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V. Employment & Labor Law

The 1909 Act and preceding legislation demanded strict compliance with the statutory copyright notice requirement.[164] The relaxed standards of the 1976 Act reflects the increasingly relaxed judicial interpretation of the 1909 Act.[165] The 1976 Act further reflects less concern with the threat of monopoly resulting from copyright protection and more concern for creativity and individual achievement.[166] With the relaxed notice requirements incorporated into the 1976 Act and the corresponding judicial sensitivity to the underlying goal of alerting the innocent infringer, the unit publication doctrine will become a more frequently applied theory, and as a consequence of the Fourth Circuit's decision in *Koontz v. Jaffarian*, the federal courts will refer to the doctrine by name.[167]

FAYE L. FERGUSON

V. EMPLOYMENT & LABOR LAW

A. Holmes v. Bevilacqua: Establishing a Prima Facie Case of Discriminatory Promotion Practices

Congress enacted Title VII of the Civil Rights Act of 1964 (Title VII)[1]

164. *See supra* notes 15-18 and accompanying text (discussion of strict judicial application of statutory notice requirement prior to 1909 Act).

165. *See supra* note 2 and accompanying text (discussion of modifications in statutory notice provisions); *supra* notes 22-115 and accompanying text (cases illustrating lenient construction of 1909 Act).

166. *See supra* notes 153-63 and accompanying text (discussing policy underlying statutory notice requirement).

167. *See supra* notes 22-115 and accompanying text (review of federal courts' use of equitable principles to relax statutory notice requirements); *supra* notes 10-14 and accompanying text (discussion of evolution of statutory notice requirement); *supra* note 8 and accompanying text (naming of unit publication doctrine attributable to Fourth Circuit in *Koontz*).

1. Civil Rights Act of 1964, tit. VII, Pub L. No. 88-352, 78 Stat. 241 (1964)(codified at 42 U.S.C. §§ 1981-2000h-6 (1982)). Congress enacted Title VII to give employees equal employment opportunities by removing barriers that favor certain identifiable groups of white employees over other employees. H.R. 7152, 88th Cong., 2d Sess., 110 CONG. REC. 7247 (1964). By enacting Title VII, Congress did not intend to guarantee a job to every person regardless of qualifications. *Id.* at 7247. Title VII does not require an employer to hire an employee simply because the employee is a member of a protected class. *Id.* Rather, Title VII protects an employer's right to require any prospective employee, who is or is not a member of a protected class, to meet the employer's applicable job qualifications. *Id.* Indeed, Title

to achieve equality in the employment arena.[2] Title VII prohibits an employer[3] from discriminating against an individual based on race, color, religion, sex, or national origin.[4] Although Title VII prohibits discriminatory employment practices, a plaintiff alleging employment discrimination bears the burden of establishing a prima facie case by showing that an employer treated the plaintiff less favorably because of the employee'sd d race, color, religion, sex, or national origin.[5] Once the plaintiff establishes a prima facie

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VII's purpose is to promote employment based on an employee's job qualifications rather than on the basis of race or color. *Id.*

2. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241; *see* McDonnell Douglas v. Green, 411 U.S. 792, 801 (1973). In McDonnell Douglas v. Green, the United States Supreme Court stated that Congress' purpose in enacting Title VII was to ease a plaintiff's burden of establishing a prima facie case of racial employment discrimination. *McDonnell Douglas*, 411 U.S. at 801; *see* Fekete v. Steel Corp., 424 F.2d 331, 336 (3d Cir. 1970)(pointing out purpose of Title VII was to allow plaintiff to establish prima facie case without difficulty). In enacting Title VII, Congress found that by not allowing an employer to consider the immutable characteristics of an employee in the employment decision, an employer would evaluate prospective employees on permissible criteria. *See* H.R. 7152, 88th Cong., 2d Sess., 110 CONG. REC. 7247 (discussing purpose of Title VII).

3. *See* 42 U.S.C. § 2000e(b)(1976 & Supp. 1981)(definition of employer). Title VII imposes the same standards of compliance on public and private employers. *See* Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977)(Congress intended equal treatment of public and private employers); *see also* H.R. REP. No. 238, 92nd Cong., 2d Sess. 1, *reprinted in* 1972 *U.S.Code Cong. & Ad. News* 2137 (Title VII applies equally to public and private employers). Title VII defines public employers as persons engaged in any activity, business or industry in commerce or in a labor dispute would hinder or obstruct commerce. *Id.* Title VII defines private employers as any person engaged in any industry affecting commerce that employs 15 or more people for 20 or more weeks in the current or proceeding year. *Id.* Under Title VII, private employers do not include the United States, corporations wholly owned by the United States, any department or agency of the District of Columbia, Indian tribes, or tax exempt private membership clubs. *Id.*

4. *See* 42 U.S.C. §2000e-2(a)(prohibiting certain discriminatory considerations). Congress granted the Equal Employment Opportunity Commission (EEOC) the power to prohibit discrimination by allowing the EEOC to bring a civil action against an employer or to negotiate a settlement between the employer and the applicant. *See* 42 U.S.C. §2000e-4(f)(c)(1970), *amended by*, 42 U.S.C. § 2000e-5 (1976 & Supp V 1981). Congress amended Title VII in 1972 to enable the EEOC more effectively to enforce Title VII. *See* H.R. REP. No. 238, 92nd Cong., 1st Sess. 2, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2138 (1972 amendment increasing enforcement powers). To bring a civil action against an employer under Title VII, a claimant initially must file a complaint with the EEOC within 180 days of the alleged discrimination. 42 U.S.C. § 2000e-5(e). The EEOC must give notice to the employer of the alleged discriminatory practice within ten days of the filing date. *Id.* The EEOC will conduct a preliminary investigation to determine whether reasonable cause exists to believe that the charge was true. *Id.* If the EEOC determines that no reasonable cause exists, the EEOC will dismiss the action and notify the charging party and the employer of the dismissal. *Id.* Upon notification of dismissal, the charging party may then bring the Title VII claim against the employer within 90 days in federal court. *Id.* at § 2000e-(f)(1). Conversely, if the EEOC finds reasonable cause to believe that the charged employer engaged in discriminatory practices, the EEOC will attempt to negotiate a settlement between the parties. *Id.* at § 2000e-5(b). If the EEOC is unable to negotiate a settlement, the EEOC will bring a civil action against the charged employer. *Id.* at § 2000e(f)(1).

5. *See McDonnell Douglas*, 411 U.S. at 802. Employment practices can be discriminatory in several ways. *Id.* at 802-03. Disparate treatment is one form of employment discrimination.

case of employment discrimination, the burden shifts to the employer to articulate legitimate, nondiscriminatory reasons for the employee's rejection.[6] If the employer demonstrates that there existed nondiscriminatory reasons for the employment action, the burden shifts back to the plaintiff to show that the employer's explanation for the employment action was a pretext for a racially motivated decision.[7] Because of the difficulty of producing direct or indirect evidence to establish a prima facie case of employment discrimination, plaintiffs in the early cases under Title VII failed to meet their initial prima facie burden.[8]

International Bhd. v. United States, 431 U.S. at 335-36 n.15 (1977). Disparate treatment occurs when an employer treats an individual less favorably because of the individual's membership in a protected class. *Id.* For example, disparate treatment occurs when an employer refuses to hire an applicant who is otherwise qualified, because of the applicant's membership in a protected class. *Id.*; *see* Akins v. Central Bell Tel. Co., 744 F.2d 1133, 1135 (disparate treatment occurs if employer treats applicant less favorably because of applicant's membership in protected class). Disparate impact is another type of discrimination. *International Bhd.*, 431 U.S. at 335. In contrast, disparate impact occurs when an employment practice that is neutral on its face discriminates in practice against a protected class. *Id.* For example, disparate impact occurs when an employment practice , such as employee testing, operates to eliminate members of a protected class. *See* Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

6. *See* McDonnell Douglas v. Green, 411 U.S. at 802 (discussing effects of plaintiff satisfying burden of establishing prima facia case); *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981)(employer only required to articulate reason for employment action which creates question of fact and need not establish by preponderance of evidence that articulated reason was true motive for employer's action); Board of Trustees of Keene State College v. Sweeny, 439 U.S. 24 (1978)(employer only must articulate legitimate, nondiscriminatory reason for employment action and need not prove lack of discriminatory motive); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-76 (1978) (employer's burden is merely to articulate legitimate considerations for employment decision); *see, e.g.*, Morrison v. Booth, 763 F.2d 1366, 1372 (D.C. Cir.1985)(disciplinary problems constituted legitimate reason for discharge of black employee); Dybczak v. Tuskegee Inst., 737 F.2d 1524, 1529-30 (11th Cir.1984)(inability to fulfill contractual responsibility of employment is legitimate nondiscriminatory reason for discharge of employee) *cert. denied*, 469 U.S. 1211 (1985); Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1308 (8th Cir.1983)(poor work record is legitimate, nondiscriminatory reason for refusal to promote).

7. *See Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. at 253 (plaintiff has burden of rebutting employer's articulation of legitimate, nondiscriminatory reason for not hiring plaintiff). A plaintiff will win or lose most discriminatory employment practice claims on the third stage of the burden allocation scheme which requires the plaintiff to establish that the employer's articulated reason for the employment action is, in fact, a pretext. *See* Schlei, EMPLOYMENT PRACTICE DISCRIMINATION LAW, 14 (2d ed. 1983)(discussing allocation of burden of proof in disparate treatment cases). A plaintiff may establish that an employer's proffered reason for the employment action is a pretext by direct evidence, statistical evidence, or comparative evidence. *Id.*; *see* Slack v. Havins, 11 F.E.P. 27, 28 (S.D.Cal.1973) (evidence of discrimination lacking); Martin v. Chrysler Corp., 10 F.E.P. 329, 330 (E.D. Mich. 1974)(comparative evidence of discrimination lacking between black and white workers).

8. *See* 42 U.S.C. § 1981 (1964)(prohibiting discriminatory employment practices). The United States Supreme Court has long realized the difficulty plaintiffs have in showing that an employer treated the plaintiff less favorably because of the plaintiff's membership in a protected class. *McDonnell Douglas*, 411 U.S. at 802. *See, e.g.*, Dothard v. Rawlinson, 433

Responding to the difficulty in establishing a prima facie case under Title VII, the United States Supreme Court in *McDonnell Douglas v. Green*,[9] created a framework for plaintiffs to establish a prima facie case of racial employment discrimination.[10] Establishing a prima facie case under the

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U.S. 321, 328-337 (1977)(discussing Title VII claim of discriminatory employment because of sex); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88-9(1973)(discussing Title VII claim of discriminatory employment because of national origin); *McDonnell Douglas*, 411 U.S. 792, 801-02 (1973)(discussing Title VII claim of discriminatory employment because of race). The Supreme Court in *McDonnell Douglas* attempted to ease the plaintiff's burden by allowing the plaintiff to satisfy four tests which would establish a prima facie case of employment discrimination. *Id.* A plaintiff can also establish a prima facie case of employment discrimination by direct or indirect evidence. *McDonnell Douglas*, 411 U.S. at 801. Direct evidence of an employer's use of impermissible racial considerations in an employment decision includes bigoted or otherwise discriminatory statements made by the employer. *Id.* Direct or indirect evidence, however, is seldom available. *Id.*; *see also* Gates v. Georgia-Pacific Corp., 326 F.Supp. 397, 399 (D. Ore. 1970)(direct evidence of an employer's discriminatory motive is seldom available and circumstantial evidence may establish prima facie case) *aff'd*, 492 F.2d 292 (9th Cir. 1974). Direct evidence of an employer's discriminatory motive, however, often is available in cases involving alleged sexual discrimination. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239,258 (3d Cir. 1975)(describing direct evidence of gender discrimination in employment practices), *cert. denied*, 421 U.S. 1011 (1975). Direct evidence of an employer's discriminatory motive is also often available in cases involving age discrimination. *See* Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 821-22 (5th Cir. 1972)(interview notes requested employee age fall within certain range). If, however, direct or indirect evidence of employment discrimination is available, a plaintiff cannot use the *McDonnell Douglas* test to establish a prima facie case of employment discrimination. Trans World Airlines v. Thurston, 105 S.Ct. 613,622 (1985).

9. 411 U.S. 792 (1973).

10. McDonnell Douglas v. Green, 411 U.S. 792, 794-96 (1973). In *McDonnell Douglas*, the plaintiff, a black employee, worked for McDonnell Douglas until McDonnell Douglas fired him from work because of a general reduction in the work force. *McDonnell Douglas*, 411 U.S. at 794. During the period of his unemployment, the plaintiff engaged in an illegal "stall in," in which the plaintiff blocked the front gates of the McDonnell Douglas factory, and a "lock in," in which the plaintiff locked McDonnell Douglas employees into a building. *Id.* at 794-95. The plaintiff engaged in the "stall in" and "lock in" tactics because of his belief that the layoff was racially motivated. *Id.* at 794. When McDonnell Douglas decided to rehire many of the employees that McDonnell Douglas previously had laid off, McDonnell Douglas refused to rehire the plaintiff because the plaintiff had participated in the illegal "stall in" and "lock in" activities. *Id.* at 796. The plaintiff sued McDonnell Douglas claiming that McDonnell Douglas did not rehire the plaintiff because of his race and involvement in civil rights activities. Green v. McDonnell Douglas, 390 F.Supp 501, 502 (E.D.Missouri, 1975). The district court dismissed the plaintiff's discriminatory hiring practice claim because the EEOC found no evidence of discrimination. *Id.* at 502. The district court found that McDonnell Douglas's refusal to rehire the plaintiff was based solely on the plaintiff's participation in the illegal demonstrations and not on the plaintiff's legitimate civil rights activities. *Id.* at 502-03 The district court concluded that Title VII did not protect employees against illegal activities such as the 'stall in" and 'lock in' demonstrations. *Id.* The defendant appealed. McDonnell Douglas v. Green, 774 F.2d 636, 637. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's holding that unlawful demonstrations were not protected activities under Title VII, but reversed the dismissal of the plaintiff's claim relating to discriminatory hiring practices. *Id.* at 638-39. The Eighth Circuit in *McDonnell Douglas* held that a prior EEOC determination of nondiscrimination did not bar the plaintiff from

McDonnell Douglas framework creates a rebuttable presumption that the employer used impermissible racial considerations in his employment decision.[11] The *McDonnell Douglas* framework establishes four tests that a plaintiff must pass to meet the initial prima facie burden in an employment discrimination case.[12] The first prong of the *McDonnell Douglas* test requires the plaintiff to show that he is a member of a protected class.[13] The second and third prongs of the *McDonnell Douglas* test require the plaintiff to show that he applied and was qualified for the available position.[14] Under the fourth prong, the open position requirement, the plaintiff must show that after the employer rejected the plaintiff's application, the employer continued to accept applications from other candidates for the open position.[15]

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bringing the discriminatory claim in federal court. *Id.* at 639. To clarify the standards applicable to establishing a prima facie case of employment discrimination, the United States Supreme Court granted certiorari. McDonnell Douglas v. Green, 411 U.S. 792, 798. The Supreme Court noted that the critical issue concerned the order and allocation of proof in a private, individual suit alleging employment discrimination. *Id.* at 800. The Supreme Court, therefore, formulated a test for establishing a prima facie case of employment discrimination. *Id.* at 802. Under the *McDonnell Douglas* test, the United States Supreme Court allowed the plaintiff to demonstrate that McDonnell Douglas's reason for refusing to rehire the plaintiff was merely a pretext for discriminatory employment practices. *Id.* at 807; *see also infra* notes 12-15 and accompanying text (discussing requirements of prima facie case of racial employment discrimination under *McDonnell Douglas*).

11. *See McDonnell Douglas*, 411 U.S. at 802 (describing effect of establishing prima facie case under *McDonnell Douglas* framework).

12. *See id.* (establishing four requirements of prima facie case if employee cannot prove employment discrimination by direct or indirect evidence); *infra* notes 13-15 and accompanying text (discussing how plaintiff satisfies *McDonnell Douglas* requirements).

13. *McDonnell Douglas*, 411 U.S. at 802; *see* 42 U.S.C. §1981 (discussing extent of Title VII protection); *supra* note 8 accompanying text (Title VII protects people who are members of certain identifiable classes). The plaintiff in *McDonnell Douglas* was a member of a protected class because he was black. *McDonnell Douglas*, 411 U.S. at 801; *see* Mitchel v. Baldridge, 759 F.2d 80,81 (D.C.Cir. 1985) (plaintiff satisfied first requirement of *McDonnell Douglas* test because he was both black and Hispanic); Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1306 (8th Cir. 1984) (plaintiff satisfied first requirement of *McDonnell Douglas* test because plaintiff was black); Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989,991 (8th Cir. 1984)(plaintiff satisfied first requirement of *McDonnell Douglas* test because plaintiff was black).

14. *See McDonnell Douglas*, 411 U.S. at 802 (discussing requirements of establishing prima facie case of racial employment discrimination). The plaintiff in *McDonnell Douglas* satisfied the second and third prongs of a prima facie case by showing that McDonnell Douglas sought mechanics and that the plaintiff applied, and was qualified for a position as a mechanic. *Id.*; *see* Mitchell v. Baldridge, 759 F.2d 80, 81 (plaintiff satisfied second and third prongs of *McDonnell Douglas* by showing he applied and was qualified for the position of computer systems analyst); Johnson v. Yellow Freight Sys.Inc., 734 F.2d at 1307 (plaintiff satisfied second and third prongs of *McDonnell Douglas* by showing he applied and was qualified for labor position); Muldrew v. Anheuser-Busch, Inc., 728 F.2d at 991 (same).

