

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 16 Survivors' Claims: Entitlement Under Part 718

Chapter 16

Survivors' Claims: Entitlement Under Part 718	<u>16.1</u>
I. Applicability	<u>16.1</u>
II. Standards of entitlement	<u>16.1</u>
A. Survivors' claims filed prior to January 1, 1982 where the miner is entitled to benefits as a result of a claim filed prior to January 1, 1982	<u>16.1</u>
B. Survivors' claims filed prior to January 1, 1982 where there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982	<u>16.1</u>
1. Death due to pneumoconiosis	<u>16.2</u>
2. Lay evidence	<u>16.3</u>
C. Survivors' claims filed on or after January 1, 1982 where the miner is entitled to benefits as a result of a claim filed prior to January 1, 1982	<u>16.3</u>
D. Survivors' claims filed on or after January 1, 1982 where there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982	<u>16.4</u>
1. Death due to pneumoconiosis	<u>16.4</u>
2. "Hastening death" standard	<u>16.5</u>
a. Prior to applicability of December 2000 regulations ..	<u>16.5</u>
b. After applicability of December 2000 regulations . . .	<u>16.7</u>
3. Traumatic injury or principal cause of death is an unrelated medical condition	<u>16.7</u>
III. Presumptions available under Part 718	<u>16.7</u>
A. Ten years or more of coal mine employment	<u>16.7</u>

B.	Fifteen years or more of coal mine employment	16.8
C.	Twenty-five years or more of coal mine employment	16.8
D.	Complicated pneumoconiosis	16.9

Chapter 16

Survivors' Claims: Entitlement Under Part 718

I. Applicability

[VII(F); VIII(C)(2); X(I)]

Part 718 applies to survivors' claims which are filed on or after April 1, 1980. 20 C.F.R. § 718.1. There are four possible methods of analyzing evidence in a survivor's claim under Part 718: (1) where the survivor's claim is filed prior to January 1, 1982 and the miner is entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; (2) the survivor's claim is filed prior to January 1, 1982 and there is no living miner's claim or the miner is not found entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; (3) the survivor's claim is filed after January 1, 1982 and the miner was found entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; and (4) the survivor's claim is filed after January 1, 1982 where there is no living miner's claim filed prior to January 1, 1982 or the miner is found not entitled to benefits as a result of a living miner's claim filed prior to January 1, 1982. Select the set of conditions which is applicable to your claim and proceed to the appropriate subdivision.

II. Standards of entitlement

A. Survivors' claims filed prior to January 1, 1982 where the miner is entitled to benefits as a result of a claim filed prior to January 1, 1982

The regulations at 20 C.F.R. § 725.212 provide for automatic entitlement to survivor's benefits in cases where the miner is found entitled to benefits as a result of a claim filed prior to January 1, 1982. See the discussion on automatic entitlement in *Chapter 12*. This provision applies to both survivors' benefits arising when the miner is totally disabled during his lifetime and those awarded when the miner dies due to pneumoconiosis. *Pothering v. Parkson Coal Co.*, 861 F.2d 1321 (3d Cir. 1988).

B. Survivors' claims filed prior to January 1, 1982 where there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982

Where there is no miner's claim filed before January 1, 1982 resulting in entitlement to benefits, a survivor whose claim is filed prior to January 1, 1982 must establish entitlement to survivor's benefits. The permanent Department of Labor regulations at Part 718 provide that a survivor is entitled to benefits only where the miner died due to pneumoconiosis. 20 C.F.R. §§ 718.205(a), 725.212(a)(3), 725.218(a)(2), and 725.222(a)(5). As a result, the survivor of a miner who was totally disabled due to pneumoconiosis at the time of death, but died due to an unrelated cause, is not entitled to benefits. 20 C.F.R. § 718.205(b).

The regulations at Part 718 afford the survivor who files a claim prior to January 1, 1982 the

aid of presumptions at §§ 718.303, 718.304, and 718.305 as well as the use of lay testimony. As will be discussed later in this Chapter, these presumptions (with the exception of § 718.304) and the lay testimony provisions become inapplicable where the survivor files his or her claim on or after January 1, 1982.

1. Death due to pneumoconiosis

Subsection 718.205(b) provides that, in the case of a survivor's claim filed prior to January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria are met:

- (1) competent medical evidence established that the miner's death was due to pneumoconiosis;
- (2) death was due to multiple causes including pneumoconiosis and it is not medically feasible to distinguish which disease caused death or the extent to which pneumoconiosis contributed to the cause of death;
- (3) the presumption of § 718.304 [complicated pneumoconiosis] is applicable;
- (4) the presumptions of §§ 718.303 or 718.305 are applicable; or
- (5) the cause of death is significantly related to or significantly aggravated by pneumoconiosis.

