PART VII

SURVIVORS' CLAIMS

A. DERIVATIVE ENTITLEMENT

Unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivors' claims filed on or after January 1, 1982, ONLY WHEN the miner's death was due to pneumoconiosis EXCEPT if the survivor's entitlement is established by §718.306 on a claim filed PRIOR TO June 30, 1982. Note: the question of entitlement in a claim for survivors' benefits need not be reached if benefits are awarded in a living miner's claim filed prior to June 30, 1982, thus entitling the survivor to an award derivative of that to the miner. ***Freeman United Coal Mine Co. v. Benefits Review Board,*** 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990); *see* 20 C.F.R. §718.1.

DIGESTS

An eligible survivor of a miner who had filed a claim during his lifetime before January 1, 1982, need not file a new claim after the miner's death in order to receive benefits on the basis of death due to pneumoconiosis. ***Pothering v. Parkson Coal Co.,*** 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988).

The Sixth Circuit has held that a prior determination of survivor benefit eligibility pursuant to Part B of Title IV of the Act, 30 U.S.C. §§921-925, eliminates the necessity of independently establishing the miner's total disability due to pneumoconiosis under the criteria in Part C of the Act in order to establish a survivor's entitlement under 20 C.F.R. §725.218(a)(2). ***Director, OWCP v. Saulsberry***, 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989).

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B. SECTION 411(c)(1)

The Supreme Court upheld the statutory presumptions under the 1972 Act, Black Lung Benefits Act of 1972, Public Law No. 92-303, 86 Stat. 150 (1972)(codified as amended at 30 U.S.C. §921(c)(1)-(4)(1985)), against constitutional attack in ***Usery v. Turner Elkhorn Mining Co.,*** 428 U.S. 1, 96 S.Ct. 2882 (1976). In that case, the Court held that the presumptions contained in Sections 411(c)(1)-(4) of the Act, 30 U.S.C. §§921(c)(1)-(4), did not violate the due process clause of the fifth amendment because for a legislative presumption involving a matter of economic regulation to be valid under the due process clause, "'it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'" ***Turner-Elkhorn Mining Co.,*** 428 U.S. at 28, 96 S.Ct. at 2898 (quoting ***Mobile, Jackson and Kansas City Railroad Co. v. Turnipseed,*** 219 U.S. 35, 43, 31 S.Ct. 136, 138 (1910).

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C. SECTION 411(c)(2)

Section 411(c)(2) of the Act provides that if a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis. 30 U.S.C. §921(c)(2). Section 411(c)(2) was deleted by the Black Lung Benefits Amendments of 1981, and the presumption is not applicable to survivors' claims filed on or after January 1, 1982. 30 U.S.C. §921(c)(2); 20 C.F.R. §718.303(c). Section 411(c)(2) is implemented by Sections 410.462 and 718.303 of the regulations, 20 C.F.R. §§410.462, 718.303.

Section 718.303 provides that death shall be found to be due to a respirable disease in any case where the evidence establishes that death was due to multiple causes, including a respirable disease, and it is not medically feasible to distinguish which disease caused death or the extent to which the respirable disease contributed to the cause of death. 20 C.F.R. §718.303(a)(1). The presumption may be rebutted by a showing that the deceased miner did not have pneumoconiosis, that his or her death was not due to pneumoconiosis or that pneumoconiosis did not contribute to his or her death. 20 C.F.R. §718.303(b). ***Beard v. Director, OWCP***, 10 BLR 1-82 (1987), *aff'd*, 856 F.2d 192 (6th Cir. 1988)(table); ***Bury v. Director, OWCP***, 9 BLR 1-79 (1986).

The Board has held that the cases of ***Tackett v. Benefits Review Board***, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986) and ***Hunter v. Director, OWCP***, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986) construe the Section 411(c)(2) presumption as implemented under 20 C.F.R. Part 410, Subpart D by Section 410.462, and do not control a case adjudicated under Section 718.303, the implementing regulation of Section 411(c)(2) of the Act under 20 C.F.R. Part 718. ***Beard****, supra*. Claimant must demonstrate under Section 718.303(a) that the deceased miner engaged in ten or more years of coal mine employment and died from a respirable disease but does not have to establish a reasonable possibility that death was due to pneumoconiosis as required by ***Hunter*** and ***Tackett***. Construction of Section 410.462 is inapplicable to claims filed under 20 C.F.R. Part 718. ***Beard****, supra*.

