

PART I

INTRODUCTION

D. CONSTITUTIONALITY OF THE ACT AND REGULATIONS

In 1976, the United States Supreme Court held that the Act did not violate the Fifth Amendment Due Process Clause by requiring operators to compensate former employees who terminated their work in the coal mine industry before the Act was passed. **Usery v. Turner-Elkhorn Mining Co.**, 428 U.S. 1, 3 BLR 2-36 (1976); see also **Trujillo v. Kaiser Steel Corp.**, 3 BLR 1-497 (1981). For a discussion of the Board's authority to address constitutional issues, see Part III of the Desk Book. The Court also upheld the constitutionality of the definition of "total disability" contained in Section 402(f), the presumptions found in Section 411(c)(1), (2) and (3), the limitation on rebuttal evidence contained in Section 411(c)(4), and Section 413(b), which provides that no claim shall be denied solely on the basis of a negative chest roentgenogram. **Usery**, 428 U.S. at 28; 30 U.S.C. §§902(f), 921(c)(1)-(4), 923(b). The Board has held that the differing Part B and Part C standards for offset of excess earnings do not violate the due process rights of Part B beneficiaries. **Kosh v. Director, OWCP**, 8 BLR 1-168 (1985), *aff'd*, No. 85-3508 (3d Cir., May 6, 1986)(unpublished).

In **Trujillo**, the Board held that the presumption found in Section 411(c)(5) of the Act was constitutional. 30 U.S.C. §921(c)(5) Several United States Courts of Appeals have reached the same result. **North American Coal Corp. v. Campbell**, 748 F.2d 1124, 7 BLR 2-89 (6th Cir. 1984); **Bishop v. Director, OWCP**, 690 F.2d 131, 5 BLR 2-13 (7th Cir. 1982); **Battaglia v. Peabody Coal Co.**, 690 F.2d 106, 5 BLR 2-1 (7th Cir. 1982); **United States Steel Corp. v. Oravetz**, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982).

The United States Court of Appeals for the Seventh Circuit held that the Secretary did not exceed statutory authority in promulgating the interim presumption holding that it was consistent with the Act even though the presumptions were more liberal than the statutory benchmarks. The Court rejected the argument that the absence of a requirement that dust conditions between surface and underground mine work be comparable impermissibly extended coverage beyond the Act's intent and purpose. **Peabody Coal Co. v. Director, OWCP [Huber]**, 778 F.2d 358, 8 BLR 2-84, 2-89 (7th Cir. 1985); see also **Inman v. Peabody Coal Co.**, 6 BLR 1-1249 (1985).

In **Jones v. The New River Co.**, 3 BLR 1-199 (1981), the Board held that the interim presumption at 20 C.F.R. §727.203(a)(1) was constitutional. **Accord Kaiser Steel Corp. v. Director, OWCP [Sena]**, 757 F.2d 1078, 7 BLR 2-150, 2-164 (10th Cir.

1985); **Alabama By-Products Corp. v. Killingsworth**, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); see also **Wheaton v. North American Coal Corp.**, 8 BLR 1-21 (1985); **Parsons v. Black Diamond Coal Co.**, 7 BLR 1-236 (1984).

The Board upheld the constitutionality of the interim presumption found at 20 C.F.R. §727.203(a)(2), finding that it was not irrational or so unreasonable as to be purely arbitrary. **McCluskey v. Zeigler Coal Co.**, 2 BLR 1-1248 (1981). The United States Courts of Appeals for the Seventh and Tenth Circuits have reached the same conclusion. **Huber**, 8 BLR at 2-93; **Sena**, 7 BLR at 2-165. Section 727.203(a)(3) was upheld by the Board in **Robertson v. Alabama By-Products Corp.**, 7 BLR 1-793 (1985); **Martino v. United States Fuel Co.**, 6 BLR 1-33 (1983).

