Caraway proved underground mining employment in excess of fifteen years and testified that as a result of breathing difficulties and general weakness, he ceased mining employment in 1958. He further testified to the usual symptoms of CWP including smothering spells, gasps, wheezes, sleeping difficulties and chest pain. These symptoms were corroborated by Caraway's wife and next-door neighbor.[115]

Although the bulk of x-ray evidence submitted was negative for CWP, one physician interpreted an x-ray as positive for complicated CWP while another read an additional x-ray as positive for simple CWP.[116] Further, one ventilatory study had been conducted which, while indicative of a reduced ventilatory capacity, nevertheless failed to qualify Caraway under the interim regulatory presumption of entitlement.[117]

Notwithstanding these negative test results, the overwhelming weight of testimony furnished by treating and examining physicians supported Caraway's claim of entitlement to benefits. Dr. Porterfield, claimant's treating physician from 1965 to 1972, diagnosed CWP on the basis of numerous physical examinations and x-

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113. 591 F.2d 383.

114. 623 F.2d at 7.

115. *Id.* at 9.

116. *Id.* at 10. Although Caraway made no claim of entitlement on the basis of the interim presumption, under the court's ruling in *Dickson, see* text accompanying notes 35-36 *supra*, either of these x-ray interpretations would have entitled Caraway to benefits under the interim presumption in light of the abundance of "other evidence of a respiratory or pulmonary disorder." Dr. J.T. McMurray, who diagnosed complicated CWP, is a board-certified radiologist, and Dr. J.W. Kennard, who diagnosed simple CWP, is a board-certified radiologist and certified reader of coal miners' chest x-rays. *See* Administrative Record at 122, 131, Caraway v. Califano, 623 F.2d 7 [hereinafter cited as *Caraway* Record]. For a definition of the various radiological certification labels see 20 C.F.R. § 718.202(a)(1)(ii)(C-F) (1980).

117. 693 F.2d at 10. Although claimant's MVV (maximum voluntary ventilation) value fell within qualifying range, the FEV_1 (forced expiratory volume in one second) value exceeded the stated criteria. Both values must be within the qualifying range to establish entitlement to benefits under the interim presumption. *See* notes 11-12 *supra*.

rays and concluded that Caraway was unable to perform useful work. This report was rendered in January of 1973.[118] On June 5, 1973, an examining physician, Dr. Dickinson, concluded from chest x-rays and pulmonary capacity tests that Caraway was totally disablied from multiple problems and definitely had CWP; however, he declined to estimate the degree of total disability as a result of CWP.[119]

Further, in both 1974 and 1976, examining physicians reported that Caraway was totally disabled due to CWP. Dr. Lewis, who issued the 1976 report, further concluded that Caraway was totally disabled as a result of CWP on or before June 30, 1973.[120] Although neither the 1974 nor the 1976 examining physician's report conclusively established Caraway's disability on or before June 30, 1973,[121] the court noted that CWP is a progressive disease. Therefore, under standards announced in *Begley v. Mathews*,[122] the 1974 and 1976 reports constituted at least some evidence of Caraway's condition as of June 30, 1973.[123]

The only medical report tending to discount Caraway's claim of total disability from CWP was one rendered by a treating physician in July of 1973. While treating Caraway for chest pain, Dr. Rolston noted that x-rays revealed a lesion in the right lower lung and that breath sounds were very poor at the base of the right lung. At the request of the Social Security Administration, however, Dr. Rolston submitted a report regarding claimant's respiratory and cardiovascular systems a month later, in which he stated that "recent examinations have been completely unremarkable."[124]

On the basis of these reports, three of which concluded total disability due to CWP, it would appear axiomatic that Caraway was entitled to the benefit of the section 921(c)(4) presumption. The ALJ, however, clearly placed greater weight on the negative interpretations of Caraway's x-rays and the non-qualifying ventilatory study than on the reports from the examining physicians.[125] In

118. 693 F.2d at 9.
119. *Id.*
120. *Id.* at 10.
121. *See* text accompanying note 3 *supra.*
122. 544 F.2d 1345.
123. 623 F.2d at 11.
124. *Id.* at 9.
125. *See, e.g., Caraway* Record at 11-12.

weighing the evidence in this manner, the ALJ relied upon Social Security Ruling 73-37. That Ruling provides that where x-ray or ventilatory function tests fail to meet the medical criteria required for application of the interim presumption, there is an inference that the miner is not totally disabled.[126] Although the Court of Appeals for the Sixth Circuit has not invalidated Social Security Ruling 73-37,[127] it held in *Prokes v. Mathews*[128] that great care must be exercised in its application.[129] In *Caraway*, the ALJ construed the Ruling as allowing negative x-rays and ventilatory studies to override relevant positive evidence furnished by treating physicians, thus effectively preventing the claimant from utilizing the section 921(c)(4) rebuttable presumption.

