Chapter 16
Survivors' Claims:
Entitlement Under 20 C.F.R. Part 718

I. Applicability

Twenty C.F.R. Part 718 applies to survivors' claims filed on or after April 1, 1980. 20 C.F.R. § 718.1. There are five possible methods of analyzing evidence in a survivor's claim under 20 C.F.R. Part 718:

> (1) The survivor's claim is filed prior to January 1, 1982, and the miner is entitled to benefits as a result of the miner's lifetime claim filed prior to January 1, 1982;
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> (2) The survivor's claim is filed prior to January 1, 1982, and there is no miner's lifetime claim, or the miner is not found entitled to benefits from a lifetime claim filed prior to January 1, 1982;
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> (3) The survivor's claim is filed after January 1, 1982, and the miner was found entitled to benefits as a result of the miner's lifetime claim filed prior to January 1, 1982;
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> (4) The survivor's claim is filed after January 1, 1982, and there is no miner's lifetime claim filed prior to January 1, 1982, or the miner is found not entitled to benefits as a result of a lifetime claim filed prior to January 1, 1982; and
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> (5) The survivor's claim is filed after January 1, 2005, and is pending on or after March 23, 2010, and the miner was finally awarded benefits in his or her lifetime claim.

Select the set of conditions that applies to your claim, and proceed to the appropriate subdivision of this Chapter.

For issues related to application of collateral estoppel in a survivor's claim, *see* Chapter 25.

II. Standards of entitlement

A. Survivor's claim filed prior to January 1, 1982, and 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 survivors where the miner is found entitled to benefits as a result of a claim filed prior to January 1, 1982. For a discussion of automatic entitlement, *see* Chapter 12. This provision applies to survivors' claims where: (1) the miner is totally disabled during his lifetime and benefits were awarded, or (2) the miner dies due to pneumoconiosis. *Pothering v. Parkson Coal Co.*, 861 F.2d 1321 (3rd Cir. 1988).

B. Survivor's claim filed prior to January 1, 1982 and 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 20 C.F.R. Part 718 provide a survivor is entitled to benefits only where evidence demonstrates 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 20 C.F.R. Part 718 afford the survivor, who files a claim prior to January 1, 1982, the aid of presumptions at 20 C.F.R. §§ 718.303, 718.304, and 718.305 as well as the use of lay testimony. As will be discussed later in this chapter, the presumption at 20 C.F.R. § 718.303 is not applicable where the survivor files his or her claim on or after January 1, 1982.

1. Death due to pneumoconiosis

Twenty C.F.R. § 718.205(b) provides, in the case of a survivor's claim filed prior to January 1, 1982, death is 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).

a. Must make threshold finding of pneumoconiosis

In *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993), in a survivor's claim under 20 C.F.R. 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.

b. No entitlement for "psychological" injury attributable to pneumoconiosis

In *Johnson v. Peabody Coal Co.*, 26 F.3d 618 (6th Cir. 1994), the Sixth Circuit held 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 "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 a case involving a deceased miner, if (1) a survivor's claim was filed prior to January 1, 1982, and (2) there is no medical or other relevant evidence addressing the issue of disability, then 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. § 718.204(c)(5).

In *Pekala v. Director, OWCP*, 13 B.L.R. 1-1 (1989), the Board concluded 20 C.F.R. § 718.204(c)(5) is available in cases where the medical evidence of record does not *affirmatively establish the absence* of a lung disease. The Board declined, however, to rule on the applicability of 20 C.F.R. § 718.204(c)(5) where evidence is *insufficient* to establish total disability under subsections (c)(1)-(4).

In *Pekala,* the Board also concluded, although its decision involved the lay evidence provisions of 20 C.F.R. § 718.204(c)(5), the same rule applied to cases adjudicated under 20 C.F.R. § 727.203(a)(5). As a result, it is noteworthy that several circuit courts of appeal hold 20 C.F.R. § 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 20 C.F.R. § 727.203(a)(1)-(4). *Hillibush v. Dept. of Labor*, 853 F.2d 197 (3rd Cir. 1988)[1]; *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 20 C.F.R. § 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 20 C.F.R. § 727.203(a)(1)-(4). *Coleman v. Director, OWCP*, 829 F.2d 3 (6th Cir. 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 (3rd Cir. 1995).

Statements made by a deceased miner during his or her lifetime about his or her physical condition are relevant, and these statements are 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). Evidence should 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).

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[1] In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004), the court stated its decision in *Hillibush v. Dep't. of Labor*, 853 F.2d 197, 205 (3rd Cir. 1988) provides the survivor may prove her claim using "medical evidence alone, non-medical evidence alone, or the combination of medical and non-medical evidence . . .." Thus, under *Hillibush*, the Administrative Law Judge consider lay evidence in determining whether the miner had a pulmonary or respiratory impairment, but "[e]xpert testimony will usually be required to establish the necessary relationship between . . . observed indicia of pneumoconiosis and any underlying pathology." As a result, the court determined it was error for the Administrative Law Judge in *Soubik* to accord less weight to a medical opinion because it was based, in part, on lay evidence.

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

1. Generally

In cases where a miner is entitled to benefits as the 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 the miner was totally disabled due to pneumoconiosis at the time of death, or died due to pneumoconiosis. 20 C.F.R. §§ 718.204(a), 725.212, 725.218, and 725.222.

2. Automatic entitlement, miner in payment status based on claim filed before January 1, 1982

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 holds Section 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).

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 20 C.F.R. Part 718 add criteria for demonstrating entitlement to survivors' benefits. Specifically, these regulations provide a survivor is entitled to benefits only where the miner *died due to pneumoconiosis* (unless 20 C.F.R. § 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).

