JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

PREPARED BY THE U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
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CHAPTER 5
What Is The Applicable Law?

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I. Overview of the Black Lung Benefits Act

A. Generally

The black lung benefits program was first established under Title IV of the Federal Coal Mine Health and Safety Act of 1969. The Act was to be implemented by the Social Security Administration which promulgated regulations at 20 C.F.R. Part 410 to accomplish the task. The number of claims greatly exceeded Congress' expectations, however, which resulted in a longer than anticipated processing time with relatively few claimants being awarded benefits. Therefore, in 1972, Congress passed the Black Lung Benefits Act in an effort to liberalize the requirements of entitlement and to transfer jurisdiction over such claims to the Department of Labor. The Act required that the Social Security Administration write interim regulations governing entitlement to facilitate the transfer of jurisdiction to the Department of Labor. These interim Social Security regulations are located at 20 C.F.R. § 410.490 (commonly referred to as a "section 415 transition claim").

Because the interim regulations at § 410.490 were more favorable to the claimant than the Part 410 regulations, a disparity arose in the adjudication of claims. Moreover, state compensation programs were providing inadequate benefits to miners who were totally disabled due to coal workers' pneumoconiosis. See, *e.g.*, *O'Brockta v. Eastern Assoc. Coal Co.*, 18 B.L.R. 1-71 (1994). For these reasons, Congress amended the Black Lung Benefits Act in 1977. The Act, as amended, authorized the Department of Labor to write interim and permanent regulations for all claims. Section 435 of the amended Act provided that the miner could elect review of all pending or previously denied Part B claims by either the Social Security Administration or Department of Labor under § 410.490. Moreover, all pending or previously denied Part C claims would be reviewed automatically by the Department of Labor.

The interim Department of Labor regulations at 20 C.F.R. Part 727 became effective in March of 1978 and applied to all reviewed claims and to new claims filed until the completion of the permanent regulations. Two years later, the Department of Labor completed the promulgation of the permanent regulations at 20 C.F.R. Part 718.

In general, claims filed on or before July 1, 1973 are categorized as Part B claims and are adjudicated under the regulations at 20 C.F.R. Part 410 and/or § 410.490. Claims filed after July 1, 1973 constitute Part C claims and are adjudicated under Parts 727 and/or 718 of the regulations. For an instructive discussion of the history of the Black Lung Benefits Act, see the Third Circuit's decision in *Elliot Coal Mining Co. v. Director, OWCP*, 17 F.3d 616 (1994). *See also Harman Mining Co. v. Layne*, 21 B.L.R. 2-507 (4th Cir. 1998) (unpub.).

B. December 2000 regulatory amendments, effective dates of

On December 20, 2000, the Department substantively amended certain regulatory provisions at 20 C.F.R Parts 718 and 725. The Department stated that the amendments were made in order to simplify administrative procedures before the district director; to provide new rules on evidentiary development, primarily in regard to the numerical limitations on medical evidence and in regard to the early identification of a single responsible operator; and, to clarify the meaning of legal requirements, such as the definition of pneumoconiosis and the extent to which pneumoconiosis must contribute to the miner's total disability or death. *See* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,920-79,924 (Dec. 20, 2000).

In regard to the applicability of the amended regulations, the Department set the effective date as January 19, 2001. Subsection 725.2(c) states the following:

> The provisions of this part reflect revisions that became effective on January 19, 2001. With the exception of the following sections, this part shall also apply to the adjudication of claims that were pending on January 19, 2001: §§ 725.309, 725.310, 725.351, 725.360, 725.367, 725.406, 725.407, 725.408, 725.409, 725.410, 725.411, 725.412, 725.414, 725.415, 725.416, 725.417, 725.418, 725.421(b), 725.423, 725.454, 725.456, 725.457, 725.458, 725.459, 725.465, 725.491, 725.492, 725.493, 725.494, 725.494, 725.495, 725.547. The version of those sections set forth in 20 CFR, parts 500 to end, edition revised as of April 1, 1999, apply to the adjudications of claims that were pending on January 19, 2001. For purposes of construing the provisions of this section, a claim shall be considered pending on January 19, 2001 if it was not finally denied more than one year prior to that date.