20 C.F.R. § 718.205(b).

In *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993), the Board held that, in a survivor's claim under Part 718, the administrative law judge must make a threshold determination as to the existence of pneumoconiosis under 20 C.F.R. § 718.202(a) prior to considering whether the miner's death was due to pneumoconiosis, even though nothing in the regulations specifically requires this procedure.

In *Johnson v. Peabody Coal Co.*, 26 F.3d 618 (6th Cir. 1994), the Sixth Circuit held that a survivor is not entitled to black lung benefits where her claim was “predicated upon the theory that her husband was severely depressed at the time he committed suicide and that his depression was caused by his illnesses, including pneumoconiosis.” The court noted that “legislative history is silent as to whether a psychological component would establish the necessary link between pneumoconiosis and death” and the court was “reluctant to plunge the DOL and the courts into yet another battle of the courtroom experts, unless Congress has decided that is the way it should be.”

2. Lay evidence

In the case involving a deceased miner in which the survivor's claim was filed prior to January 1, 1982, and where there is no medical or other relevant evidence addressing the issue of disability, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total disability. 20 C.F.R. § 725.204(c)(5).

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 *insufficient* to establish total disability under subsections (c)(1)-(4).

In *Pekala*, the Board also concluded that, although its decision involved the lay evidence provisions of § 718.204(c)(5), the same rule applied to cases adjudicated under § 727.203(a)(5). As a result, it is noteworthy that several circuit courts of appeal have held that § 727.203(a)(5) is available where the miner is deceased and the medical evidence of record is merely *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).

Statements made before death by a deceased miner about his or her physical condition are relevant and shall be considered in making a determination as to whether the miner was totally disabled at the time of death. 20 C.F.R. § 718.204(d)(1). This evidence must address the existence of, or disability due to, a respiratory or pulmonary impairment. *Gessner v. Director, OWCP*, 11 B.L.R. 1-1, 1-3 (1987).

In the absence of “medical or other relevant evidence in the case of a deceased miner,” the Third Circuit reiterated that lay evidence may be considered in determining whether the miner was totally disabled due to pneumoconiosis or died due to the disease. *Keating v. Director, OWCP*, 71 F.3d 1118 (3d Cir. 1995).

C. Survivors' claims filed on or after January 1, 1982 where the miner is entitled to benefits as a result of a claim filed prior to January 1, 1982

In cases where a miner is found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on a survivor's claim filed on or after January 1, 1982. This is because survivor's benefits are awarded where it is demonstrated that the miner was totally disabled due to pneumoconiosis at the time of his or her death or died due to pneumoconiosis. 20 C.F.R. §§ 718.204(a), 725.212, 725.218, and 725.222.

Section 422(1) of the Act relieves survivors of the requirement of filing a claim specifically

for survivor's benefits in cases where the decedent miner was entitled to benefits as the result of a claim filed prior to January 1, 1982. The Board has held that § 422(1) permits a survivor to benefit from the miner's filing date where the miner's claim was filed before January 1, 1982 and, although not receiving benefits under a finally adjudicated award, the miner was in payment status. *Smith v. Camco Mining Inc.*, 13 B.L.R. 1-17 (1989).

In *Reigh v. Director, OWCP*, 20 B.L.R. 1-44 (1996), *rev'g.*, 18 B.L.R. 1-65 (1995)(on recon.), the Board held that the Act “mandates a result whereby a (surviving) party filing a Part C claim be able to avail himself of derivative entitlement from a previous award of benefits under a Part B claim.” Specifically, the Board concluded that the automatic derivative entitlement provisions at § 725.218(a)(2) apply to the surviving daughter's Part C claim where the surviving widow was found entitled to benefits on her Part B claim. However, where the deceased miner's daughter, had been “married, divorced, remarried and subsequently widowed,” she lost her status as an unmarried dependent child of the miner because, as noted by the Board, “a surviving child of the beneficiary cannot revive her status as an unmarried dependent of her parents upon the death of her husband.” Citing to Third Circuit precedent, which had appellate jurisdiction over the case, the Board stated that “a dependent child's eligibility, once lost, does not reemerge upon subsequent events resulting in the child satisfying conditions of dependency . . .” *See also Deloe v. Director, OWCP*, 15 B.L.R. 1-9 (1991) (following Sixth Circuit precedent).