For a survivor's claim filed on or after January 1, 1982, where (1) the miner is not entitled to benefits as a result of a lifetime claim filed prior to January 1, 1982, or (2) no miner's lifetime claim was filed prior to January 1, 1982, then the survivor must demonstrate each element of entitlement (pneumoconiosis, pneumoconiosis causation, and contribution of

pneumoconiosis to death). *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 20 C.F.R. §§ 718.303 and 718.305, to aid in establishing entitlement to benefits.

1. Death due to pneumoconiosis

Twenty C.F.R. § 718.205(c) applies to survivor's claims filed on or after January 1, 1982 and provides 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).

Eligibility for survivors' benefits is dependent on whether the miner's death is due to pneumoconiosis. 20 C.F.R. § 718.205(a). Moreover, it is important to note the regulations at 20 C.F.R. § 718.204(c)(5), permitting lay evidence testimony to establish total disability, do not apply where (1) the survivor's claim is filed on or after January 1, 1982, and (2) there is no miner's lifetime claim resulting in entitlement to benefits filed prior to January 1, 1982. 20 C.F.R. § 718.204(c)(5).

In *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993), the Board held, in a 20 C.F.R. 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 20 C.F.R. § 718.205.

2. "Hastening death" standard

a. For claims filed on or before January 19, 2001

The Board and circuit courts adopted divergent standards with regard to determining whether a miner's death was due to pneumoconiosis. While the Board concluded death must be "significantly" related to (or aggravated by) pneumoconiosis, certain circuit courts adopted the "hastening death" standard, which requires establishment of a lesser causal

nexus between pneumoconiosis and the miner's death. The following sets forth the holdings of the Board and circuit courts with regard to the standard under 20 C.F.R. § 718.205(c):

- Benefits Review Board

Under the provisions of 20 C.F.R. § 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

Any condition that *hastens* the miner's death is a substantially contributing cause of death for purposes of 20 C.F.R. § 718.205. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001 (3rd 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), *cert. denied*, 113 S. Ct. 969 (1993); *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").

The following case summaries contain a few principles of weighing medical evidence under 20 C.F.R. § 718.205:

- Lay and medical testimony regarding "breathing difficulties"

In *Mancia v. Director, OWCP*, 130 F.3d 579 (3rd Cir. 1997), 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 stated there was no indication that objective testing was necessary to diagnose *cor pulmonale*, and this condition is generally associated with pneumoconiosis. The physician concluded 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, while lay testimony cannot be used to determine the cause of death, un-contradicted 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."

- Equivocal opinion insufficient to satisfy "hastening death" standard

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

- Hastens death "in any way" sufficient to support entitlement

In *Hill v. Director, OWCP*, 562 F.3d 264 (3rd Cir. 2009), the court reversed an Administrative Law Judge's denial of benefits in a widow's claim. Under the facts of the case, the miner's treating physician concluded, although pancreatic cancer was the immediate cause of the miner's death, the presence of chronic obstructive pulmonary disease hastened his demise because it compromised his respiratory system. The Administrative Law Judge found this was insufficient evidence upon which to award survivor's benefits because the physician did not attribute development of the miner's COPD to his history of coal dust exposure.

Because the miner was awarded benefits on his lifetime claim, the parties stipulated to the presence of coal workers' pneumoconiosis in the widow's claim. From this, the sole remaining entitlement issue in the widow's claim, according to the court, *should have been* death causation, and not whether the miner's COPD stemmed from coal dust exposure:

> Rather than seizing upon a semantic technicality to reject Dr. Carey's explanation of the causes of Hill's death, the ALJ should have recognized that 'pneumoconiosis,' as defined under the Black Lung Benefits Act, was a cause of, and a hastening factor in, his death.

Moreover, citing to *Lukosevicz v. Director, OWCP*, 888 F.2d 1001 (3rd Cir. 1989), the court reiterated it was "irrelevant" that pancreatic cancer was the immediate cause of the miner's death; rather, the court determined benefits should have been awarded in the survivor's claim if evidence

demonstrated "pneumoconiosis contributed to the miner's death, *albeit briefly*." (italics in original). Upon review of the record, the treating physician's opinion that COPD compromised the miner's respiratory system and hastened his death was sufficient to award survivor's benefits under the Act. The court stated:

> [W]e are at a loss to understand why the ALJ was so troubled by Dr. Carey's testimony about the effect of a compromised respiratory system on the human body. One need not be board certified in pulmonology nor have an advanced degree in anatomy to appreciate the impact that low oxygen levels in the blood can have on the human body. Common sense suggests that if the heart and lungs do not have a sufficient supply of oxygen to function properly, the result could surely include organ failure as well as other complications.

The Third Circuit noted, "Every physician who examined Hill within a month of his death, and every medical examination and finding, confirmed his pulmonary disease, decreased breath sounds, and respiratory difficulties." The court added, "[P]neumoconiosis need only have some identifiable effect on the miner's ability to live" in order for the widow to be entitled to benefits. From this, it concluded:

> The law simply does not require a miner with a respiratory system that has been ravaged by mine-related pneumoconiosis to hang on until a physician can document his last moment of life so that the survivor will be able to document that his impaired respiratory system hastened his death.

The court then stated, "Given the medical evidence on this record, we believe that Mrs. Hill has established her entitlement to survivor's benefits as a matter of law, and there is nothing left to do but award the benefits she is clearly entitled to."

Similarly, in *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996), the Fourth Circuit held, in a survivor's claim under 20 C.F.R. Part 718, Claimant must demonstrate pneumoconiosis "hastened" the miner's death "in any way." As such, the court held 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.