20 C.F.R. § 725.2(b) (Dec. 20, 2000). In its comments, the Department states that its:

> . . . definition of a 'pending claim' is intended to prevent the application of certain regulatory revisions (those which will be applied only on a prospective basis) to any claim that was filed before the date on which those revisions take effect. The definition includes claims pending at various stages of adjudication (*i.e.*, before the district directors, the Office of Administrative Law Judges, the Benefits Review Board, or the federal courts). In addition, some claims that have been finally denied prior to the effective date of the revisions can be revived by a subsequent request for modification. For example, a claim may have been finally denied three months before the rules became effective, and the claimant may file a request for modification nine months later (or six months after the revised regulations took effect). The Department does not intend that the revised regulations that are prospective only (including, for example, the limitation on evidence) be used to adjudicate such a claim, and has drafted the definition of a 'pending claim' to ensure that result.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,956 (Dec. 20, 2000).

With regard to the applicability of the substantively changed Part 718 regulations, § 718.2 provides the following:

> This part is applicable to the adjudication of all claims filed after March 31, 1980, and considered by the Secretary of Labor under section 422 of the Act and part 725 of this subchapter. If a claim is subject to the provisions of section 435 of the Act and subpart C of part 727 of this subchapter (see 20 CFR 725.4(d)) cannot be approved under that subpart, such claim may be approved, if appropriate, under the provisions contained in this part. The provisions of this part shall, to the extent appropriate, be construed together in the adjudication of all claims.

20 C.F.R. § 718.2 (Dec. 20, 2000). In its comments to part 718, the Department stated the following:

> [The Department] rejected recommendations to make all of the revisions either fully retroactive or entirely prospective. The Department adhered to its earlier explanation in the initial notice of proposed rulemaking: some regulations could apply to pending claims because they codify existing agency interpretations of the BLBA and regulations, while other regulations must be limited to prospective application because they involve significant changes to the existing program which could disrupt the parties' interests. The Department therefore declined to adopt a single approach for all of the revisions.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,949 (Dec. 20, 2000). In its comments to the amended regulations, the Department further states the following:

> With respect to rules that clarify the Department's interpretation of former regulations, the Department quoted *Pope v. Shalala*, 998 F.2d 473 (7th Cir. 1993), *overruled on other grounds, Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999), for the proposition that an agency's rules of clarification, in contrast to rules of substantive law, may be given retroactive effect.
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> The Department's rulemaking includes a number of such clarifications. For example, the revised versions of §§ 718.201 (definition of pneumoconiosis), 718.204 (criteria for establishing total disability due to pneumoconiosis) and 718.205 (criteria for establishing death due to pneumoconiosis) each represent a consensus of the federal courts of appeals that have considered how to interpret former regulations.
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> Moreover, none of the appellate decisions with respect to these regulations represents a change from prior administrative practice. Thus, a party litigating a case in which the court applied such an interpretation would not be entitled to have the case remanded to allow that party an opportunity to develop additional evidence.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,955 (Dec. 20, 2000).

In *Nat'l. Mining Ass'n., et al. v. Chao*, Civil Action No. 00-3086, the National Mining Association challenged the validity of a number of the amended regulations before District Judge Emmet G. Sullivan. During litigation of the case, District Judge Sullivan issued a *Preliminary Injunction Order* requiring that all cases be stayed unless the adjudicator determined that application of the amended regulations would not have an affect on the outcome of the claim. On August 9, 2001, District Judge Sullivan issued a *Memorandum Opinion and Order* lifting the stay and affirming the validity of all challenged regulations. *See Nat'l. Mining Ass'n., et al. v. Chao*, Civil Action No. 00-3086 (D. D.C., Aug. 9, 2001).

II. Types of claims

Under the regulations, there are seven types of black lung claims which are adjudicated by this Office.

A. The living miner's claim (BLA)

The miner files a claim for benefits during his or her lifetime. This claim may be pursued by the estate of the miner or a survivor in the event the miner dies before his or her claim is finally adjudicated. This claim will be assigned a "BLA" case number. *See Chapters 8 - 11.*

B. The survivor's claim (BLA)

The widow or dependent of a miner files a claim for benefits after the miner's death asserting that the miner died due to coal workers' pneumoconiosis or was totally disabled due to coal workers' pneumoconiosis at the time of death. This claim is considered independently of a miner's living claim (if one was filed). The survivor's claim will be assigned a "BLA" case number. *See Chapters 12 - 16.*

C. Medical Benefits Only (BMO)

When the Act was administered by the Social Security Administration, miners were only entitled to benefits, and not medical services, which would be required due to the miner's poor health. The Department of Labor regulations, on the other hand, provide for automatic entitlement to medical services related to the miner's condition upon an award of benefits. A special provision was made for those claims which resulted in entitlement to benefits under the Act as administered by the Social Security Administration whereby the miner could request reimbursement for medical services. These claims are assigned "BMO" case numbers. *See Chapter 19.*