15. *See McDonnell Douglas*, 411 U.S. at 802 (discussing requirements of establishing prima facie case of racial employment discrimination). The plaintiff in *McDonnell Douglas* satisfied the fourth prong by showing that the position remained open while McDonnell Douglas continued to search for mechanics after the plaintiff's rejection. *Id.*; *see, e.g.*, Mitchell

The United States Court of Appeals for the Fourth Circuit in *Holmes v. Bevilacqua*,[16] sitting en banc, recently deviated from traditional standards by modifying the open position prong of the *McDonnell Douglas* test. In *Holmes v. Bevilacqua* the Fourth Circuit found that a qualified applicant seeking to establish a prima facie case of racial employment discrimination under *McDonnell Douglas* cannot satisfy the open position prong in situations in which the employer has filled the position.[17] The Fourth Circuit in *Holmes* decided that in situations in which the employer has filled the position, the plaintiff, after satisfying the first three prongs of *McDonnell Douglas*, must present additional evidence of the employer's use of impermissible racial considerations to establish a prima facie case.[18]

In *Holmes*, Holmes, a black man, failed to receive a desired promotion from the position of Assistant Commissioner to the position of Deputy Commissioner of the Commonwealth of Virginia Department of Mental Health and Mental Retardation.[19] In spite of Holmes' superior qualifications, Joseph J. Bevilacqua, Commissioner of Mental Health and Mental Retardation, hired Howard Cullum, a white man, to fill the vacant Deputy Commissioner's position.[20] Claiming that Bevilacqua unlawfully had denied the promotion to Holmes because of Holmes' race in violation of Title VII, Holmes filed suit against Bevilacqua, individually and in Bevilacqua's official capacity.[21] Rejecting the Title VII claim, the district court dismissed Holmes'

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v. Baldridge, 759 F.2d 80,85 (1985) (plaintiff satisfied fourth requirement of *McDonnell Douglas* by showing position remained open after employer rejected plaintiff); Johnson v. Yellow Freight Sys. Inc., 734 F.2d 1304 (same); Muldrew v. Anheuser-Busch,Inc., 728 F.2d 989 (same).

16. 390 F.Supp. 501 (E.D. Missouri), *rev'd* 774 F.2d 636 (1985), *rev'd on rehearing*, 41 F.E.P. 43 (4th Cir.1986)(en banc).

17. *Holmes*, 41 F.E.P. at 47.

18. *Id.*

19. 774 F.2d 636, 637-38 (4th Cir. 1985). In *Holmes*, many applicants applied for the position of deputy commissioner *Id.* at 638. The Mental Health and Mental Retardation Department found that five applicants, including Holmes and Cullum were qualified. *Id.* The Department rated Holmes the third highest qualified applicant. *Id.* The Department rated Cullum the fifth highest qualified applicant. *Id.* Bevilacqua and the employee relations coordinator interviewed all five applicants. *Id.* Bevilacqua and the employee relations coordinator asked all five applicants the same four questions. *Id.* Bevilacqua, however, did not justify Cullum's promotion based on the four questions asked at the interview. *Id.* Bevilacqua justified his choice of Cullum because of Cullum's skill and experience in dealing with municipalities and local governments. *Id.*

20. *Id.* In *Holmes*, Holmes was a 40 year old black man who held a bachelor's degree in Sociology, a masters degree in Special Education, and a doctoral degree in Special Education. *Id.* In 1981, Holmes began working for the Mental Health and Mental Retardation Department as the Assistant Commissioner. *Id.* Prior to becoming Assistant Commissioner, Holmes had acted as the Southern Regional Director for Mental Retardation Services of Nevada. *Id.* at 638. Holmes also had authored several articles published in a scholarly journal. *Id.* Cullum had never directed a Mental Retardation facility, and had authored no scholarly publications. *Id.* The Department of Mental Health and Mental Retardation first appointed Cullum as temporary, part-time Deputy Commissioner to fill the vacancy until the department found a permanent replacement. *Id.*

21. *Id.* at 636.

action.[22] The district court held that Holmes failed to establish a prima facie case because Holmes did not satisfy the open position prong of the *McDonnell Douglas* test.[23] Holmes appealed the decision of the district court to the Fourth Circuit.[24] On appeal, the Fourth Circuit reversed the decision of the district court.[25]

After determining that the plaintiff had satisfied the first three prongs, the Fourth Circuit panel adjusted the open position requirement of the *McDonnell Douglas* test for promotion situations.[26] The Fourth Circuit panel noted that in promotion situations, the position remains open only until the employer selects an applicant to fill the position.[27] The Fourth Circuit panel, therefore, concluded that a plaintiff who was denied a promotion because the employer promoted another applicant, could not satisfy the open position requirement.[28] The Fourth Circuit panel, therefore, held that in individual employment discrimination cases involving promotion situations when the position is filled simultaneously with the rejection of other candidates, the fourth prong of the *McDonnell Douglas* test required

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22. *Id.* In *Holmes*, Holmes testified that in a meeting between Holmes and Bevilacqua subsequent to the employment decision, Holmes expressed concern that the questions asked of him in the interview were not the criteria by which Bevilacqua had hired Cullum. *Id.* Holmes further testified that Bevilacqua explained to Holmes that the criteria by which Bevilacqua judged Cullum was Cullum's experience in municipal government and community affairs. *Id.* Additionally, Holmes testified that Bevilacqua stated that Bevilacqua's employment decision was a subjective decision. *Id.* Testimony also included Holmes' educational background and experience. *Id.* At the close of the plaintiff's evidence, Bevilacqua made a motion under FED.R.CIV.P. Rule 41(b) on the grounds that upon the facts and the applicable law Holmes had no right to relief. *Id.*; *see* FED.R.CIV.P. 41(b)(motion to dismiss for failure to state claim for which relief can be granted). Bevilacqua specifically argued that Holmes had not made out a prima facie case of employment discrimination under Title VII. *Holmes*, 724 F.2d at 639. Finding that Holmes failed to establish a prima facie case, the district court in *Holmes* granted Bevilacqua's Rule 41(b) motion and dismissed the case. *Id.*

23. *See Holmes*, 774 F.2d at 639 (discussing prima facie case requirements). The district court in *Holmes* stated that Holmes met the first three requirements of *McDonnell Douglas* by showing that he was black, that he applied and was qualified for the position, and that the employer rejected him. *Id.* The only question before the district court, therefore, was whether Holmes satisfied the open position requirement of the *McDonnell Douglas* test. *Id.* The district court found that since Bevilacqua had appointed Cullum to the position, the position had not remained open, and Holmes had not satisfied the open position requirement. *Id.*; *see supra* note 15 and accompanying text (discussing open position prong of *McDonnell Douglas* test).

24. *Holmes*, 774 F.2d at 636.

25. *Id.* at 639-40.

26. *Id.* at 639. The Fourth Circuit panel in *Holmes* found that Holmes had met the first three requirements of *McDonnell Douglas* by showing that the employer had not abolished the position and filled the position with an applicant not a member of a protected class. *Id.* at 640. Bevilacqua, however, argued that since he appointed Cullum to the position, the position did not remain open. *Id.* Bevilacqua thus contended that Holmes did not meet the minimum requirements of *McDonnell Douglas* and, therefore, was not entitled to the presumption of discrimination. *Id.* at 639.

27. *Holmes*, 774 F.2d at 639.

28. *Id.*

the plaintiff to establish only that the employer did not abolish the position for which the plaintiff applied.[29] The Fourth Circuit panel in *Holmes* thus found that Holmes established a prima facie case of employment discrimination by satisfying the first three prongs of *McDonnell Douglas* and by showing that the employer did not abolish the position.[30] In response to the panel's adverse ruling, defendant Bevilacqua petitioned the Fourth Circuit for a rehearing.[31]

On rehearing, the Fourth Circuit sitting en banc reversed its prior decision and affirmed the decision of the district court.[32] The Fourth Circuit asserted that the *McDonnell Douglas* analysis applied to Holmes' disparate treatment claim.[33] In applying the *McDonnell Douglas* analysis, the Fourth Circuit

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29. *Id.* The Fourth Circuit majority panel in *Holmes* contended that the defendant's interpretation of the open position requirement of the *McDonnell Douglas* test would be, in effect, a determination that the *McDonnell Douglas* test was not applicable in promotion situations in which the position is filled. *Id.* Additionally, the *Holmes* panel contended that the usefulness of the *McDonnell Douglas* presumption is limited to cases in which a plaintiff claiming employment discrimination cannot find direct evidence of employment discrimination. *Id.*

30. *Id.*

31. *Holmes*, 41 F.E.P. 43, 48 (1986). Either party may suggest a rehearing en banc. FED. R. APP. P. 35(b). En banc refers to a session of the court in which the entire membership of the court participates in the decision. BLACKS LAW DICTIONARY 684 (5th ed. 1979). Under the Federal Rules of Appellate Procedure Rule 35(a), a court should not order a rehearing en banc unless consideration by the full court is necessary to maintain consistency of the court's decisions. BLACKS LAW DICTIONARY 684 (5th ed. 1979). Another reason a court would order a rehearing en banc would be in a situation in which the appeal involves a question of exceptional importance. See FED. R. APP. P. 35(a)(explaining proceeding and appropriateness of en banc decisions).

32. *Holmes v. Bevilacqua*, 41 F.E.P. 43, 47.

33. *Id.* at 47. Before concluding that the *McDonnell Douglas* framework applied, the en banc court in *Holmes* distinguished the facts of *McDonnell Douglas* from the facts in the present case. *Id.* In *McDonnell Douglas*, McDonnell Douglas rejected the plaintiff, who applied for and was qualified for the vacant position, and continued to consider other applicants. *McDonnell Douglas*, 411 U.S. at 796. The en banc court in *Holmes* reasoned that in factual situations such as *McDonnell Douglas* in which persons apply for a vacant position and an employer rejects the applicant before the employer considers all of the applicants, the court considered significant in establishing a prima facie case of employment discrimination that the plaintiff applied and was qualified for the position. *Holmes*, 41 F.E.P. at 47. The *Holmes* court also considered significant that the employer rejected the plaintiff only to have the job remain open and later filled by a person not a member of a protected class with similar qualifications. *Id.* at 47. The en banc court emphasized that leaving open the position justifies the presumption of racial discrimination and establishes a prima facie case. *Id.* The en banc court in *Holmes*, however, recognized that the promotion of Cullum and the rejection of Holmes were simultaneous, and thus, the position had not remained open. *Id.* After distinguishing the facts of *McDonnell Douglas* and *Holmes*, the Fourth Circuit en banc majority, relying on *International Bhd. of Teamsters v. United States*, contended that a plaintiff must show that an employer did not refuse to hire the plaintiff because of insufficient qualifications or because no vacancy existed. *Holmes*, 41 F.E.P. at 47; *see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977)(noting purpose of open position requirement). The *Holmes* court contended that since Cullum's promotion was simultaneous to the plaintiff's rejection, the position did not remain open and the plaintiff could not justify a presumption

found that Holmes had not satisfied the initial burden of establishing a prima facie case of employment discrimination.[34] The *Holmes* court noted that Holmes had satisfied the first prong of the *McDonnell Douglas* analysis by showing that Holmes was a member of a protected class.[35] The *Holmes* court further indicated that Holmes had satisfied the second and third prongs of the analysis by showing that he had applied and was qualified for the position of deputy commissioner.[36] The Fourth Circuit, however, noted that since Bevilacqua had hired Cullum for the position at the same time Bevilacqua had rejected Holmes, Holmes had not satisfied the fourth prong of the *McDonnell Douglas* test.[37] The Fourth Circuit, therefore, modified the *McDonnell Douglas* test in cases involving promotion practices in which the employer filled the position for which the plaintiff had applied simultaneously with his rejection.[38] In modifying the *McDonnell Douglas* test, the Fourth Circuit required the plaintiff to satisfy not only the first three prongs of *McDonnell Douglas*, but also required the plaintiff to present additional evidence of racial employment discrimination.[39] The *Holmes* court held that while Holmes had satisfied the first three prongs of *McDonnell Douglas*, Holmes had failed to present any direct or additional evidence of employment discrimination.[40] The Fourth Circuit, therefore,

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of discrimination. *Id.* The *Holmes* majority further recognized that in Holmes' promotion situation, the position remained open only until Bevilacqua accepted one of the other qualified applicants. *Id.* The Fourth Circuit, however, concluded that the *McDonnell Douglas* framework applied in promotion situations, even though the plaintiff could not meet the fourth prong due to a filling of the position simultaneous with the plaintiff's rejection. *Id.*

34. *Holmes*, 41 F.E.P. at 47. The en banc court in *Holmes* contended that meeting the first three prongs of the *McDonnell Douglas* test did not create a presumption of individual employment discrimination. *Id.* The *Holmes* majority contended that Holmes, by not satisfying the open position requirement, had failed to adduce any evidence of discrimination. *Id.*; *see infra* note 39 and accompanying text (discussing Fourth Circuit's prima facie case burden on plaintiff).

35. *Holmes*, 41 F.E.P. at 47; *see supra* note 8 and accompanying text (discussing definition of protected class under Title VII).

36. *Holmes*, 41 F.E.P. at 47; *see supra* note 20 and accompanying text (discussing Holmes' qualifications).

37. *Holmes*, 41 F.E.P. at 47. The Fourth Circuit en banc majority in *Holmes* indicated that without satisfying the open position requirement, an applicant could not establish a prima facie case of racial employment discrimination by satisfying only the first three *McDonnell Douglas* prongs.*Id.*; *see supra* note 26 and accompanying text (discussing Fourth Circuit's en banc majority's interpretation of open position prong under *McDonnell Douglas*).

38. *See Holmes*, 41 F.E.P. at 47 (determining that modification of *McDonnell Douglas* test is necessary in promotion situations in which plaintiff could not satisfy open position prong of *McDonnell Douglas*).

39. *Id.* The en banc court in *Holmes* stated that in situations in which the plaintiff cannot meet the open position requirement of *McDonnell Douglas*, the plaintiff must adduce some evidence that an immutable characteristic was a determining factor in the employer's decision. *Id.*

40. *Id.* at 47-48. The en banc court in *Holmes* noted that Holmes did not present any direct or indirect evidence of racial employment discrimination concerning Bevilacqua's decision to promote Cullum and reject Holmes. *Id.*

affirmed the district court's dismissal of Holmes' employment discrimination claim.[41]

Although agreeing with the en banc majority regarding the use of the *McDonnell Douglas* test in establishing a prima facie case of racial employment discrimination, the dissent in *Holmes* asserted that the majority erroneously concluded that Holmes failed to establish a prima facie case.[42] The dissent contended that the open position requirement of the *McDonnell Douglas* test required the plaintiff to establish only that the employer had not abolished the position for which the plaintiff applied.[43] The dissent did not require proof that the employer had left the position open.[44] The dissent, however, concluded that even if the majority was correct in requiring Holmes to present additional evidence of the employer's improper motivation when the position was no longer open, Holmes had established a prima facie case of employment discrimination by introducing additional evidence of the employer's improper motivation.[45] The dissent in *Holmes* recognized that Bevilacqua justified the promotion of Cullum based on Cullum's experience in municipal government and local community affairs.[46] Holmes, however, had presented evidence that indicated that when Bevilacqua interviewed the candidates, Bevilacqua did not ask questions relating to experience in municipal government or local community affairs.[47] The dissent in *Holmes*, therefore, concluded that Bevilacqua's claimed criteria for appointment was suspect.[48]

Although the Supreme Court has not considered the merits of a case involving racial discriminatory promotion practices under *McDonnell Douglas*, several lower courts have addressed cases involving racially discriminatory promotion practices.[49] In *Bundy v. Jackson*[50] the United States Court of Appeals for the District of Columbia Circuit, in determining whether the plaintiff established a prima facie case under *McDonnell Douglas*,

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41. *Id.*

42. *See id.* at 49 (Winter, J. dissenting) (noting that plaintiff had adduced evidence of racial employment discrimination).

43. *Id.*

44. *See id.* at 48. The *Holmes* en banc majority and dissent both agreed that Holmes satisfied the first three prongs of the *McDonnell Douglas* framework. *Id.* at 47; *id.* at 49(Winter, J. dissenting). Justice Winter's dissent in *Holmes*, however, disagreed with the majority's interpretation of the open position requirement. *Id.* at 49 (Winter, J. dissenting).

45. *Holmes*, 41 F.E.P. at 49.

46. *Id.*; *supra* note 22 (discussing employer's justification of promotion).

47. *Holmes*, 41 F.E.P. at 49.

48. *Id.*

49. *See, e.g.*, Garlington v. St. Anthony Hosp. Ass'n, 792 F.2d 752, 753 (8th Cir. 1986)(racially discriminatory promotion practice established by plaintiff relying on *McDonnell Douglas* test to establish inference of discrimination); Monroe v. Burlington Indus., Inc., 784 F.2d 568, 571 (4th Cir. 1986)(same); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 562-63 (4th Cir. 1985)(same); Bundy v. Jackson, 641 F.2d 934, 951 (D.C.Cir. 1981)(racially discriminatory promotion practice case) *infra* notes 54-56 and accompanying text (discussing Eighth Circuit's express requirements of prima facie case of discrimination under *McDonnell Douglas*).

50. 641 F.2d 934 (D.C. Cir. 1981).

adjusted the *McDonnell Douglas* test for promotion cases.[51] The District of Columbia Circuit stated that in a promotion situation, a plaintiff must establish the first three prongs of the *McDonnell Douglas* test.[52] Additionally, a plaintiff, to establish a prima facie case, must show that the employer promoted an employee of similar qualifications who was not a member of a protected class at the same time the employer denied the plaintiff's request for promotion.[53]

The United States Court of Appeals for the Eighth Circuit, in *Bell v. Bolger*,[54] considered the requirements of establishing a prima facie case of disparate treatment under *McDonnell Douglas* to a promotion case, and reached a conclusion different from conclusion that the *Holmes* majority reached.[55] The Eighth Circuit held in *Bell* that in a promotion situation in which a plaintiff has established the first three prongs of the *McDonnell Douglas* test but cannot establish the open position requirement because the position was filled, the plaintiff need only show that although filled, the employer selected a person not a member of a protected class to fill the position.[56] The Eighth Circuit expressly stated that the plaintiff established

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51. 641 F.2d 934 (D.C.Cir. 1981). In *Bundy v. Jackson*, Bundy, a female Vocational Rehabilitation Specialist with the District of Columbia Department of Corrections applied for a promotion to a GS-9 position, a position for which she was qualified. *Id.* at 939-41. Although Bundy's supervisors informed Bundy that they would make no promotions, Bundy discovered that the supervisors subsequently promoted others who were not female. *Id.*

52. *Id.* at 951. The D.C. Circuit in *Bundy* contended that for Bundy to establish the first three prongs of a prima facie case of discrimination, Bundy must prove that she belongs to a protected group and that she was qualified and applied for a promotion. *Id.*

53. *Id.* The Bundy court stated that to meet the fourth prong of the *McDonnell Douglas* test, Bundy must show that she was considered and denied the promotion, and that the employer promoted other employees who were not members of a protected class at the time the employer denied the plaintiff's request for a promotion. *Id.*

54. 708 F.2d 1312, 1315 (8th Cir. 1983). In *Bell v. Bolger*, Bell, a 43 year old black security police officer for the Postal Inspection Service applied for the position of Labor Relations Assistant along with forty other applicants *Id.* at 1314. A review committee granted interviews to the seven best qualified applicants. *Id.* Bell was one of the seven applicants. *Id.* The committee individually scored each application and recommended the applicants that received the top three scores. *Id.* at 1316-16. Bell received the fifth highest score. *Id.* The selection officer ultimately hired a thirty-four year old white male whose application the review committee had scored highest for the position. *Id.*

55. *Id.* at 1315.