The Appeals Council affirmed the findings of the ALJ, but perhaps mindful of *Prokes* and decisions from other circuits invalidating Social Security Ruling 73-37[130] specifically stated that its conclusion was not based upon "specific inferences of non-disability" arising "solely from the negative x-rays and ventilatory studies of record."[131] Notwithstanding this self-serving statement of objectivity, the Appeals Council applied the spirit if not the letter of Social Security Ruling 73-37 by simply discrediting the physical examina-

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126. Social Security Ruling 73-37 (1973). The Sixth Circuit first encountered this ruling in Prokes v. Mathews, 559 F.2d 1057 (6th Cir. 1977), a case in which the ALJ had applied the ruling, and based on a denial 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 1059. To this extent, *Caraway* is duplicative of *Prokes*. As the court in *Prokes* incisively noted, to interpret the ruling as allowing the exclusion of other relevant medical evidence whenever negative x-rays or pulmonary function studies are present is to convert the "inference" allowed by the ruling into a nonallowable presumption that the claimant is not disabled. *Id.* at 1061. Thus, *Prokes* held that "[t]o 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. The use of the ruling to limit the ability of a miner to establish entitlement to benefits by means of "other relevant evidence," however, constitutes error and renders the § 921(c)(4) rebuttable presumption a nullity. *Id.* While the Third Circuit court has also criticized Social Security Ruling 73-37, *see* Schaaf v. Mathews, 574 F.2d 157, 160 (3d Cir. 1978) and Gober v. Mathews, 574 F.2d 772, 778 (3d Cir. 1978), the Eighth Circuit court, followed recently by the Fourth Circuit court, has invalidated the ruling in its entirety. Hubbard v. Califano, 596 F.2d 623, 626 (4th Cir. 1979); Bozwich v. Mathews, 558 F.2d at 479-80.

127. *See* Singleton v. Califano, 591 F.2d at 385.

128. 559 F.2d 1057 (6th Cir. 1977).

129. *Id.* at 1061-62.

130. *See, e.g.*, cases cited in note 126 *supra*.

131. 623 F.2d at 11 n.4; *Caraway* Record at 176.

tions and relying instead on the negative x-rays in the record.[132] In *Caraway*, the Sixth Circuit court made no mention of Social Security Ruling 73-37, which presumably played no part in the Appeals Council's ruling.[133]

The Sixth Circuit held that the Appeals Council and the district court, in discrediting the reports of Caraway's examining physicians, violated the letter of 30 U.S.C. section 923(b) which provides that:

> In determining the validity of claims under this part [which part includes § 921(c)(4)], all relevant evidence shall be considered, including where relevant, medical tests such as blood gas studies, x-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, . . . and other supportive materials.[134]

Here, the greater weight of the evidence furnished by Caraway's treating physicians clearly established a totally disabling respiratory or pulmonary impairment, thus allowing the invocation of the section 921(c)(4) presumption.

Where the section 921(c)(4) presumption has been afforded in part on the basis of the medical opinion, the presumption can only be rebutted by a medical opinion that the claimant does not have CWP.[135] This holding of *Ansel v. Weinberger* was applied verbatim in *Caraway*.[136] The Social Security Administration's expert, Dr. Rolston, noted that "recent examinations [of Caraway] have been completely unremarkable."[137] In addition, he stated that Caraway exhibited very poor breath sounds at the base of the right lung[138] but made no statement that Caraway did *not* have CWP.[139] Therefore, within the precise letter of *Ansel*, the Social Security Administration failed to produce a medical opinion that Caraway did not have CWP and, accordingly, the judgment of the district court was vacated and the case remanded for an award of benefits.[140]

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132. *Id.*

133. By expressly denying any application of Social Security Ruling 73-37, methinks the Council doth protest too much!

134. 623 F.2d at 11, *citing* 30 U.S.C. § 923(b).

135. *See* text accompanying note 70 *supra*.

136. *Compare* 529 F.2d at 310 *with* 623 F.2d at 12.

137. 623 F.2d at 12.

138. Indeed, this is positive evidence of a pulmonary or respiratory impairment.

139. 623 F.2d at 12.

