PART VI

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 410

C. TOTAL RESPIRATORY DISABILITY

4. SECTION 410.426

If the medical evidence of record alone is insufficient to establish that the miner's pneumoconiosis is totally disabling pursuant to 20 C.F.R. §410.424, the administrative law judge must then determine whether the claimant's pneumoconiosis can be deemed totally disabling pursuant to the vocational and medical factors found in Section 410.426. 20 C.F.R. §410.426(a); ***Barton v. Island Creek Coal Co.***, 2 BLR 1-509 (1979). This regulation, however, may not be used to prove existence of clinical pneumoconiosis; it may only be used to prove that pneumoconiosis, once established, is totally disabling. ***Van Scyoc v. Director, OWCP***, 2 BLR 1-875 (1980).

Section 410.426(a) provides that pneumoconiosis may be found totally disabling if, because of the severity of pneumoconiosis, the miner is (or was) not only unable to do his usual coal mine work, but also cannot (or could not), considering age, education, and work experience, engage in any other kind of comparable or gainful work in the immediate area of his residence. Thus, the initial question to be resolved is whether pneumoconiosis has produced functional limitations that render the miner unable to meet the physical demands of his usual coal mine work. If this requirement is met, consideration is then given to age, education, and work experience in determining whether the miner is able to engage in any other kind of comparable and gainful work. *See* ***Kolesar v. The Youghiogheny and Ohio Coal Co.***, 760 F.2d 728, 7 BLR 2-210 (6th Cir. 1985).

The Board has held that the vocational factors listed in Section 410.426 may, in conjunction with medical evidence documenting the severity of the miner's pneumoconiosis, be used to support a finding that the miner is totally disabled. Age, education and work experience, however, are only relevant in a determination of the miner's ability to perform comparable and gainful work. ***Bentley v. Director, OWCP***, 7 BLR 1-612 (1984).

Section 410.426(b) provides that, subject to the limitations of Section 410.426(a), the miner's pneumoconiosis will be deemed totally disabling if he has a respiratory impairment due to his pneumoconiosis that is demonstrated by ventilatory study results equal to or less than the values listed in the accompanying table. To use this regulation, the ventilatory study must include both a maximum voluntary ventilation value (MVV), also known as a maximum breathing capacity value (MBC), and a one-

second forced expiratory volume value (FEV1). 20 C.F.R. §410.426(b).

Even though the administrative law judge credits a ventilatory study that qualifies under the table at 20 C.F.R. §410.426(b), that does not mandate a finding that the miner's pneumoconiosis is totally disabling. Rather, it creates a presumption that may be rebutted. ***Vance v. Buffalo Mining Co.***, 1 BLR 1-555 (1978). Moreover, the primary cause requirement found in Section 410.426(a) applies equally to Section 410.426(b). ***Wells v. Peabody Coal Co.***, 3 BLR 1-85 (1976), *aff'd sub nom*. ***Peabody Coal Co. v. Benefits Review Board***, 560 F.2d 797 (7th Cir. 1977); ***Fletcher v. Appalachian Coal Co.***, 1 BLR 1-785 (1978).

Section 410.426(c) provides that even though the table values of Section 410.426(b) are not met, pneumoconiosis may nevertheless be found totally disabling if a physical performance test establishes a chronic respiratory or pulmonary impairment which is medically the equivalent of the values specified in Section 410.426(b). There is very little case law discussing Section 410.426(c). In ***Edwards v. Republic Steel Corp.***, 2 BLR 1-3 (1979), the claimant argued that it was the Director's duty to obtain physical performance tests, and that the Director's failure to do so prejudiced him by precluding him from establishing total disability under this regulation. The Board rejected this argument stating that, since the claimant bore the burden of persuasion, it was incumbent upon him to obtain such test results.