56. *Id.* at 1316-17; The defendant, the Postal Service, in *Bell* argued that the *McDonnell Douglas* test did not apply to promotion situations in which the employer filled the position. *Id.* at 1317. The Postal Service contended that after satisfying the first three requirements of *McDonnell Douglas* the plaintiff must establish more than the fourth prong of *McDonnell Douglas* to establish a prima facie case. *Id.* The Eighth Circuit in *Bell* recognized that the burden of establishing a prima facie case of disparate treatment under the *McDonnell Douglas* test is not onerous. *Id.* at 1317 (citing *Burdine*, 450 U.S. at 253). The Eighth Circuit concluded that Bell had adduced evidence that he was a member of two protected classes because Bell was black and over forty. *Id.* at 1317. The Eighth Circuit pointed out that Bell was one of the seven best qualified applicants who had interviewed for the position. *Id.* Relying on the United States Court of Appeals for the District of Colombia decision in *Bundy v. Jackson*, the Eighth Circuit found that the court could modify the fourth requirement of the *McDonnell*

a prima facie case when the plaintiff proved that he was a member of a protected class, that he was qualified for the position, that the employer rejected him, and that the employer promoted a person not a member of a protected class to the position.[57]

The Fourth Circuit's en banc decision in *Holmes* is inconsistent with the decisions of circuits that have addressed the application of the *McDonnell Douglas* test in promotion situations because the *Holmes* court, by rigidly interpreting the open position requirement, increases the plaintiff's burden of establishing a prima facie case.[58] The Fourth Circuit majority in *Holmes* held that a prima facie case of discriminatory promotion practices under *McDonnell Douglas* required the plaintiff to present additional evidence of racial discrimination.[59] By requiring an additional showing of an employer's use of impermissible racial considerations, the Fourth Circuit en banc majority increased the plaintiff's burden in establishing a prima facie case beyond traditional requirements.[60] In modifying the elements of a prima facie case the Fourth Circuit disregarded the purpose underlying the *McDonnell Douglas* test by creating a burdensome standard for a plaintiff seeking to establish a prima facie case of employment discrimination.[61] To justify the burdensome prima facie standard and the rigid modification of the open position prong, the court in *Holmes* distinguished between situations in which several applicants apply and are rejected before the employer has filled the position and situations in which the employer promoted one applicant and simultaneously rejected another applicant for the position.[62] The Fourth Circuit en banc court considered significant that in situations in which several applicants apply and are rejected before the employer has filled the position, that the employer continued to search for qualified applicants not a member of a protected class.[63] The Fourth Circuit contended that the open position requirement justifies the presumption of discrimination because an employer more likely than not uses impermissible racial

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Douglas test and effectuate the purpose of the test. *Bell*, 798 F.2d at 1315; *Bundy*, 641 F.2d at 951.The Eighth Circuit specifically stated that because the Postal Service review committee rejected Bell for the position and promoted a white male, Bell adduced sufficient evidence to establish a prima facie case. *Bell*, 798 F.2d at 1317.

57. *Bell*, 783 F.2d at 1317.

58. *See supra* notes 50-57 and accompanying text (discussing circuit courts that have used *McDonnell Douglas* test in promotion situations in which employer simultaneously filled position and rejected plaintiff).

59. *Holmes*, 41 F.E.P. at 47.

60. *See supra* note 9 and accompanying text (discussing purpose behind allowing plaintiff to establish prima facie case in employment discrimination suits).

61. *See Holmes*, 41 F.E.P. at 47 (Fourth Circuit's burdensome production standard); *supra* notes 34-40 and accompanying text (describing Fourth Circuit's en banc requirements of establishing prima facie case).

62. *See Holmes*, 41 F.E.P. at 47 (*Holmes* majority distinguishing between open position cases and filled position cases).

63. *See id.* (Fourth Circuit en banc court in *Holmes* reasoning pertaining to open position requirement); *supra* note 33 (open position and filled position distinction).

considerations in an employment decision if the employer rejects a qualified applicant who is a member of a protected class and then continues to search for an applicant not a member of a protected class.[64] The Fourth Circuit en banc majority, however, failed to consider that in promotion situations, the plaintiff satisfies the presumption of discriminatory purpose of the open position requirement by showing that the employer did not abolish the position and filled the position with an applicant not a member of a protected class.[65]

The decisions of circuits that have addressed the problem of applying the *McDonnell Douglas* test to promotion situations support the reasoning of the Fourth Circuit panel and not the en banc decision in *Holmes*.[66] The Fourth Circuit panel held that in promotion situations, a plaintiff who has established the first three prongs of the *McDonnell Douglas* test need only show that the employer did not abolish the position and promoted a candidate not a member of a protected class to the position.[67] The Fourth Circuit panel recognized that the *McDonnell Douglas* test enabled a plaintiff to establish a prima facie case of racial employment discrimination when the plaintiff could not obtain direct or indirect evidence of employment discrimination.[68] Consistent with decisions of other circuits, the Fourth Circuit panel determined that the Supreme Court in *McDonnell Douglas* did not intend the initial burden of establishing a prima facie case to be difficult.[69] Accordingly, the Fourth Circuit panel's less stringent standard for establishing a prima facie case encourages employees to report discriminatory employment practices and discourages employers from using discriminatory employment practices.[70] The Fourth Circuit panel further recognized that requiring the plaintiff to show only that the employer did not abolish the position and filled the position with an applicant not a member of a protected class prevents an employer from asserting that there existed no vacancy.[71] The Fourth Circuit en banc decision, however, deviated

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64. *Holmes*, 41 F.E.P. at 47.

65. *See id.* (discussing significance of open position requirement); *compare with supra* notes 34-40 and accompanying text (discussing Fourth Circuit panel's analysis of open position requirement under *McDonnell Douglas*).

66. *See supra* notes 50-57 and accompanying text (discussing circuits that have confronted problem of establishing a prima facie case of discriminatory promotion practices).

67. *Holmes*, 774 F.2d at 640.

68. *Holmes*, 774 F.2d at 638-39.

69. *See id.* at 639 (discussing plaintiff's burden of production under *McDonnell Douglas*); *see also McDonnell Douglas*, 411 U.S. at 802 (noting plaintiff's burden of production should not be onerous) *supra* note 26 (discussing Fourth Circuit panel requirements of establishing a prima facie case in discriminatory promotion situations).

70. *See supra* notes 30-34 and accompanying text (describing modifications by Fourth Circuit en banc court in *Holmes* establishing additional requirement under *McDonnell Douglas*); *cf.* notes 23-29 and accompanying text (discussing *Holmes* Fourth Circuit panel's prima facie requirements under *McDonnell Douglas*);

71. *See Holmes*, 774 F.2d at 639 (discussing *McDonnell Douglas* requirements of establishing prima facie case of employment discrimination). The United States Supreme Court in

from the purpose of Title VII and the purpose of *McDonnell Douglas* test by ignoring the concerns recognized by the panel.[72]

The *Holmes* decision advises Fourth Circuit attorneys that to establish a prima facie case of racial employment under Title VII using the *McDonnell Douglas* test, the plaintiff, after establishing the first three prongs of the *McDonnell Douglas* test, must additionally show in promotion situations in which the plaintiff cannot meet the open position prong, that an unlawful racial consideration motivated the employment decision.[73] By favoring employers, the Fourth Circuit effectively has discouraged employees from reporting discriminatory employment practices, contrary to the purpose of the *McDonnell Douglas* test.[74] Congress enacted Title VII to prevent employers from discriminating against employees on the basis of race, color, religion, sex, or national origin.[75] An employees's burden of establishing a prima facie case of employment discrimination should, therefore, not be so difficult.[76]

LANCE ORMAND VALDEZ

B. Stapleton v. Westmoreland Coal Company: *Has the Dust Settled On Black Lung Benefit Eligibility*

The Black Lung Benefits Amendments of 1972 (1972 Amendments) increased the ease with which coal miners could obtain monetary relief for coal-workers pneumoconiosis (pneumoconiosis) contracted by exposure to

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McDonnell Douglas recognized that if an employer could assert that a vacancy did not exist the plaintiff could not establish a prima facie case under *McDonnell Douglas*. *Id.* The plaintiff could not establish a prima facie case because the plaintiff could not demonstrate that the employer was accepting applications for the position. *McDonnell Douglas*, 411 U.S. at 802-03.

72. *See supra* notes 66-71 and accompanying text (concerns recognized by panel in *Holmes* of imposing an onerous prima facie burden on plaintiffs charging employers with discriminatory practices).

73. *See supra* notes 30-34 and accompanying text (discussing Fourth Circuit's new approach in resolving discriminatory claims involving promotion practices).

74. *See supra* notes 1-3 and accompanying text (discussing purpose of Title VII and *McDonnell Douglas* test).

75. *See* note 4 and accompanying text (discussing Congress' intent in enacting Title VII).

76. *See supra* note 2 and accompanying text (supporting non-burdensome prima facie case standard).

coal dust in mine employment.[1] The Federal Coal Mine Health and Safety Act of 1969[2] (the Act) provided the initial compensatory scheme for coal miners totally disabled by pneumoconiosis.[3] The 1972 Amendments added evidentiary rules, diagnostic standards, and a series of presumptions to the Act.[4] The amended Act allowed the weight of medical uncertainties to fall

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1. Black Lung Benefits Amendments of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) (codified at 30 U.S.C. § 901-945 (1982)). Pneumoconiosis, or Black Lung Disease, is a disease of the lungs caused by the inhalation of coal dust, usually during coal mine employment. Drummond Coal Co. v. Freeman, 733 F.2d 1523, 1524 (11th Cir. 1984). Medical authorities classify pneumoconiosis as simple or complicated. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 7 (1976) (defining simple and complicated pneumoconiosis). Coal dust alone causes simple pneumoconiosis, which is characterized by small opacities which appear as shadows or nodules in the lung fields on a chest x-ray. *Usery*, 428 U.S. at 7. Complicated pneumoconiosis is typically a reaction to a combination of dust and other factors and involves progressive massive fibrosis characterized by larger opacities. *Usery*, 428 U.S. at 7; *see* Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. VA. L. REV. 721, 728-44 (1980-81) (providing detailed explanation of disease, detection of disease, and medical standards).

2. Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 901 (1982). Congress amended the Federal Coal Mine Health and Safety Act (the Act) in both 1972 and 1978. Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677, 678 (1983). The Black Lung Benefits Reform Act of 1977 (1978 Amendments) liberalized the claims award process by adding more presumptions to the Act. Pub. L. No. 95-239, 92 Stat. 95 (1977) (enacted March 1, 1978). *See, e.g.*, 30 U.S.C. § 921(c)(1) (1982) (adjudicators presume that mine employment caused pneumoconiosis if claimant in mine employment for ten years of more); 30 U.S.C. § 921(c)(2) (1982) (death from respiratory disease together with ten years coal mine employment raises rebuttable presumption that pneumoconiosis caused death); 30 U.S.C. § 921(c)(3) (1982) (showing complicated pneumoconiosis by x-ray or autopsy raises irrebuttable presumption of eligibility); 30 U.S.C. § 921(c)(4) (1982) (showing fifteen years employment in underground mines and totally disabling respiratory or pulmonary impairment raises rebuttable presumption that pneumoconiosis caused total disability).

Congress amended the Act again in 1981 with the Black Lung Benefits Amendments of 1981 (1981 Amendments). Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981) (codified at 30 U.S.C. § 922, 923 (1982)). The 1981 Amendments made establishing eligibility for benefits more difficult for claimants filing after the January 1, 1982 enactment date. Lopatto, *supra*, at 677. The 1981 Amendments achieved stricter eligibility requirements in two ways. Lopatto, *supra*, at 677. The 1981 Amendments eliminated three presumptions based in part on length of service. Lopatto, *supra*, at 677. The 1981 Amendments deleted presumptions codified at 30 U.S.C. § 921(c)(2), (c)(4), (c)(5) (1982). Lopatto, *supra*, at 677, 700-01. The 1981 Amendments also deleted a provision of the 1978 Amendments that prohibited the government from re-evaluating a qualified radiologist's previous positive evaluation of a claimant's x-rays. Lopatto, *supra*, at 702.

3. *See Usery*, 428 U.S. at 8-10 (defining manner in which Act imparts financial responsibility for payment of benefits). Total disability under the Act means that pneumoconiosis prohibits a miner from working in a job requiring skills similar to the skills that the miner regularly used in mine employment. *See* 30 U.S.C. § 902(f)(l)(A) (1982) (setting forth statutory definition of total disability). In 1969, the government estimated that 100,000 miners required compensation. Lopatto, *supra* note 2, at 678 & n.9. By the end of 1981, over 520,000 miners, spouses, survivors, and dependents of miners received compensation under the Act. Lopatto, *supra* note 2, at 677, 678 & n.9.

4. *See* 30 U.S.C. §§ 902(f), 921(c)(l)-(c)(4) (1982) (codifying particular rebuttable presumptions for claims filed on or before December 31, 1973). Prior to the enactment of the Black Lung Amendments of 1972 (1972 Amendments), the Social Security Administration

favorably on the side of the claimant.[5]

Congress further amended the Act with the Black Lung Benefits Reform Act of 1977 (1978 Amendments).[6] The 1978 amendments expanded benefits coverage by instructing the Secretary of Labor (Secretary) to promulgate criteria designed to liberalize the claims award process.[7] The Department of Labor (D.O.L.) regulations promulgated pursuant to the amended Act entitle the claimant to raise a presumption of entitlement to benefits.[8] A claimant invokes a presumption in a two step process.[9] The first step requires the claimant to show that the claimant worked for a coal mining operation for at least ten years.[10] After having shown at least ten years of mine employ-

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(S.S.A.) processed all Black Lung Benefits claims filed under the Act. *See* 20 C.F.R. § 410 (1986) (codification of permanent S.S.A. eligibility criteria). Congress envisioned originally that after 1973 miners would file claims with approved state workmen's compensation agencies. *See* Query, *The Black Lung Benefits Act: An Operator's Perspective* 83 W. VA. L. REV. 855, 856-57 (1980-81) (tracking development of Federal Black Lung Benefits Program). The 1972 Amendments, however, shifted responsibility for Black Lung Benefits claims to the Department of Labor (D.O.L.). *See* Underhill v. Peabody Coal Co., 687 F.2d 217, 219 (7th Cir. 1982) (reciting detailed summary of evolution of section 727.203). To facilitate an orderly transition of claims processing from the S.S.A. to the D.O.L., Congress mandated in the 1972 amendments that the Secretary of Health, Education and Welfare adopt the "interim" presumptions in order to resolve swiftly the massive backlog of claims filed with the S.S.A. *See* 20 C.F.R. § 410.490(a) (1986) (introductory statement to publication of presumptions authorized by 1972 Amendments). Congress intended that the D.O.L. assess all claims under the interim standards until the D.O.L. promulgated revised standards. *See* H.R. REP. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 308, 309 (explanatory statement of conference committee on 1978 Amendments).

5. *See* Solomons, *Workers Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems*, 41 ALB. L. REV. 195, 196-97 (1977) (discussing certain aspects of, and continued need for, occupational disease compensation reform).

6. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1977) (enacted March 1, 1978). The Black Lung Benefits Reform Act of 1977 (1978 Amendments) required the D.O.L. to adopt new criteria for eligibility that were no more restrictive than the criteria that the S.S.A. used. *See* 30 U.S.C. § 902(f)(2) (1982) (codifying congressional mandate to D.O.L. not to promulgate eligibility criteria that is more restrictive than S.S.A. criteria). The 1978 Amendments attempted to correct a substantial disparity in claims approval rates between the S.S.A. and the D.O.L. *See* Solomons, *A Critical Analysis of the Legislative History Surrounding The Black Lung Interim Presumption And A Survey Of Its Unresolved Issues*, 83 W. VA. L. REV. 869, 873-74 & n.14 (1980-81) (citing low D.O.L. claims approval rate of part C claims).

7. *See* 30 U.S.C. § 902(f)(2) (1982) (Congress mandated that D.O.L. not provide for more stringent eligibility criteria than S.S.A. criteria).

8. *See* 20 C.F.R. § 727.203 (1986) (codified at 30 U.S.C. § 921(c) (1982)) (codifying the D.O.L. interim presumption regulation that provides several ways in which to invoke presumption of eligibility).

9. *See* 20 C.F.R. § 727.203(a) (1986) (delineating criteria claimant must meet to invoke presumption of eligibility); *infra* note 11 (quoting text of § 727.203).

10. *See* 20 C.F.R. § 727.203 (1986) (codifying D.O.L. presumption regulation). *See, e.g.*, Alabama By-Products v. Killingsworth, 733 F.2d 1511, 1517 (11th Cir. 1984) (stating that length of mine employment and evidence of pneumoconiosis are conjunctive requirements of § 727.203); *Freeman*, 733 F.2d at 1524-26 (explaining two stage process for invoking presumption); *Underhill*, 687 F.2d at 220 (reiterating that section 727.203 provides for invoking presumption in two step method).

ment, the claimant must present medical evidence that meets or exceeds the criteria set forth in the regulations.[11] A claimant who satisfies the requirements of the two step process raises a presumption of total disability from mine related pneumoconiosis and entitlement to Black Lung Benefits.[12] Once the claimant invokes the presumption, the burden of persuasion shifts to the challenger to prove a lack of entitlement.[13]

The presumption codified at 20 C.F.R. Section 727.203 is one of the regulations that the D.O.L. promulgated under the 1978 Amendments.[14] Section 727.203(a) provides a procedure by which a claimant may invoke a

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11. *See* 20 C.F.R. § 727.203 (1986) (text of § 727.203). The D.O.L. regulation regarding the interim presumption provides:

Interim Presumption:

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following requirements is met.

