

**PART X**

**SURVIVORS' CLAIMS**

**A. INTRODUCTION**

The Act provides benefits to certain survivors of deceased miners. Survivors potentially entitled to benefits include the miner's widowed spouse, surviving divorced spouse, children, parents, brothers and sisters. See 30 U.S.C. §922. The survivor must meet certain preliminary conditions of entitlement before s/he will be eligible for benefits. These conditions and requirements vary depending on the survivor's relationship to the miner and are found at 20 C.F.R. §§725.212-725.233. See Part II.B. of the Desk Book. Survivor's claims, which are classified as Part B or Part C depending upon the date of filing, see 20 C.F.R. §725.1, are filed by the survivors in their own behalf, and the benefits derived should be distinguished from augmented miner's benefits. See 20 C.F.R. §§725.204-725.211. A survivor may receive benefits under a *miner's* claim from the date of onset of total disability [see Part X of the Desk Book] until the month before the miner's death, **Combs v. Director, OWCP**, 8 BLR 1-88 (1985), but survivors' benefits, *per se*, are payable beginning with the month of the miner's death, **Mihalek v. Director, OWCP**, 9 BLR 1-157 (1986); see 20 C.F.R. §§725.503; 725.545; see generally **Edwards v. Director, OWCP**, 16 BLR 1-43 (1990); **Smith v. Camco Mining Inc.**, 13 BLR 1-17, 1-19 n.4 (1989).

Prior to January 1, 1982, the purpose of the Act provided for the payment of benefits to survivors of miners who either were totally disabled due to pneumoconiosis arising from coal mine employment or died due to such pneumoconiosis. 30 U.S.C. §901(a). The purpose of the Act was amended effective January 1, 1982, however, to provide for the payment of benefits to survivors of only those miners who had died due to pneumoconiosis arising from coal mine employment. *Id.* Thus, in cases involving miner's claims filed prior to January 1, 1982, benefits will be paid to eligible survivors of a miner if the miner was receiving benefits at the time of death under a finally adjudicated award of benefits for total disability due to pneumoconiosis, see 20 C.F.R. §§725.212, 725.218, 725.222, or if it is ultimately established that the miner was totally disabled due to pneumoconiosis at the time of death or that the miner died due to pneumoconiosis, see 20 C.F.R. §725.1. Similarly, under the purpose of the Act, in cases in which a miner's claim was not filed prior to January 1, 1982, the survivor must establish that the deceased miner's death was due to pneumoconiosis, except in those cases in which survivor's entitlement is established under Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), under a survivor's claim filed prior to June 30, 1982, see 20 C.F.R. §§725.212, 725.218, 725.222.

Claims reviewed under Section 435(a) of the Act, 30 U.S.C. §945(a), are subject to consideration under the substantive interim regulatory provisions found at 20 C.F.R. Part 727 and 20 C.F.R. §410.490, see **Pittston Coal Group v. Sebben**, 109 S.Ct. 414, 12 BLR 2-89 (1988), see Part IX of Desk Book, with further consideration under the permanent criteria pursuant to Section 727.203(d) for claims denied under Section 727.203. The Board has construed Section 727.203(d) as mandating consideration under the permanent criteria of 20 C.F.R. Part 410, Subpart D, see **Muncy v. Wolfe Creek Coal Collieries Co.**, 3 BLR 1-627 (1978), while the following Courts of Appeal have indicated that consideration under 20 C.F.R. Part 718 is mandated by Section 727.203(d), on the following bases: in **Caprini v. Director, OWCP**, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987) and **Strike v. Director, OWCP**, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987) the Courts held that claims adjudicated after March 31, 1980, are subject to consideration under Part 718; in **Knuckles v. Director, OWCP**, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989), the Court held that claims adjudicated by the administrative law judge after March 31, 1980, are subject to consideration under Part 718. In **Oliver v. Director, OWCP**, 888 F.2d 1239, 13 BLR 2-124 (8th Cir. 1989), the Court indicated, without providing a rationale, that Section 727.203(d) required application of Part 718 to claims that failed under the interim presumption.

Sections 410.450 through 410.462, 20 C.F.R. §§410.450-410.462, provide means by which death due to pneumoconiosis may be established. Section 410.450 also provides for benefits to the eligible survivor of a miner who was entitled to benefits at the time of death. Sections 410.410 through 410.430, 20 C.F.R. §§410.410-410.430, provide methods for establishing whether the miner was totally disabled due to pneumoconiosis at the time of death.