DIGESTS

The Board held that, although lay evidence is to be considered under Section 718.303(a), the administrative law judge's failure to do so in this case is harmless in

view of the administrative law judge's affirmable determination that the weight of the medical evidence does not support a finding that the miner's death was due to a respirable disease. ***Beard v. Director, OWCP***, 10 BLR 1-82 (1987), *aff'd*, 856 F.2d 192 (6th Cir. 1988)(table).

Where death certificate listed "probably myocardial infarction" as cause of death and the autopsy physician found anthracosis, fibrosis, central lobular emphysema, and moderate hypertrophy of the pulmonary arteries and the record also reflected that the miner had been treated for respiratory problems for several months before his death, the Court held that the Section 411(c)(2) presumption was properly invoked under 20 C.F.R. §718.303(a)(1) and that the death certificate was insufficient to rebut the presumption. ***McClendon v. Drummond Coal Co.***, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988).

The Third Circuit recognized that the difference in language between Sections 410.462 and 718.303 is a strong indication that in a case governed by Section 718.303, the claimant need not show that the disease reported suggests a reasonable possibility of death due to pneumoconiosis. ***Marx v. Director, OWCP***, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989).

The Fourth Circuit has held that the Board's requirement that claimants show the chronic nature of lung cancer on a case-by-case basis under 20 C.F.R. §410.462(b) is not unreasonable. Further, the Fourth Circuit stated that ***Rose v. Clinchfield Coal Co.***, 614 F.2d 936 (4th Cir. 1980) does not stand for the proposition that "lung cancer" is "chronic" as a matter of law. Furthermore, to be entitled to the Section 411(c)(2) presumption pursuant to Section 410.462, claimant must establish that the disease that caused the miner's death was a chronic dust disease or a chronic disease of the lung *and* that the disease suggested a reasonable possibility of death. ***Hunter v. Director, OWCP***, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986), *aff'g*, 8 BLR 1-120 (1985).

The Fourth Circuit held that rebuttal under Section 410.462(b) requires the party opposing entitlement to establish either that miner did not have pneumoconiosis *or* that the lung disease did not arise out of coal mine employment. It is insufficient to show that the miner's fatal disease did not suggest a reasonable possibility of death due to pneumoconiosis. ***Hunter v. Director, OWCP***, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986), *aff'g*, 8 BLR 1-120 (1985).

The Sixth Circuit affirmed the administrative law judge's finding that rebuttal of the Section 411(c)(2) presumption was established under 20 C.F.R. §410.462 since the medical evidence established that there was no connection between the miner's disability and death and his coal mine employment. ***Colvin v. Director, OWCP***, 838 F.2d 192 (6th Cir. 1988).

In distinguishing Sections 410.462 and 718.303, the Third Circuit held that while Section 410.462 and Section 718.303 each provide a rebuttable presumption of death due to pneumoconiosis where the miner was employed for at least ten years of coal mine employment and died of a respirable disease, claimant need not show that the respirable disease suggests a reasonable possibility of death due to pneumoconiosis under Section 718.303. ***Marx v. Director, OWCP,*** 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989).

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D. SECTION 411(c)(3)

Section 411(c)(3) of the Act, 30 U.S.C. §411(c)(3), provides an *irrebuttable* presumption that a miner who is suffering or has suffered from complicated pneumoconiosis is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that he was totally disabled due to pneumoconiosis at the time of his death. 20 C.F.R. §§410.418, 410.458, 718.304. In a survivor's claim where claimant has established the presumption under Section 411(c)(3) of the Act, s/he must still establish, by direct proof or presumption, that the miner's pneumoconiosis arose out of coal mine employment. 20 C.F.R. §§410.416, 718.203.