D. Medical Treatment Dispute (BTD)

In some cases, the employer or Director will allege that certain medical treatment received by the miner is unnecessary and/or unrelated to his or her black lung condition. These cases are assigned "BTD" case numbers. *See Chapter 20.*

E. Medical Interest (BMI)

Often a miner's medical bills will be paid by the Director out of the Trust Fund while the employer disputes such medical treatment. Once the employer is finally adjudicated to be liable for such medical treatment, then it is required to reimburse the Trust Fund with the costs of the medical services plus interest. Medical interest cases generally arise from a dispute regarding the date of accrual of the interest due. These claims are assigned "BMI" numbers. *But see Chapter 21* (an administrative law judge does not have authority to award such interest and, if he or she is assigned the case, it should be remanded to the district director).

F. Overpayment (BLO)

Where the claimant (miner or survivor) received benefits in error or received more benefits than he or she was entitled to receive, an overpayment is created. The employer or Director, OWCP may then commence collection of the overpayment amount. The administrative law judge must decide whether the overpayment is waived and, if not, whether the claimant is financially capable of repaying the overpayment amount and the repayment schedule. These claims are assigned "BLO" case numbers. *See Chapter 18*.

G. Black Lung Civil Money Penalty (BCP)

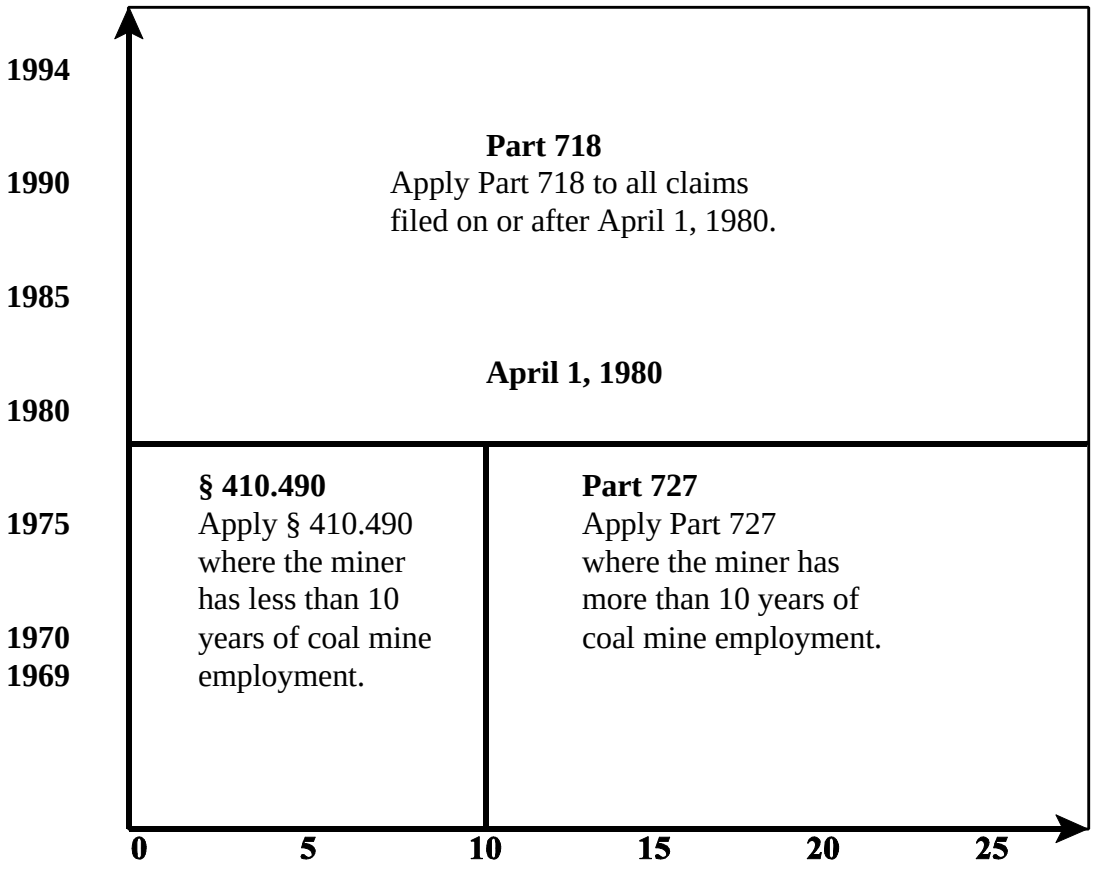
If the Responsible Operator fails to obtain insurance coverage for the payment of benefits as required by law, the Director, OWCP may pursue the corporate officers personally and/or the assets of the Employer. 20 C.F.R. § 725.620. These claims are assigned "BCP" case numbers.