- Sixth Circuit, "specifically defined process" required

In the survivor's claim, *Conley v. National Mines Corp.*, 595 F.3d 297 (6th Cir. 2010), the miner suffered from lung cancer, which metastasized to his brain, pancreas, and liver. The Administrative Law Judge determined the miner suffered from both clinical coal workers' pneumoconiosis as well as chronic obstructive pulmonary disease (COPD) due, in part, to his coal dust exposure. A treating physician testified, because of his COPD, the miner had "less respiratory reserve, less capacity to deal with these things, and that therefore it does make a difference." From this, the Administrative Law Judge concluded coal dust-induced COPD hastened the miner's death, and benefits were awarded.

Citing to its opinion in *Eastover Mining Co. v. Williams*, 338 F.3d 501 (6th Cir. 2003), the court reiterated "[l]egal pneumoconiosis only 'hastens' a death if it does so through a specifically defined process that reduces the miner's life by an estimable time." And, unsupported statements by a physician will not meet this standard. While the court declined to hold a "precise number of days," or an estimate of months or years, would be required, it stated "context and common sense will govern the resolution of these questions." However, an opinion that pneumoconiosis makes a person generally weaker or more susceptible to "other trauma" is insufficient, according to the court, to meet this standard.

Compare Griffith v. Director, OWCP, 49 F.3d 184 (6th Cir. 1995) ("pneumoconiosis is a substantially contributing cause or factor leading to the miner's death if it serves to hasten that death in any way").

- Suicide

The amended regulations at 20 C.F.R. § 718.205 provide that survivors' claims may be compensable, even where the miner dies due to traumatic injury or suicide if the irrebuttable presumption at 20 C.F.R. § 718.304 is invoked, or the presumption at 20 C.F.R. § 718.305 is invoked and remains unrebutted. Specifically, the amended regulation provides:

> [E]xcept where the § 718.304 presumption is invoked, survivors are not eligible for benefits where the miner's death was caused by traumatic injury (including suicide) or the principal cause of death was a medical condition not related to pneumoconiosis, unless the claimant establishes (by proof or presumption) that pneumoconiosis was a substantially contributing cause of death.

20 C.F.R. § 718.205(b)(5).

Prior to promulgation of these amendments, in *Johnson v. Peabody Coal Co.*, 26 F.3d 618 (6th Cir. 1994), the Sixth Circuit held a survivor was not entitled to benefits based on her theory that "her husband was severely depressed at the time he committed suicide and that his depression was caused by his illnesses, including pneumoconiosis." In the comments to the amendments, the following is stated:

> The court (in *Johnson*) found the Act's legislative history to be silent on whether psychological injury may establish the causal link between pneumoconiosis and death. In part because the then-applicable 1981 Amendments 'were designed to limit, not expand benefits,' . . . the court concluded that benefits should not be paid to survivors of a miner who commits suicide. But that important reasoning is no longer valid because the ACA amendments repealed many of the restrictions on benefits that were instituted by the 1981 Amendments and considered by the *Johnson* court. Accordingly, the Department does not view the *Johnson* decision as dispositive. Instead, compensating a miner's survivors where the miner's suicide is causally linked to pneumoconiosis is consistent with workers' compensation principles and underlying Congressional intent.

78 Fed. Reg. 59,103 (Sept. 25, 2013).

- "Negligible" effect; no entitlement

In *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993), the Fourth Circuit held 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. For claims filed after January 19, 2001

A new subsection has been added to 20 C.F.R. § 718.205(c), which codifies the pre-amendment "hastening death" standard of several circuit courts, 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). Thus, the Administrative Law Judge may consider case law of the circuit courts related to the "hastening death" standard, *supra*, in this chapter. For survivors' claims filed after January 1, 2005, which are pending on or after March 23, 2010, death causation may be established through: (1) invocation of the presumption at 20 C.F.R.

§ 718.304; (2) invocation of the 15-year presumption where the presumption is not rebutted; or (3) medical evidence demonstrating that pneumoconiosis was a "substantially contributing cause" of the miner's death.

In *Bailey v. Consolidation Coal Co.*, BRB No. 05-0324 BLA (Sept. 30, 2005) (unpub.), the Administrative Law Judge properly found coal workers' pneumoconiosis substantially contributed to the miner's pneumonia which, in turn, caused his death. In so holding, the Board stated:

> We note that as the Secretary observed when promulgating Section 718.205(c)(5), the proposition that persons weakened by pneumoconiosis may expire quicker from other diseases *is* a medical point, with some empirical support. *See* 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000).

Slip op. at 6 (emphasis in original). *See also Moser v. Director, OWCP,* 25 B.L.R. 1-__, BRB No. 12-0293 BLA (Feb. 26, 2013)(pub.) (a subsequent survivor's claim was properly denied under 20 C.F.R. § 725.309 where her original claim was denied for failure to demonstrate death due to coal workers' pneumoconiosis).

For additional discussion on weighing evidence, *see* Chapter 3. For a discussion of the limitations on the admission of evidence under the amended regulations, *see* Chapter 4.

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 complicated pneumoconiosis, and the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. § 718.304 (complicated pneumoconiosis) was invoked. *Sumner v. Blue Diamond Coal Co.*, 12 B.L.R. 1-74 (1988). *See also* the discussion related to suicide, *supra*, in this chapter.