The new permanent criteria, applicable to claims filed after March 31, 1980, 20 C.F.R. §718.2, see **Tennessee Consolidated Coal Co. v. Crisp**, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); **Sizemore v. National Mines Corp.**, 10 BLR 1-93 (1987), are found at 20 C.F.R. Part 718. See Part VII of the Desk Book. Section 718.205, 20 C.F.R. §718.205, enumerates means by which death due to pneumoconiosis may be established, including the presumptions provided by Sections 411(c)(2)-(4) of the Act, 30 U.S.C. §921(c)(2)-(4), as respectively implemented at Sections 718.303, 718.304, and 718.305, 20 C.F.R. §§718.303, 718.304, 718.305, but does not refer to the survivors' presumption provided by Section 411(c)(5), 30 U.S.C. §921(c)(5), which is implemented at Section 718.306, 20 C.F.R. §718.306. Section 718.204, 20 C.F.R. §718.204, provides means by which total disability due to pneumoconiosis at time of death may be established, including the presumption provided by Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented at 20 C.F.R. §718.305.

In construing regulatory provisions concerning the establishing of elements of entitlement based solely on lay testimony in survivors' claims, various United States Courts of Appeals have relied on the statutory mandate that all relevant evidence be considered in the adjudication of entitlement under the Act, 30 U.S.C. §923(b), to

interpret such regulatory provisions in a liberal manner. See **Cook v. Director, OWCP**, 901 F.2d 33, 13 BLR 2-427 (4th Cir. 1990)[survivor claimant may establish invocation pursuant to 20 C.F.R. §727.203(a)(5) where other relevant evidence is inadequate to establish invocation pursuant to 20 C.F.R. §727.203(a)(1)-(4) -- evidence here did not include evidence relevant to subsections (a)(1)-(4)]; **Hillibush v. Benefits Review Board**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988)[survivor claimant may rely on lay evidence alone to establish the presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.305(b) if the medical and other relevant evidence is by itself insufficient to establish invocation of the presumption]; **Koppenhaver v. Director, OWCP**, 864 F.2d 287, 289, 12 BLR 2-103, 2-107 (3d Cir. 1988), *vacating* 11 BLR 1-51 (1988)(en banc recon.)(survivor claimant may establish entitlement to the presumption provided by 20 C.F.R. §727.203(a)(5) where the available medical evidence is insufficient to establish total disability or the lack thereof); **Collins v. Old Ben Coal Co.**, 861 F.2d 481 (7th Cir. 1988)[affidavits must be considered under 20 C.F.R. §727.203(a)(5), and may alone be adequate to establish invocation thereunder where the other relevant evidence is insufficient to establish invocation under 20 C.F.R. §727.203(a)(1)-(4)]; **Coleman v. Director, OWCP**, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987)[access to 20 C.F.R. §727.203(a)(5) barred by medical evidence establishing the absence of lung disease]; **Dempsey v. Director, OWCP**, 811 F.2d 1154, 9 BLR 2-226 (7th Cir. 1987)[survivor claimant may rely on lay evidence under 20 C.F.R. §727.203(a)(5) to establish invocation where the medical evidence of record is insufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(1)-(4)].

In **Pekala v. Director, OWCP**, 13 BLR 1-1 (1989), a case arising within the Third Circuit, the Board followed the holding in **Coleman**, *supra*, in applying **Hillibush**, *supra*, as **Coleman** had been cited with approval by the **Hillibush** Court. For other digests concerning 20 C.F.R. §727.203(a)(5), see Part IX.A.1.e.; for digests concerning 20 C.F.R. §718.305, see Part VII.B.4.b.

The regulatory provisions governing the processing of claims, including survivors' claims, are found at 20 C.F.R. Part 725. Sections of particular relevance to survivors' claims include Sections 725.201, 725.212 - 725.233, which concern who may qualify as eligible survivors under the Black Lung Act, the conditions and duration of entitlement. Section 422(1) of the Act, 30 U.S.C. §932(1), relieves survivors of the requirement of filing a new claim in certain cases involving awards to decedent miners on claims filed prior to January 1, 1982. See **Smith v. Camco Mining Inc.**, 13 BLR 1-17 (1989). The Board has held that Section 422(1) permits a survivor claimant to benefit from the miner's filing date where the miner's claim was filed before January 1, 1982, and, although not receiving benefits under a finally adjudicated award, the miner was in payment status, *i.e.*, receiving interim benefits, at the time he died. **Smith**, *supra*. In construing Section 422(1), in a case involving a miner's claim filed prior to January 1, 1982, and in which the miner was receiving benefits at the time of death, the United States Court of Appeals for the Third Circuit held that the survivor claimant was not required to file a separate claim for benefits to be awarded on the basis of death due to