140. *Id.*

Judge Kennedy, in dissent, would have held that Dr. Rolston's report constituted substantial evidence to support the Appeals Council and district court's finding that the claimant was not totally disabled from a pulmonary or respiratory impairment in accordance with the Sixth Circuit's decision in *Adkins v. Weinberger*.[141] *Adkins* denied benefits to a widow attempting to establish entitlement after her husband died while still employed in the coal mines. The court in *Adkins*, however, was presented with medical evidence that the deceased miner had been treated for coronary insufficiency for two or three years prior to death and his family physician attributed the cause of death to acute coronary thrombosis.[142] Thus, *Adkins* is clearly distinguishable from *Caraway* wherein the claimant's medical history indicated many years of treatment for respiratory impairments. Moreover, it seems inconceivable that the findings of one physician could constitute "substantial evidence"[143] of non-entitlement to the section 921(c)(4) presumption in the face of statements from four treating physicians, one of whom examined the claimant four times a year over a period of seven years,[144] demonstrating entitlement to the presumption. In accordance with the remedial nature of the federal black lung benefits program, as documented in legislative history,[145] the Sixth Circuit has long since abandoned the restrictive view espoused by Judge Kennedy.[146]

The majority holding in *Caraway* strikes another blow at the effect, if not the letter, of Social Security Ruling 73-37 and buttresses the view taken by *Ansel* that rebuttal evidence must comply with the precise letter of section 921(c)(4). As such, rebuttal evidence must contain a medical opinion as to the nonexistence of CWP where a medical opinion confirming CWP has invoked the presumption.

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141. *Id.* at 13 (Kennedy, J., dissenting), *citing* Adkins v. Weinberger, 536 F.2d 113 (6th Cir. 1976).

142. 536 F.2d 113.

143. *See* note 25 *supra*.

144. 623 F.2d at 9.

145. *See* S. REP. No. 97-743, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2305-07, 2312-15.

146. *See, e.g.*, Morris v. Mathews, 557 F.2d at 570, wherein the court stated "[b]oth the Department of Health, Education, and Welfare and the United States Courts are obligated to follow this act so as to give realistic and not niggardly effect to the stated [C]ongressional purposes." *Id.*

D. *Conn v. Harris*

Conn v. Harris[147] is duplicative of *Caraway* in that negative x-ray readings and non-qualifying ventilatory studies received more probative credit than statements furnished by examining physicians.[148]

Conn, who filed for benefits on September 1, 1970, established by his testimony more than fifteen years of coal mine employment as well as shortness of breath, coughing, wheezing and pain upon bending or stooping. The only two physicians who examined the claimant, both of whom were certified readers of coal miners x-rays, diagnosed simple CWP on the basis of x-ray examinations.[149] One of these physicians, Dr. Varney, after a physical examination and x-ray on April 9, 1973, recommended that Conn not return to underground coal mining.[150] The only evidence militating for a finding against the existence of a totally disabling respiratory or pulmonary impairment consisted of negative pulmonary function studies and negative x-ray readings rendered by non-examining physicians.[151]

Consistent with the approach taken in *Singleton* and *Ansel*[152] the court held that these negative test results, standing alone, were not sufficient to prevent the section 921(c)(4) presumption from arising nor could they serve to rebut it.[153] As in *Caraway,* there was no medical opinion in the record that the claimant did not suffer from CWP.[154] Accordingly, Conn was held entitled to benefits under section 921(c)(4).[155]

The Secretary of Health, Education & Welfare, in a supplemental brief, vigorously urged the court to remand for an opportunity to rebut the presumption if it determined that the presumption

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147. 621 F.2d 228 (6th Cir. 1980).

148. *Compare* 623 F.2d at 11 *with* 621 F.2d at 229.

149. 621 F.2d at 229. Either of these x-ray interpretations would have entitled Conn to the interim presumption under *Dickson. See* note 116 *supra.*

150. 621 F.2d at 229.

151. *Id.*

152. *See* text accompanying notes 96-97 *supra.*

153. 621 F.2d at 229.

154. *Id.* at 230. *Conn* is even a stronger case than *Caraway* in this regard since the only medical opinions by examining physicians in *Conn* were wholly supportive of his claim of entitlement. No partially negative report such as that of Dr. Ralston in *Caraway* was presented.

155. 621 F.2d at 230.

should be afforded, rather than remanding for a award of benefits.[156] The court, citing numerous authorities, declined this option and directed an award of benefits.[157] Indeed, a remand in order to give the Secretary another opportunity to rebut the presumption would have been futile where, under *Ansel,* as interpreted in *Miniard,*[158] the record was devoid of a medical opinion stating that Conn did not have CWP.[159]

E. *Sullivan v. Califano*

Sullivan v. Califano[160] is illustrative of the evidentiary obstacles facing a miner with less than fifteen years of coal mine employment who attempts to prove total disability due to CWP. *Sullivan* is the only decision emanating from the Sixth Circuit this term which affirms a denial of benefits as a result of the claimant's failure to establish the existence of CWP.