E. The survivor's claim is filed after January 1, 2005, and is pending on or after March 23, 2010, and the miner was finally awarded benefits in his or her lifetime claim

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010) (PPACA) was enacted on March 23, 2010. Of relevance to certain survivors' claims, the PPACA: (1) revived automatic entitlement; and (2) revived availability of the 15-year presumption at 20 C.F.R. § 718.305 for survivors who do not qualify for automatic entitlement. With regard to automatic entitlement, the revised regulations implementing the PPACA provide the following:

> **§ 725.212 Conditions of entitlement; surviving spouse or surviving divorced spouse**
>
> (a) * * *
> (3) The deceased miner either:
> (i) Is determined to have died due to pneumoconiosis; or
> (ii) Filed a claim for benefits on or after January 1, 1982, which results or resulted in a final award of benefits, and the surviving spouse or surviving divorce spouse filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.

78 Fed. Reg. 59117 (Sept. 25, 2013).

Survivors who do not qualify for automatic entitlement, and who do not meet the requirements for invocation of presumptions at 20 C.F.R. §§ 718.304 and 718.305, must demonstrate each of the following elements of entitlement by a preponderance of the evidence: (1) the miner suffered from pneumoconiosis; (2) the disease arose from coal mine employment; and (3) the miner's death was due to the disease. 20 C.F.R. § 718.205. *See Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988). In addition, the survivor is not entitled to use lay evidence to aid in establishing entitlement to benefits. *See* the discussion related to death causation, *supra*, in this chapter.

1. Section 1556 of the PPACA held constitutional

a. Benefits Review Board

In *Mathews v. United Pocahontas Coal Co.*, 24 B.L.R. 1-193 (2010), *recon. denied,* BRB No. 09-0666 BLA (Apr. 14, 2011), the Board adopted the Director's position, and upheld the constitutionality of Section 1556(c) of the PPACA providing for automatic entitlement in certain survivors' claims. *See*

also Dotson v. McCoy Elkhorn Coal Corp., 25 B.L.R. 1-13 (2011) (en banc); *Fairman v. Helen Mining Co.*, 24 B.L.R. 1-227 (2011).

In *Thorne v. Eastover Mining Co.*, ___ B.L.R. ___, BRB No. 13-0136 BLA (Sept. 27, 2013), the Board upheld automatic entitlement to survivor's benefits pursuant to Section 1556 of the Patient Protection and Affordable Care Act (PPACA), where the miner was eligible for benefits at the time of his 2010 death based on an award issued by an Administrative Law Judge in 1986. Employer maintained that, as a practical matter, the miner's federal award was offset by his state award such that he was not "eligible" for benefits at the time of his 2010 death for purposes of automatic entitlement. The Administrative Law Judge disagreed. The Board stated:

> [T]he administrative law judge's finding, that the offset of the miner's federal black lung benefits by the state award (as opposed to termination of the award) did not affect the miner's eligibility for benefits under the Act, is consistent with the applicable regulations.

Slip op. at p. 3. Consequently, the finding of automatic entitlement was affirmed.

b. Third Circuit

The Third Circuit addressed Section 1556's revival of "automatic entitlement" for survivors of miners who were awarded benefits on their lifetime claims and, by published decision in *B&G Construction Co. v. Director, OWCP [Campbell]*, 662 F.3d 233 (3rd Cir. 2011), the court held that the provisions are constitutional. In *Marmon Coal Co. v. Director, OWCP [Eckman]*, 726 F.3d 387 (3rd Cir. 2013), the court affirmed application of the automatic entitlement provisions to a subsequent survivor's claim filed after January 1, 2005 and pending on or after March 23, 2010.

c. Fourth Circuit

The Fourth Circuit affirmed Section 1556's revival of "automatic entitlement" for survivors in *West Virginia CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011), *aff'g.*, *Stacy v. Olga Coal Co.*, 24 B.L.R. 1-207 (2010), *cert. denied*, 133 S.Ct. 127 (2012).

d. Sixth Circuit

In *Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473 (6th Cir. 2011), the court remanded a claim for consideration under the revived

15-year presumption. The court did not directly address the constitutionality of Section 1556 of the PPACA.

e. Seventh Circuit

In *Keene v. Consolidation Coal Co.*, 645 F.3d 844 (7th Cir. 2011), the circuit court held that revival of the 15-year presumption at 20 C.F.R. § 718.305 through Section 1556 of the PPACA is constitutional. The court did not address revival of "automatic entitlement" for survivors of miners who were awarded benefits on their lifetime claims.

2. Applicability of automatic entitlement

a. Threshold criteria

To qualify for automatic entitlement under the PPACA: (1) the survivor's claim must be filed after January 1, 2005, and pending on or after March 23, 2010; and (2) benefits must be finally awarded in the miner's lifetime claim. *See also Moser v. Director, OWCP,* 25 B.L.R. 1-__, BRB No. 12-0293 BLA (Feb. 26, 2013)(pub.) (a subsequent survivor's claim filed after January 1, 2005 was properly denied under 20 C.F.R. § 725.309 where her original claim was denied for failure to demonstrate death due to coal workers' pneumoconiosis, and the miner's lifetime claim had been denied such that she did not meet the threshold criteria for automatic entitlement under the PPACA).

b. Date of filing survivor's claim controls

The Board and circuit courts hold it is the date of filing the survivor's claim, not the date the miner's claim was filed, which controls applicability of the PPACA's automatic entitlement provisions.

- Originally filed claim by survivor

In *Mathews v. United Pocahontas Coal Co.*, 24 B.L.R. 1-193 (2010), *recon. denied,* BRB No. 09-0666 BLA (Apr. 14, 2011), the survivor filed her claim for benefits on October 3, 2005, which was "pending on or after March 23, 2010." The Board noted the following:

> Employer agrees that amended Section 932(l) is applicable to this case, as claimant filed her claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was in payment status at the time of his death. (citation omitted). Thus, claimant is derivatively entitled to survivor's benefits pursuant to 30 U.S.C. § 932(l). Consequently, as amended

> Section 932(l) does not afford employer the opportunity to defend the claim once derivative entitlement has been established, ...