D. Survivors' claims filed on or after January 1, 1982 where there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982

The permanent Department of Labor regulations at Part 718 have significantly stiffened the criteria for entitlement to survivors' benefits. Specifically, these regulations provide that a survivor is entitled to benefits only where the miner *died due to pneumoconiosis* (unless § 718.306 is applicable and the survivor's claim was filed before June 30, 1982). 20 C.F.R. §§ 725.212(a)(3), 725.218(a)(2), 725.222(a)(5), and 718.205(a). As a result, the survivor of a miner who was totally disabled due to pneumoconiosis at the time of death, but died due to an unrelated cause, is not entitled to benefits. 20 C.F.R. § 718.205(c).

A survivor is automatically entitled to benefits only where the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982. However, a survivor is no longer automatically entitled to such benefits under a claim filed on or after January 1, 1982 where the miner is not entitled to benefits as a result of the miner's claim filed prior to January 1, 1982 or where no miner's claim was filed prior to January 1, 1982. *Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988). In addition, the survivor is not entitled to the use of lay evidence, or the presumptions at §§ 718.303 and 718.305 to aid in establishing entitlement to survivors' benefits.

1. Death due to pneumoconiosis

Subsection 718.205(c) applies to survivor's claims filed on or after January 1, 1982 and provides that death will be due to pneumoconiosis if any of the following criteria are met:

- (1) competent medical evidence established that the miner's death was due to

pneumoconiosis; or

(2) pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or the death was caused by complications of pneumoconiosis; or

(3) the presumption of § 718.304 [complicated pneumoconiosis] is applicable.

20 C.F.R. § 718.205(c).

These provisions narrow eligibility for survivor's benefits to those cases where the miner's death is due to pneumoconiosis. 20 C.F.R. § 718.205(a). Moreover, it is important to note that the regulations at § 718.204(c)(5) permitting lay evidence testimony to establish total disability do not apply where the survivor's claim is filed on or after January 1, 1982 and there is no miner's claim resulting in entitlement to benefits filed prior to January 1, 1982. 20 C.F.R. § 718.204(c)(5). It is noteworthy that, in *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993), the Board held that in a Part 718 survivor's claim, the administrative law judge must make a threshold determination as to the existence of pneumoconiosis under 20 C.F.R. § 718.202(a) prior to considering whether the miner's death was due to the disease under § 718.205.

2. "Hastening death" standard

a. Prior to applicability of December 2000 regulations

The Board and circuit courts have adopted divergent standards with regard to determining whether a miner's death was due to pneumoconiosis. While the Board concludes that death must be "significantly" related to or aggravated by pneumoconiosis, the circuit courts have developed the "hastening death" standard which requires establishment of a lesser causal nexus between pneumoconiosis and the miner's death. The following listing sets forth the holdings of the Board and circuit courts with regard to weighing evidence under § 718.205(c):

- ! **Benefits Review Board.** Under the provisions of § 718.205(c), "death will be considered to be due to pneumoconiosis where the cause of death is significantly related to or significantly aggravated by pneumoconiosis." *Foreman v. Peabody Coal Co.*, 8 B.L.R. 1-371, 1-374 (1985).
- ! **Third, Fourth, Sixth, Seventh, and Tenth Circuits.** The United States Court of Appeals for the Third Circuit has held that any condition that *hastens* the miner's death is a substantially contributing cause of death for purposes of § 718.205. *Lukosevich v. Director, OWCP*, 888 F.2d 1001 (3d Cir. 1989). The Fourth, Sixth, Seventh, and Tenth Circuits have adopted this position in *Shuff v. Cedar Coal Co.*, 967 F.2d 977 (4th Cir. 1992); *Brown v. Rock Creek Mining Corp.*, 996 F.2d 812 (6th Cir. 1993)(J. Batchelder dissenting); and *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178 (7th Cir. 1992); *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871 (10th Cir. 1996) (a survivor is entitled to benefits if pneumoconiosis hastened the miner's death "to any degree").

