JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

PREPARED BY THE U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC

AUGUST 2001

CHAPTER 13
Survivors' Claims: Entitlement Under Part 410

Chapter 13

Chapter 13
Survivors' Claims: Entitlement Under Part 410

I. Applicability
[X(I)]

The time limits for filing a survivor's claim under Part 410 are set out in the regulations at 20 C.F.R. §§ 410.231(b) and (c).

The Board has held that a claim which is reviewed and denied under the interim regulations at § 410.490 (a § 415 transition claim) must be analyzed under the permanent regulations at Part 410. *Wells v. Peabody Coal Co.*, 3 B.L.R. 1-85 (1981). Additionally, in *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 B.L.R. 1-627 (1978), the Board held that Part 410 applied to all claims filed prior to the effective date of the permanent Department of Labor regulations at Part 718 (which is March 31, 1980), where the claimant failed to establish entitlement under Part 727.

However, five circuit courts of appeals have disagreed with the Board's holding in *Muncy* and conclude that Part 718, and not Part 410, applies to Part C claims filed prior to March 31, 1980, but adjudicated and denied under Part 727 after March 31, 1980. *Terry v. Director, OWCP*, 956 F.2d 251 (11th Cir. 1992); *Oliver v. Director, OWCP*, 888 F.2d 1239 (8th Cir. 1989); *Knuckles v. Director, OWCP*, 869 F.2d 996 (6th Cir. 1989); *Caprini v. Director, OWCP*, 824 F.2d 283 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987).

Some administrative law judges may nevertheless choose to analyze claims under Part 410 in addition to Part 718 on the theory that the Part 410 regulations are less restrictive (and not more restrictive as stated in *Caprini*) than the Part 718 regulations and that Part 718 is written to apply to claims *filed* after April 1, 1980.

II. The regulation

The survivor of a miner is entitled to benefits under Part 410 by either showing that the miner was totally disabled due to pneumoconiosis at the time of death, §§ 410.410 - 410.430, or by showing that the miner's death was due to pneumoconiosis, §§ 410.454 - 410.462. The existence of pneumoconiosis may be established by chest x-ray, biopsy, or autopsy evidence. 20 C.F.R. §§ 410.414 and 410.454.

III. Presumptions available to certain survivors

A. Ten years or more coal mine employment

Under §§ 410.416 and 410.456, if a miner was employed for ten or more years in the Nation's coal mines and suffered from pneumoconiosis, it will be presumed that the pneumoconiosis arose out of such coal mine employment; in any other case, the claimant must submit the evidence necessary to establish that the pneumoconiosis, from which the deceased miner suffered, arose out

of coal mine employment. The administrative law judge must consider the etiology of the pneumoconiosis, rather than the etiology of any respiratory impairment. *Dunlap v. Director, OWCP*, 8 B.L.R. 1-375 (1985).

B. Ten years or more coal mine employment; death from respirable disease

If a miner was employed for ten years or more in the Nation's coal mines and died from a respirable disease, it will be presumed that his death was due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. § 410.462(a). The claimant is required to demonstrate that the miner suffered from pneumoconiosis or a respirable disease. Death will be found to be due to a respirable disease when death is medically ascribed to a chronic dust disease or to another chronic disease of the lung. The Board has held that bronchopneumonia is not a respirable disease within the meaning of the presumption. *Martin v. Director, OWCP*, 6 B.L.R. 1-535 (1983). The Board held, in *Pyle v. Allegheny River Mining Co*., 2 B.L.R. 1-1143 (1981), that the presumption may be invoked upon a showing of death due to lung cancer, since lung cancer is a chronic condition. However, in *Hunter v. Director, OWCP*, 8 B.L.R. 1-120 (1985), the Board reversed *Pyle* and stated that the burden is on the claimant in each case to establish the chronic nature of the miner's lung cancer before the presumption is invoked.

Death will not be found to be due to a respirable disease where the disease reported does not suggest a reasonable possibility that death was due to pneumoconiosis. The Fourth Circuit expressed a concern that, "the Board [has] treated the `reasonable possibility' language of the second sentence of § 410.462(b) as part of the Director's rebuttal case when the language of the regulation clearly provides that it is the claimant who bears this evidentiary burden." *Hunter v. Director, OWCP*, 803 F.2d 800, 803 (4th Cir. 1986). The court held that the claimant "must come forward with evidence that the disease which caused death was a chronic dust disease or a chronic disease of the lung *and* that the disease reported suggests a reasonable possibility of death due to pneumoconiosis." *Id*. at 804 (emphasis in original). The Sixth Circuit Court of Appeals reached a similar result in *Tackett v. BRB*, 806 F.2d 640 (6th Cir. 1986).