Id. at 1-200.

Thus, the Board holds it is the date of filing of the survivor's claim, not the miner's claim, which controls applicability of Section 932(l), as amended by the PPACA. *See also West Virginia CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011), *aff'g.*, *Stacy v. Olga Coal Co.*, 24 B.L.R. 1-207 (2010) *cert. denied*, 133 S.Ct. 127 (2012) (it is the date of filing the survivor's claim, not the filing date of the miner's claim, which controls applicability of the amendments); *Wright v. Eastern Associated Coal Co.*, 25 B.L.R. 1-69 (2012) (operative date for automatic entitlement is the date the widow's claim is filed; "to the extent that amended Section 932(l) conflicts with Section 901(a) of the Act, the more specific terms of Section 1556(b) of the PPACA prevail"); *Mullins v. ANR Coal Co.*, 25 B.L.R. 1-49 (2012); *Fairman v. Helen Mining Co.*, 24 B.L.R. 1-227 (2011).

- Petition for modification by survivor

In *Mullins v. ANR Coal Co.*, 25 B.L.R. 1-49 (2012), the Board affirmed the Administrative Law Judge's determination that Claimant was automatically entitled to benefits under Section 1556 of the PPACA. Under the facts of the claim, the District Director denied benefits for failure to demonstrate death causation prior to enactment of the PPACA. Then, after enactment of the PPACA, the widow filed a petition for modification, and her claim was awarded in accordance with the PPACA. On appeal, Employer argued, since the widow's claim was originally denied prior to passage of the PPACA, it was improper to award benefits to her in the wake of the PPACA. The Board dismissed this argument stating:

> Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922 as incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a), permits the reopening and readjudication of a denied survivor's claim within one year of the order denying benefits, based on a showing of a mistake in a determination of fact, including the ultimate fact of entitlement. (citations omitted). The language of Section 1556(c) of the PPACA mandates the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010, and provides that a survivor of a miner who was receiving benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis.

(citations omitted). Because claimant filed her claim after January 1, 2005, timely requested modification such that the claim was pending after March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(l).

- Subsequent claim by survivor

In *Richards v. Union Carbide Corp.*, 25 B.L.R. 1-31 (2012) (en banc) (J. McGranery, concurring and dissenting; J. Boggs, dissenting), *aff'd. sub. nom.,* 721 F.3d 307 (4th Cir. 2013), after hearing oral argument from the parties, the Board affirmed the Administrative Law Judge's application of the automatic entitlement provisions of Section 1556 to a subsequent survivor's claim. Here, the widow's first claim for survivor's benefits was denied by an Administrative Law Judge in 2006. Subsequently, the widow filed a second claim in 2009, which remained pending after passage of the PPACA on March 23, 2010. Employer argued:

> . . . that allowing automatic entitlement to benefits in a subsequent survivor's claim under amended Section 932(l) renders meaningless the time limitations set by Congress in Section 1556 of the PPACA; nullifies the prior final decision denying entitlement; and ignores the governing language of 20 C.F.R. § 725.2 and the applicable provisions at Section 725.309(d)(3).

The Board disagreed, and adopted the position of the Director and Claimant; *to wit*:

> By restoring the derivative entitlement provisions of Section 932(l), Congress effectively created a 'change,' establishing a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis. Thus, as correctly noted by the Director, the principles of res judicata addressed in Section 725.309, requiring that a subsequent claim be denied unless a change is established, are not implicated in the context of a subsequent survivor's claim filed within the time limitations set forth under Section 1556, because entitlement thereunder is not tied to relitigation of the prior finding that the miner's death is not due to pneumoconiosis. (citation omitted). Accordingly, we hold that the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in

Section 1556 of the PPACA.

On appeal, the Fourth Circuit agreed that the PPACA allows for automatic entitlement of subsequent survivors' claims where the miner was finally awarded benefits in a lifetime claim.

By published decision in *Rose v. Trojan Mining & Processing*, 25 B.L.R. 1-91 (2012), the Administrative Law Judge properly awarded benefits in a subsequent survivor's claim under the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). The Board reiterated its holding in *Richards v. Union Carbide Corp.*, 25 B.L.R. 1-31 (2012) (en banc) (J. McGranery, concurring and dissenting; J. Boggs, dissenting), *aff'd. sub. nom.,* 721 F.3d 307 (4th Cir. 2013) to hold the automatic entitlement provisions apply to subsequent survivors' claims:

> The principles of res judicata addressed in Section 725.309, requiring that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, are not implicated in the context of a survivor's subsequent claim filed within the time limitations set forth under Section 1556 of the PPACA, because entitlement under amended Section 932(l) is not tied to re-litigation of the prior finding that the miner's death was not due to pneumoconiosis.

c. Automatic entitlement, date of onset

- Original claim by survivor

In *Dotson v. McCoy Elkhorn Coal Corp.*, 25 B.L.R. 1-13 (2011) (en banc), a claim involving application of the PPACA's automatic entitlement provisions in a survivor's claim, the Board held that benefits in an originally filed survivor's claim date commence with the month of the miner's death:

> Employer argues that to allow entitlement to derivative benefits dating back to the miner's death in 1998 is tantamount to finding that the miner's death was due to pneumoconiosis during the period from 1981 through January 1, 2005, even though the PPACA was not applicable during that period. Employer asserts that such a 'harsh, retroactive application of the law' provides claimant with a 'windfall,' since claimant did not file her claim until eight years after the miner's death.
>
> . . .