In *Mancia v. Director, OWCP*, 130 F.3d 579 (3d Cir. 1997), the Third Circuit held

that it was error for the administrative law judge to discredit a treating physician's opinion that the miner suffered from cor pulmonale on grounds that the physician did not conduct objective testing in support of his diagnosis. The court held that there was no indication that objective testing was necessary to diagnose cor pulmonale and that this condition is generally associated with pneumoconiosis. The physician concluded that the miner's cardiac arrest, which resulted in his death, was hastened by the progressive breathing difficulties he experienced due to pneumoconiosis. The court noted that, while lay testimony cannot be used to determine the cause of death, uncontradicted lay testimony of the miner's breathing difficulties further supporting the treating physician's medical conclusion is probative and must be considered. Thus, Claimant established entitlement to benefits because the treating physician "clearly, consistently and unwaveringly opined that the miner's chronic lung disease led to his deteriorating medical condition, and, ultimately, to his death."

The Fourth Circuit, in *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384 (4th Cir. 1999), held that the administrative law judge erred in finding that pneumoconiosis contributed to the miner's death based upon an equivocal physician's opinion. Specifically, Dr. Rasmussen opined that it was "possible" and "[i]t can be stated" that pneumoconiosis contributed to the miner's death. The court held that his opinion was "merely a statement this it is possible that the condition could have contributed to death." The court also stated that the opinion could support a contrary conclusion. It noted that "in an agency proceeding the gatekeeping function to evaluate evidence occurs when the evidence is considered in decision making rather than when the evidence is admitted." Said differently, while evidence is generally admitted in administrative proceedings with less regard for reliability, the administrative law judge must determine its probative value as an expert fact-finder.

The Sixth Circuit reaffirmed its holding in *Brown* to state that benefits are awarded to a survivor who establishes that "pneumoconiosis is a substantially contributing cause or factor leading to the miner's death if it serves to hasten that death in any way." *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995). Similarly, in *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996), the Fourth Circuit held that, in a survivor's claim under Part 718, the claimant must demonstrate that pneumoconiosis "hastened" the miner's death "in any way." In this vein, the court held that the Director's "stipulation," that the miner suffered from legal pneumoconiosis arising from coal dust exposure at the time of death, was binding notwithstanding a lack of medical evidence in the record to support the stipulation. *But see Johnson v. Peabody Coal Co.*, 26 F.3d 618 (6th Cir. 1994) (survivor not awarded benefits where theory of entitlement was that "her husband was severely depressed at the time he committed suicide and that his depression was caused by his illnesses, including pneumoconiosis"); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993) (a physician's opinion that pneumoconiosis contributed to the miner's death to a "negligible" degree was insufficient to satisfy the "hastening death" standard).

b. After applicability of December 2000 regulations

A new subsection has been added to § 718.205(c) which adopts the “hastening death” standard and provides the following:

(5) Pneumoconiosis is a 'substantially contributing cause' of a miner's death if it hastens the miner's death.

20 C.F.R. § 718.205(c)(5) (Dec. 20, 2000).

3. Traumatic injury or principal cause of death is an unrelated medical condition

Survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. § 718.205(c)(4). *Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988) (survivor not entitled to benefits where the miner's death was due to a ruptured abdominal aortic aneurysm). A survivor, however, is not precluded from benefits where the miner's death is due to traumatic injury if the deceased miner had access to the irrebuttable presumption of death due to pneumoconiosis at § 718.304 (complicated pneumoconiosis). *Sumner v. Blue Diamond Coal Co.*, 12 B.L.R. 1-74 (1988).

III. Presumptions available under Part 718

Section 411(c) of the Black Lung Benefits Act, as amended, 30 U.S.C. § 921(c), provides certain statutory presumptions applicable to survivors' claims. This section is implemented in the regulations at 20 C.F.R. §§ 718.302-718.306. The presumptions applicable to survivors' claims include the following: (1) § 718.303, death from a respirable disease; (2) § 718.304, complicated pneumoconiosis; (3) § 718.305, the 15 year presumption; and (4) § 718.306, the 25 year presumption. 20 C.F.R. §§ 718.302-718.306.

A. Ten years or more of coal mine employment

This presumption is applicable only to survivors' claims filed prior to January 1, 1982. 20 C.F.R. § 718.303(c).

Under § 718.303, if a deceased miner was employed for ten or more years in one or more coal mines and died from a respiratory disease, there shall be a rebuttable presumption that his or her death was due to pneumoconiosis. Also, death shall be found to be due to a respirable disease in any case in which the evidence establishes that death was due to multiple causes, including a respirable disease, and it is not medically feasible to distinguish which disease caused death or the extent to which the respirable disease contributed to the cause of death. The claimant is only required to demonstrate that the miner's death was due to a respirable disease, and “does not have to establish a reasonable possibility that death was due to pneumoconiosis.” *Beard v. Director, OWCP*, 10 B.L.R. 1-82, 1-84 (1987). The presumption is rebutted by a showing that the deceased miner did not

have pneumoconiosis, that his or her death was not due to pneumoconiosis, or that pneumoconiosis did not contribute to his or her death. 20 C.F.R. § 718.303(b). See *Bury v. Director, OWCP*, 9 B.L.R. 1-79 (1986).

