

PART VIII

STATUTORY PRESUMPTIONS IN MINERS' CLAIMS

C. SECTION 411(c)(4)

2. IMPLEMENTATION UNDER PART 718 AND IN SURVIVORS' CLAIMS

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**.

For case listings and digests of the Section 411(c)(4) presumption in living miners' cases, see Part VIII.C.

SURVIVOR'S CLAIMS

Sections 410.414(b) and 410.454(b), 20 C.F.R. §§410.414(b), 410.454(b), of the regulations, implementing Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), provide a survivor with various methods of proving pneumoconiosis and grant certain presumptions of total disability due to pneumoconiosis at the time of death and death due to pneumoconiosis. If the survivor establishes that the miner worked for fifteen

years or more of coal mine employment in the underground mines, or the equivalent thereof, and that the miner suffered from a totally disabling chronic respiratory or pulmonary impairment prior to death, it is presumed that the miner was totally disabled due to pneumoconiosis at the time of death, 20 C.F.R. §§410.414(b), 718.305(a), or that his death was due to pneumoconiosis, 20 C.F.R. §§410.454(b), 718.305(a). The presumption may be rebutted only by establishing that the miner did not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of, or in connection with, work in a coal mine. 20 C.F.R. §§410.414(b)(2), 410.454(b)(2), 718.305(a), (d).

It should be noted that the Section 411(c)(4) presumption was deleted by the Black Lung Benefits Amendments of 1981, and the presumption is, therefore, inapplicable to claims filed on or after January 1, 1982. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(e).

Sections 410.414 and 410.454 also contain a "many years" provision and an "other relevant evidence" provision, which are discussed in Parts VI.E. and VIII.C.4. of the Desk Book. Section 718.305 does not contain comparable provisions.

Section 718.305 contains provisions that clarify the use of lay testimony to establish the Section 411(c)(4) presumption. Section 718.305(a) states that, in the case of a *living* miner, a spouse's affidavit or testimony may not be used *by itself* to establish the applicability of the presumption. Section 718.305(b) provides that, 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.

Section 718.305(c) provides that the determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made in accordance with Section 718.204. The Board has held that, in a survivor's claim, where the medical evidence of record affirmatively establishes "that no lung disease was present," claimant is precluded from establishing total disability with lay evidence under Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §718.204(c)(5). ***Pekala v. Director, OWCP***, 13 BLR 1-1 (1989)[issue of the availability of Section 718.204(c)(5) where there is medical evidence of record that falls short of affirmatively establishing the absence of lung disease was not before the Board].

In a survivor's claim, rebuttal of the Section 718.305(a) presumption requires the party opposing entitlement to rebut both the presumptions of total disability due to pneumoconiosis and death due to pneumoconiosis. ***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.).

For case listings and digests of the Section 411(c)(4) presumption in survivors'

claims see Part X.F. of the Desk Book.

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