> Rather, employer argues, the date of filing of the survivor's claim should be utilized as the commencement date for benefits, consistent with the default date for the commencement of miner's benefits under Section 725.503(b), in those cases where the evidence does not establish the month of onset of total disability due to pneumoconiosis. Because Congress limited the automatic continuation of benefits provision to claims filed after January 1, 2005, that are pending on or after March 23, 2010, and expressed no intent to utilize the miner's date of death as the commencement date for benefits, as set out in Section 725.503(c), employer asserts that 'fairness' dictates that benefits, if awarded, should commence from one of the following dates: (1) March 23, 2010, the date of enactment of the amendments; (2) January 30, 2006, the date claimant filed her claim; or (3) at the earliest, January 1, 2005, the date Congress selected as the date after which claims must be filed for consideration under amended Section 932(l).

On the other hand, the Board noted the Director's arguments to the contrary:

> The Director contends that, while the Act does not specifically address the date from which benefits to a survivor should commence, the Director promulgated the regulation at Section 725.503 over thirty years ago, through express statutory authority. This regulation provides, in pertinent part, that '[b]enefits are payable to a survivor who is entitled beginning with the month of the miner's death, or January 1, 1974, whichever is later.' (citations omitted) The Director asserts that Section 725.503(a) is applicable to claims filed pursuant to amended Section 932(l), arguing that when the PPACA was passed, Congress did not change the Director's long-standing position that survivor's benefits commence the month of the miner's death.
>
> . . .
>
> The Director contends, therefore, that benefits should commence from August 1998, the month in which the miner died. (citation omitted).

Id. at 1-17 and 1-18.

The Board noted the PPACA is silent with regard to the onset date of survivor's benefits under its automatic entitlement provisions. In awarding

benefits to the survivor as of August 1998, the month of the miner's death, the Board held, "Congress is presumed to know the law when it passes legislation, and it gave no indication from the language of Section 1556 that it intended to change the established rule entitling survivors to receive benefits from the date of the miner's death." The Board also noted it was not persuaded by Employer's argument that the survivor will receive a "windfall" of benefits because "the Act contains no time limit for the filing of a claim by a survivor of a miner."

- Petition for modification by survivor

Benefits awarded in a survivor's claim on modification under 20 C.F.R. § 725.310, which stems from application of the automatic entitlement provisions at Section 1556 of the PPACA, are payable from the month in which the miner died. *Mullins v. ANR Coal Co.*, 25 B.L.R. 1-49 (2012).

In *U.S. Steel Mining Co. v. Director, OWCP [Starks]*, 719 F.3d 1275 (11th Cir. 2013), the court affirmed application of the automatic entitlement provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 1556 (2010) (PPACA) to the post-PPACA petition for modification of a pre-PPACA survivor's claim filed after January 1, 2005, which had been denied. Because the miner was finally awarded benefits on his lifetime claim, and the survivor's claim remained pending on modification on March 23, 2010, the survivor's claim was awarded on modification pursuant to the PPACA.

- Subsequent claim by survivor

In *Richards v. Union Carbide Corp.*, 25 B.L.R. 1-31 (2012) (en banc) (J. McGranery, concurring and dissenting; J. Boggs, dissenting), *aff'd. sub. nom.,* 721 F.3d 307 (4th Cir. 2013), after hearing oral argument of the parties, the Board affirmed the Administrative Law Judge's application of the automatic entitlement provisions of Section 1556 to a subsequent survivor's claim. With regard to the onset date for commencement of benefits in a subsequent survivor's claim awarded under the PPACA, the Board adopted the position of the Director:

> . . . derivative benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 from the month after the month in which the denial of the prior claim became final.

Slip op. at 7. The Board noted the original survivor's prior claim was denied by the Administrative Law Judge in May 2006. Pursuant to 20 C.F.R. § 725.479(a), this denial became final "at the expiration of the thirtieth day

after it was filed in the office of the district director," which was June 2006. Thus, the onset date for the payment of benefits in the subsequent claim was July 2006. *See also Rose v. Trojan Mining & Processing*, 25 B.L.R. 1-91 (2012).

d. No hearing required; automatic entitlement

In *Fairman v. Helen Mining Co.*, 24 B.L.R. 1-227 (2011), the Board held no hearing is required in claims involving automatic entitlement under the PPACA:

> Contrary to employer's argument, the administrative law judge was not required to provide employer with a second hearing[2] after the amendments to the Act were enacted on March 23, 2010. The Act and regulations mandate that an administrative law judge hold a hearing on any claim whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment pursuant to 20 C.F.R. § 725.452. (citation omitted). In this case, the Director moved for summary judgment, arguing that there was no genuine issue of material fact concerning claimant's entitlement to benefits under amended Section 932(l).

Id. at 1-230.

In *Groves v. Vision Processing, LLC*, BRB Nos. 09-0780 BLA and 09-0780 BLA-A (Sept. 29, 2010)(unpub.), the Administrative Law Judge awarded benefits in the miner's claim, but denied survivor's benefits. While Employer did not appeal the Administrative Law Judge's consolidated decision, Claimant did file an appeal of the denial of her claim. Because the survivor's claim was filed after January 1, 2005, the Board adopted the position of the Director, OWCP, and reversed the denial of survivor's benefits on grounds that Section 1556 of the PPACA applied, and the survivor was automatically entitled to benefits based on the award of benefits in the miner's lifetime claim. Employer maintained it was denied due process; *to wit*, it did not have notice or an opportunity to be heard on the new enactment providing derivative entitlement. The Board held, to the contrary, Employer had notice and an opportunity to be heard in conjunction with its litigation in the miner's lifetime claim, and this satisfied the due process requirement for purposes of the survivor's claim. The Board stated:

[2] The claim was docketed in February 2009, and was heard by the Administrative Law Judge in May 2009.