III. Department of Labor jurisdiction

Jurisdiction to adjudicate claims under the Black Lung Benefits Act lies with the Department of Labor pursuant to 30 U.S.C. § 901, *et seq.* and the regulations promulgated thereunder at Title 20, Code of Federal Regulations. The procedural regulations at 29 C.F.R. Part 18 apply to black lung claims, but the evidential rules at § 18.101, *et seq.* do not. 29 C.F.R. § 18.1101.

IV. The applicable regulatory scheme

The applicability of a particular set of regulations is determined primarily from the date on which a claim was filed. Once you conclude which regulations should be applicable from the chart below, turn to the appropriate chapter in this *Benchbook* to determine whether any other necessary criteria are met.



Note that, as a point of clarification regarding the chart, for those claims filed during the effective dates of the Part 727 regulations, but where the miner has demonstrated fewer than ten years of coal mine employment, then the claim is adjudicated under § 410.490. This is because the plain language of the Part 727 regulations requires that a miner establish at least ten years of coal mine employment to be applicable whereas § 410.490 contains no such restrictions. If, however, the claim is filed during the effective dates of the § 410.490 regulations then, regardless of the number of years of coal mine employment, the claim must be adjudicated under § 410.490. *See Chapters 8 and 9* for the specific effective dates of these regulations.

V. Circuit court jurisdiction

Generally, appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(en banc). In *Broyles v. Director, OWCP*, 143 F.3d 1348 (10th Cir. 1998), the Tenth Circuit held that a survivor's appeal must be filed in the jurisdiction where the miner's coal mine employment, and therefore his harmful exposure to coal dust, occurred. The court stated that, based upon the record before it, the miner's "only exposure to coal dust occurred in the Seventh Circuit" such that the case would be transferred to that court for adjudication pursuant to 28 U.S.C. § 1631. However, it is noteworthy that, in *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983), the Eighth Circuit held that "black lung disease is a 'cumulative' injury" which is "caused by extensive exposure to coal dust, and it is impossible to say that any one exposure 'caused' the miner to get black lung." Consequently, the court rejected the "'last injurious contact'" rule to state that the "appeal lies in any circuit in which claimant worked and was exposed to the danger, prior to manifestation of the injury."

VI. The three-year statute of limitations
[I(F)]

A. The statute

The Act, at 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 are more liberal to the claimant and read, in part, as follows:

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.
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> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

It is noteworthy that the Board has held that the statute of limitations applies only to the first claim filed, *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990), and it is presumed that a claim is timely filed unless the party opposing entitlement demonstrates it is untimely and there are no "extraordinary circumstances" under which the limitation period should be tolled, *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 B.L.R. 1-95 (1994). *But see Chapter* 24 for a discussion of the applicability of the three year statute of limitations in a multiple claim.

B. Hearing required prior to dismissal

By unpublished decision, *Wright v. Manning Coal Corp.*, BRB No. 93-0838 BLA (July 27, 1994)(unpublished), the Board held that an administrative law judge's dismissal of a claim as untimely was improper even where counsel conceded that the claimant was informed by a physician that he was totally disabled and that he suffered from coal workers' pneumoconiosis. In so holding, the Board noted that the record was devoid of evidence that the miner had "actual physical receipt" of the physician's written opinion. Moreover, while the physician diagnosed coal workers' pneumoconiosis and total disability, the Board found that, in his report, he did "not in fact specifically attribute claimant's total disability to pneumoconiosis arising out of coal mine employment." Thus, the Board concluded that "inasmuch as a determination regarding rebuttal of the timeliness presumption is fact-specific and depends on the administrative law judge's credibility assessments of the documentary and testimonial evidence . . . an administrative law judge should not dismiss a case without a *de novo* hearing pursuant to 20 C.F.R. § 725.451."