Sullivan filed his claim for Part B benefits alleging total disability due to CWP as a result of fifteen years of coal mine employment. The ALJ found Sullivan's claim of fifteen years employment unsupported by the documentary evidence of record and determined that Sullivan had worked only ten years in the mines.[161] This finding prevented Sullivan from being able to invoke the section 921(c)(4) presumption which is premised upon fifteen years of coal mine employment.[162]

Sullivan, his wife, and son, all testified to his inability to sleep due to breathing difficulties, constant shortness of breath, and productive cough. Further, medical evidence in support of Sullivan's

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156. *Id.*

157. *Id.*

158. *See* text accompanying notes 106-09 *supra.*

159. Curiously, the court stated "[b]ecause we order the award of benefits, we need not decide the retroactivity of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, which establishes a more lenient burden of proof for claimants." 621 F.2d at 230 n.2. The court was apparently unwilling at this juncture to reconcile the inconsistent approaches it had taken in past cases respecting retroactivity of the Reform Act. *Compare Dickson,* 590 F.2d 616 (applying the Reform Act retroactively) *with* Hill v. Califano, 592 F.2d 341 (decided without reference to the Reform Act).

160. 617 F.2d 1215 (6th Cir. 1980).

161. *Id.* Records produced from the Social Security Administration failed to demonstrate 60 calendar quarters of coal mine employment. Administrative Record at 73-76, Sullivan v. Califano, 617 F.2d 1215 [hereinafter cited as *Sullivan* Record].

162. *See* text accompanying note 70 *supra.*

claim consisted of six readings of three chest x-rays, two ventilatory studies, a physical examination, an extensive report of the treating physician and a paper review of the two ventilatory studies.[163]

As a result of the inconclusive x-ray readings, Sullivan made no attempt to establish entitlement to the interim presumption on the basis of x-rays. The vetilatory studies also produced mixed results. The first, conducted in January, 1973, failed to produce values low enough to qualify for the interim presumption; however, a second test, conducted in July, 1975, did yield values sufficient to qualify for the interim presumption. The appellate court agreed with Sullivan's contention that this latter study, even though made approximately two years after the date on which disability must be shown (June 30, 1973), would constitute at least some evidence of Sullivan's condition prior to June 30, 1973.[164] The results of this last study were reviewed, at the request of the Appeals Council, by a pulmonary specialist who determined that such studies showed qualifying values only because Sullivan had failed to expend the maximum breathing effort during the studies.[165] As a result, the court determined that substantial evidence supported the ALJ's decision that the ventilatory studies were insufficient to establish Sullivan's entitlement to benefits under the interim presumption.

Although Sullivan's coal mine employment was of insufficient duration to afford him the benefit of the section 921(c)(4) presumption, the court noted that he could nevertheless demonstrate entitlement if "other relevant evidence" established the existence of a totally disabling chronic respiratory or pulmonary impairment that arose out of coal mine employment.[166] To support his claim of entitlement on this basis, Sullivan submitted the opinion of his treating physician, rendered in 1971, which stated that he was disabled due to several conditions, one of which was chronic obstructive lung disease. He also proffered the opinion of the physician who had conducted the 1975 ventilatory study which stated that Sullivan suffered from a "mild but definite obstructive pulmonary

163. 617 F.2d at 1216.

164. *Id., citing* Begley v. Mathews, 544 F.2d 1345.

165. 617 F.2d at 1216. It should be noted that 30 U.S.C. § 923(b), as amended by the Reform Act, does *not* prohibit re-reading ventilatory studies.

166. 617 F.2d at 1216, *citing* 20 C.F.R. § 410.414(c) (1979).

disease" as of June 30, 1973.[167] The court presumably afforded this opinion little weight since it was in part based on the ventilatory study which was subsequently discredited.[168]

In addition, after a thorough physical examination which noted clear lungs and no signs of congestion, an examining physician, Dr. Fleming, concluded in March, 1973, that Sullivan had "no evidence of a chronic respiratory or pulmonary disease that would prevent coal mine work."[169] As a result, the Social Security Administration determined that the negative ventilatory study of January, 1973, and this March, 1973, opinion, constituted better evidence of Sullivan's condition as of June 30, 1973, than did the 1971 and 1975 physicians' opinions. Since the March, 1973, opinion was nearer in time to the date upon which disability must be determined than was the 1971 opinion, and had not been discredited as had the 1975 opinion, the 1973 opinion constituted substantial evidence upon which to base the finding of non-entitlement to benefits. Accordingly, the judgment of the district court denying benefits was affirmed.[170] Thus *Sullivan,* when compared with the cases previously discussed herein, demonstrates that the miner with fewer than fifteen years of coal mine employment must prove his claim for benefits under the Act with the aid of fewer statutory and regulatory presumptions of entitlement than are available to miners with lengthier coal mine employment.