pneumoconiosis and would therefore benefit from the miner's filing date for the purpose of applicable presumptions and substantive regulations. **Pothering v. Parkson Coal Co.**, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988). The Court noted, however, that Section 422(1) did not prohibit the Director, OWCP, from requiring survivors to file certain information, e.g., a notice of the miner's death. In **Marx v. Director, OWCP**, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989), the Third Circuit relied on the Director's concession that the date of filing of the survivor's claim in that case was to be based on the filing of a "Survivor's Notification of Beneficiary Death", which qualified as a written statement of the intention to file a claim under Section 725.305(b). In cases in which a miner dies while receiving benefits under a claim filed after January 1, 1982, however, the survivor claimant must separately establish entitlement to benefits on the basis of death due to pneumoconiosis, on the basis of the regulations and presumptions applicable on the date of the filing of the survivor's claim. **Neeley v. Director, OWCP**, 11 BLR 1-85 (1988).

A survivor's claim and the deceased miner's claim are separate claims and do not merge under 20 C.F.R. §725.309(c). **The Earl Patton Coal Co. v. Patton**, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988); see Part III.F.2. of the Desk Book; see also **Johnson v. Eastern Associated Coal Corp.**, 8 BLR 1-248 (1985); but see **Kubachka v. Windsor Power House Coal Co.**, 11 BLR 1-171, 1-173 n.1 (1988). Under Section 725.309(c) and (d), if an earlier survivor's claim is finally denied, a subsequent survivor's claim must also be denied based on the prior denial unless claimant's subsequent claim is considered a petition for modification, thereby satisfying the requirements of 20 C.F.R. §725.310. **Mack v. Matoaka Kitchikan Fuel**, 12 BLR 1-197 (1989).

Although not yet squarely addressed by the Board in a published decision, unpublished Board decisions issued in the aftermath of **Lukman v. Director, OWCP**, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), *rev'g* 11 BLR 1-71 (1988), 10 BLR 1-56 (1987), and **Jordan v. Director, OWCP**, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989) indicate that the **Mack** holding, which is based on a strict application of the principle of *res judicata* to duplicate survivors' claims, may be reconsidered by the Board. See generally **Dotson v. Director, OWCP**, 14 BLR 1-10 (1990)(en banc order). The principle of collateral estoppel will not preclude a survivor claimant from relitigating an issue already determined in a deceased miner's claim (e.g., whether the miner suffered from a totally disabling respiratory impairment) where the standard of proof pursuant to 20 C.F.R. Part 727 applicable to the deceased miner's claim is distinct from the standard of proof pursuant to 20 C.F.R. Part 718 applicable to the survivor's claim. **Alexander v. Island Creek Coal Co.**, 12 BLR 1-44 (1988), *aff'd sub nom. Island Creek Coal Co.*, No. 88-3863 (6th Cir. Aug. 29, 1989) (unpub.).

In a survivor's claim, the doctrine of collateral estoppel is not applicable to preclude employer or the Director from relitigating the issue of occupational pneumoconiosis previously established in the living miner's claim if benefits were ultimately denied in the miner's claim, because the issue was not necessary to the

judgment. Additionally, where a survivor's claim includes autopsy evidence which was not available and could not have been adduced at the time of adjudication of the miner's claim, an exception to application of the doctrine of collateral estoppel may be warranted to allow relitigation of the issue of occupational pneumoconiosis. **Hughes v. Clinchfield Coal Co.**, 21 BLR 1-134 (1999)(*en banc*).

## CASE LISTINGS

### DIGESTS

In cases in which a miner dies while receiving benefits under a claim filed after January 1, 1982, however, the survivor claimant must separately establish entitlement to benefits on the basis of death due to pneumoconiosis, on the basis of the regulations and presumptions applicable on the date of the filing of the survivor's claim. **Neeley v. Director, OWCP**, 11 BLR 1-85 (1988).

A survivor's claim and the deceased miner's claim are separate claims and do not merge under 20 C.F.R. §725.309(c). **The Earl Patton Coal Co. v. Patton**, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988); see also **Johnson v. Eastern Associated Coal Corp.**, 8 BLR 1-248 (1985); but see **Kubachka v. Windsor Power House Coal Co.**, 11 BLR 1-171, 1-173 n.1 (1988).

Board held that, under Section 402(g) of the Act, 30 U.S.C. §902(g), illegitimate children may qualify as eligible survivors. **Hawkins v. Peabody Coal Co.**, 11 BLR 1-157, 1-160 (1988), *aff'd on other grds*, No. 89-3336 (6th Cir. Jan. 2, 1990)(unpub.).

