

PART VII

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

B. EXISTENCE OF PNEUMOCONIOSIS

4. SECTION 718.202(a)(3): PRESUMPTIONS

- b. **Section 718.305** [See Section 411(c)(4), 30 U.S.C. §921(c)(4); Part VIII.C. of the Desk Book].

The presumption at Section 718.305 is available in claims filed before January 1, 1982 where the miner worked at least 15 years in underground mining or comparable surface mining, and the evidence establishes the existence of a totally disabling respiratory or pulmonary impairment. At invocation, claimant is not required to establish that the miner's totally disabling respiratory or pulmonary impairment is chronic or that it arose out of coal mine employment. See **Tanner v. Freeman United Coal Co.**, 10 BLR 1-85 (1987). Rather, the inquiry is concerned with the severity of the respiratory impairment irrespective of its cause. The determination of the existence of a totally disabling respiratory or pulmonary impairment, for purpose of applying this presumption, shall be made in accordance with Section 718.204. See 20 C.F.R. §718.305(c); **Tanner, supra**.

At rebuttal, the specific etiology of the totally disabling respiratory impairment need not be established. See **Tanner, supra**. Rather, the party opposing entitlement must establish either that the miner does not or did not have pneumoconiosis or that the miner's impairment did not arise out of or in connection with coal mine employment. See **Alexander v. Island Creek Coal Co.**, 12 BLR 1-44 (1988), *aff'd sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir., Aug. 29, 1989)(unpub.); **Defore v. Alabama By-Products**, 12 BLR 1-27 (1988); **Tanner, supra**. In a survivor's case filed before January 1, 1982, the party opposing entitlement must proffer evidence sufficient to rebut both the presumptions of total disability due to pneumoconiosis and death due to pneumoconiosis to prevent the order of an award. See **Alexander, supra**.

CASE LISTINGS

DIGESTS

Section 718.305 is not applicable to any claim filed on or after January 1, 1982. 20

C.F.R. §718.305(e). See **Kubachka v. Windsor Power House Coal Corp.**, 11 BLR 1-171 (1988); **Langerud v. Director, OWCP**, 9 BLR 1-101 (1986).

Neither the Act nor the implementing regulations requires that a claimant establish more than that the conditions existing at the surface coal mine work site are substantially similar to conditions found in an underground mine. **McGinnis v. Freeman United Coal Mining Co.**, 10 BLR 1-4 (1987); **Wagahoff v. Freeman United Coal Mining Co.**, 10 BLR 1-100 (1987).

The Seventh Circuit held that although claimant carries the burden of establishing comparability of conditions in surface mines as to underground mines, claimant need not present evidence of conditions prevailing in underground mines but only demonstrate that he was exposed to sufficient coal dust in his employment, thereafter shifting the burden to employer. **Director, OWCP v. Midland Coal Co.**, 855 F.2d 509, BLR (7th Cir. 1988) *remanding* **Leachman v. Midland Coal Co.**, 10 BLR 1-79 (1987).

If the miner has the benefit of Section 718.305, the causal relationship is presumed and the burden to disprove this relationship lies with the party opposing entitlement. **Tanner v. Freeman United Coal Co.**, 10 BLR 1-85 (1987).

If the evidence is insufficient to establish total disability pursuant to Section 718.204, as is required by Section 718.305, then a finding of total disability at Section 718.305 is precluded. **Trent v. Director, OWCP**, 11 BLR 1-26 (1987); **Shedlock v. Bethlehem Mines Corp.**, 9 BLR 1-195 (1986).

In a survivor's claim, the Third Circuit held that in the absence of an autopsy, a death certificate may not be used to preclude invocation of a presumption of a totally disabling respiratory or pulmonary impairment. Here, the administrative law judge erred in finding Section 718.305(b) inapplicable because the miner worked until his death. **Hillibush v. U.S. Department of Labor**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988).

The Third Circuit held that in a survivor's claim where the medical evidence is insufficient to invoke the presumption, claimant may rely on affidavits to establish the presumption of pneumoconiosis. Moreover, Section 718.305(b) requires the administrative law judge to determine the miner's usual coal mine employment and then to consider whether the lay evidence of record provides a sufficient basis for comparing the miner's physical limitations prior to his death with the requirements of his usual coal mine employment. **Hillibush v. U.S. Department of Labor**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988).

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 administrative law judge, 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 administrative law judge'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 he 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)).

The Seventh Circuit recognized that, where blindness was the sole cause of a miner's disability, and pneumoconiosis played no role in his inability to work, the evidence is sufficient to establish rebuttal of the Section 718.305 presumption. ***Gulley v. Director, OWCP***, 397 F.3d 535 (7th Cir. 2005).

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