Conclusion

The black lung decisions rendered by the United States Sixth Circuit Court of Appeals during the recent survey year see the court clarifying the degree and type of medical evidence necessary to invoke the section 921(c)(4) presumption. Further, the court has more fully detailed the language that must be contained in a medical opinion that will be sufficient to rebut this presumption. While providing meaningful explanations in this area, it is submitted that the court's recent decisions create confusion regarding whether certain provisions of the Reform Act will be retroactively applied to pending Part B cases. Although the court has yet to render a defin-

167. *Id.*
168. *See* text accompanying note 166 *supra.*
169. 617 F.2d at 1216; *Sullivan* Record at 6-7.
170. 617 F.2d at 1216-17.

itive statement on the propriety of such retroactive application, it has utilized provisions of the Reform Act in certain cases while declining to do so in others which are seemingly indistinguishable on their facts. Retroactive application of the Reform Act is highly suspect in light of its legislative history,[171] and thus the court should modify the holdings of *Dickson* and *Miniard* in this regard. *Moore v. Califano,*[172] presently pending before the court, affords an opportunity to do just that.

Throughout its decisions, one sees the court as well as federal agencies wrestling with inconclusive x-ray readings and the evidentiary effect they should be afforded. As should now be obvious, any number of trained x-ray readers can in good faith reach different conclusions as to whether a given x-ray discloses simple CWP. Consequently, except in the case of complicated CWP which is more easily diagnosed by x-ray, the existing black lung legislation

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171. *See, e.g.,* Yakim v. Califano, 587 F.2d 149, wherein the court stated:

> There is evidence in the legislative history, however, supporting the premise that Congress decided against having the Act apply to cases presently pending in the courts. The original house bill, H.R. 4544, 95th Cong., 1st Sess. §§ 8, 16 (1977), contained a provision mandating retroactive application of amendments affecting certain evidentiary matters. In disapproving the Department of Health, Education and Welfare's practice of rereading x-rays, terming it "second-guessing," the Committee report stated, "[t]he Committee therefore intends that this provision be retroactively applied to denied and pending claims as well as to new ones . . . . Because of administrative omissions in this regard, the amendment is made retroactive to December 30, 1969 . . . ." Significantly, this provision was removed from the final bill by the Senate-House Conference Committee. The Conference Committee report made no direct reference to the deletion, simply stating that "[t]he conference substitute provides that the amendments will take effect on the date of enactment . . . ." Nevertheless, the striking of the retroactivity provision weighs heavily against application of the evidentiary amendments to pending cases.

Id. at 150 (citations omitted). The "striking of the retroactivity provision" by the Senate-House Conference Committee was not considered by the court in *Dickson,* 590 F.2d at 623. Other courts have held that the statutory scheme or the legislative history indicate the amendments should not be applied by the courts in cases which were decided by the Secretary before the statute was passed. *See* Moore v. Harris, 623 F.2d 908 (4th Cir. 1980); Robertson v. Califano, 601 F.2d 1276, 1279 & 1279 n.2 (4th Cir. 1979) (denied benefits but claimant may reapply to the agency under 1977 Reform Act); Beck v. Mathews, 601 F.2d 376, 379 n.4 (9th Cir. 1978) (refused to remand in light of the 1977 Reform Act; claimant will have to reapply); Freeman v. Califano, 600 F.2d 1057, 1060 (5th Cir. 1979); Yakim v. Califano, 587 F.2d at 150-51; Treadway v. Califano, 584 F.2d at 49-52; Ohler v. Secretary of HEW, 583 F.2d 501, 506 (10th Cir. 1978) (did not apply 1977 Reform Act; claimant may reapply under it).

172. Moore v. Califano, 633 F.2d 727, decided subsequent to the drafting of this article, will be analyzed in detail in the 1982 DET. COLL. L. REV. Survey Issue.

should be amended to prohibit entitlement to benefits on the basis of x-ray evidence alone.

As cases decided by the Benefits Review Board begin to be reviewed by the court further amplification of existing principles, and hopefully, resolution of confusion, will occur.