Chapter 14
Survivors' Claims:
Entitlement Under 20 C.F.R. § 410.490

I. Applicability

Twenty C.F.R. § 410.490 applies to survivors' claims where (1) the miner dies before January 1, 1974, and (2) the survivor files a claim for benefits within six months of the miner's death. 20 C.F.R. § 410.490(b).

Twenty C.F.R. § 410.490 also applies to claims filed under 20 C.F.R. Part 727, where the miner worked less than ten years in the Nation's coal mines. *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*).

Moreover, a claim reviewed and denied under the interim regulations at 20 C.F.R. § 410.490 is analyzed under 20 C.F.R. Part 410. *Wells v. Peabody Coal Co.*, 3 B.L.R. 1-85 (1981).

II. Invocation of the interim presumptions

Similar to 20 C.F.R. Part 727, 20 C.F.R. § 410.490 provides two presumptions applicable to survivors' claims. A miner is presumed totally disabled at the time of death, and his death is presumed due to pneumoconiosis if chest x-ray, autopsy, or biopsy evidence establishes the existence of pneumoconiosis. Or, in the case of a miner employed for at least 15 years in underground (or comparable) coal mine employment, the presumptions are invoked if ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (meeting the duration requirements of 20 C.F.R. § 410.412(a)(2) as demonstrated by values which are equal to or less than the values specified in the table), and the impairment arose out of coal mine employment. 20 C.F.R. § 410.490(b)(1) and (2). "Lay testimony about the miner's physical condition will not suffice to invoke the presumption." *Lloyd v. Mathews,* 413 F. Supp. 1161, 1163 (E.D. Pa. 1976).

Where the presumptions of disability and/or death due to pneumoconiosis are not invoked due to insufficient evidence, a claimant may establish the requisite disability or death causation under the provisions set forth at 20 C.F.R. §§ 410.412 to 410.462. 20 C.F.R. § 410.490(e).

III. Rebuttal of the interim presumptions

The interim presumptions are rebutted if evidence establishes: (1) the individual was in fact doing his or her usual coal mine work (or comparable and gainful work), or (2) the individual was able to do his or her usual coal mine work (or comparable and gainful work). 20 C.F.R. § 410.490(c)(1) and (2). Evidence that the miner was in fact doing his or her usual coal mine work at the time of death is relevant to rebuttal of the interim presumption. *Farmer v. Weinberger*, 519 F.2d 627, 630 (6th Cir. 1975).

A. Physical versus vocational capability

In assessing total disability, the Board applies the same standard as is applied for total disability as 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).

In the Sixth Circuit, for Part B claims, the court applies the vocational disability standard (*i.e.* 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 analysis. *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* Chapters 8 and 10.

B. Rebuttal methods under 20 C.F.R. Part 727 incorporated into 20 C.F.R. § 410.490

Comparing rebuttal provisions at 20 C.F.R. § 410.490(c) with those at 20 C.F.R. § 727.203(b) reveals the provisions at 20 C.F.R. § 727.203(b) provide two additional means of rebuttal: (1) the miner's total disability does 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). Thus, the provisions at 20 C.F.R. Part 727 require ten years of coal mine employment and provide four means of rebuttal, whereas the more liberal 20 C.F.R. § 410.490 regulations require no minimum period of coal mine employment, and set forth only two means of rebuttal.

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

The Supreme Court's decision in *Pauley* resolved a conflict that developed among the Board and circuit courts. Under *Pauley,* 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. The Court reasoned the 20 C.F.R. Part 410 regulations act in concert to infer inclusion of the rebuttal provisions at 20 C.F.R. § 727.203(b)(3) and (b)(4).

For a discussion of rebuttal under 20 C.F.R. § 727.203(b)(3) and (b)(4) in survivors' claims, *see* Chapters 10 and 15.