> The fact that employer chose not to appeal the award in the miner's claim, on which an award in the survivor's claim now rests, does not mean that employer's due process rights have been violated.

Slip op. at 6. On appeal, in *Vision Processing, LLC v. Director, OWCP [Groves]*, 705 F.3d 551 (6th Cir. 2013), the Sixth Circuit affirmed the award of benefits noting:

> Since enacting a program for black-lung benefits in 1969, now known as the Black Lung Benefits Act, Congress has repeatedly tinkered with the claim-filing process, sometimes making it harder for miners and survivors to obtain benefits, sometimes making it easier.

Id. at 551. The court held the automatic entitlement provisions revived by the PPACA are properly applied to a survivor's claim filed after January 1, 2005 and pending on or after March 23, 2010, where the miner was finally awarded benefits in a lifetime claim.

3. Revival of 15-year presumption in certain survivors' claims

a. Threshold criteria

Section 1556 of the PPACA revived access to the 15-year presumption for certain survivors' claims. Specifically, if the survivor files a claim for benefits after January 1, 2005, and the claim is pending on or after March 23, 2010, then the 15-year presumption is available.

As of the date of revision of this *Benchbook*, the Secretary of Labor engaged in notice-and-comment rulemaking to issue revised regulations at 20 C.F.R. § 718.305 implementing Section 1556 of the PPACA. 77 Fed. Reg. 19,456 (Mar. 30, 2012). The foregoing provisions were promulgated on September 25, 2013, and are located at 78 Fed. Reg. 59,102. The Department's amendments are as follows:

> **§ 718.305 Presumption of pneumoconiosis.**
> (a) *Applicability.* This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.
> (b) *Invocation.* (1) The claimant may invoke the presumption by establishing that—
> (i) the miner engaged in coal-mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground mines in

conditions substantially similar to those in underground mines, or in any combination thereof; and

(ii) the miner or survivor cannot establish entitlement under section 718.304 by means of chest x-ray evidence; and

(iii) the miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to § 718.204, except that § 718.204(d) shall not apply.

(2) The conditions in a mine other than an underground mine will be considered ''substantially similar'' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there.

(3) In a claim involving a living miner, a miner's affidavit or testimony, or a spouse's affidavit or testimony, may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment.

(4) In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

(c) *Facts presumed.* Once invoked, there will be rebuttable presumption—

(1) In a miner's claim, that the miner is totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of death; or

(2) In a survivor's claim, that the miner's death was due to pneumoconiosis.

(d) *Rebuttal.*

(1) *Miner's Claim.* In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner did not have:

(A) Legal pneumoconiosis as defined in § 718.202(a)(2); and

(B) Clinical pneumoconiosis as defined at § 718.201(a)(1), arising out of coal mine employment (*see* § 718.203); or

(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined at § 718.201.

(2) *Survivor's Claim.* In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner did not have:

(A) Legal pneumoconiosis as defined in § 718.202(a)(2); and

(B) Clinical pneumoconiosis as defined at § 718.201(a)(1), arising out of coal mine employment (*see* § 718.203); or

(ii) Establishing that no part of the miner's death was caused by pneumoconiosis as defined in § 718.201.

(3) The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

For additional discussion of the 15-year presumption, *see* Chapter 11.

b. General structure

Under 20 C.F.R. § 718.305, if a miner was employed for fifteen years or more in one or more underground coal mines, or under "substantially similar" conditions at a surface mine, and where evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis. 20 C.F.R. § 718.305(a). A spouse's affidavit or testimony may not be used by itself to establish the applicability of the presumption. 20 C.F.R. § 718.305(a). The presumption may be rebutted by establishing that (1) the miner does not have pneumoconiosis (clinical or legal), or (2) his or her death did not arise out of coal mine employment.

In *Copley v. Buffalo Mining Co.*, 25 B.L.R. 1-81 (2012), the Administrative Law Judge applied the 15-year presumption to award benefits in a survivor's claim. Upon finding the PPACA's revival of the 15-year presumption was constitutional, the Board affirmed the Administrative Law Judge's invocation of the presumption based on findings of (1) 28 years of underground coal mine employment, and (2) a totally disabling respiratory impairment under 20 C.F.R. § 718.204.

Turning to rebuttal, the Administrative Law Judge "did not specifically summarize the x-ray and CT scan readings," but concluded Employer failed to rebut the existence of pneumoconiosis because the pathologists agreed that the disease was present on autopsy. The Board, therefore, determined it was "harmless error" not to summarize the x-ray and CT scan evidence as "the administrative law judge permissibly credited the autopsy evidence, since it is 'highly reliable' for diagnosing the presence or absence of

pneumoconiosis."

The Administrative Law Judge then concluded Employer failed to rebut disability causation, and benefits were awarded. Counsel for the Director, OWCP argued this constituted error in a survivor's claim. As noted by the Board:

> The Director contends that 'invocation of amended Section 411(c)(4) by a survivor results *only* in a presumption of death due to pneumoconiosis' and '[c]onsequently, the presumption is rebutted by proving that the miner did not suffer from pneumoconiosis or that the miner's death was wholly unrelated to his coal mine employment.'