The Board has strictly construed the medical criteria for establishing complicated pneumoconiosis by requiring that an autopsy report diagnose "massive lesions"; an autopsy that merely diagnoses large opacities (*i.e.*, nodules greater than one centimeter) is insufficient to invoke the Section 411(c)(3) presumption. *See* ***Lohr v. Rochester & Pittsburgh Coal Co.***, 6 BLR 1-1264 (1984). In ***Clites v. Jones & Laughlin Steel Corp.***, 2 BLR 1-1019 (1980), the administrative law judge found Section 411(c)(3) invocation established based on a physician's statement that he equated nodules he found during an autopsy to one centimeter opacities revealed by x-rays. The Board held that this equivalency determination was improper because an administrative law judge lacks medical expertise to make such a determination. The Third Circuit reversed the Board, holding that the administrative law judge properly found complicated pneumoconiosis established based on the physician's statement. ***Clites v. Jones & Laughlin Steel Corp.***, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981).

The Board has not expressly adopted or disapproved the Third Circuit's holding in ***Clites***. It has, however, narrowly construed it by requiring that any equivalency determination be based on *medical evidence* that equates the autopsy findings to the requisite x-ray diagnoses, *e.g.*, a *physician* must state that nodules revealed in autopsy would be greater than one centimeter *on an x-ray*. The administrative law judge may not make such a determination without such supporting medical evidence. *See* ***Smith v. Island Creek Coal Co.***, 7 BLR 1-734 (1985); ***Lohr****, supra*.

DIGESTS

The Sixth Circuit rejected employer's argument that the adjudicator erred in relying on a doctor's x-ray finding of "Category A large opacity" under Section 410.418 because he also noted "tuberculosis" and "honeycomb lung," holding that the administrative law judge could reasonably conclude that the Category A opacities were caused by complicated pneumoconiosis. ***Wolf Creek Collieries v. Robinson***, 872 F.2d 1264, 12 BLR 2-259 (6th Cir. 1989).

The Fourth Circuit held that because the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides three different ways of diagnosing complicated pneumoconiosis, it requires that the administrative law judge make an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption, *i.e.*, if a diagnosis is by biopsy, that a miner have “massive lesions” which would, if x-rayed, show as opacities greater than one centimeter in diameter. [Note: The Fourth Circuit declined to impose a rule that complicated pneumoconiosis can only be diagnosed by a biopsy or autopsy if it reveals evidence of a lesion at least two centimeters in diameter in order establish “massive lesions,” which would, if x-rayed, show as opacities greater than one centimeter in diameter. The Fourth Circuit noted that it may be possible for the Department of Labor to engage in a single fact-finding exercise to determine how large a lesion must be in order to appear on an x-ray as a greater than one-centimeter opacity and thereafter to promulgate a rule imposing this finding on all future cases.] ***Double B Mining, Inc. v. Blankenship***, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999).

The Sixth Circuit held that Section 718.205(c)(4) does not preclude an award of benefits to a surviving widow where the miner’s death was caused by a traumatic injury, if the deceased miner suffered from complicated pneumoconiosis and, therefore, is entitled to the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. *See* Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). ***Gray v. SLC Coal Co.***, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

The Sixth Circuit held that the irrebuttable presumption of death due to pneumoconiosis at Section 718.304, *see* Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), is not automatically triggered by x-ray evidence showing one or more large opacities greater than one centimeter in diameter when conflicting evidence is presented, such as the conflicting autopsy evidence in this case, that rebuts the x-ray readings, as an administrative law judge must weigh all the different categories of evidence under Section 718.304 together pursuant to Section 923(b) of the Act, 30 U.S.C. §923(b). ***Gray v. SLC Coal Co.***, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

Although x-ray evidence showing one or more large opacities greater than one centimeter in diameter is sufficient to establish complicated pneumoconiosis and,

therefore, invoke the irrebuttable presumption at Section 718.304(a), *see* Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), the Sixth Circuit held that the one-centimeter standard applicable to x-ray evidence under Section 718.304(a) does not apply to autopsy evidence under Section 718.304(b). Thus, a physician's opinion that 1.5 centimeter lesions seen on an autopsy lung-tissue slide was not complicated pneumoconiosis because the lesions would not appear as opacities greater than one centimeter on an x-ray and were not "massive lesions" comports with Section 718.304 and may be credited by the administrative law judge. ***Gray v. SLC Coal Co.***, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