The Board upheld the constitutionality of 20 C.F.R. to §727.203(a)(4), rejecting employer's contention that there was statutory basis for invoking the presumption under this when claimant is capable of undergoing a complete evaluation. **Allen v. Brown Badgett, Inc.**, 6 BLR 1-567 see also **Huber**. Finally, the Board found Section 727.203(a)(5) presumptively valid in **Gessner v. Director, OWCP**, 11 BLR 1-1 (1987).

The Board has consistently rejected the contention that the rebuttal provisions of 20 C.F.R. §727.203(b) unconstitutionally limit rebuttal where the employer was unable to identify any evidence that could not be considered under the available rebuttal methods. **Minor v. Alabama By-Products Corp.**, 7 BLR 1-676 (1985); **Pate v. Alabama By-Products Corp.**, 6 BLR 1-636 (1983); **Sainz v. Kaiser Steel Corp.**, 5 BLR 1-758 (1983), *aff'd sub nom. Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984).

The United States Supreme Court upheld as valid the rebuttal provisions at 20 C.F.R. §727.203(b)(3) and (b)(4). **Pauley v. Bethenergy Mines, Inc.**, 111 S.Ct. 2524, 15 BLR 2-155 (1991).

[The Act]

CASE LISTINGS

[in **Trujillo** Board held presumption found in Section 411(c)(5) of Act, 30 U.S.C. §921(c)(5), constitutional; several other Courts have reached same result] **North American Coal Corp. v. Campbell**, 748 F.2d 1124, 7 BLR 2-89 (6th Cir. 1984); **Bishop v. Director, OWCP**, 690 F.2d 131, 5 BLR 2-13 (7th Cir. 1982); **Battaglia v. Peabody Coal Co.**, 690 F.2d 106, 5 BLR 2-1 (7th Cir. 1982); **U.S. Steel Corp. v. Oravetz**, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982).

[Fourth Circuit held more extensive offset of excess earnings for Part B than Part C beneficiaries did not violate due process rights of Part B beneficiaries because

difference was rationally aimed at preserving federal funds] **Kosh v. Director, OWCP**, 8 BLR 1-168 (1985), *aff'd*, No. 85-3508 (3d Cir., May 6, 1986)(unpub.).

DIGESTS

The Board held that where a claimant files a claim for medical benefits only under Part C pursuant to 30 U.S.C. §924(a), the employer is not denied due process although it may have been excluded from participation when claimant was found eligible for benefits under Part B. The opportunity for a *de novo* administrative hearing on the merits of the medical benefits claim under Part C satisfies employer's procedural due process rights. **Zaccaria v. North American Coal Corp.**, 9 BLR 1-119 (1986).

The Board held that Section 435(c) of the Act, 30 U.S.C. §945(c), sets January 1, 1974, as the cutoff date for the retroactive payment of benefits. This section does not provide when benefits may commence *after* January 1, 1974. Such determination, in the absence of evidence of onset of total disability, is based on the claim filing date as provided at Sections 725.503(b), 727.302(c). The Board further held that these regulations are consistent with the language and intent of Section 435(c) of the Act, and do not discriminate unfairly against Part B claimants, as opposed to Part C claimants, with respect to the commencement of benefits. **New v. Director, OWCP**, 11 BLR 1-139 (1987), *aff'd sub nom. Curse v. Director, OWCP*, 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988).

The Board upheld 30 U.S.C. §902(e) and 20 C.F.R. §725.217, which provide for the determination of dependency of a surviving divorced spouse, as constitutional, finding that the sections do not create improper distinctions between classes of surviving divorced spouses. **Gabbard v. Director, OWCP**, 12 BLR 1-35 (1988).

The Board upheld Section 402(g), 30 U.S.C. §902(g), which defines the term "child" as a child or step-child "who is unmarried." The Board held that, contrary to claimant's contention, Section 402(g) does not create a suspect classification or violate claimant's right to freely exercise his religion. **Sullenberger v. Director, OWCP**, 22 BLR 1-54 (2000).