The principle of collateral estoppel will not preclude a survivor claimant from relitigating an issue already determined in a deceased miner's claim (e.g., whether the miner suffered from a totally disabling respiratory impairment) where the standard of proof pursuant to 20 C.F.R. Part 727 applicable to the deceased miner's claim is distinct from the standard of proof pursuant to 20 C.F.R. Part 718 applicable to the survivor's claim. **Alexander v. Island Creek Coal Co.**, 12 BLR 1-44 (1988), *aff'd sub nom. Island Creek Coal Co.*, No. 88-3863 (6th Cir. Aug. 29, 1989)(unpub.).

In construing Section 422(1), in a case involving a miner's claim filed prior to January 1, 1982, and in which the miner was receiving benefits at the time of death, the Third Circuit held that the survivor claimant was not required to file a separate claim for benefits to be awarded on the basis of death due to pneumoconiosis and would therefore benefit from the miner's filing date for the purpose of applicable presumptions and substantive regulations. The Court noted, however, that Section 422(1) did not prohibit the Director, OWCP, from requiring survivors to file certain information, e.g., a notice of the miner's death. **Pothering v. Parkson Coal Co.**, 861 F.2d 1321, 12 BLR 2-

60 (3d Cir. 1988).

Under Section 725.309(c) and (d), if an earlier survivor's claim is finally denied, a subsequent survivor's claim must also be denied based on the prior denial unless claimant's subsequent claim is considered a petition for modification, thereby satisfying the requirements of 20 C.F.R. §725.310. **Mack v. Matoaka Kitchekan Fuel**, 12 BLR 1-197 (1989).

The Third Circuit relied on the Director's concession that the date of filing of the survivor's claim in that case was to be based on the filing of a "Survivor's Notification of Beneficiary Death", which qualified as a written statement of the intention to file a claim under Section 725.305(b). **Marx v. Director, OWCP**, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989).

In a case arising within the Third Circuit, the Board followed the holding in **Coleman v. Director, OWCP**, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987)[access to 20 C.F.R. §727.203(a)(5) barred by medical evidence establishing the absence of lung disease], in applying **Hillibush v. Benefits Review Board**, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988)[survivor claimant may rely on lay evidence alone to establish the presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.305(b) if the medical and other relevant evidence is by itself insufficient to establish invocation of the presumption] as **Coleman** had been cited with approval by the **Hillibush** Court. **Pekala v. Director, OWCP**, 13 BLR 1-1 (1989).

Section 422(1) of the Act, 30 U.S.C. §932(1), relieves survivors of the requirement of filing a new claim in certain cases involving awards to decedent miners on claims filed prior to January 1, 1982. The Board has held that Section 422(1) permits a survivor claimant to benefit from the miner's filing date where the miner's claim was filed before January 1, 1982, and, although not receiving benefits under a finally adjudicated award, the miner was in payment status, *i.e.*, receiving interim benefits, at the time he died. **Smith v. Camco Mining Inc.**, 13 BLR 1-17 (1989).

A survivor may receive benefits under a *miner's* claim from the date of onset of total disability until the month before the miner's death, **Combs v. Director, OWCP**, 8 BLR 1-88 (1985), but survivors' benefits, *per se*, are payable beginning with the month of the miner's death, **Mihalek v. Director, OWCP**, 9 BLR 1-157 (1986); see 20 C.F.R. §§725.503; 725.545. **Edwards v. Director, OWCP**, 16 BLR 1-43 (1990); **Smith v. Camco Mining Inc.**, 13 BLR 1-17, 1-19 n.4 (1989).

In a survivor's claim, the doctrine of collateral estoppel is not applicable to preclude employer or the Director from relitigating the issue of occupational pneumoconiosis previously established in the living miner's claim if benefits were ultimately denied in the miner's claim, because the issue was not necessary to the judgment. Additionally, where a survivor's claim includes autopsy evidence which was not available and could

not have been adduced at the time of adjudication of the miner's claim, an exception to application of the doctrine of collateral estoppel may be warranted to allow relitigation of the issue of occupational pneumoconiosis. **Hughes v. Clinchfield Coal Co.**, 21 BLR 1-134 (1999)(*en banc*).