To the extent that there is a divergence between the medical and legal standards for complicated pneumoconiosis, a trier-of-fact must apply the standard enunciated by Congress. The presumption under §921(c)(3) is triggered by a congressionally defined condition, for which the statute gives no name, but which if found to be present, creates an irrebutable presumption that disability or death was cause by pneumoconiosis. The statute provides three methods for establishing the existence of this condition, but the methods are not necessarily useful as diagnostic, clinical guidelines, and the statute demonstrates no intent to incorporate a purely medical definition of "complicated pneumoconiosis." ***Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*]**, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

The Fourth Circuit held that an autopsy prosector's description of massive lesions in both lungs, specifically his notation of "multiple jet black nodules measuring up to 4 cm" in the upper right lung and a similar nodule measuring 6 cm in the upper left lung, contrasted with the observation that the lower portions of the miner's lungs were "densely anthracotic without mass lesions," was sufficient to trigger the irrebuttable presumption under 20 C.F.R. §718.304(b). ***Perry v. MYNU Coals, Inc.***, 469 F.3d 360, 23 BLR 2-274 (4th Cir. 2006)(Williams, CJ., dissenting).

The Fourth Circuit held that the autopsy prosector's uncontradicted testimony, that the 4 cm and 6 cm fibrous masses seen on autopsy in the miner's upper lungs would have appeared as opacities greater than one centimeter in diameter had they been x-rayed, was sufficient to trigger the irrebuttable presumption under 20 C.F.R. §718.304(a). The court observed that the prosector was the only doctor to assess the size of the nodules in gross and under a microscope, which gave him additional perpective that the other doctors lacked. While the prosector stated that he was not "one-hundred percent sure" of his conclusion, the court indicated that, read in context, the prosector's qualification was at most an acknowledgment that uncertainty is part of medicine, and that this refusal to express a diagnosis in categorical terms constituted candor, not equivocation, which enhanced rather than undermined the prosector's credibility. ***Perry v. MYNU Coals, Inc.***, 469 F.3d 360, 23 BLR 2-274 (4th Cir. 20, 2006)(Williams, CJ., dissenting).

The United States Court of Appeals for the Eleventh Circuit held, that it would decline to follow the holding of the United States Court of Appeals for the Fourth Circuit in ***Double***

B. Mining Inc.*, *v. Blankenship, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999), that equivalency determinations between the between the x-ray standard, and the autopsy standard, *see* 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, were essential to determine that the existence of complicated pneumoconiosis was established. ***Pittsburg & Midway Coal Co.* [*Cornelius*]**, 508 F.3d 975, 987 n.7, 24 BLR 2-72 n.7 (11th Cir. 2007).

The United States Court of Appeals for the Eleventh Circuit held that once the existence of the condition known as complicated pneumoconiosis, 30 U.S.C. §921(c)(3), Black Lung Benefits Act §411(c)(3), as implemented by 20 C.F.R. §718.304, has been established pursuant to 20 C.F.R. §718.304, a claimant is entitled to the presumption that the miner's death was due to the condition, and thus any interpretation of 20 C.F.R. §718.205(c)(4) that "allows this statutorily created mandatory 'irrebutable' presumption somehow to be rebutted" would be invalid. ***Pittsburg & Midway Coal Co.* [*Cornelius*]**, 508 F.3d 975, 981, 24 BLR 2-72 (11th Cir. 2007).

In a case where the United States Court of Appeals for the Fourth Circuit acknowledged that all relevant evidence supported a finding that claimant had radiographic opacities greater than three centimeters, the court rejected employer's assertion that the administrative law judge improperly shifted the burden of proof, holding that the administrative law judge's approach in weighing the evidence was consistent with ***Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*]**, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), insofar as she "simply stated that the clear evidence of large opacities would support the presumption unless the record contained 'affirmative evidence' showing either that the opacities did not exist or that they were due to something else, such as a disease other than pneumoconiosis." In affirming the award of benefits, the court also held that the administrative law judge permissibly rejected, as speculative and equivocal, the opinions of employer's experts, who opined that large opacities identified were unrelated to coal dust exposure and likely due to other conditions, such as tuberculosis, histoplasmosis, granulomatous disease, or sarcoidosis, as they failed to point to evidence that claimant was suffering from any of the alternative diseases and explain the bases for their respective diagnoses. ***Westmoreland Coal Co. v. Cox***, 602 F.3d 276, BLR (4th Cir. 2010).