(1) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis;

(2) 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 (omitted);

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table (omitted);

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

. . .

(b) *Rebuttal of interim presumption.*

In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

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

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work; or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

. . .

20 C.F.R. § 727.203 (1986).

12. *See id.* (regulation provides that claimants who successfully meet eligibility criteria invoke rebuttable presumption).

13. 20 C.F.R. § 727.203(b) (1986). *See, e.g., Usery*, 428 U.S. at 38 (Supreme Court upheld constitutionality of presumption scheme in which presumption explicitly rebuttable by employer); Bethlehem Mine Corp. v. Massey, 736 F.2d 120, 123 (4th Cir. 1984) (holding that employers must rule out causal link between coal mine employment and total disability); Peabody Coal Co. v. Lowis, 708 F.2d 266, 268 (7th Cir. 1983) (discussing manner in which employers may rebut § 727.203 presumption).

14. *See supra* note 11 (quoting 20 C.F.R. § 727.203 (1986)).

presumption of entitlement to benefits.[15] A claimant who worked as a coal miner for at least ten years may invoke or trigger the presumption by presenting evidence that meets or exceeds one or more of four medical requirements.[16] If a claimant presents a chest x-ray that establishes the existence of pneumoconiosis, the claimant invokes the presumption under subsection (a)(1).[17] Under subsection (a)(2) the claimant invokes the presumption of entitlement by providing ventilatory studies that establish the presence of a chronic pulmonary or respiratory disease.[18] If a claimant with ten or more years of mine employment introduces blood gas studies that demonstrate the presence of an oxygen impairment, the claimant invokes the presumption under subsection (a)(3).[19] A claimant invokes the presumption under subsection (a)(4) by presenting other medical evidence that establishes the presence of a totally disabling respiratory or pulmonary impairment.[20]

An employer rebuts the presumption under section 727.203(b)(l) if the employer establishes that the miner continued in his usual coal mine employment or in work using similar skills.[21] Under subsection (b)(2) an employer rebuts the presumption by establishing that the miner is capable of performing his usual coal mine work or work requiring similar skills.[22] Under subsection (b)(3), if the employer establishes that the miner's death or disability did not arise in whole or in part from coal mine employment, the employer rebuts the presumption.[23] If the employer is able to establish

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15. *See* 20 C.F.R. § 727.203(a) (1986) (providing alternative methods of presenting evidence of pneumoconiosis to invoke presumption).

16. 20 C.F.R. § 727.203(a)(l)-(a)(4) (1986).

17. 20 C.F.R. § 727.203(a)(l) (1986).

18. 20 C.F.R. § 727.203(a)(2) (1986). A ventilatory study measures the ability of an individual to transport oxygen and carbon dioxide in and out of the lungs. *See Peabody*, 708 F.2d at 270 (discussing technical aspects of ventilatory testing); Smith & Newman, *The Basics of Federal Black Lung Litigation*, 83 W. VA. L. REV. 763, 781 (1981) (reviewing essentials of Black Lung related medicine). *See generally* Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. VA. L. REV. 721 (1981) (detailed discussion of methodology of ventilatory studies). A ventilatory study measures forced expiratory volume (FEV), which is the maximum amount of air that an individual can expel from the lungs in one second. *Peabody*, 708 F.2d at 270. A ventilatory study also measures maximum voluntary ventilation (MVV), which is the amount of air that an individual is able to expel in one minute during a maximum repetitive respiratory effort. *Id.* The MVV and FEV values are the values to which section 727.203(a)(2) refers. 20 C.F.R. § 727.203(a)(2) (1986); *see supra* note 11 (setting forth § 727.203).

19. 20 C.F.R. § 727.203(a)(3) (1986). A blood gas study measures an individual's ability to carry oxygen from the lung's alveoli into the blood. *Peabody*, 708 F.2d at 271. A blood gas study tests an arterial blood sample and measures oxygen pressure (PO=2) and carbon dioxide pressure (PCO=2). *Peabody*, 708 F.2d at 271. The values assigned oxygen and carbon dioxide pressure are the values to which subsection 727.203(a)(3) refers. *See supra* note 11 (reproducing text of § 727.203); *see also* Smith & Newman, *The Basics of Federal Black Lung Litigation*, 83 W. VA. L. REV. 763, 785 (1981) (detailed technical discussion of methodology of blood gas testing).

20. 20 C.F.R. § 727.203(a)(4) (1986).

21. 20 C.F.R. § 727.203(b)(1) (1986).

22. 20 C.F.R. § 727.203(b)(2) (1986).

23. 20 C.F.R. § 727.203(b)(3) (1986).

that the claimant does not have pneumoconiosis, the employer rebuts the presumption under subsection (b)(4).[24]

While the language in section 727.203 may at first appear unambiguous, questions arise regarding the evidence that the regulation requires to invoke the presumption.[25] Fourth Circuit decisions do not interpret section 727.203 uniformly.[26] In *Stapleton v. Westmoreland Coal Company*,[27] the United States Court of Appeals for the Fourth Circuit designated the type and quantum of proof required to invoke the presumption.[28] The Fourth Circuit also decided what type of evidence employers may use to rebut the presumption.[29]

In *Stapleton*, the Fourth Circuit consolidated the appeals of three separate decisions of the D.O.L.'s Black Lung Benefits Review Board (Board).[30] Each of the three Black Lung Benefits claimants attempted to invoke the presumption under section 727.203(a).[31] In one of the three board cases, *Stapleton v. Westmoreland Coal Company*, the claimant attempted to invoke the presumption under subsections (a)(l), (a)(2) and (a)(3) by introducing x-rays, ventilatory studies, and blood gas studies.[32] In the second case, *Ray v. Jewell Ridge Coal Corp.*, the claimant attempted to invoke the presumption under subsections (a)(l) and (a)(2) by introducing x-rays and ventilatory studies.[33] Finally, in *Mullins Coal Company, Inc. of Virginia v. Cornett*,

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24. 20 C.F.R. § 727.203(b)(4) (1986).

25. *See infra* notes 126-36 and accompanying text (demonstrating wavering view of Board on proper interpretation of § 727.203).

26. *See, e.g.*, Whicker v. U.S. Dept. of Labor Benefits Review Board, 733 F.2d 346, 348 (4th Cir. 1984) (A.L.J. must weigh conflicting evidence in invocation stage and that employers may not rely principally on nonqualifying evidence in rebuttal); Consolidation Coal Co. v. Sanati, 713 F.2d 480, 481-82 (4th Cir. 1983) (A.L.J. must weigh evidence under preponderance standard prior to invoking presumption); Hampton v. U.S. Dept. of Labor Benefits Review Board, 678 F.2d 506, 507-08 (4th Cir. 1982) (A.L.J. must invoke presumption if claimant presents one piece of qualifying medical evidence).

27. 785 F.2d 424 (4th Cir. 1986) (per curiam), *cert. granted sub nom.* Mullins Coal Co. v. Director, OWCP, 55 U.S.L.W. 3472 (U.S. Jan. 13, 1987) (No. 86-327).

28. *Id.* at 426-27; *see* 20 C.F.R. § 727.203(a)(l)-(a)(4) (1986) (listing criteria for invoking presumptions).

29. *Stapleton*, 785 F.2d at 427; *see* 20 C.F.R. § 727.203(b)(1)-(b)(4) (1986) (delineating various methods by which employers may rebut presumption).

30. *Stapleton*, 785 F.2d at 427; *see infra* notes 31-44 and accompanying text (discussion of three individual cases consolidated for appeal in Fourth Circuit).

The D.O.L.'s Office of Workers' Compensation Programs (O.W.C.P.) initially processes benefits claims. Kilcullen, *Benefits Under the Federal Black Lung Program*, 26 PRAC. LAW 71, 73 (1980). A hearing officer then hears the case and issues decisions and orders. *Id.* Claimants may appeal a hearing of officer's decisions to the Black Lung Benefits Review Board (Board). *Id.* A claimant may appeal a final order of the Board to the United States Circuit Court of Appeals for the circuit where the claimant was last employed. *Id.*

31. *See Stapleton*, 785 F.2d at 428-31 (discussing facts of three cases consolidated for appeal in Fourth Circuit); *see infra* notes 32-44 and accompanying text (reviewing three cases that *Stapleton* court decided).

32. *Stapleton*, 785 F.2d at 428-30.

33. *Id.* at 430.

the claimant attempted to invoke the presumption under subsections (a)(l)-(a)(4) by introducing x-rays, ventilatory studies, blood gas studies, and the testimony of physicians.[34]

In *Stapleton*, the Administrative Law Judge (A.L.J.) found that the claimant successfully invoked the presumption under (a)(1) by introducing one positive x-ray.[35] In *Ray*, the A.L.J. found that the claimant did not present evidence entitling the claimant to the presumption.[36] The A.L.J. in *Mullins* found that the claimant successfully invoked the presumption under subsections (a)(l), (a)(2) and (a)(3).[37] In the rebuttal stage of *Stapleton*, the A.L.J. concluded that medical evidence, including a more recent negative x-ray, sufficiently rebutted the presumption.[38] The A.L.J. in *Stapleton*, therefore, denied benefits to the claimant.[39] In *Mullins*, the A.L.J. determined that the presumption survived the employer's rebuttal evidence.[40] The A.L.J. in *Mullins* awarded benefits to the claimant.[41] In each case, the Board affirmed the conclusions of the A.L.J.[42] Subsequently, each losing party appealed to the Fourth Circuit.[43] The Fourth Circuit consolidated the appeals and reviewed the cases en banc.[44]

In the Fourth Circuit's per curiam opinion, a majority of the court determined that in order to invoke the presumption under the criteria that the Secretary enumerated in section 727.203(a), a claimant must present credible evidence demonstrating that one qualifying x-ray indicates the presence of pneumoconiosis,[45] that a single qualifying set of ventilatory studies indicates a chronic respiratory disease,[46] that a single qualifying set of blood gas studies indicates an impairment in the transfer of oxygen to the lungs,[47] or that a single physician's opinion meets the requirements of section 727.203(a)(4).[48] The Fourth Circuit stated that even if no qualified physician submitted an opinion, a claimant may invoke the presumption under subsection (a)(4) if medical evidence other than x-rays, ventilatory

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34. *Id.* at 430-31. Each of the three claimants involved in the Fourth Circuit case worked in coal mines for at least 10 years. *Id.* at 428-430. By establishing at least 10 years of mine employment, the three claimants could raise a presumption of eligibility under any presumption enumerated in section 727.203(a). 20 C.F.R. § 727.203(a)(1)-(a)(4) (1986).

35. *Stapleton*, 785 F.2d at 429.

36. *Id.* at 430.

37. *Id.*

38. *Id.* at 429.

39. *See id.* (holding that nonqualifying medical evidence adequately rebutted presumption under § 727.203 (b)(4)).

40. *Id.* at 430-31.

41. *Id.*

42. *Id.*

43. *Id.* at 427.

44. *Id.*

45. *See id.* at 426 (interpreting § 727.203(a)(l)).

46. *See id.* (interpreting § 727.203(a)(2)).

47. *See id.* (discussing § 727.203(a)(3)).

48. *See id.* (construing § 727.203(a)(4)).

studies, or blood gas studies establish that the claimant is totally disabled due to pneumoconiosis.[49]

The Fourth Circuit held that in order to determine whether the employer rebutted the presumption established under section 727.203(a), an A.L.J. must consider all relevant medical evidence.[50] The only limitation that the Fourth Circuit placed on an adjudicator considering evidence in rebuttal under section 727.203(b) was that the A.L.J. may not deny benefits because of a single negative x-ray.[51] The court then applied the rules that the court enunciated in the per curiam opinion to the three fact situations before the court.[52] The Fourth Circuit affirmed the decisions of the A.L.J. in *Stapleton* and *Mullins*.[53] The court also found that the A.L.J. in *Ray* erred by not invoking the presumption and remanded the case for the A.L.J. to consider rebuttal evidence.[54]

The Fourth Circuit's per curiam opinion consisted of parts of four individual opinions upon which a majority of the court agreed.[55] Concerning section 727.203(a), the per curiam opinion reflected in large part the individual opinion of Judge Hall.[56] Judge Hall asserted in the lead opinion that to invoke the presumption under section 727.203(a), a claimant need present only one piece of the specified qualifying medical evidence enumerated in section 727.203(a)(l)-(a)(4).[57] Judge Hall stated that a claimant

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49. *Id.* at 427.

50. *Id.* at 427.

51. *See id.* at 427 (stating that single x-ray statute was only limitation on court's consideration of all relevant evidence). The United States Court of Appeals for the Fourth Circuit in *Stapleton* held that § 923(b) of the Federal Mine Safety & Health Act limits a court's consideration of all relevant evidence by mandating that an adjudicator may not deny a claim solely on the basis of one negative x-ray. *Id.*; 30 U.S.C. § 923(b) (1982).

The Fourth Circuit also decided the date from which the Act requires the payment of interest on an award. *Stapleton*, 785 F.2d at 437-39. In *Mullins*, the Board awarded interest from the tenth anniversary of the claimant's employment with the company held liable on the claim. *Id.* at 431. In reversing the Board's decision on the interest issue, the Fourth Circuit held that interest accrued thirty days after the agency first awarded benefits. *Id.* at 439. The Director of the Office of Worker's Compensation Programs (Director) had ordered that interest accured from the first award of benefits. *Id.* at 437-38. The Fourth Circuit agreed that interest should accrue thirty days from the first award of benefits, and deferred to the Director's view on the interest issue. *Id.*, at 439.

52. *Id.* at 427.

53. *Id.*

54. *Id.*

55. *See id.* at 426-27 (per curiam opinion).

56. *See id.* at 426-27, 431-34 (opinion of Hall, J. on invocation).

57. *See id.* at 433-34 (holding that claimant satisfies initial burden of proof by introducing one qualifying piece of medical evidence). Judge Hall rejected the view of Judge Phillips, which required A.L.J. to weigh all of the evidence before invoking the presumption. *Id.* at 434. Judge Hall contended that imposing a preponderance of the evidence standard in the invocation stage required claimants to prove facts that Congress intended courts to presume. *Id.* Judge Hall held that requiring a claimant to prove facts intended only to be presumed made the presumption at least partially irrebuttable. *Id.* The legislative history surrounding the presumption makes clear that Congress required the D.O.L. to promulgate a rebuttable

triggered the presumption under subsections (a)(l) and (a)(4) when the claimant produced a single x-ray or physician's opinion.[58] Judge Hall cited the use of the word "a" in the language of subsections (a)(l) and (a)(4) to support a contention that Congress intended to allow claimants to invoke the presumption by introducing only one piece of qualifying medical evidence.[59] Judge Hall further contended that the only reasonable interpretation of the language in subsections (a)(2) and (a)(3) required a claimant to introduce only one set of qualifying ventilatory or blood gas studies.[60] Judge Hall noted that the mandatory ventilatory and blood gas testing procedures under the Act required several component tests.[61] Judge Hall claimed that the component testing procedure that controlled ventilatory and blood gas testing assured results of sufficient reliability to justify basing an invocation of the presumption under subsection (a)(2) or (a)(3) on the results.[62] Judge Hall differed from the majority in holding that a claimant may not invoke the presumption under subsection (a)(4) without introducing the opinion of a qualifying physician.[63]

In considering the rebuttal phase of the regulation, Judge Hall spoke for a majority of the court in stating that after a claimant invoked the presumption, the burden of proof shifted to the employer to rebut the

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presumption. *See* H.R. REP. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 308, 309-10 (conference report indicated to Secretary that presumption was not to be irrebuttable).

58. *See Stapleton*, 785 F.2d at 433-34 (express terms of § 727.203(a) require that claimants invoke presumptions under (a)(1) or (a)(4) by presenting one piece of specified evidence). The Federal Register sets forth the standards for measuring the reliability and authenticity of medical evidence. *See* 20 C.F.R. § 718.101-107 (1986) (citing D.O.L. requirements for development of medical evidence); 20 C.F.R. § 727.206 (1986) (citing D.O.L. quality standards applicable to evidence).

59. *See Stapleton*, 785 F.2d at 433-34 (Hall, J., relying on express language of regulation as evidence of congressional intent); *supra* note 11 (quoting § 727.203).

60. *See Stapleton*, 785 F.2d at 434 (stating that a reasonable interpretation of (a)(2) and (a)(3) is that claimants invoke presumptions by introducing one set of qualifying test results).

61. *Id.; see supra* notes 18-19 (describing ventilatory and blood gas testing procedures).

62. *See Stapleton*, 785 F.2d at 434. The Fourth Circuit noted that the regulations require that ventilatory studies consist of several tests along with two or three tracings of each test and that blood gas studies consist of several phases including at rest and at exercise components. *Id.*

63. *See id.* at 434-35 (physician's opinion is absolute prerequisite to invoking presumption under § 727.203(a)(4)). *But see id.* at 426-27 (per curiam court held that claimants may invoke presumption under § 727.203(a)(4) absent a physician's opinion). Judge Hall advocated a reversal of *Consolidation Coal Co. v. Sanati*. *Id.* at 434; *see also* Consolidation Coal Co. v. Sanati, 713 F.2d 480 (4th Cir. 1983) (case relied on by Phillips, J., to support position on invocation stage of § 727.203). Judge Hall noted that *Sanati* held that in order to invoke the presumptions codified at § 727.203(a)(1)-(a)(4), a claimant must prove by a preponderance of the evidence all of the facts necessary to establish the presumption. *Stapleton*, 785 F.2d at 434; *see also Sanati*, 713 F.2d at 482 (Widener, J., holding that invocation part of § 727.203 required preponderance standard). The *Stapleton* majority, however, decided not to overrule *Sanati* completely. *Stapleton*, 785 F.2d at 427. The Fourth Circuit retained the *Sanati* standard for weighing evidence when a claimant attempts to invoke the presumption under § 727.203(a)(4) in the absence of a qualifying physician's opinion. *Id.*

presumption.[64] Judge Hall asserted that the adjudicators must weigh the evidence under a preponderance standard only in the rebuttal stage.[65] Under a preponderance standard an argument or position supported by the greater weight of the evidence prevails over an argument supported by less convincing evidence.[66]

Judge Hall noted that the regulation specifically mandates the consideration of all relevant medical evidence under section 727.203(b).[67] Judge Hall stated that in the rebuttal stage, the burden of proof shifted to the employer to disprove by a preponderance of the evidence the causal relationship between a claimant's mine employment and disability.[68] According to Judge Hall, a successful rebuttal proves that the claimant does not suffer from pneumoconiosis, or that the claimant otherwise does not meet the criteria for obtaining benefits under the Act.[69] Judge Hall differed from the majority in advocating the reaffirmance of *Whicker v. United States Department of Labor Benefits Review Board.*[70] In *Whicker*, the United States

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64. *Stapleton* 785 F.2d at 435. The *Stapleton* court held that when there is no physician's opinion, adjudicators must weigh all other medical evidence that may bear on the existence of total disability due to respiratory or pulmonary impairment. *Id.* at 466. The types of medical evidence adjudicators must consider under subsection (a)(4), in the absence of a physician's opinion, include lung scans, physical examinations, and medical histories. *Id.* at 466.