Section 410.426(d) provides that where ventilatory studies or physical performance tests are medically contraindicated, cannot be obtained, or produce results that fail to establish total disability under Section 410.426(b) or 410.426(c), the miner's pneumoconiosis may nevertheless be found totally disabling if other relevant evidence establishes that the miner has (or had) a chronic respiratory or pulmonary impairment, the severity of which prevents (or prevented) him not only from doing his previous coal mine work, but also considering his age, education and work experience, prevents (or prevented) him from engaging in comparable and gainful work. 20 C.F.R. §410.426(d). Non-qualifying blood gas studies, non-qualifying ventilatory studies and medical reports may also be considered "other relevant evidence" by the administrative law judge under Section 410.426(d). ***Marsiglio v. Director, OWCP***, 8 BLR 1-190 (1985); ***Bain v. Old Ben Coal Co.***, 2 BLR 1-1219 (1981); ***Honaker v. Jewell Ridge Coal Corp.***, 2 BLR 1-947 (1980).

It is also important to note that lay testimony is recognized as "other relevant evidence" under this regulation and lay testimony, by itself, may be sufficient to establish total respiratory disability in a survivor's case where there is no medical evidence relevant to the existence or the extent of respiratory disability. ***Woolwine v. Director, OWCP***, 6 BLR 1-1023 (1984); *see also* ***Dobbins v. Schweiker***, 641 F.2d 1354, 3 BLR 2-9 (9th Cir. 1981); ***Corridoni v. Weinberger***, 402 F.Supp. 983 (M.D. Pa. 1975); ***Henderson v. Director, OWCP***, 7 BLR 1-866 (1985). Where the record in a survivor's case contains medical evidence regarding the existence or extent of

respiratory disability, the lay testimony must be considered in conjunction with the medical evidence. ***Henderson v. Director, OWCP***, 7 BLR 1-866 (1985); ***Fluharty v. Director, OWCP***, 5 BLR 1-357 (1982); ***Wozny v. Director, OWCP***, 2 BLR 1-141 (1979). In a living miner's claim, however, it is important to note that lay testimony alone, absent corroborating medical evidence, is insufficient to establish total disability by a respiratory or pulmonary impairment pursuant to 20 C.F.R. Part 410, Subpart D. *See* 20 C.F.R. §410.422(c); ***Lipka v. Director, OWCP***, 8 BLR 1-360 (1985).

Additionally, Section 410.426(d) is subject to the primary cause requirement of Section 410.426(a). *See* ***Castle v. Director, OWCP***, 4 BLR 1-237 (1981); ***Childress v. Harman Mining Corp.***, 2 BLR 1-644 (1979). Also note that Section 410.426(d) merely establishes that pneumoconiosis is totally disabling; it does not establish the source or existence of pneumoconiosis. This must be done pursuant to Sections 410.416 and 410.414. Nevertheless, this regulation may be used to prove existence of a chronic respiratory or pulmonary impairment, and thus may aid in establishing existence of presumptive pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and 20 C.F.R. §410.414(b). *See* ***Van Scyoc v. Director, OWCP***, 2 BLR 1-875 (1980).

As noted above, Section 410.426(d) provides that the miner's pneumoconiosis may be deemed totally disabling if "other relevant evidence" establishes the existence of a chronic respiratory or pulmonary impairment that prevents him from engaging in his usual coal mine employment *and* comparable and gainful work. In ***Fletcher v. Central Appalachian Coal Co.***, 1 BLR 1-980 (1978), *aff'd sub nom*. ***Central Appalachian Coal Co. v. Director, OWCP***, 679 F.2d 1086, 4 BLR 2-92 (4th Cir. 1982), however, the Board discussed claimant's burden of proof under this regulation and held that, as under Section 410.412, the claimant establishes a *prima facie* case of total respiratory disability if he establishes the existence of a chronic respiratory or pulmonary impairment which prevents the miner from engaging in his usual coal mine employment. The burden then shifts to the party opposing entitlement to show that the miner can nonetheless perform comparable and gainful work in the immediate area of his residence.

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