JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

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CHAPTER 15
Survivors' Claims: Entitlement Under Part 727

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I. Applicability
[X(H)]

Part 727 applies to a survivor's claim which is filed on or after January 1, 1974, but before April 1, 1980, where it is established that the miner had ten years or more coal mine employment.

The survivor is required by the Act to file his or her claim first "under an approved state workers' compensation law or, if no such law was available in an appropriate State, the claim was to be filed with the Secretary of Labor under Part C of title IV of the Act." 30 U.S.C. § 931; 20 C.F.R. § 727.1.

If a survivor's claim is filed on or after January 1, 1974, but miner has less than ten years of employment, then the claim should be analyzed under § 410.490. *See Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988); *Whiteman v. Boyle Land Fuel Corp.*, 15 B.L.R. 1-11 (1991)(*en banc*).

Section 727.203(d) states that, where eligibility is not established under Part 727, such eligibility may be established under Part 718. The Board concluded that this provision, as written, was inconsistent with § 402(f)(2) of the Act and stated that claims denied under Part 727 should be review under Part 410. *Muncy v. Wolfe Creek Collieries Co.*, 3 B.L.R. 1-85 (1981).

The Third, Sixth, Seventh, Eighth, and Eleventh Circuits have held, to the contrary, that if a claimant cannot establish entitlement under Part 727, and the claim is adjudicated after March 31, 1980, then the regulations at Part 718, not 410, are applicable. *Terry v. Director, OWCP*, 956 F.2d 251 (11th Cir. 1992); *Caprini v. Director, OWCP*, 824 F.2d 283 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987); *Oliver v. Director, OWCP*, 888 F.2d 1239 (8th Cir. 1989); *Knuckles v. Director, OWCP*, 869 F.2d 996 (6th Cir. 1989).

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.

However, rebuttal under § 727.203(b)(2) precludes entitlement under Parts 410 and 718. *Wheaton v. North American Coal Corp.*, 8 B.L.R. 1-21 (1985) (consideration under Part 410 precluded); *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989) (consideration under Part 718 precluded).

Moreover, rebuttal under § 727.203(b)(3) or (b)(4) precludes entitlement under Part 410. *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 B.L.R. 1-829 (1985) (rebuttal at (b)(3) addressed); *Lefler v. Freeman United Coal Co.*, 6 B.L.R. 1-579 (1983) (rebuttal at (b)(4) addressed).

II. The regulation

A survivor's claim is analyzed in the same manner as a living miner's claim under Part 727 except, in the case of a survivor, lay evidence may, in certain circumstances, be used to establish total disability due to pneumoconiosis or death due to pneumoconiosis. 20 C.F.R. § 727.203(a)(5).

Invocation under § 727.203(a) gives rise to the following two interim presumptions in a survivor's claim: (1) that the miner was totally disabled due to pneumoconiosis at the time of death; and (2) that the miner's death was due to pneumoconiosis. 20 C.F.R. § 727.203(a). See *also Jennings v. Brown Badgett, Inc.*, 9 B.L.R. 1-94 (1986); *Conners v. Director, OWCP*, 7 B.L.R. 1-482 (1984).

There is one other presumption found at Part 727 which is applicable to survivors' claims. The provisions at § 727.204(a) set forth a rebuttable presumption of entitlement to survivor's benefits "[i]n the case of a miner who died on or before March 1, 1978, who was employed for 25 years or more in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, unless it is established at the time of death such miner was not partially or totally disabled due to pneumoconiosis." 20 C.F.R. § 727.204(a).

III. The interim presumptions

A. Methods of invocation

Under § 727.203(a), a miner who engaged in coal mine employment for at least 10 years will be presumed to have been totally disabled due to pneumoconiosis at the time of death, or his or her death will be presumed to be due to pneumoconiosis arising out of coal mine employment, if any one of the following medical criteria is met:

> (1) an x-ray, autopsy, or biopsy establishes the existence of pneumoconiosis;
>
> (2) ventilatory studies establishing the presence of a chronic respiratory or pulmonary disease;
>
> (3) blood gas studies demonstrating the presence of an impairment in the transfer of oxygen; or
>
> (4) other medical evidence establish the presence of a totally disabling respiratory or pulmonary impairment.

20 C.F.R. § 727.203(a).

Because satisfying the requirements of any one of the separate medical criteria is sufficient to invoke the interim presumption, the Fourth Circuit, in *Lagamba v. Consolidation Coal Co.*, 787 F.2d 172 (4th Cir. 1986), held that the administrative law judge erred in not invoking the presumption based on the x-ray evidence and qualifying blood gas studies, where the autopsy report confirmed the cause of death as hepatitis and reported no evidence of pneumoconiosis. For a

discussion regarding invocation under §§ 727.203(a)(1)-(4), see Chapter 10.

B. Lay evidence

The provisions at § 727.203(a)(5) permit invocation of the interim presumption in a survivor's claim where an affidavit of the survivor, or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment. However, there is conflict among the Board and circuit courts of appeals regarding availability of § 727.203(a)(5) as a means of invocation.

In *Pekala v. Director, OWCP*, 13 B.L.R. 1-1 (1989), the Board concluded that § 718.204(c)(5) was available in cases where the medical evidence of record did not *affirmatively establish* the absence of a lung disease. The Board declined, however, to rule on the applicability of § 718.204(c)(5) where the evidence is held *insufficient to invoke* under subsections (a)(1)-(4). Although the decision in *Pekala* involved the lay evidence provisions at § 718.204(c)(5), the Board held that the same rule applies in cases adjudicated under § 727.203(a)(5).