65. *Id.*

66. *See* Lampe v. Franklin American Trust Co., 96 S.W.2d 710, 723 (Mo. 1936) (preponderance means that adjudicator finds evidence in support of argument more convincing and worthy of belief than evidence offered in opposition); *see also* 9 WIGMORE, EVIDENCE § 2498 Measure of Jury's Persuasion (Chadbourn rev. 1981) (survey of use of preponderance standard).

67. *See Stapleton*, 785 F.2d at 435 (stating that placement of language in rebuttal section requiring consideration of all relevant evidence is appropriate and consistent with legislative intent underlying Act).

68. *Id.; see* Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 123 (4th Cir. 1984) (stating that statutory language makes clear that to rebut presumption, employers must rule out causal relationship between mine employment and total disability).

69. *Stapleton*, 785 F.2d at 435. Several federal circuit courts agree that after invocation of a presumption, the burden shifts to the employer to rebut the presumption. *See, e.g., Bethlehem*, 736 F.2d at 123-24 (burden is on employer to disprove relationship between mine employment and total disability); Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1120 (6th Cir. 1984) (language of § 727.203(b)(3) relates to burden on employer to rebut presumption), *cert. den.*, 105 S. Ct. 2357 (1985); Kaiser Steel Corp. v. Director, O.W.C.P., 748 F.2d 1426, 1430 (10th Cir. 1984) (burden of persuasion as well as burden of production shifts to employer after claimant triggers presumption); Alabama By-Products v. Killingsworth, 733 F.2d 1511, 1514 (11th Cir. 1984) (burden of proof shifts to employer in rebuttal).

70. *Stapleton*, 785 F.2d at 436; *see* Whicker v. U.S. Dept. of Labor Benefits Review Bd., 733 F.2d 346, 348 (4th Cir. 1984) (holding that A.L.J.'s unconditional reliance on nonqualifying blood gas and ventilatory function tests was erroneous). In *Whicker v. U.S. Dept. of Labor Benefits Review Bd.*, the claimant invoked the presumption under § 727.203(a)(1) by presenting qualifying x-ray evidence. *Whicker*, 733 F.2d at 348. Relying principally on nonqualifying ventilatory and blood gas studies, the A.L.J. in *Whicker* found that the employer rebutted the presumption. *Id.* The Fourth Circuit in *Whicker* ruled that the A.L.J. erred in considering nonqualifying test results as the principal means of rebuttal. *Id.* Because raising

Court of Appeals for the Fourth Circuit disallowed the use of non-qualifying evidence as the principal means of rebuttal.[71] Nonqualifying evidence is evidence that does not meet any of the necessary criteria for invoking the presumption set forth in section 727.203 (a)(1)-(a)(4).[72] Judge Hall, however, found that nonqualifying evidence is particularly relevant in rebuttal when examining physicians interpret the nonqualifying evidence as part of a diagnosis.[73] Judge Hall concluded that nonqualifying test results are relevant only as components of the rebuttal evidence.[74]

Judge Phillips concurred in part and dissented in part from Judge Hall's opinion.[75] The per curiam decision relied on the opinion of Judge Phillips for the rationale of the court that Judge Hall's opinion did not provide.[76] Judge Phillips posited that in order to invoke the presumption the regulations required proof of the existence of the specified medical criteria.[77] Judge Phillips noted the use of the word "establish" in both the invocation and rebuttal subsections of the regulation.[78] Judge Phillips concluded that the words "establish" and "prove" are synonymous.[79] Judge Phillips held that when the language of section 727.203 uses a form of the word "establish," the regulation requires a claimant to prove the existence of qualifying medical criteria.[80] Judge Phillips stated, therefore, that prior to invoking the presumption, the A.L.J. should measure the medical evidence against a preponderance standard in order to determine if the claimant proved the existence of qualifying criteria.[81] Judge Phillips found that section 727.203

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the presumption requires a claimant to present evidence supporting the invocation of the presumption under any § 727.203(a) subsection, the *Whicker* court partially excluded nonqualifying test results. *Id.* Considering the language and purposes of § 727.203, the court held that forcing claimants to present evidence that supported the invocation of two or more of the presumptions under § 727.203(a) would be inherently unfair. *Id.*; *see infra* notes 90-93 and accompanying text (discussing Fourth Circuit's reversal of *Whicker*).

71. *Stapleton*, 785 F.2d at 436. Judge Hall stated that to overrule *Whicker*, and allow the use of nonqualifying tests as the principal means of rebutting the presumption, would defeat the specific language and purposes of the applicable regulation. *Id.*; *see infra* notes 210-12 and accompanying text (examining legislative history underlying § 727.203(b)).

72. *See Whicker*, 733 F.2d at 348 (defining nonqualifying evidence).

73. *Stapleton*, 785 F.2d at 436.

74. *Id.* Judge Sprouse fully concurred with the holdings and rationale of Judge Hall; *See id.* at 449 (Sprouse, J., joined by Winter, Hall and Sneeden, J.J.).

75. *Id.* at 439 (Phillips, J., joined by Russell, Murnaghan, and Ervin, J.J.).

76. *See id.* at 426-27 (per curiam opinion).

77. *Id.* at 441.

78. *Id.* at 443.

79. *See id.* (Phillips, J., asserting that word "establish," in common usage, indicates burden of persuasion rather than burden of production).

80. *Id.* at 441. Judge Phillips asserted that absent an expressed standard of proof in the regulation, a preponderance standard is the correct standard to apply. *Id.* at 443 n.6. Judge Phillips found that there existed no express standard of proof in section 727.203. *Id.* Judge Phillips, therefore, concluded that to establish a prima facie case of compensable disability, claimants must prove the existence of the elements of the presumption by a preponderance of the evidence. *Id.* at 441, 443 & n.6.

81. *Stapleton*, 785 F.2d at 441.

contained a passage mandating the consideration of all relevant evidence in adjudicating claims.[82] Judge Phillips further found that the section 727.203 mandate to consider all relevant evidence applied to the entire presumption regulation, including the invocation subsection.[83] Moreover, Judge Phillips stated that the failure to consider relevant evidence in the invocation stage would exclude evidence that may bear on the merit and validity of benefits claims.[84]

Judge Phillips stated that after invoking the presumption, the burden of persuasion regarding disproving eligibility, measured against a preponderance standard, shifts to the party opposing the claim.[85] Judge Phillips, however, dissented on the issue of which specific facts the rebuttal evidence may disprove.[86] Judge Phillips found that rebuttal evidence may not disprove a fact that a claimant proved in the invocation stage.[87] For example, Judge Phillips held that to invoke the presumption under subsection (a)(l), a claimant must prove by a preponderance of the x-ray evidence that the claimant suffers from pneumoconiosis.[88] Judge Phillips would allow an employer to rebut the presumption established under subsection (a)(1) under any 727.203(b) subsection except subsection (b)(4), which requires evidence establishing that the claimant does not have pneumoconiosis.[89]

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82. *See id.* at 443 (Director's interpretation requiring assessment of all relevant evidence in invocation stage finds support in plain words of § 727.203).

83. *See id.* (asserting that mandate to consider all relevant evidence applies to entire regulation, including both invocation and rebuttal sections). Judge Hall contended that adjudicators must weigh evidence under a preponderance standard only in the rebuttal stage because the specific words mandating the consideration of all relevant evidence appear in section 727.203(b). *Id.* at 435.

84. *Id.* at 449.

85. *See id.* at 441 (Judge Phillips stating that employer's burden of proof in rebuttal is to negate elements of disability claim that claimant did not prove in invoking presumption).

86. *See id.* (Judge Phillips holding that employers may not negate elements of a claim that claimant proved by preponderance of evidence in invocation stage).

87. *Id.*

88. *Id.* at 446; *see supra* notes 75-84 and accompanying text (Judge Phillips stated that § 727.203(a) requires claimants to prove, by preponderance of evidence, facts necessary to invoke presumption).

89. *Stapleton*, 785 F.2d at 441. Judge Phillips concluded that specific relationships existed between presumption and rebuttal. *Id.* at 447-48. If a claimant invokes the presumption under subsection (a)(1), the claimant has proved that he has pneumoconiosis, and raised a rebuttable presumption that the pneumoconiosis arose out of coal mine employment and that pneumoconiosis totally disabled the claimant. *Id.* If a claimant invokes the presumption under subsection (a)(2) or (a)(3), the claimant has proved that he has a respiratory or pulmonary problem, and raises the rebuttable presumption that pneumoconiosis caused the respiratory or pulmonary problem, that the pneumoconiosis arose from mine employment, and that the disease is totally disabling. *Id.* at 448. A claimant invoking the presumption under § 727.203(a)(4) proved that a respiratory or pulmonary problem caused total disability and raised a rebuttable presumption that pneumoconiosis arose from mine employment and caused the respiratory or pulmonary problem. *Id.*

Judge Phillips further held that to invoke the presumption under (a)(4), the claimant must prove total disability. *Id.* Judge Phillips also held that rebuttal under (b)(1) requires

Judge Phillips spoke for the majority on the issue of the use of nonqualifying evidence in rebuttal.[90] Judge Phillips noted that allowing the introduction of all relevant evidence gave employers fair opportunity to prove that the claimant's pneumoconiosis was not totally disabling.[91] Judge Phillips noted that the language of section 727.203 expressly directed courts to consider all relevant evidence.[92] Judge Phillips stated that a rule excluding nonqualifying evidence would prevent employers from presenting probative evidence concerning presumed facts of causation and total disability.[93]

In arriving at a decision, Judge Phillips asserted that he was deferring to the interpretation of the Director of the Office of Workers Compensation

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employers to prove that a claimant does or is able to do his usual coal mine work, or comparable work. *Id.* Judge Phillips, therefore, would not allow employers to rebut the presumption invoked under subsection (a)(4) by proving a (b)(l) rebuttal. *Id.*

90. *See id.* at 427 (per curiam opinion).

91. *Id.* at 446-47. Judge Phillips would overrule two decisions of the United States Court of Appeals for the Fourth Circuit, *Whicker* and *Hampton v. U.S. Dept. of Benefits Review Bd. Id.* Whicker v. U.S. Dept. of Labor Benefits Review Bd., 733 F.2d 346 (4th Cir. 1984); Hampton v. U.S. Dept. of Benefits Review Bd., 678 F.2d 506 (4th Cir. 1982). Judge Phillips would overrule *Whicker* and *Hampton* to the extent that the decisions did not allow an A.L.J. to consider nonqualifying evidence in the rebuttal stage. *See Stapleton*, 785 F.2d at 446-47 (Judge Phillips held that *Whicker* and *Hampton* violated statutory mandate to consider all relevant evidence); *see also Whicker*, 733 F.2d at 348 (A.L.J. cannot use nonqualifying test results to rebut legitimately invoked presumption); Hampton v. U.S. Dept. of Benefits Review Bd., 678 F.2d 506, 507-508 (4th Cir. 1982) (claimant does not have to present evidence to invoke presumption under other subsections once claimant raises presumption under one subsection). Judge Phillips contended that the holdings in *Whicker* and *Hampton* were contrary to the statutory mandate of 30 U.S.C. § 923(b) which states that employers may not rebut the presumption on the basis of a single negative x-ray. *Stapleton*, 785 F.2d at 446; *see* 30 U.S.C. § 923(b) (codification of single x-ray statute, mandating circumstances under which Secretary must accept radiologist's interpretation of claimant's chest roentgenogram).

92. *Stapleton*, 785 F.2d at 446.

93. *Id.* Judge Phillips concluded that the language of section 727.203 supplied no basis for excluding nonqualifying evidence, even if employers used nonqualifying evidence as the principal means of rebuttal. *Id.*

Judge Widener concurred and dissented from the opinion of Judge Hall. *See id.* at 465 (opinion of Widener, J., joined by Chapman, Wilkinson, J.J.). Judge Widener agreed that a claimant may invoke the presumption under subsections (a)(l)-(a)(3) by producing one qualifying piece of evidence. *See id.* (recognizing that production of one qualifying x-ray, blood gas, or ventilatory study is sufficient to invoke presumption under subsections (a)(l)-(a)(3)). Judge Widener held that imposing a preponderance standard in the invocation stage would require a double evaluation of identical evidence under the same standard. *Id.* Judge Widener stated that an A.L.J. first would evaluate the evidence under section 727.203(a) in the invocation stage. *Id.* Judge Widener found that Judge Phillips' view on invocation would require a second evaluation of the evidence under section 727.203(b) in the rebuttal stage. *Id.* Judge Widener held that in the absence of a physician's documented opinion, an A.L.J. should weigh under a preponderance of the evidence standard any other relevant medical evidence, in order to determine if the evidence established the presumption under (a)(4). *Id.*

In the rebuttal stage, Judge Widener would allow a court to consider relevant evidence, whether the evidence is qualifying or nonqualifying. *Id.* at 466-67. Judge Widener stated that the language of the statute requires that a court consider all relevant evidence regardless of the weight that the evidence may carry. *See id.* (contending that there exists no reason to impose artificial restrictions on availability of evidence in claims adjudications).

Programs (Director) regarding section 727.203.[94] Judicial deference to an agency's interpretation of an agency regulation was thus a major issue in the Fourth Circuit's decision.[95] Specifically, the court considered whether the deference rule required the Fourth Circuit to defer to the Director's interpretation of section 727.203.[96] The first issue that the Fourth Circuit addressed regarding the deference question concerned whether section 727.203(a) required the court to weigh all relevant evidence against a preponderance standard prior to invoking a presumption.[97] A second issue concerned the court's use of nonqualifying test results in the rebuttal stage of section 727.203.[98]

Interpretations by agencies of agency regulations generally are preferable to judicial interpretations.[99] Courts lack specialized experience and expertise that agencies possess.[100] Blind adherence to agency interpretations, however, creates several obvious problems.[101] If courts blindly adhered to agency interpretations, there would exist no barriers to agencies changing interpretations at any time.[102] Judicial adherence to agencies' changing interpreta-

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94. *Id.* at 440; *see supra* note 30 (examining procedure D.O.L. employs to adjudicate Black Lung Benefits claims).

95. *See Stapleton*, 785 F.2d at 440 (Judges Sprouse and Phillips examining deference issue). The deference rule refers to the practice by which courts defer to an administrative agency's construction of governing statutes and regulations. *See* Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587, 587 (1984) (examining agency interpretations of agency regulations).

96. *See Stapleton*, 785 F.2d at 439-64 (individual opinions of Judges Phillips and Sprouse). The Fourth Circuit confined to the opinions of Judges Phillips and Sprouse extensive discussion of substantive Administrative Law issues. *Id.* Judge Sprouse, who fully concurred with the opinion of Judge Hall, wrote separately only to respond to the opinion of Judge Phillips. *Id.* at 449.

97. *Id.* at 426-27; *see supra* notes 45-49 and accompanying text (discussing Fourth Circuit's opinion on operation of §§ 727.203(a)(l)-(a)(4)).

98. *Stapleton*, 785 F.2d at 427; *see supra* notes 50-51 and accompanying text (Fourth Circuit's decision on proper use of relevant evidence in rebuttal); *Stapleton*, 785 F.2d at 445 (Judge Phillips identified invocation issue and use of nonqualifying evidence in rebuttal issue as areas of critical conflict between Judge Hall and Director in interpreting § 727.203).

99. *See, e.g.*, Weaver, *supra* note 95, at 587 & n.4 (1984) (citing support for theory that principal reason for judicial deference to agency interpretations is expertise of agencies in specific areas); Levin & Woodward, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329, 330 (1979) (courts determine required degree of deference after considering agency's technical knowledge and experience); DAVIS, 5 ADMINISTRATIVE LAW § 29:13 (2d ed. 1984) (reviewing recent Supreme Court decisions involving deference to agency interpretations).

100. *See supra* note 99 (citing importance of agency expertise in determining degree of deference court required to accord agency interpretations of regulations).

101. *See* Weaver, *supra* note 95, at 611-23 (citing positive and negative aspects of deference to agency interpretations).

102. *See id.* at 612-13 (discussing effect of changing political philosophies on agencies' interpretations). A further problem contributing to shifting agency interpretations is that agencies continually apply increased expertise and knowledge to agency operations. *Id.* New expertise may change the way an agency interprets a regulation. *Id.* An additional problem is that despite an agency's expertise, the agency's interpretation may be wrong. *Id.*

tions of regulations would detract from reliability and predictability in the law.[103] If courts adhered to any agency interpretation of a regulation, the executive branch would have a perfect vehicle by which to assert indirect control over administrative policy.[104] Agencies could reflect each new administration's policies simply by changing interpretations of regulations, rather than by rescinding or amending the regulations.[105] Changing personnel could subject the interpretations of regulations to change based on personal biases.[106] Each revised interpretation would erode further the intent of the original promulgators of a regulation.[107]

Congress endowed the Social Security Administration (S.S.A.) and the D.O.L. with authority to implement fully the legislative intent underlying the Act.[108] The S.S.A. and the D.O.L. attempted to implement congressional intent by promulgating regulations.[109] One of the regulations that the D.O.L.