(emphasis in original). The Board reviewed statutory history, and held the following:

> [W]e conclude that invocation of the amended Section 411(c)(4) presumption, in a survivor's claim filed after January 1, 2005, gives rise to a presumption that the miner's death was due to pneumoconiosis. In order to rebut this presumption, therefore, the party opposing entitlement must establish either that the miner did not have pneumoconiosis, or that his death did not arise from his coal mine employment.

The Board further stated its holding is consistent with the standard set forth by the Department in proposed 20 C.F.R. § 718.305, implementing amended Section 411(c)(4), which provides the following:

> (d) Rebuttal . . .
> (2) Survivor's Claim. In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by establishing that
> (i) the miner did not have pneumoconiosis, as defined in section 718.201; or
> (ii) the miner's death did not arise in whole or in part out of dust exposure in the miner's coal mine employment.

77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. § 718.305).

c. Disease of unknown origin, no rebuttal

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); *Barber v. Director, OWCP*, 43 F.3d 899 (4th Cir. 1995) (rebuttal was not established where the autopsy report and related opinions "do not identify the origin of (the miner's) diseases" in light of the broad legal definition of pneumoconiosis).

d. Lay testimony

A determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made in accordance with 20 C.F.R. § 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 holds, however, "Lay evidence may not be used to establish the existence of a totally disabling respiratory impairment under 20 C.F.R. § 718.305, if the record contains other medical evidence." *Bury v. Director, OWCP*, 9 B.L.R. 1-79, 1-81 (1986). For additional discussion of lay testimony, *see* Chapter 11. For additional discussion of the 15-year presumption, see Chapter 11.

III. Presumptions available under 20 C.F.R. 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. 20 C.F.R. §§ 718.303-718.306. The presumptions applicable to certain survivors' claims include the following: (1) 20 C.F.R. § 718.303 (ten-year presumption); (2) 20 C.F.R. § 718.304 (complicated pneumoconiosis); (3) 20 C.F.R. § 718.305 (15-year presumption); and (4) 20 C.F.R. § 718.306 (25-year presumption). 20 C.F.R. §§ 718.303-718.306.

The presumptions at 20 C.F.R. §§ 718.303 (10-year presumption), and 718.306 (25-year presumption), apply to very limited survivors' claims as discussed *infra*.

The presumption at 20 C.F.R. § 718.304 (complicated pneumoconiosis) applies regardless of the date the survivor's claim is filed. Under 20 C.F.R. § 718.304, there is an irrebuttable presumption the 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 invokes the presumption under 20 C.F.R. § 718.304, the survivor still must establish the miner's pneumoconiosis arose out of coal mine employment. This is because the regulations at 20 C.F.R. Part 718 require that the miner be totally disabled due to *coal workers'* pneumoconiosis, and the presumption at 20 C.F.R. § 718.304 affords an irrebuttable presumption of total disability due to pneumoconiosis without regard to the etiology of the disease. For an analysis of evidence pertaining to complicated coal workers' pneumoconiosis exists, *see* Chapter 11.

And, the 15-year presumption at 20 C.F.R. § 718.305 applies either to: (1) survivors' claims filed prior to January 1, 1982; or, (2) survivors' claims filed after January 1, 2005, which are pending on or after March 23, 2010, where the miner engaged in at least 15 years of qualifying coal mine employment and suffered from a totally disabling respiratory impairment. If your survivor's claim meets these threshold requirements, *see* the discussion pertaining to the 15-year presumption in this chapter, *supra*.

A. Ten years or more of coal mine employment and death from a respirable disease (20 C.F.R. § 718.303)

1. Applicability

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

2. Requirements

Under 20 C.F.R. § 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 is a rebuttable presumption that his or her death was due to pneumoconiosis. Also, death shall be due to a respiratory 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 respiratory disease contributed to the cause of death. A claimant only is required to demonstrate the miner's death was due to a respiratory disease, and s/he "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 establishing that the deceased miner (1) did not have pneumoconiosis, (2) his or her death was not due to pneumoconiosis, or (3) pneumoconiosis did not contribute to death. 20 C.F.R. § 718.303(b). *See Bury v. Director, OWCP*, 9 B.L.R. 1-79 (1986).

B. The "25 year" presumption

1. Applicability

The 25-year presumption is only applicable to survivors' claims filed between January 1, 1982 and June 30, 1982. 20 C.F.R. § 718.306(a).

2. Requirements

In the case of a miner who (1) died on or before March 1, 1978, and (2) was employed for 25 or more years in one or more coal mines prior to June 30, 1971, the eligible survivors who filed claims prior to June 30, 1982, shall be entitled to payment of benefits, unless it is established the miner was not partially or totally disabled due to pneumoconiosis at the time of his/her death. 20 C.F.R. § 718.306(a). For purposes of the 25-year presumption, a miner is "partially disabled" if s/he had a reduced ability to engage in work as defined at 20 C.F.R. § 718.204(b). 20 C.F.R. § 718.306(b).

3. Rebuttal

To rebut the presumption, evidence must demonstrate (1) the miner's ability to perform work was not reduced at the time of his or her death, (2) the miner did not have pneumoconiosis, or (3) any disability existing 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 that makes no mention of pneumoconiosis. 20 C.F.R. § 718.306(d).

4. Lay testimony

In a survivor's claim filed on or after January 1, 1982, but prior to June 30, 1982, if entitlement is sought under 20 C.F.R. § 718.306, and there is no medical or other relevant evidence, then affidavits (or equivalent sworn testimony) from persons knowledgeable about the miner's physical condition shall be sufficient to establish total or partial disability. However, a determination of total disability may not be based solely on 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).