Several circuit courts of appeal have held, however, that § 727.203(a)(5) is available where the miner is deceased and the medical evidence of record is insufficient to invoke the presumptions under § 727.203(a)(1)-(4). *Hillibush v. Dept. of Labor*, 853 F.2d 197 (3d Cir. 1988); *Cook v. Director, OWCP*, 901 F.2d 33 (4th Cir. 1990); *Collins v. Old Ben Coal Co.*, 861 F.2d 481 (7th Cir. 1988). To the contrary, the Sixth Circuit Court of Appeals holds that § 727.203(a)(5) is not available where there is medical evidence regarding the miner's pulmonary condition, even if such evidence is insufficient to invoke the presumptions through § 727.203(a)(1)-(4). *Coleman v. Director, OWCP*, 829 F.2d 3 (6th Cir. 1987).

C. Rebuttal of the interim presumptions

As with invocation of the interim presumptions, the analysis under the rebuttal provisions is the same as for a living miner's claim recalling, however, that two presumptions must be rebutted when a survivor's claim is involved.

The regulations at 20 C.F.R. § 727.203(b) provide the following four means of rebuttal: (1) the miner was in fact doing his usual coal mine work or comparable and gainful work at the time of death; (2) the miner was able to do his usual coal mine work or comparable and gainful work at the time of death; (3) the total disability or death did not arise in whole or in part out of coal mine employment; or (4) the miner did not suffer from pneumoconiosis. 20 C.F.R. § 727.203(b).

The party opposing entitlement carries the burden of establishing rebuttal of both presumptions by a preponderance of the evidence. *Conners v. Director, OWCP*, 7 B.L.R. 1-482 (1985). In *Consolidation Coal Co. v. Smith*, 837 F.2d 321 (8th Cir. 1988), the Eighth Circuit stated that the standard of § 727.203(b)(3) rebuttal in a survivor's claim requires that the party opposing entitlement must rule out any causal relationship between a miner's total disability or death and a respiratory ailment arising from coal mine employment. Therefore, the court held that, since the evidence failed to support a conclusion that the miner's anthracosis was not a contributing factor to his disability or death, rebuttal was not established under § 727.203(b)(3). The Board and a number

of other circuit courts of appeals have also adopted the "rule out" standard under § 727.203(b)(3). *See Borgeson v. Kaiser Steel Corp.*, 12 B.L.R. 1-169 (1989); *Rosebud Coal Sales Co. v. Weigand*, 831 F.2d 926 (10th Cir. 1987); *Palmer Coking Coal Co. v. Director, OWCP*, 720 F.2d 1054 (9th Cir. 1983); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984); *Kline v. Director, OWCP*, 877 F.2d 1175 (3d Cir. 1989).

Under § 727.205, a deceased miner's employment in a mine at the time of death *shall not* be used as conclusive evidence that the miner was not totally disabled. In the case of a deceased miner who was employed in a coal mine at the time of death, all relevant evidence, including the circumstances of such employment and the statements of the miner's spouse, shall be considered in determining whether the miner was totally disabled due to pneumoconiosis at the time of death. *See, e.g., Conners v. Director, OWCP*, 7 B.L.R. 1-482 (1985). However, in *Spadafore v. Director, OWCP*, 8 B.L.R. 1-82 (1985), the Board held that since the miner was not only employed at the time of death, but also was performing his job adequately, working overtime, and rarely missing work on account of illness, the interim presumption that the miner was totally disabled due to pneumoconiosis at the time of death was rebutted under § 727.203(b)(1). For a discussion of rebuttal under Part 727, see Chapter 10.

IV. Presumption of survivor's entitlement to benefits -- 25 years or more of coal mine employment

Under § 727.204, in the case of a miner who died on or before March 1, 1978, and who was employed for 25 years in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, unless it is established that, at the time of death, the miner was not partially or totally disabled due to pneumoconiosis. A miner will be considered to have been partially disabled if he or she had reduced ability to engage in his or her usual coal mine work or comparable and gainful work as defined by Part 718. *Prater v. Hite Preparation Co.*, 829 F.2d 1363 (6th Cir. 1987).

To rebut the presumption at § 727.204, the evidence must demonstrate that the miner's ability to perform his or her usual and customary work or comparable and gainful work was not reduced at the time of his or her death or that the miner did not have pneumoconiosis. 20 C.F.R. § 727.204(c). *Short v. Westmoreland Coal Co.*, 10 B.L.R. 1-127 (1987). Thus, in *Feathers v. Consolidation Coal Co.*, 8 B.L.R. 1-26 (1985), the Board held that the presumption was rebutted where evidence established that the miner was working full time, in a satisfactory manner at the same job he had held for the previous 20 years; therefore, he was not partially or totally disabled at the time of death. The following evidence alone is insufficient to rebut the presumption:

(1) evidence that a deceased miner was employed in a coal mine at the time of death;

(2) evidence pertaining to a deceased miner's level of earnings prior to death;

(3) a chest x-ray interpreted as negative for the existence of pneumoconiosis;

(4) a death certificate which makes no mention of pneumoconiosis.

20 C.F.R. § 727.204(d).

Although one of the above items, by itself, cannot establish rebuttal, more than one of the listed types of evidence may (within the discretion of the fact-finder) constitute sufficient rebuttal evidence. *Short v. Westmoreland Coal Co*., 10 B.L.R. 1-127, 1-129 (1987). *See also Freeman v. Director, OWCP*, 687 F.2d 214 (7th Cir. 1982); *U.S. Steel Corp. v. Oravetz*, 686 F.2d 197 (3d Cir. 1982); *Duda v. North American Coal Co.*, 6 B.L.R. 1-1203 (1984).