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103. *Id.* The unpredictability that changing agency interpretations creates encourages litigation. *Id.; see generally* Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 3 n.18 (discussing problem of courts tailoring decisions involving applications of deference rule to reach desired result).

104. *See* Weaver, *supra* note 95, at 612-13 (citing examples of politically altered interpretations of administrative regulations).

105. Weaver, *supra* note 95, at 613 n.147. There exists evidence indicating that administrative imposition of policy through changes in interpretations already has occurred. *Id.; see* Bob Jones Univ. v. United States, 461 U.S. 574, 577-85 (1983) (suit to strip University of tax exempt status because of University's racially discriminatory policies). In *Bob Jones University v. United States*, the United States Court of Appeals for the Fourth Circuit upheld an Internal Revenue Service (I.R.S.) decision to revoke Bob Jones University's tax exempt status. *Bob Jones*, 461 U.S. at 582, 584. The I.R.S. interpreted a tax exemption provision of the Internal Revenue Code as not allowing a school that practiced discrimination to maintain tax exempt status. *Bob Jones*, 461 U.S. at 578. Prior to the I.R.S. ruling, the I.R.S. considered the provision as granting tax exempt status to certain schools despite the schools' racially discriminatory policies. *Bob Jones*, 461 U.S. at 577-78. The United States Supreme Court affirmed the decision of the Fourth Circuit and the interpretation of the I.R.S. *See Bob Jones*, 461 U.S. at 609 (Court held that University was not tax exempt organization under I.R.S. provision because University did not serve or harmonize demonstrably with public interest). Prior to the Supreme Court's decision, however, the Reagan Administration changed the position of the Executive Branch on the tax exempt issue. Weaver, *supra* note 95, at 613 n.147. The Reagan Administration insisted that the I.R.S. Code provision did not allow the I.R.S. discretion to deny tax exempt status based on the racially discriminatory policy of the taxpayer. Weaver, *supra* note 95, at 613 n.147.

106. *See* Weaver, *supra* note 95 at 613 (stating that political considerations may cause agencies to alter interpretations of regulations).

107. *See id.* at 611-15 (suggesting that deference standards do not allow courts to protect adequately against agencies' effectively amending regulations by changing interpretation).

108. *See* 30 U.S.C. § 902(f)(2) (1982) (directing Secretary of Labor to adopt criteria no more restrictive than criteria of Social Security Administration regarding establishing eligibility for Black Lung Benefits); *infra* note 211 (discussing legislative mandate for D.O.L. eligibility criteria that was no more restrictive than criteria of S.S.A.).

109. *See Oversight of the Administration of the Black Lung Program, 1977: Hearing before the Subcommittee on Labor of the Committee on Human Resources*, 95th Cong., 1st Sess. 49 (1977) (legislative history of § 727.203); *Hearings on H.R. 3476, H.R. 8834, H.R. 8838 Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 93rd Cong., 1st & 2d Sess. 329, 341, 349, 399 (1973-1974) (discussing establishing a presumption applicable to Part C claims).

promulgated pursuant to congressional authority is section 727.203.[110] Congress decided that the S.S.A. and the D.O.L. possessed the necessary expertise to promulgate regulations that balance the legal and medical issues arising in the typical Black Lung case.[111] The Fourth Circuit faced the question of whether, and to what extent, a court must give deference to an agency interpretation.[112]

A preliminary issue that the Fourth Circuit did not resolve fully was whether the D.O.L. consistently had applied the Director's interpretation of section 727.203.[113] The Director submitted a brief to the Fourth Circuit that set forth the interpretation of section 727.203 on which Judge Phillips relied.[114] Prior to *Stapleton*, the Director never had expressed formally an interpretation of section 727.203.[115] Judge Sprouse, in an individual opinion, asserted that there existed no affirmative evidence in the Director's brief indicating that the D.O.L. reasonably and consistently had applied the Director's interpretation of section 727.203.[116] Judge Sprouse, however, failed to reveal evidence to support the claim that the D.O.L. had not

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110. *Hearings on H.R. 3476, H.R. 8834, H.R. 8838 Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 93rd Cong., 1st & 2d Sess. 329, 341 349,399 (1973-74); *see supra* note 11 (setting forth text of § 727.203).

111. *See* S. 2917, 91st Cong., 1st Sess. § 501 (1977), *reprinted in* Legislative History of Federal Coal Mine Health and Safety Act of 1969, 94th Cong., 1st Sess. 1963-64 and *Federal Coal Mine Health and Safety Act: Hearings on Black Lung Benefits Provisions Before the H. Comm. on Education and Labor*, 95th Cong., lst Sess. 275 (1977) (explaining reasons for assigning agency task of administering Black Lung Benefit Program).

112. *See Stapleton*, 785 F.2d at 439-40, 449 (opinions of Phillips and Sprouse, J.J.). The dispute in *Stapleton* concerned whether or not to apply the deference rule. *Id.* The Fourth Circuit has applied the deference principle in certain cases. *See, e.g.*, Motley v. Heckler, 800 F.2d 1253, 1254 (4th Cir. 1986) (agency entrusted with implementing statutory scheme is entitled to substantial deference); Starrett v. Special Counsel, 792 F.2d 1246, 1252 (4th Cir. 1986) (although deference to agency interpretations is required at times, blind adherence to every agency interpretation is not); Dixon v. Nationwide Mut. Ins. Co., 784 F.2d 1176, 1181 (4th Cir. 1986) (considerable deference due an agency's interpretation of a statute that Congress charges agency with implementing).

113. *See Stapleton*, 785 F.2d at 440 n.1 (discussing whether to consider Director's interpretation of § 727.203 as consistently applied agency interpretation); *id.* at 449 (Judge Hall rejecting Director's interpretation of 727.203 because Director did not show interpretation was consistently applied interpretation of agency).

114. *See id.* at 432 (Director's brief supported argument that claimants must invoke presumption by proving elements by preponderance of evidence). The Director of the Office of Workers' Compensation Programs (O.W.C.P.) intervened in *Stapleton* in order to present and defend the Director's interpretation of section 727.203. *Id.* at 440 n.1.

115. *Id.* at 440 n.1. Prior to *Stapleton*, the Director had published no interpretation of section 727.203. *Id.* The *Stapleton* court, therefore, could refer to no interpretation of § 727.203 of the Director's that was inconsistent with the interpretation that the Director introduced to the Fourth Circuit. *Id.*

116. *Id.* Judge Sprouse implied that the Director needed to assert that the D.O.L. had reasonably and consistently applied the interpretation before the Fourth Circuit could defer to the interpretation. *Id.* at 449-50. Judge Sprouse, finding no assertion of the D.O.L.'s reasonable and consistent application of the Director's interpretation, would not require the court to adhere to the Director's interpretation. *Id.*

applied consistently the Director's interpretation.[117] Similarly, Judge Phillips alluded to no affirmative evidence to refute Judge Sprouse's contention that the D.O.L. did not apply reasonably and consistently the Director's interpretation.[118] Invoking the presumption under the Director's interpretation of section 727.203(a) is more difficult than invoking the presumption under the Fourth Circuit's interpretation.[119] Under the Director's interpretation, a claimant bears the burden of persuasion to prove the existence of the qualifying medical criteria specified in section 727.203(a)(l)-(a)(4).[120] The Fourth Circuit's interpretation requires the claimant to bear only a burden of production to introduce at least one piece of qualifying medical evidence delineated in section 727.203(a)(l)-(a)(4).[121] The most recent amendment to the Act highlights the need to examine the consistency of the D.O.L's application of the Director's interpretation.[122] The 1981 amendment to the Act made establishing Black Lung Benefits eligibility more difficult.[123] The Director's interpretation is consistent with the goals of the 1981 Amendment.[124] The Director's introduction of an interpretation of section 727.203 warranted a more thorough effort by the court to determine whether the D.O.L. consistently had applied the Director's interpretation.[125]

Logically, reviewing past Board decisions involving the interpretation of section 727.203 should enable courts to determine the interpretation of the regulation consistently applied by the D.O.L.[126] The Board, however, has applied conflicting interpretations of section 727.203.[127] In *Consolidation Coal Company v. Sanati*,[128] for example, the Board affirmed an express

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117. *See id.* (Judge Sprouse relied on Director's failure to present evidence showing that agency consistently applied Director's interpretation of § 727.203 to hold that Fourth Circuit owed no deference to interpretation).

118. *See id.* at 440 n.l. (Judge Phillips relied on Director's interpretation of § 727.203 because Director's interpretation was only one available to court).

119. *See infra* notes 120-21 and accompanying text (explaining how Director's interpretation of § 727.203(a) makes invoking presumption more difficult than invoking presumption under per curiam position).

120. *See* Brief for the Director, Office of Workers' Compensation Programs at 15-18, Stapleton v. Westmoreland Coal Co., 785 F.2d 424 (4th Cir. 1986) (Director advocated placing burden of persuasion, rather than burden of production, on claimant in invocation stage).

121. *See Stapleton*, 785 F.2d at 426-27 (per curiam opinion of Fourth Circuit).

122. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981) (codified at 30 U.S.C. §§ 922, 923 (1982)); *see supra* note 2 (discussing provisions of 1981 Amendments).

123. *See* Note, *Black Lung Benefits Amendments of 1981: Transfer of Special Claims Under Section 205*, 86 W. VA. L. REV. 1023, 1026-1028 (1983-84) (reviewing legislative history and underlying intent of 1981 Amendments).

124. *See supra* notes 113-18 and accompanying text (citing failure of court to resolve whether D.O.L. consistently applied Director's interpretation of § 727.203).

125. *See supra* notes 113-18 and accompanying text (alluding to importance of Board's striving to maintain consistency in the application of regulations).

126. *See infra* notes 128-136 and accompanying text (citing examples of Board decision inconsistencies regarding correct operation of § 727.203).

127. *Id.*

128. 713 F.2d 480 (4th Cir. 1983).

A.L.J. ruling.[129] The A.L.J. in *Sanati* specifically held that an A.L.J. may not weigh evidence in the invocation stage.[130] More specifically, the A.L.J. held that introducing one qualifying piece of medical evidence set forth in subsections (a)(l)-(a)(4) was sufficient to invoke the presumption.[131] In other cases, however, the Board affirmed A.L.J. rulings contrary to the Board's holding in *Sanati*.[132] For example, in *Strako v. Ziegler Coal Company*,[133] the Board concluded that before invoking the presumption under subsection (a)(2), the A.L.J. must weigh all of the evidence.[134] In *Sanati*, the Board required only one piece of qualifying medical evidence to invoke the presumption, while in *Strako* the Board required A.L.J.'s to weigh the medical evidence prior to invoking the presumption.[135] The Board's decisions do not reflect the consistent application of any single interpretation.[136]

The Fourth Circuit, after briefly considering whether the D.O.L. consistently applied the Director's interpretation, analyzed standards of judicial review regarding agency interpretations of regulations.[137] The standards under which courts review agency interpretations vary widely.[138] Many cases

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129. *Sanati*, 713 F.2d at 481.

130. *Id.*

131. *Id.* In *Consolidation Coal Co. v. Sanati*, the United States Court of Appeals for the Fourth Circuit recognized that the medical evidence included conflicting x-rays and ventilatory and blood gas studies, as well as conflicting physicians' opinions. *Id.* The A.L.J. invoked the presumption under § 727.203(a)(4) on the strength of a physician's opinion that pneumoconiosis had disabled the claimant. *Id.* The Board affirmed the A.L.J. *Id.* at 482. The Fourth Circuit, however, reversed the Board. *Id.* The Fourth Circuit in *Sanati* ruled that an A.L.J. must weigh in the invocation stage all of the evidence concerning a fact necessary to establish the presumption. *Id. Compare* Sharpless v. Califano, 585 F.2d 664, 667 (4th Cir. 1978) (Fourth Circuit affirmed Board opinion that preponderance standard applied in invocation stage); Petry v. Califano, 577 F.2d 860, 864 (4th Cir. 1978) (Fourth Circuit, affirming Board, holding that claimant must prove facts necessary to invoke presumption by preponderance of evidence) *with* Stiner v. Bethlehem Mines Corp., 3 Black Lung Rep. 1-487 (1981) (Board rejected preponderance standard in invocation stage).

132. *See* Justice v. Jewell Ridge Coal Corp., 3 Black Lung Rep. 1-547 (1981) (holding that before invoking the presumption under subsection (a)(l), A.L.J. must weigh results of all x-ray readings).

133. 3 Black Lung Rep. 1-136 (1981).

134. Strako v. Ziegler Coal Company, 3 Black Lung Rep. 1-136, 1-143 (1981). The A.L.J. must weigh the evidence in the invocation stage and determine whether the weight of the qualifying ventilatory evidence was greater than the weight of the nonqualifying evidence. *Id.*

135. *See supra* notes 128-134 (discussing *Sanati* and *Strako*).

136. *Id.*

137. *Stapleton*, 785 F.2d at 440, 449-51.

138. *See* Weaver, *supra* note 95, at 591-95. The United States Supreme Court employs several standards in considering whether to defer to an agency's interpretation. *Id.* at 591; *see e.g.*, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980) (stating that courts should defer to Reserve Board's interpretations in Federal Reserve Board action unless interpretation is demonstrably irrational); Ehlert v. U.S., 402 U.S. 99, 105 (1971) (stating that courts should defer to reasonably, consistently applied agency interpretations); Immigration and Naturalization Serv. v. Stanisic, 395 U.S. 62, 72 (1969) (stating that courts should defer to agency interpretation unless agency interpretation is unreasonable or plainly erroneous).

refer to a reasonableness standard.[139] The reasonableness standard mandates that a court should not substitute a judicial interpretation unless an agency does not reasonably interpret an agency regulation.[140] The United States Supreme Court employed the reasonableness standard in *Udall v. Tallman*.[141] In *Tallman*, the Secretary of the Interior interpreted an Executive Order relating to the disposition of public lands in Alaska.[142] The Secretary interpreted part of the Order as withdrawing land that the Order covered from settlement, location, sale, entry, or other disposition.[143] The Secretary determined that the terms "settlement," "location," "sale" and "entry" all contemplated a transfer of title of the land in question.[144] The Secretary, therefore, interpreted the term "other disposition" to mean a passage of title to the land.[145] The Secretary's interpretation left the land available for leasing.[146]

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139. Weaver, *supra* note 95, at 595-97. Lower federal courts apply a number of different standards in determining whether to defer to an agency interpretation of a regulation. *Id.* The inconsistency in the lower courts regarding which deference standard to apply in a particular case results in confusion when a court attempts to determine the appropriate standard. *Id.* Courts at all levels of the federal judiciary often fail to apply any deference standard in favor of other interpretive rules, thus increasing the confusion relating to which deference standard to apply in a particular instance. *Id.* at 597-600. *See, e.g.*, Northwest Central Pipeline Corp. v. F.E.R.C., No. 84-1697, slip. op. at (10th Cir. August 5, 1986) (court may reverse discretionary decision of agency only if decision was arbitrary or capricious); Deters v. Sec. of Health, Educ. & Welfare, 789 F.2d 1181, 1184 (5th Cir. 1986) (courts should not substitute interpretation if agency reading is not unreasonable); Baker v. Heckler, 730 F.2d 1147, 1149 (8th Cir. 1984) (courts should give due deference to agency's interpretation of agency's regulation).

In *Stapleton*, Judge Sprouse cited *Allen v. Bergland* to support the contention that the Fourth Circuit must seek to determine whether the agency consistently applied an interpretation. *Stapleton*, 785 F.2d at 450; *see* Allen v. Bergland, 661 F.2d at 1001, 1004 (holding that threshold question is whether agency interpretation is reasonable and consistently applied). In *Allen*, the Fourth Circuit also considered the interpretation's reasonableness as an important factor in deciding whether or not to defer to an agency. *Allen*, 661 F.2d at 1004.

140. *See supra* note 115 (stating that reigning confusion in courts on which deference standard, if any, applies often leads courts to substitute incorrectly courts' own interpretation for that of agencies').

141. 380 U.S. 1, *rehg. denied.*, 380 U.S. 989 (1965).

142. Udall v. Tallman, 380 U.S. 1, 1 (1965). The public lands in *Udall v. Tallman* fell under Executive Order No. 8979 and Public Land Order No. 487. *Tallman*, 380 U.S. at 5; Exec. Order No. 8979, 6 Fed. Reg. 6471 (1941); Public Land Order No. 487, 13 Fed. Reg. 3462 (1948), revoked by Public Land Order No. 1212, 20 Fed. Reg. 6795 (1955). Parallels existing between regulations and Executive Orders allow application of *Tallman* principles to cases involving administrative regulation interpretations. *See* BLACK'S LAW DICTIONARY, 511, 1156-57 (noting similarity between Executive Orders and administrative regulations).

143. *Tallman*, 380 U.S. at 19.

144. *Id.*

145. *Id.*

146. *See id.* (holding that no term in Order precluded renting land that Order affected). The *Tallman* Court also noted that public land laws generally apply to the alienation of land and not to the leasing of land. *Id.* The United States District Court for the District of Columbia implicitly held that the Order did not preclude the Secretary from leasing the lands. *Id.* at 3. The United States Court of Appeals for the District of Columbia reversed the decision of the district court, holding that the Order precluded the Secretary from leasing the land.

The *Tallman* Court noted that there existed other reasonable interpretations of the Order's language.[147] The Court, however, held that because the Secretary's interpretation was reasonable, courts must defer to the Secretary's interpretation.[148]

The agency in *Tallman*, unlike the D.O.L. in *Stapleton*, consistently applied the challenged interpretation.[149] The Department of the Interior made the agency interpretation of the Order a matter of public record.[150] People thus relied on the Department of Interior's interpretation in *Tallman* to a greater degree than people relied on the previously unpublished Director's interpretation in *Stapleton*.[151] The Supreme Court, however, has deferred to unpublished interpretations.[152] The Fourth Circuit, therefore, should not have rejected the Director's interpretation merely because the Director's interpretation was not published or codified.[153]

Udall v. Tallman, 324 F.2d 411, 404 (1963). The Supreme Court reversed the decision of the Court of Appeals. *Tallman*, 380 U.S. at 4.