The Seventh Circuit affirmed the administrative law judge's award of survivor's benefits under 20 C.F.R. §718.205(c). The Seventh Circuit determined that the correct application of nonmutual collateral estoppel precluded employer from arguing that the miner did not have pneumoconiosis, a fact established by the award of benefits in the miner's claim. Regarding the cause of the miner's death, the Seventh Circuit rejected employer's argument that the administrative law judge improperly relied on the opinion of Dr. Ridge, the miner's physician. Dr. Ridge was a general practitioner who treated neither the miner's cancer nor his pulmonary disease and referred the miner to specialists for both. Dr. Ridge opined that the acceleration seen in the miner's demise due to cancer was attributable to his weakened state which was due to pneumoconiosis. The court cited the Department of Labor's observation, when promulgating the regulation at 20 C.F.R. §718.205(c)(5), that persons weakened by pneumoconiosis "may expire quicker from other diseases," see 65 Fed.Reg. 79,920, 79,950 (Dec. 20, 2000), and referred to Dr. Ridge's advantage of observing whether a pulmonary problem "sapped" the miner's ability to withstand the effects of the cancer. One judge concurred in the opinion, declining to join the portions of the decision wherein the court discussed hypothetical ways in which employer might have prevailed. **Zeigler Coal Co. v. Director, OWCP [Villain]**, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002).

In a survivor's claim where no autopsy was performed and entitlement to benefits was established in the living miner's claim, the Board upheld the administrative law judge's determination that the doctrine of collateral estoppel was not applicable to preclude litigation of the issue of the existence of pneumoconiosis, because the change in law enunciated by the Fourth Circuit in **Island Creek Coal Co. v. Compton**, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), affected the fact-finder's weighing of the evidence, thus the issue was not identical to the one previously litigated. **Collins v. Pond Creek Mining Co.**, BRB No. 02-0329 BLA (Jan. 28, 2003).

Where the previous finding of pneumoconiosis in the miner's lifetime claim was based on the true doubt rule, which is no longer valid, the doctrine of collateral estoppel does not apply to preclude litigation of the issue of pneumoconiosis in the survivor's claim because the allocation of the burden of proof differs in the two proceedings. Additionally, where the previous finding of pneumoconiosis was based solely on the x-ray evidence in the miner's claim, whereas the subsequent holding in **Island Creek Coal Co. v. Compton**, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000), requires that the different types of evidence submitted pursuant to 20 C.F.R. §718.202(a)(1)-(4) be weighed together to determine whether a preponderance of all the evidence establishes the existence of pneumoconiosis, collateral estoppel does not

apply to preclude litigation of the issue of pneumoconiosis in the survivor's claim because the issue of the existence of pneumoconiosis is not identical to the one previously litigated in the miner's claim. **Sturgill v. Old Ben Coal Co.**, BRB No. 02-0874 (Aug. 28, 2003).

The Sixth Circuit reversed the Board's Decision and Order in which the Board affirmed the administrative law judge's award of survivor's benefits. The Sixth Circuit held that the Board erred in affirming the administrative law judge's reliance on the opinion of the miner's treating physician to find that claimant established death due to pneumoconiosis under 20 C.F.R. §718.205(c), because the administrative law judge improperly gave preference to the treating physician's opinion based on his status. The Sixth Circuit determined that the miner's treating physician's opinion, that pneumoconiosis hastened the miner's demise because the miner's lack of oxygen and retention of carbon dioxide had an effect on all parts of his body, "suffers from several serious problems that render his opinion an inadequate basis for the ALJ's conclusion," slip op. at 12, and "[even] if [the opinion] is an accurate medical conclusion, it is legally inadequate," slip op. at 13. The Sixth Circuit indicated that under the treating physician's interpretation, pneumoconiosis would virtually always "hasten' death at least some minimal degree. The Sixth Circuit held, "Legal pneumoconiosis only hastens death if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Id.* The Sixth Circuit thus concluded that the miner's treating physician's opinion is conclusory and inadequate. The Sixth Circuit also reviewed its cases and those of other circuit courts of appeal, as well as the regulation at 20 C.F.R. §718.104(d). The Sixth Circuit concluded that there is no rule requiring deference to the opinion of a treating physician in black lung claims, and indicated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." Slip op. at 9. **Eastover Mining Co. v. Williams**, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

The Board affirmed the administrative law judge's denial of a duplicate survivor's claim pursuant to Section 725.309 as claimant failed to demonstrate that one of the applicable conditions of entitlement at Section 725.212, including at least one condition unrelated to the miner's physical condition at the time of his death, had changed. **Boden v. G.M. & W. Coal Co., Inc.**, 23 BLR 1-38 (2004).

In a Part 718 survivor's claim where no autopsy was performed and entitlement to benefits was established in the living miner's claim, the doctrine of non-mutual offensive collateral estoppel may be available to preclude litigation of the issue of the existence of the pneumoconiosis. However, even where the criteria for application of the doctrine are met, collateral estoppel may not be invoked where the circumstances of the case justify an exception to the general issue preclusion principles. **Polly v. D & K Coal Co.**, BLR , BRB No. 04-0737 BLA (May 27, 2005).

07/05