To invoke the presumption, the claimant must establish the following: (1) that the miner suffered from pneumoconiosis or a respirable disease; (2) that his death may have been due to multiple causes; and (3) that it is not medically feasible to distinguish which disease caused death or specifically how much each disease contributed to death. 20 C.F.R. § 410.462(b); *Bosser v. U.S. Steel Corp*., 7 B.L.R. 1-478 (1984); *Copley v. Olga Coal C*o., 6 B.L.R. 1-181 (1983); *Zavora v. U.S. Steel Corp*., 2 B.L.R. 1-1202 (1980); *McLaughlin v. Jones & Laughlin Steel Corp*., 2 B.L.R. 1-103 (1979); *Smakula v. Weinberger*, 572 F.2d 127 (3d Cir. 1978); *Wallace v. Mathews*, 554 F.2d 299 (6th Cir. 1977); *Searchrist v. Weinberger*, 538 F.2d 1054 (4th Cir. 1976).

Where the miner's death is due to multiple causes, the Board has held that pneumoconiosis need not be the "primary cause" of death. *Zavora v. U.S. Steel Corp*., 2 B.L.R. 1-1202 (1980). Reliable death certificates and autopsy reports may constitute substantial evidence upon which to find that death was due to multiple causes (including pneumoconiosis). *McLaughlin v. Jones & Laughlin Steel Corp*., 2 B.L.R. 1-103 (1979); *Kinnick v. National Mines Corp*., 2 B.L.R. 1-221 (1979). However, a physician's lack of personal knowledge of the deceased miner and failure to

perform an autopsy are factors to be considered in determining the reliability of the death certificate. *Copley v. Olga Coal Co*, 6 B.L.R. 1-181 (1983). The Board has also held that a claimant has not established that the miner's death was due to multiple causes where the evidence showed that the miner died of gunshot wounds. *Clites v. Jones & Laughlin Steel Corp.*, 2 B.L.R. 1-1019 (1980).

The claimant must also establish that it is medically infeasible to distinguish which disease caused death. "[P]neumoconiosis need not be found to be a `significant contributing factor to death.' All that need be shown is that it is not medically feasible to ascribe death to one specific cause or to ascertain the specific contribution of each of the several conditions which combined to cause death." *McLaughlin v. Jones & Laughlin Steel Corp*., 2 B.L.R. 1-103, 1-108 (1979).

Under § 410.412(b)(1), a miner will be considered to have been totally disabled due to pneumoconiosis at the time of death if, at the time of death, his pneumoconiosis prevented him from engaging in his usual or comparable and gainful coal mine work. *See* 20 C.F.R. §§ 410.424 through 410.426.

Under § 410.424(a), medical consideration alone shall justify a finding that a miner was totally disabled where his impairment is one that met the duration requirement in § 410.412(a)(2) or § 410.412(b)(2) and is listed in the Appendix (*i.e.*, blood gas studies, cor pulmonale, or congestive heart failure). However, medical considerations shall not justify a finding that an individual was totally disabled if other evidence rebuts the finding, *e.g.*, the individual was engaged in comparable and gainful work. Under § 410.424, the claimant need not show that pneumoconiosis was the primary cause of the decedent's total disability. Rather, the party opposing entitlement then bears the burden of showing that the decedent was not totally disabled due to pneumoconiosis. *Dunlap v. Director, OWCP*, 8 B.L.R. 1-375 (1985).

C. Fifteen or more years of coal mine employment

Under §§ 410.414(b) and 410.454(b), if evidence (other than that listed above) demonstrates the existence of a totally disabling chronic respiratory or pulmonary impairment, a miner is presumed to be totally disabled due to pneumoconiosis at the time of death or a miner's death is presumed to be due to pneumoconiosis, if the miner was employed for 15 or more years in one or more of the Nation's underground mines or mines where the conditions were substantially similar to those of an underground mine. The presumption may also be invoked where the evidence shows a work history reflecting many years of such coal mine employment (less than 15 but greater than 10), *Williamson v. Director, OWCP*, 6 B.L.R. 1-1020 (1984)), and where it is also established that the miner suffers from a severe lung impairment. 20 C.F.R. §§ 410.414(b)(4) and 410.454(b)(4). The presumption may be rebutted only if it is established that the miner does not, or did not, have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 20 C.F.R. §§ 410.414(b)(2) and 410.454(b)(2).

D. Complicated pneumoconiosis

Under §§ 410.418 and 410.458, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis at the time of his death or that death was due to pneumoconiosis if he suffered from complicated pneumoconiosis. The determination of whether complicated

pneumoconiosis exists is a finding of fact within the purview of the administrative law judge. *Maypray v. Island Creek Coal Co*., 7 B.L.R. 1-683 (1985).