147. *Tallman*, 380 U.S. at 16. The Supreme Court in *Tallman* noted that the United States Court of Appeals for the District of Columbia held that disposition of land included leasing. *Id.* The Supreme Court held that the Secretary's prevailing interpretation was as reasonable as the the Court of Appeals interpretation. *Id.* The Court, therefore, deferred to the Secretary's interpretation because the interpretation was a reasonable construction of the Orders. *Id.* The *Tallman* Court held that in order to defer to the agency interpretation a court did not need to find that the agency interpretation was the only reasonable interpretation, or that the court would reach a similar interpretation. *Id.* Rather, the Court held that if an agency interpretation is reasonable courts must defer to the agency interpretation. *Id.*

148. *Id.* at 4.

149. *See id.* (noting that agency interpretation was part of pulic record).

150. *Id.*

151. *See supra* notes 99-107 and accompanying text (noting difficulty in relying on interpretations subject to change by agency); *see also Tallman*, 380 U.S. at 4 (public's oppurtunity to know agency's position on meaning of Orders weighed heavily in Court's decision to defer to agency interpetation). Although the Director's interpretation of section 727.203 was not a matter of public record, a reasonable assumption is that some miners may have believed themselves incapable of establishing eligibility under the Director's interpretation and thus, failed to file claims. *Supra notes* 99-107.

152. *See* Immigration and Naturalization Serv. v. Stanisic, 395 U.S. 62, 72 (1969) (noting that Court deferred to unpublished interpretation of deportation regulation); Thorpe v. Housing Auth. of the City of Durham, 393 U.S. 268, 272 (1969) (upholding agency action based on interpretation contained in circulars not yet incorporated into agency manual).

153. *See Stanisic*, 395 U.S. at 72 (noting that Court deferred to unpublished agency interpretations); *Thorpe*, 393 U.S. 272 (decision based on unpublished agency interpretation).

In *Stanisic*, the Court deferred to an interpretation of a regulation by the Immigration and Naturalization Service (INS). *Stanisic*, 395 U.S. at 72. The Court found the interpretation of INS dispositive because INS promulgated, administered and consistently applied the regulation. *Id.* The Court found the INS interpretation controlling, as the interpretation was not plainly erroneous. *Id.*

In *Thorpe*, the Court deferred to the agency's decision to base an action on a circular, containing an interpretation of a regulation, that had not been physically added to the Agency's manual. *Thorpe*, 393 U.S. at 275. Although incorporation into the manual was normal procedure, the Court held that an agency decision to base an action on the new circular was defensible and entitled to deference. *Id.* Finally, the Court decided that the language of the circular was mandatory and clear, and, therefore, upheld agency action based on the circular. *Id.*

Judge Phillips' individual opinion did not refer explicitly to a reasonableness standard in considering the Director's interpretation.[154] Courts' cannot limit analyses of an interpretation under a reasonableness standard to a review of the words of the regulation or statute in question.[155] Judge Phillips stated that, as a matter of law, the Fourth Circuit should have deferred to the Director's interpretation unless the Director's interpretation of section 727.203 was plainly erroneous or made section 727.203 inconsistent with the Act.[156] The standards of judicial review on which Judge Phillips relied to ratify the Director's interpretation were factors in the analysis of the overall reasonableness of section 727.203.[157] Judge Sprouse accepted Judge Phillips' characterization of the applicable deference standards.[158] Judge Sprouse, however, maintained that an agency interpretation first promulgated in a litigation brief did not rise to the level of an interpretation to which the deference principle applies.[159] Judge Sprouse, therefore, would not defer to the Director's interpretation of section 727.203.[160] Nevertheless, Judge Sprouse analyzed the interpretation under the standards of review that Judge Phillips set forth, concluding that the Director's interpretation was plainly erroneous and also rendered section 727.203 inconsistent with the Act.[161]

The United States Supreme Court employed the plainly erroneous standard in *Bowles v. Seminole Rock Company*.[162] In *Bowles*, the Court reviewed an administrative interpretation of a maximum price regulation.[163] To combat wartime inflation, the Office of Price Administration regulated the prices of specified articles.[164] The maximum price regulation provided that

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154. *See Stapleton*, 785 F.2d at 440 (Judge Phillips expressly referred only to plainly erroneous standard and to standard under which no deference is due interpretation that renders regulation inconsistent with enabling statute).

155. *See Tallman*, 380 U.S. at 4, 19 (stating that when agency interpretation was reasonable, and not clearly erroneous, courts must defer to interpretation); *see also* Weaver, *supra* note 95, at 591-97 (citing confusion concerning applicable standards in deference cases); *see* U.S. v. Larionoff, 431 U.S. 864, 873 (1977) (stating that regulations must be consistent with enabling statute).

156. *Stapleton*, 785 F.2d at 440. Judge Phillips discussed two standards of review of agency interpretations of regulations referred to in the *Stapleton* opinion. *Id.* Judge Phillips failed to distinguish between a plainly erroneous standard and an inconsistent with the regulation standard of review. *Id.* Judge Phillips referred to the plainly erroneous standard and the inconsistent with the regulation standard interchangeably. *Id.*

157. *See id.* at 440 n.2 (stating that courts should confine review of agency interpretations to bounds of reasonableness to establish workable deference principles).

158. *Id.* at 449. Judge Sprouse would not defer to the Director's interpretation in *Stapleton* because the Director submitted the interpretation in a brief as an intervenor. *Id.*

159. *Id.*

160. *Id.*

161. *See id.* (opinion of Judge Sprouse applying standards that Judge Phillips advocated and finding that Fourth Circuit need not defer to Director's interpretation of § 727.203).

162. 325 U.S. 410 (1945).

163. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 411 (1945).

164. *See id.* at 413 (regulation at issue in *Bowles* was part of larger regulatory scheme designed to bring entire economy of nation under price control).

the most that a seller could charge for regulated goods was the highest price that the seller charged within a selected base period.[165] The administrator determined the allowable maximum price according to a regulated scheme.[166] The *Bowles* decision focused on one of the ways in which the agency calculated the highest price charged within the base period.[167] The agency interpreted the regulation to mean that the allowable maximum price was the highest price charged for goods delivered within the base period, even though the sale of the goods occurred earlier.[168] The defendant in *Bowles* maintained that the regulation only referred to goods sold and delivered during the base period.[169] To resolve the dispute, the Court relied on the plain words and relevant agency interpretation of the regulation.[170] The Court determined that unless the agency's interpretation was plainly erroneous, the agency interpretation was the ultimate criterion upon which a court based the meaning of the regulation.[171] The Court, referring to the regulatory language, found that the agency's interpretation of the regulation was not plainly erroneous.[172] The Court, therefore, stated that the agency's interpretation of the regulation prevailed over the defendant's interpretation.[173]

Judge Phillips advocated application of the plainly erroneous standard to the Director's interpretation of section 727.203.[174] If the language of section 727.203 lends no support to the Director's interpretation, the Director's interpretation is plainly erroneous.[175] Section 727.203(a)(l) presumes that pneumoconiosis totally disables a miner with at least 10 years of coal mine employment if a chest x-ray establishes the existence of pneumoconiosis.[176] Judge Sprouse argued in support of the per curiam holding regarding subsection (a)(l).[177] Judge Sprouse stated that if the drafters of the regulation intended to require only one qualified x-ray to invoke the (a)(l) presumption, there were few clearer ways to express that intent than to require the

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165. *See id.* at 414-15 (regulation specified March 1942 as base period for determining highest price seller could charge for regulated goods).

166. *Id.* at 414-15.

167. *See id.* (noting that regulatory scheme provided alternate methods for calculating highest allowable price if circumstances precluded using method at issue in *Bowles*).

168. *Id.* at 414-15.

169. *See id.* at 415 (highlighting conflicting interpretations of price regulation).

170. *See id.* at 414 (holding that in choosing between varying interpretations of a regulation, agency interpretations control unless interpretation is plainly erroneous).

171. *Id.* at 414.

172. *Id.* at 416.

173. *Id.* at 418.

174. *Stapleton*, 785 F.2d at 440.

175. *See Larionoff*, 431 U.S. at 872-73 (holding regulations invalid if plainly erroneous); *Tallman*, 380 U.S. at 16-17 (stating that agency interpretations of regulations are valid and accorded great deference by courts unless plainly erroneous); *Bowles*, 325 U.S. at 413-14 (holding that courts owe no deference to plainly erroneous agency interpretations).

176. 20 C.F.R. § 727.203(a)(1) (1986); *see supra* note 11 and accompanying text (quoting § 727.203(a)(1)).

177. *Stapleton*, 785 F.2d at 453-54.

presentation of "a" chest x-ray.[178] Moreover, the balance of the language in section (a) of the regulation lends support to the theory that the regulation requires only one qualifying piece of medical evidence to invoke the presumption.[179] For example, the presumption under (a)(4) arises if the claimant presents a physician's medical opinion that establishes the presence of a totally disabling respiratory or pulmonary impairment.[180] The language of subsections 727.203(a)(l) and (a)(4) clearly requires an A.L.J. to invoke the presumption if the claimant introduces one piece of qualifying medical evidence.[181]

The language of subsections (a)(2) and (a)(3), however, is not as clear as the language contained in subsections (a)(l) and (a)(4) with regard to how claimants may invoke the presumption.[182] Subsections (a)(2) and (a)(3) refer to ventilatory and blood gas studies that establish or demonstrate an element necessary to establish eligibility for Black Lung Benefits.[183] Under subsection (a)(2), the ventilatory studies that a claimant presents must establish the presence of a chronic respiratory disease.[184] Under subsection (a)(3), a claimant's blood gas studies must demonstrate the presence of an oxygen transfer impairment.[185] Drafters of the regulation did not explain what, if any, functional difference existed between the words "establish" and "demonstrate."[186] If the drafters intended to use demonstrate as a synonym for establish, and to use establish synonymously with prove, the language of section 727.203 would lend further support to Judge Phillips' position on the invocation stage.[187] The drafters of section 727.203 used two different words in the language of subsections 727.203(a)(2) and (a)(3),

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178. *Id.* The Fourth Circuit held that requiring a preponderance standard under subsection (a)(l) would acknowledge the validity of intolerable drafting. *Id.*

179. 20 C.F.R. § 727.203(a) (1986); *see supra* note 11 and accompanying text (setting forth § 727.203).

180. 20 C.F.R. § 727.203(a)(4)(1986).

181. 20 C.F.R. §§ 727.203(a)(1) and (a)(4) (1986). *See supra* notes 175-80 and accompanying text (examining language of subsections 727.203(a)(1) and (a)(4)).

182. 20 C.F.R. § 727.203(a)(2) (1986); 20 C.F.R. § 727.203(a)(3) (1986); *see supra* note 11 and accompanying text (setting forth text of subsections 727.203(a)(2) and (a)(3)).

183. *See supra* note 11 (quoting text of § 727.203).

184. *See* 20 C.F.R. § 727.203(a)(2) (1986) (stating that claimants must produce test results that establish eligibility according to table of ventilatory capacity values).

185. *See* 20 C.F.R. § 727.203(a)(3) (1986) (stating that in order for claimant to obtain benefits, claimant's blood gas study results must qualify under table of values attached to subsection 727.203(a)(3)).

186. *See Stapleton*, 785 F.2d 445. In *Stapleton*, Judge Phillips noted the shift from use of the word "establish" in (a)(2) to the word "demonstrate" in (a)(3). *Id.* Judge Phillips attempted to highlight the futility of literally interpreting section 727.203 by noting several syntactical errors. *Id.* Judge Phillips decided that Judges Hall and Sprouse erred in literally interpreting the regulation. *Id.* Judge Phillips held that the word "a" in subsections (a)(l) and (a)(4) meant that one piece of evidence may invoke the presumption. *Id.* Judge Phillips, however, held that one piece of qualifying medical evidence does not raise automatically the presumption. *Id.*

187. *See id.* at 439 (opinion of Judge Phillips).

leaving ambiguous the intended operation of the two subsections.[188]

Judge Phillips, however, regarded the ambiguity in the language of section 727.203 as insignificant.[189] Combining the use of the word "establish" in section 727.203 with the regulation's requirement to consider all relevant evidence, Judge Phillips found the Director's interpretation most consistent with the language of the regulation.[190] Use of the plurals in blood gas studies and ventilatory studies bolstered the Director's argument.[191] The language of subsection (a)(2) and (a)(3) to some degree support a contention that the D.O.L. contemplated that an A.L.J. would consider more than just one qualifying ventilatory or blood gas study.[192] The language of subsection (a)(l) and (a)(4), however, conflicts with the position of Judge Phillips regarding the language of subsections (a)(2) and (a)(3).[193] Subsections (a)(l) and (a)(4) refer to introducing a single piece of medical evidence that will give rise to the presumption.[194]

Analyzing the totality of the language of section 727.203 gives more meaningful support to the Director's interpretation.[195] Judge Phillips did not show convincingly that the language of subsections (a)(l) and (a)(4) supports the theory that claimants must invoke the presumption under a preponderance of the evidence standard.[196] In contrast, Judge Sprouse

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188. *See Bowles*, 325 U.S. at 414 (holding that when language of regulation is ambiguous, courts must defer to agency interpretations unless plainly erroneous).

189. *See Stapleton*, 785 F.2d at 442 (Judge Phillips held that inability to discern intended operation of presumption from only plain words of § 727.203 was inevitable because of intellectual complexities involved with concept of presumptions in general).

190. *Id.* Judge Phillips held that the Director's interpretation set forth a proof scheme that resolved the issues pertaining to all the factors in a black lung claim. *Id.* Judge Phillips found no inconsistency between the Director's interpretation and section 727.203 that would make the interpretation plainly erroneous. *Id.*

191. *Id.; see* 20 C.F.R. §§ 727.203(a)(2),(a)(3) (1986) (use of plurals in subsections (a)(2) and (a)(3) supports Director's stance advocating preponderance standard in invocation stage of § 727.203). Judge Phillips stated that Judge Hall's interpretation of §§ 727.203(a)(2) and (a)(3) strained the plain meaning of the language in the subsections. *Stapleton*, 785 F.2d at 445 n.ll; *see supra* notes 60-62 and accompanying text (Hall, J., holding that invoking subsections (a)(2) and (a)(3) required only one qualifying ventilatory or blood gas study, with no preponderance standard). Judge Phillips held that use of plural objects in (a)(2) and (a)(3) indicated a requirement to weigh all relevant evidence in the invocation stage. *Stapleton*, 785 F.2d at 445 & n.11.

192. *See supra* notes 77-84 and accompanying text (discussing Judge Phillips' position on invocation section).

193. *See supra* notes 177-81 and accompanying text (Sprouse, J., discussing language in subsections (a)(l) and (a)(4)).

194. *Id.*

195. *See Stapleton*, 785 F.2d at 433-34 (Judge Hall analyzed the language of § 727.203). Judge Hall stated that Judge Phillips opinion rendered superfluous the rebuttal phase of section 727.203. *Id.* Judge Hall held that imposing a preponderance standard of proof in the invocation stage rendered the presumptions irrebutable. *Id.; see also id.* at 447-48 (Phillips, J., holding that employers may not rebut certain facts that claimant proved in invocation stage).

196. *Id.* at 339 (opinion of Judge Phillips).

presented a strong, although not dispositive, explanation of the language of subsections (a)(2) and (a)(3).[197] Judge Sprouse decided that the language of subsections (a)(2) and (a)(3) fits into a scheme in which the claimant bears only a burden of production in the invocation stage.[198] Judge Sprouse realized, however, that although the Director's interpretation did not constitute the only reasonable construction of the language of the regulation, the Director's interpretation was not plainly erroneous.[199]

If the Director's interpretation did not make section 727.203 inconsistent with the Act, therefore, the Director's interpretation should have controlled the Fourth Circuit's decision in *Stapleton*.[200] In *United States v. Larionoff*,[201] the United States Supreme Court refused to defer to an agency interpretation of a regulation that the Court found made the regulation inconsistent with the regulation's authorizing statute.[202] In *Larionoff*, the Court reviewed a regulation regarding the establishment of eligibility criteria for re-enlistment and duty extension bonuses for specially skilled military personnel.[203] The Department of Defense regulation ordered the Navy to pay re-enlistment and duty extension bonuses in accordance with the bonus amounts in effect at the start of the new duty period.[204] The Supreme Court determined that the regulation was inconsistent with the statute authorizing the regulation's promulgation.[205] The legislative intent behind authorizing the bonuses was to induce personnel with special skills to remain in the armed forces.[206] The effectiveness of a bonus as an inducement to remain in the military depended on a serviceman's ability to rely on the promise of a set amount at the time of his decision to re-enlist or extend his duty.[207] The Court, therefore,

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197. *See id.* at 453-55 (Judge Sprouse's analysis of language in §§ 727.203 (a)(2), (a)(3)).

198. *Id.*

199. *Stapleton*, 785 F.2d at 442. Judge Phillips stated that the Director's interpretation was not the most common interpretation of the operation of the presumption because the interpretation placed burdens of persuasion on both parties. *Id.* Judge Phillips, however, stated that the Director's interpretation was not plainly erroneous because a presumption scheme that placed burdens of persuasion on both parties was not uncommon. *Id.*

200. *See id.* at 440 (Judge Phillips held that even if not plainly erroneous, court owed no deference to interpretation that rendered § 727.203 inconsistent with Act).

201. 431 U.S. 864 (1977).

202. *Larionoff*, 431 U.S. at 866.

203. *Id.* at 868.