C. Commencement of the three-year period

The Board, in *Adkins v. Donaldson Mine Co.*, 19 B.L.R. 1-34 (1993), noted that, although the Secretary's regulations contain additional language not found in the statute, such language is in line with the benevolent purpose of the Act. The Board held that the requirement of a "medical determination of total disability due to pneumoconiosis" must be strictly construed such that a determination which merely states that the claimant has coal workers' pneumoconiosis is insufficient. Moreover, the Board stated that the clause requiring that the determination be "communicated to the miner" means that a written report be "actually received" by the miner. If a written report diagnosing total disability due to pneumoconiosis was actually received by the miner, the administrative law judge must then determine the level of the miner's comprehension, *i.e.* whether he or she was truly aware that there was a "viable claim for benefits", which requires a finding as to whether the miner could read and, if so, whether the miner's level of reading enabled him or her to understand the report. *See also Cabral v. Eastern Assoc. Coal Corp.*, 18 B.L.R. 1-25 (1993) (the opposing party waived reliance on the affirmative defense of timeliness where it raised the issue before the district director but withdrew it before the administrative law judge).

VII. Addresses and phone numbers of Circuit Courts; jurisdiction

In the event you need to know the status of a case, or need other information from a particular appellate court, the following is a list of the addresses and phone numbers of the circuit courts as well as the states and/or territories over which they have jurisdiction:

FIRST CIRCUIT **(Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island)**	PHOEBE MORSE, CLERK U.S. Court of Appeals for the First Circuit One Courthouse Way, Suite 2500 Boston, MA 02210 Tel. (617) 748-9057
SECOND CIRCUIT **(Connecticut, New York, Vermont)**	ROSEANNE MACKECHNIE, CLERK U.S. Court of Appeals for the Second Circuit 40 Foley Square, Rm. 1702 New York, NY 10007 Tel. (212) 857-8700
THIRD CIRCUIT **(Delaware, New Jersey, Pennsylvania, Virgin Islands)**	MARCIA M. WALDON, CLERK U.S. Court of Appeals for the Third Circuit 21400 U.S. Courthouse 601 Market Street Philadelphia, PA 19106-1790 Tel. (215) 597-2995
FOURTH CIRCUIT **(Maryland, North Carolina, South Carolina, Virginia, West Virginia)**	PATRICIA S. CONNOR, CLERK U.S. Court of Appeals for the Fourth Circuit U.S. Courthouse 1100 East Main St., 5th Fl. Richmond, VA 23219 Tel. (804) 916-2700
FIFTH CIRCUIT **(Louisiana, Mississippi, Texas)**	CHARLES FULBRUGE, CLERK U.S. Court of Appeals for the Fifth Circuit 600 Camp Street New Orleans, LA 70130-3479 Tel. (504) 589-6514
SIXTH CIRCUIT **(Kentucky, Michigan, Ohio, Tennessee)**	LEONARD GREEN, CLERK U.S. Court of Appeals for the Sixth Circuit 524 U.S. Courthouse Cincinnati, OH 45202 Tel. (513) 684-2953

SEVENTH CIRCUIT **(Illinois, Indiana, Wisconsin)**	GINO AGNELLO, CLERK U.S. Court of Appeals for the Seventh Circuit 219 S. Dearborn St., Rm. 2722 Chicago, IL 60604 Tel. (312) 435-5850
EIGHTH CIRCUIT **(Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota)**	MICHAEL C. GANS, CLERK U.S. Court of Appeals for the Eighth Circuit 111 South 10th Street Room 24.329 St. Louis, MO 63102 Tel. (314) 244-2400
NINTH CIRCUIT **(Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Marianna Islands, Oregon, Washington)**	CATHY A. CATTERSON, CLERK U.S. Court of Appeals for the Ninth Circuit 95 7th Street San Francisco, CA 94103 Tel. (415) 556-9800
TENTH CIRCUIT **(Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming)**	PATRICK FISHER, CLERK U.S. Court of Appeals for the Tenth Circuit The Byron White U.S. Courthouse 1823 Stout Street Denver, CO 80257 Tel. (303) 844-3157
ELEVENTH CIRCUIT **(Alabama, Florida, Georgia)**	THOMAS K. KAHN, CLERK U.S. Court of Appeals for the Eleventh Circuit 56 Forsyth Street, N.W. Atlanta, GA 30303 Tel. (404) 335-6100
DISTRICT OF COLUMBIA CIRCUIT **(Washington, D.C.)**	MARK J. LANGER, CLERK U.S. Court of Appeals for the D.C. Circuit 3rd & Constitution Ave., N.W. Washington, D.C. 20001 (202) 216-7000
FEDERAL CIRCUIT COURT OF APPEALS **(Nationwide)**	JAN HORBAL, CLERK U.S. Court of Appeals for the Federal Circuit U.S. Courthouse 717 Madison Place, N.W. Washington, DC 20439 (202) 273-0300