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E. SECTION 411(c)(4)

This presumption will not apply to claims filed on or after January 1, 1982.

Under 20 C.F.R. §725.212, the survivor is automatically entitled to benefits if deceased miner:

- was receiving benefits as a result of a claim filed before January 1, 1982,

- is determined as a result of a claim filed before January 1, 1982, to have been totally disabled due to pneumoconiosis at time of death or to have died due to pneumoconiosis.

DIGESTS

Surviving spouse who filed on/after January 1, 1982, must show deceased miner's death was due to pneumoconiosis except if Section 718.306 entitlement is established for claim filed prior to June 30, 1982. *See generally,* ***Neeley v. Director, OWCP,*** 11 BLR 1-85 (1988); ***Pothering v. Parkson Coal Co.,*** 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988); ***Smith v. Camco Mining, Inc.,*** 13 BLR 1-17 (1989).

For purposes of invoking the rebuttable presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented at 20 C.F.R. §718.305(a), a miner who works in a coal mine other than an underground mine bears the additional burden of producing evidence that the conditions of his employment in a coal mine were substantially similar to conditions in an underground mine. The Seventh Circuit held that, while a miner cannot prove similarity simply by showing that he was in and around a coal mine without any further discussion of his employment conditions, a miner is not required to directly compare his work environment to conditions underground. Rather, the miner can establish similarity simply by proffering sufficient evidence of the surface mining conditions in which he worked and it is then up to the ALJ, based on his expertise, knowledge of the industry and appropriate objective factors, to compare the miner's working conditions as established by the evidence to those conditions prevalent in underground mines. The court held that in this case, the ALJ's finding of similarity was supported by the miner's unrefuted testimony about his employment conditions which clearly described, in objective terms, the extent of dust exposure caused by the job her

performed, as well as the fact that his job conditions above and below ground were the same. ***Freeman United Coal Mining Co. v. Summers***, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001)(quoting ***Director, OWCP v. Midland Coal Co.*** **[*Leachman*]**, 855 F.2d 509 (7th Cir. 1988)).

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F. SECTION 411(c)(5)

In ***Battaglia v. Peabody Coal Co.,*** 690 F.2d 106, 5 BLR 2-1 (7th Cir. 1982), the court held that Section 411(c)(5) was not arbitrary or irrational and affirmed its validity. *See also* ***Trujillo v. Kaiser Steel Corp.,*** 3 BLR 1-497 (1981).

This presumption will not apply to claims filed after June 30, 1982.

Under 20 C.F.R. §718.306:

- If the miner died on or before March 1, 1978 with 25 or more years of coal mine employment worked prior to June 30, 1971, eligible survivors who file PRIOR TO June 30, 1982 receive benefits UNLESS it is established that at the time of death the miner was not partially or totally disabled by pneumoconiosis.

- To rebut subsection (a), the evidence must show the miner's ability to perform work was not decreased at the time of death OR that the miner did not have pneumoconiosis.

DIGESTS

The court citing to ***McKinnon v. Amax Coal Co.,*** 4 BLR 1-95, 1-97 (1981), held that the Section 411(c)(5) presumption may be rebutted by a showing that (1) the miner did not have pneumoconiosis; (2) the miner was not partially or totally disabled; or (3) any disability the miner did have was not caused by pneumoconiosis. ***Amax Coal Co. v. Burns,*** 855 F.2d 499 (7th Cir. 1988).

Silent evidence may be sufficient to rebut the Section 411(c)(5) presumption where the record suggests that if lung disease were present, it would have been detected and reported. ***Burns,*** *supra.*

The court reversed the Board's affirmance of the ALJ's finding that the Section 411(c)(5) presumption had been rebutted by proof that the miner did not suffer from pneumoconiosis, holding that the x-ray report and death certificate in this case, neither of which indicated the existence of pneumoconiosis, were of "such limited probative value" as to provide inadequate support for the ALJ's rebuttal finding. In so holding, the

court also noted that the lay testimony of record indicated that the miner was at least partially disabled at the time of his death. ***Powell v. Peabody Coal Co.,*** 933 F.2d 622, 15 BLR 2-72 (8th Cir. 1991).

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