B. Fifteen years or more of coal mine employment

This presumption is applicable only to survivors' claims filed prior to January 1, 1982. 20 C.F.R. § 718.305(e).

Under § 718.305, if a miner was employed for fifteen years or more in one or more underground coal mines or in substantially similar coal mine conditions, and there is a chest x-ray interpreted negative for *complicated* pneumoconiosis such that § 718.304 is inapplicable, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner's death was due to pneumoconiosis. The claimant is not required to establish that the respiratory or pulmonary impairment arose out of coal mine employment prior to invocation of the presumption. *Tanner v. Freeman United Coal Co.*, 10 B.L.R. 1-85 (1987); *Snorton v. Ziegler Coal Co.*, 9 B.L.R. 1-106 (1986). The presumption may be rebutted by establishing that the miner 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. However, in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin. 20 C.F.R. § 718.305(d). See *Bury v. Director, OWCP*, 9 B.L.R. 1-79 (1986).

In *Snorton, supra*, the Board held that a physician's opinion was insufficient to establish that the miner's impairment did not arise out of coal mine employment where the opinion did not clearly ascribe an origin to the miner's pulmonary disability. *Id.* at 1-108. However, the Board in *Tanner* overruled *Snorton* to the extent that it stated that “the specific etiology of claimant's totally disabling respiratory impairment need not be established by the party opposing entitlement.” *Tanner*, 10 B.L.R. at 1-87.

A determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made in accordance with § 718.204. 20 C.F.R. § 718.305(c). In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. § 718.305(b). The Board has held that “[I]f evidence may not be used to establish the existence of a totally disabling respiratory impairment under § 718.305 if the record contains other medical evidence.” *Bury v. Director, OWCP*, 9 B.L.R. 1-79, 1-81 (1986).

C. Twenty-five years or more of coal mine employment

The 25 year presumption is only applicable to survivors' claims filed between January 1, 1982 and June 30, 1982.

In the case of a miner who died on or before March 1, 1978, who was employed for 25 or more years in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner

whose claims have been filed prior to June 30, 1982, shall be entitled to payment of benefits, unless it is established that at the time of death such miner was not partially or totally disabled due to pneumoconiosis. 20 C.F.R. § 718.306(a). For purposes of the 25 year presumption, a miner will be considered “partially disabled” if he or she had a reduced ability to engage in work as defined in § 718.204(b). 20 C.F.R. § 718.306(b).

To rebut the presumption, the evidence must demonstrate that the miner's ability to perform work was not reduced at the time of his or her death; or that the miner did not have pneumoconiosis; or that any disability that existed at the time of death was due to a cause other than pneumoconiosis. 20 C.F.R. § 718.306(c); *Freeman v. Old Ben Coal Co.*, 3 B.L.R. 1-599 (1981), *aff'd sub nom. Freeman v. Director, OWCP*, 687 F.2d 214 (7th Cir. 1982). None of the following items, by itself, shall be sufficient 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; or
- (4) a death certificate which makes no mention of pneumoconiosis.

20 C.F.R. § 718.306(d).

In a survivor's claim filed on or after January 1, 1982, but prior to June 30, 1982, where entitlement is sought to be established in accordance with § 718.306, where there is no medical or other relevant evidence, affidavits (or equivalent sworn testimony) from persons knowledgeable about the miner's physical condition shall be sufficient to establish total or partial disability; however, such a determination shall not be based solely upon the affidavits or testimony of the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim was approved. 20 C.F.R. § 718.204(c)(5).

D. Complicated pneumoconiosis

Under § 718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner suffered from complicated pneumoconiosis. 20 C.F.R. § 718.304. In a survivor's claim, where claimant has established the presumption under § 718.304, the survivor must still establish that the miner's pneumoconiosis arose out of coal mine employment. This is because the regulations at Part 718 require that the miner be totally disabled due to *coal workers'* pneumoconiosis, and the presumption at § 718.304 affords only a presumption of total disability due to pneumoconiosis without regard to the etiology of the disease. For an analysis of evidence to determine whether complicated pneumoconiosis exists, see the subsection regarding complicated pneumoconiosis at Chapter 11.