Chapter 9
Living Miners' Claims: Entitlement Under 20 C.F.R. § 410.490

I. Applicability of 20 C.F.R § 410.490, generally

Congress initially envisioned the Black Lung Benefits Program would be administered by the Social Security Administration in its 1969 enactment of the Federal Coal Mine Health and Safety Act. However, the 1969 Act resulted in an unexpectedly high volume of claims, and the backlogged adjudication process resulted in relatively few awards. Consequently, Congress decided to transfer jurisdiction over processing, and adjudicating, black lung claims to the U.S. Department of Labor.

A. Applies to Part B claims (claims filed prior to July 1, 1973)

The 1972 Amendments to the Act directed the Social Security Administration to promulgate interim regulations for transition of the adjudication process. These regulations are codified at 20 C.F.R. § 410.490, and apply to all claims filed before July 1, 1973. 20 C.F.R. § 410.490(b). In essence, the 20 C.F.R. § 410.490 regulations apply to all Part B claims filed with the Social Security Administration. The Department of Labor began adjudication of the Black Lung Benefits Program with claims filed under 20 C.F.R. § 410.490 between July 1 and December 31, 1973 (Section 415 transition claims) as well as Part C claims, which are filed after January 1, 1974.

In light of the regulations at 20 C.F.R. § 727.303(a) and (b), the Board held, in *Saris v. Director, OWCP*, 11 B.L.R. 1-65, 1-66 (1988), a miner's previously denied or pending Part B claim, which is referred to the Department of Labor for review, is *converted* to a Part C claim with an effective filing date as the date of the election card. As a result, 20 C.F.R. § 410.490 only applies to Part B claims filed prior to July 1, 1973. *Id.* at 1-67. *See also* 20 C.F.R. § 727.203(a).

B. Applies to 20 C.F.R. Part 727 claims where miner has fewer than 10 years employment

Twenty C.F.R. § 410.490 also applies to claims where 20 C.F.R. Part 727 is rendered inapplicable, *i.e.* the miner is unable to establish ten years

of coal mine employment. *Whiteman v. Boyle Land Fuel Co.*, 15 B.L.R. 1-11 (1991)(*en banc*). This decision was the result of a long line of conflicting decisions among the Board and various circuit courts, which ultimately was resolved by the United States Supreme Court in *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988).

II. Invocation of presumption of total disability due to pneumoconiosis

The regulation at 20 C.F.R. § 410.490(b) provides a miner is totally disabled due to pneumoconiosis if the following is established:

> (i) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or
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> (ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (of one year duration).

20 C.F.R. § 410.490(b).

And, although the provisions at 20 C.F.R. § 410.490(b)(i) are written to indicate that a single, positive x-ray study may invoke the presumptions, the United States Supreme Court ruled to the contrary in *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 435 (1987), *reh'g denied* 484 U.S. 1047 (1988). Specifically, the Court held all x-ray evidence must be weighed prior to invocation.

For a detailed discussion of weighing medical evidence, *see* Chapter 3 (general principles of weighing medical evidence), and Chapter 10 (adjudicating claims under 20 C.F.R. Part 727).

In *Phipps v. Director, OWCP*, 17 B.L.R. 1-39 (1992)(en banc), the Board held the invocation provisions at 20 C.F.R. § 727.203(a) do not apply to claims adjudicated under 20 C.F.R. § 410.490, but the rebuttal provisions at 20 C.F.R. § 727.203(b) are applicable to such claims.