204. *Id.*

205. *Id.* at 873. The United States Supreme Court in *United States v. Larionoff* determined that the legislative purpose in designating specially skilled servicemen was unambiguous. *Id.* The Court held that the manifest purpose of the bonus program was to induce servicemen to re-enlist or extend their service. *Id.* The Court held that the agency regulation was contrary to the manifest purposes of Congress in enacting the bonus program. *Id.*

206. *Id.* at 877. The Supreme Court in *Larionoff* noted that prior to the new bonus program, the military offered the same re-enlistment incentive to all personnel. *Id.* at 873. The Defense Department wanted an incentive structure tailored to manpower requirements. *Id.*

207. *Id.* at 876. The Supreme Court in *Larionoff* held that Congress intended that the incentive operate at the time of a decision to re-enlist or to extend an enlistment. *Id.* The

concluded that the eligibility criteria contained in the regulation applied when the specially skilled serviceman made the decision to remain in the military.[208]

In *Larionoff*, the Court recognized the relevance of analyzing legislative history when choosing between two or more constructions of a regulation.[209] Following an initial period of D.O.L. Black Lung Benefits claims adjudication, Congress realized that the D.O.L.'s claims approval rate was far below the approval rate of the Social Security Administration (S.S.A.).[210] With the 1978 Amendments, Congress authorized the D.O.L. to promulgate eligibility criteria in order to eliminate the inequity between the S.S.A. and the D.O.L. claims approval rates.[211] Allowing the Director's interpretation

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Supreme Court held that by determining bonuses at the time of the decision to re-enlist, Congress intended that servicemen know how much money they would receive. *Id.* Under the regulation at issue in *Larionoff*, the military could change the designation of specially skilled personnel between the time of the decision to re-enlist and the beginning date of the new service period. *Id.* The Court held that under the regulation, the bonus program did not provide servicemen with an incentive to re-enlist. *Id.* The Court stated that there was no incentive when a possibility existed that a serviceman's classification could change between the decision to re-enlist and the beginning of the new service period, depending on the manpower needs of the military. *Id.*

208. *Id.*

209. *See id.* at 873-77 (stating that servicemen must have some certainty about incentive offered in order to effectuate clear intent of Congress).

210. *See* Solomons, *supra* note 6, at 877-95 (extensive discussion of legislative history of § 727.203 in context of motivation for implementation).

211. *See id.* at 877 (D.O.L.'s low approval rate significantly related to inability of D.O.L. to use S.S.A. presumption); Drummond Coal Co. v. Freeman, 733 F.2d 1523, 1524 n.1 (11th Cir. 1984) (discussing effect of low D.O.L. claims approval rate); *see also* Kilcullen, *supra* note 30, at 71 (explaining how use of presumptions eases miner's burden of proving entitlement to Black Lung Benefits). The major impetus for ratifying the 1978 Amendments was Congress' desire to increase the number of Black Lung Benefits claims approvals. *See* Solomons, *supra* note 6, at 877-95 (extensive discussion of legislative history in context of motivation for implementation of § 727.203). The D.O.L. regulation is very similar to an S.S.A. regulation that existed prior to section 727.203. *See* Solomons, *supra* note 6, at 874 (stating that Congress sought to ensure that criteria that D.O.L. promulgated would erase inequity between S.S.A. and D.O.L. claims adjudication); 884-95 (citing events preceding Congress' adopting § 727.203). Before the 1978 Amendments authorized the D.O.L. to promulgate regulations, the D.O.L. attempted to convince the S.S.A. to extend an existing S.S.A. presumption provision to D.O.L. claims. *See* 20 C.F.R. § 410.490 (1986) (S.S.A. Black Lung Benefits presumption regulations). The D.O.L. wanted to use the S.S.A. presumption to deal more quickly with the D.O.L.'s backlog of claims. Solomons, *supra* note 6, at 884-85. The D.O.L. also desired to use the S.S.A. presumtion standard as a tool to aid in responding to pressures to raise claims approval rates. Solomons, *supra* note 6, at 884-85. Responding that the regulation was only an administrative device to speed the processing of claims, the S.S.A. refused to grant the D.O.L. requests. Solomons, *supra* note 6 at 885. Clearly, when Congress authorized the D.O.L. to promulgate eligibility criteria no more restrictive than the S.S.A. criteria, Congress intended for the D.O.L. to use the presumption in a fashion similar to the way in which the S.S.A. used the presumption. *See* 30 U.S.C. § 902(f)(2) (1982) (congressional mandate to D.O.L. to make criteria no more restrictive than S.S.A. criteria); H.R. REP. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 309-10 (stating Congress' mandate concerning strictness of D.O.L. eligibility criteria); *Freeman*, 733 F.2d at 1524 n.1 (discussing

of section 727.203(a) to prevail would have contravened the express intent of Congress in authorizing the promulgation of section 727.203.[212] Examination of the legislative history, therefore, reveals that the Director's interpretation rendered section 727.203 inconsistent with the Act.[213]

The Fourth Circuit in *Stapleton* also considered allowing the use of nonqualifying test results as evidence in rebuttal.[214] Judge Hall limited the use of nonqualifying evidence in rebuttal.[215] Judge Phillips opposed any exclusion of nonqualifying evidence.[216] Judge Phillips believed that disallow-

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history of § 727.203); Solomons, supra note 6, at 884-95 (discussing congressional ratification of D.O.L. presumption). The Director's interpretation may render the D.O.L. eligibility criteria under section 727.203 more restrictive than the S.S.A. criteria. *See Stapleton*, 785 F.2d at 433 (Judge Hall stated that Congress mandated that D.O.L. dispose of claims after considering all relevant evidence).

212. *See Stapleton*, 785 F.2d at 455 (Congress designed presumptions to modify burden of proof on claimants and make establishing eligibility easier).

213. *See infra* notes 232-38 and accompanying text (explaining partial inconsistency of Director's interpretation with § 727.203 of Act). The lack of Congressional debate concerning the scientific validity of the presumption provides a partial rationale for the Director's interpretations. *See* Solomons, *supra* note 6, at 885 (lack of congressional discussion regarding rational relationship between medical criteria that claimants introduce and presumption that pneumoconiosis caused total disability). The Director's interpretation may have been an attempt to rectify what commentators view as an inability to justify medically the inferences that an adjudicator may draw from the evidence that claimants introduce in Black Lung Benefits cases. *See* Solomons, *supra* note 6 at 890-95 (describing expert testimony before Congress on medical invalidity of S.S.A. interim presumption). Commentators criticized many aspects of the S.S.A. presumption that served as the pattern for the D.O.L. presumption. *See* Solomons *supra* note 6 at 888-91 (discussing various criticisms of section 727.203 by members of Congress and medical community). For example, the medical community knows that as people age, the normal ranges for results of ventilatory and blood gas studies change. *See* Solomons, *supra* note 6, at 880-81 (noting that medical validity of section 727.203 was suspect). Section 727.203(a)(2) and (a)(3), however, make no allowance for age. 20 C.F.R. §§ 727.203(a)(2), (a)(3) (1986); Solomons, *supra* note 6, at 880-81 (noting specific problem with regulation's failure to compensate for age in assessing ventilatory and blood gas test results). An older claimant whose ventilatory and blood gas study results are normal might invoke the presumption because of the presumption's failure to compensate for age. Solomons, *supra* note 6, at 880-81. Congress was aware of the possibility of weaknesses in the presumption and rebuttal scheme of section 727.203. *See* Solomons, *supra* note 6 at 880-81 (explaining Congressional debate regarding § 727.203). The legislature had many mechanisms with which to express congressional dissatisfaction with the status quo. For instance, Congress could have amended the Act, repealed the regulation, or expressly instructed the D.O.L. to interpret the regulation in a particular manner. Congress instead did nothing to counteract earlier expressions of an intent to make invoking the presumption and obtaining benefits relatively easy. *See supra* notes 210-13 and accompanying text (describing clear legislative intent to reduce barriers to claimants' establishing eligibility). Congress may have believed that requiring totally valid presumptions would make eligibility more difficult to establish. *See supra* notes 6-15 and accompanying text (Congress authorized promulgation of § 727.203 in order to increase claims approval rates). A section 727.203 presumption is very easy to invoke under the interpretation of the Fourth Circuit in *Stapleton*. *See Stapleton*, 785 F.2d at 426-27 (per curiam opinion).

214. *See Stapleton*, 785 F.2d at 427 (per curiam opinion).

215. *Id.* at 435; *see supra* notes 67-74 and accompanying text (discussing Judge Hall's position, which partially excluded nonqualifying evidence in rebuttal).

216. *Stapleton*, 785 F.2d at 445-46; *see supra* notes 90-93 and accompanying text (citing Judge Phillips' holding to not exclude nonqualifying test results from consideration in rebuttal).

ing the use of relevant nonqualifying evidence in the rebuttal stage could lead to the award of benefits to undeserving claimants.[217] Judge Phillips expressed concern regarding prohibiting an employer's use of relevant nonqualifying evidence in the rebuttal stage.[218] Totally disallowing the use of nonqualifying test results in the rebuttal stage would place the Board or a court in a position to facilitate a fraud.[219] A claimant would encounter little difficulty in obtaining a single piece of the required medical evidence necessary to invoke the presumption regardless of the claimant's health.[220] If a court did not consider nonqualifying evidence, the court would further a fraud by helping to insure that an employer has no means to rebut a fraudulently invoked presumption.[221] Judge Phillips' description of Judge Hall's position on the use of nonqualifying evidence in rebuttal, however, was not accurate. Judge Hall advocated upholding the decision of the Fourth Circuit in *Whicker*.[222] The *Whicker* decision clearly did not disallow every use of nonqualifying test results in rebuttal.[223] By upholding *Whicker*, Judge Hall affirmed the position that employers may not rely principally on nonqualifying test results in rebuttal.[224] Judge Hall cited *Whicker* as support for the proposition that nonqualifying test results are admissible[225] and especially probative when physicians use the results as documentation for a reasoned medical opinion.[226] A physician may use nonqualifying test results as part of a total assessment of a claimant's disability.[227] The *Whicker*

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217. *Stapleton*, 785 F.2d at 445-46 (Phillips, J., stating that any exclusion of nonqualifying evidence may prevent employers' from presenting most trustworthy medical evidence of actual nature of claimants' respiratory or pulmonary impairment).

218. *See id.* (Judge Phillips criticizing the opinion of Judge Hall). Since Judge Hall's reasoning would exclude medical evidence bearing on either causation or disability unrelated to claimant's employment, undeserving claimants may recover benefits. *Id.*

219. *Id.* at 446. Judge Phillips held that any rule disallowing the use of nonqualifying evidence mistakenly limits the use of relevant evidence in disproving a presumed fact. *Id.*

220. *Id.; see* Solomons, *supra* note 6, at 877-94 (stating that presumption is medically unjustifiable).

221. *See generally Stapleton*, 785 F.2d at 447 (Judge Phillips discussed effect of Judge Hall's position on the use of nonqualifying evidence in the rebuttal stage).

222. *Id.* at 436; *see supra* note 70 (discussing holding in *Whicker*).

223. *Whicker*, 733 F.2d at 349 (nonqualifying test results may be used in rebuttal except when used as exclusive means of rebutting presumption); *See Stapleton*, 785 F.2d at 436 (Judge Hall stated that to allow use of nonqualifying evidence as principal means of rebuttal would contradict language and purpose of § 727.203); *see also* Whicker v. U.S. Dept. of Labor Benefits Review Bd., 733 F.2d 346 (4th Cir. 1984) (employers may not rely solely on nonqualifying test results in rebuttal); Hampton v. U.S. Dept. of Labor Benefits Review Bd., 678 F.2d 506, 508 (4th Cir. 1982) (Fourth Circuit held that employers may not rely exclusively on nonqualifying evidence to rebut presumption).

224. *See Whicker*, 733 F.2d at 349 (stating that A.L.J. may deny benefits if claimant is able to do mine work and that A.L.J. may consider nonqualifying evidence).

225. *Stapleton*, 785 F.2d at 436; *see Whicker*, 733 F.2d at 348 (Fourth Circuit rejected A.L.J. decision that employer rebutted presumption because of A.L.J.'s heavy reliance on nonqualifying results).

226. *Stapleton*, 785 F.2d at 436.

227. *See id.* (opinion of Judge Hall allowing adjudicators to consider nonqualifying test results if not used as only means of rebuttal).

scheme allows consideration of nonqualifying test results in rebuttal and only disallows rebuttal based principally on nonqualifying test results.[228] *Whicker* reflected congressional intent to make establishing eligibility for benefits less difficult for claimants.[229] The *Whicker* rule also recognized the possible relevance of nonqualifying test results.[230] By allowing unrestricted consideration of all relevant nonqualifying test results, the Fourth Circuit in *Stapleton* contravened congressional intent by making the presumption easier to rebut.[231]

The *Whicker* rule protects against requiring a claimant to present proof of pneumoconiosis by two or more testing methods before deriving any benefit from the presumption.[232] For example, if a claimant invokes the presumption under section 727.203(a)(1), the claimant raises a presumption that he suffers from pneumoconiosis and the adjudicator presumes also that the disease totally disables the claimant.[233] If nonqualifying x-rays are admissible to show in rebuttal that the claimant does not have pneumoconiosis, the presumption of total disability would disappear.[234] Allowing unrestricted use of nonqualifying evidence in rebuttal, therefore, counteracts the intended evidentiary burdens of section 727.203.[235] If employers are able to make a successful rebuttal based solely on nonqualifying evidence, employers easily may deprive claimants of any of the intended advantage that the presumption provides.[236] In *Stapleton*, the Fourth Circuit lessened an employer's burden of disproving a claimant's entitlement to benefits.[237] Now, rather than defeating a claim by rebutting the presumption, an

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228. *See Whicker*, 733 F.2d at 348 (Fourth Circuit holding that allowing rebuttal based principally on nonqualifying test results would place a burden on claimants that is totally incompatible with language and purposes of regulation).

229. *See id.* (holding that Congress intended to make establishing eligibility less difficult); *supra* notes 209-13 and accompanying text (examining legislative intent underlying authorization of § 727.203).

230. *See Whicker*, 733 F.2d at 349 (disallowing rebuttal based primarily on nonqualifying evidence); *Stapleton*, 785 F.2d at 436 (Judge Hall, writing for majority, held that nonqualifying test results are relevant to rebuttal when used as documentation for examining physician's diagnosis).

231. *See Stapleton*, 785 F.2d at 455 (Congress designed presumption to shift burden of proof to make establishing eligibility less difficult; Judge Sprouse held that Judge Phillips' interpretation of § 727.203 has effect opposite of that which Congress intended).

232. *See Whicker*, 733 F.2d at 348 (noting that A.L.J.'s reliance on principally nonqualifying test results forced claimant to prove existence of pneumoconiosis by at least two of the accepted techniques codified in §§ 727.203(a)(1)-(a)(4)).

233. *See Stapleton*, 785 F.2d at 436, 461-64 (opinions of Judges Sprouse and Hall on admissibility of nonqualifying evidence in rebuttal).

234. *Id.*

235. *See id.* at 455 (Judge Sprouse finding that views of Justice Phillips counteract intent underlying § 727.203 by forcing claimant to prove in invocation stage facts that Congress intended only to be presumed).

236. *See id.* (holding that allowing rebuttal based solely on nonqualifying evidence renders establishing eligibility more difficult, counteracting congressional intent to make establishing benefit entitlement easier).

237. *Id.* at 436.

employer need only prove that the adjudicator incorrectly invoked the presumption.[238]

In *Stapleton v. Westmoreland Coal Company*, the Fourth Circuit designated the type and quantum of proof required to invoke and rebut the presumption under the criteria enumerated in section 727.203.[239] To invoke the presumption, a Black Lung Benefits claimant need present only one piece of medical evidence of the type that subsections (a)(l)-(a)(4) specify.[240] Once a claimant invokes the presumption, the burden of persuasion falls upon opponents of the claim to disprove by a preponderance of the evidence the claimant's right to benefits .[241] The Fourth Circuit's per curiam opinion rejected the agency's claim that the regulation required claimants to prove by a preponderance of the evidence the facts necessary to invoke the

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238. *See Stapleton*, 785 F.2d at 448 (Judge Phillips holding that after claimant invokes presumption, burden is on employer to disprove any element rebuttably presumed). A majority of the Fourth Circuit adopted a position on the use of nonqualifying test results in rebuttal that is contrary to the Director's. *Id. See* Brief for the Director, Office of Workers' Compensation Programs at 25-28, Stapleton v. Westmoreland Coal Co., 785 F.2d 424 (4th cir. 1986)(Director agreed that employer may not rely principally on nonqualifying evidence to rebut, and recognized that nonqualifying test results are admissible and probative when claimant used results as documentation for opinion of physician). In contrast to the Fourth Circuit in *Stapleton*, the Director expressly affirmed the *Whicker* decision regarding use of nonqualifying test results in rebuttal. Brief for the Director, Office of Workers' Compensation Programs at 28, Stapleton v. Westmoreland Coal Co., 785 F.2d 424 (4th Cir. 1986); *See also Stapleton*, 785 F.2d at 461-64 (4th Cir. 1986) (Judge Sprouse, noting that Judge Phillips based position regarding subsection (a) on deference to Director's interpretation and took position regarding subsection (b) that is contrary to Director's interpretation). The Director expressly held, as did Judges Hall and Sprouse, that nonqualifying test results, standing alone, cannot rebut a presumption. *See* Brief for the Director, Office of Workers' Compensation Programs at 25-28, Stapleton v. Westmoreland Coal Co., 785 F.2d 424 (4th Cir. 1986)(indicating that nonqualifying test results alone are insufficient evidence on which to base rebuttal). The Director also stated that nonqualifying evidence is relevant to rebutting a presumption as part of a physician's reasoned medical opinion. Brief for the Director, Office of Workers' Compensation Programs at 25-28, Stapleton v. Westmoreland Coal Co., 785 F.2d 424 (4th Cir. 1986). Judge Phillips, therefore, engaged in judicial interpretation in expressing an opinion on the allowable use of nonqualifying test results in rebuttal, despite protesting against the very same type of judicial interpretation throughout the opinion. *See Stapleton*, 785 F.2d at 446-47 (setting forth Judge Phillips' view of allowable use of nonqualifying evidence in rebuttal stage); Brief for the Director, Office of Workers' Compensation Programs at 25-28, Stapleton v. Westmoreland Coal Co., 785 F.2d 424 (4th Cir. 1986) *supra* note 120, at 25-28 (holding that employers may not rely exclusively on nonqualifying evidence to rebut a presumption). Judge Phillips inexplicably renounced the theory of judicial deference to the Director's interpretation regarding the operation of section 727.203(b). *Stapleton*, 785 F.2d at 446-47. Judge Phillips' position regarding section 727.203(b), therefore, dilutes to a great extent the persuasiveness of the deference argument regarding section 727.203(a). *Stapleton*, 785 F.2d at 446-47.

239. *See supra* notes 45-54 and accompanying text (per curiam decision of Fourth Circuit).

240. *See supra* notes 45-51 and accompanying text (court's decision on quantum of proof required to invoke presumption under §§ 727.203(a)(l)-(a)(4)).

241. *See supra* note 64 and accompanying text (Fourth Circuit holding that burden of proof shifted to employer once claimant invokes presumption).