[Part 727]

CASE LISTINGS

[Board upheld constitutionality of 20 C.F.R. §727.203(a)(4), rejecting contention there was statutory basis for invoking presumption under this when claimant capable of undergoing complete evaluation] **Allen v. Brown Badgett, Inc.**, 6 BLR 1-567 (1984); *see also Huber*.

[Board upheld constitutionality of interim presumption at 20 C.F.R. §727.203(a)(2), finding it not irrational or so unreasonable as to be purely arbitrary] **McCluskey v. Zeigler Coal Co.**, 2 BLR 1-1248 (1981). The United States Courts of Appeals for the Seventh and Tenth Circuits have reached the same conclusion. **Peabody Coal Co. v. Director, OWCP [Huber]**, 778 F.2d 358, 8 BLR 2-84, 2-93 (7th Cir. 1985); **Sena**, 7 BLR at 2-165.

[in **Jones v. The New River Co.**, 3 BLR 1-199 (1981), Board held interim presumption at 20 C.F.R. §727.203(a)(1) constitutional] Accord **Kaiser Steel Corp. v. Director, OWCP [Sena]**, 757 F.2d 1078, 7 BLR 2-150, 2-164 (10th Cir. 1985); **Alabama By-Products Corp. v. Killingsworth**, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); see also **Wheaton v. North American Coal Corp.**, 8 BLR 1-21 (1985); **Parsons v. Black Diamond Coal Co.**, 7 BLR 1-236 (1984).

[Board consistently rejected contention that rebuttal provisions of 20 C.F.R. §727.203(b) unconstitutionally limit rebuttal where employer unable to identify evidence that could not be considered under available rebuttal methods] **Minor v. Alabama By-Products Corp.**, 7 BLR 1-676 (1985); **Pate v. Alabama By-Products Corp.**, 6 BLR 1-636 (1983); **Sainz v. Kaiser Steel Corp.**, 5 BLR 1-758 (1983), *aff'd sub nom. Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984).

[Board rejected employer's allegation 20 C.F.R. §727.203(a)(3) was unconstitutional as no evidentiary basis established for challenge] **Robertson v. Alabama By-Products Corp.**, 7 BLR 1-793 (1985); **Martino v. United States Fuel Co.**, 6 BLR 1-33 (1983).

[Seventh Circuit held Secretary did not exceed statutory authority in promulgating interim presumption Court considered consistent with Act even though presumptions more liberal than statutory benchmarks; Court rejected argument that absence of requirement that dust conditions between surface and underground mine work be comparable impermissibly extended coverage beyond Act's intent and purpose; subsection (a)(2) method of invocation was constitutional] **Peabody Coal Co. v. Director, OWCP [Huber]**, 778 F.2d 358, 8 BLR 2-84 (7th Cir. 1985); see also **Inman v. Peabody Coal Co.**, 6 BLR 1-1249 (1985).

DIGESTS

The Board found Section 727.203(a)(5) presumptively valid in **Gessner v. Director, OWCP**, 11 BLR 1-1 (1987).

[Part 718]

CASE LISTINGS

[Board held 20 C.F.R. §718.205(c)(1980) is validly promulgated regulation consistent with Act] **Foreman v. Peabody Coal Co.**, 8 BLR 1-371 (1985).

[Part 725]

CASE LISTINGS

[Board upheld constitutionality of Section 725.217(a)(2) finding rational connection between receipt of substantial contributions pursuant to written agreement and surviving divorced spouse's dependency on miner] **McCoy v. Director, OWCP**, 7 BLR 1-789 (1985).

[Board noted 20 C.F.R. §725.496(b)(2)(iv) listed action by claimant, not specified in 30 U.S.C. §902(i)(2)(A), that would preclude transfer of liability under 1981 Amendments; Board held Secretary did not exceed statutory authority in promulgating provision and it is valid regulation] **Hedrick v. Green Construction Co.**, 7 BLR 1-783 (1985).

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