III. Etiology of the pneumoconiosis

Twenty C.F.R. § 410.490(b)(2) and (3) address the etiology of pneumoconiosis, and provide two means for establishing causation: (1) a miner with ten years of coal mine employment is presumed totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. § 410.490(b)(3); or (2) if the miner has less than ten years of coal

mine employment, then s/he must submit evidence sufficient to establish that pneumoconiosis arose out of coal mine employment under 20 C.F.R. § 410.490(b)(2). *Campbell v. Director, OWCP*, 10 B.L.R. 1-125 (1987); *Soloe v. Director, OWCP*, 10 B.L.R. 1-125 (1987); *Remetta v. Director, OWCP*, 8 B.L.R. 1-214 (1985); *Marsigio v. Director, OWCP*, 8 B.L.R. 1-190 (1985); *Foster v. Director, OWCP*, 8 B.L.R. 1-188 (1985). Failure to establish pneumoconiosis arising from coal mine employment precludes invocation of the presumptions at 20 C.F.R. § 410.490. *Grant v. Director, OWCP*, 857 F.2d 1102 (6th Cir. 1988).

IV. Rebuttal of the presumption of total disability due to pneumoconiosis

On its face, the language at 20 C.F.R. § 410.490(c) provides only the following two means of rebutting the interim presumption:

> (1) there is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (*see § 410.412(a)(1)*), or
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> (2) other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated) establish that the individual is able to do his usual coal mine work or comparable and gainful work (*see § 410.412(a)(1)).*

20 C.F.R. § 410.490(c)(1) and (2).

A. Comparison with rebuttal at 20 C.F.R. Part 727

A comparison of the rebuttal provisions at 20 C.F.R. § 410.490(c) with the rebuttal provisions at 20 C.F.R. § 727.203(b) reveals that 20 C.F.R. § 727.203(b) provides two additional means of rebuttal: (1) the miner's total disability did not arise out of coal mine employment and, (2) the miner does not have pneumoconiosis. 20 C.F.R. § 727.203(b)(3) and (b)(4). Therefore, 20 C.F.R. Part 727 requires ten years of coal mine employment to be applicable, and provides four means of rebuttal, whereas the more liberal 20 C.F.R. § 410.490 regulations require no minimum period of coal mine employment, and provide only two means of rebuttal.

B. Incorporation of rebuttal at 20 C.F.R. § 727.203(b)(3) and (b)(4)

In *Phipps v. Director, OWCP*, 17 B.L.R. 1-39 (1992)(en banc), the Board concluded this disparity needed to be remedied and, based on *dicta* in

the United States Supreme Court's decision in *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991), the Board held the four methods of rebuttal set forth at 20 C.F.R. § 727.203(b) are applicable to claims adjudicated under 20 C.F.R. § 410.490 of the regulations.

According to the *Pauley* Court, the rebuttal provisions at 20 C.F.R. § 727.203(b)(3) and (b)(4) are implicitly included at 20 C.F.R. § 410.490. This conclusion was supported through the language at 20 C.F.R. § 410.490, which references 20 C.F.R. § 410.416 involving the ten year coal mine employment causation presumption as well as 20 C.F.R. § 410.401(b)(1), which defines "pneumoconiosis" as compensable under the Act. Therefore, the Court reasoned the 20 C.F.R. Part 410 regulations act in concert to infer the inclusion of the rebuttal provisions at 20 C.F.R. §§ 727.203(b)(3) and (b)(4) to claims adjudicated under 20 C.F.R. § 410.490.

C. Physical capability versus vocational capability

In assessing total disability, the Board applies the same standard for total disability as is applied under 20 C.F.R. Part 727; namely, only physical capacity is considered. *Shaw v. Cementation Co. of America*, 10 B.L.R. 1-114 (1987). However, for Part B claims, the Sixth Circuit applies the vocational disability standard (*i.e.* the ability of the miner to find comparable employment in his or her immediate area of work). *Neace v. Director, OWCP*, 867 F.2d 264 (6th Cir. 1989). For Part C claims, the Sixth Circuit applies a medical test of physical capabilities, not a vocational one. *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985).

For further discussion of the factors to consider in determining whether the miner is able to perform "comparable and gainful" employment, *see* Chapter 10.

V. Applicability of 20 C.F.R. Parts 410, 727, and 718

A claim that is analyzed and denied under 20 C.F.R. § 410.490 must also be adjudicated under 20 C.F.R. Part 410. *Wells v. Peabody Coal Co.*, 3 B.L.R. 1-85 (1981).