

PART X

SURVIVORS' CLAIMS

H. SURVIVORS' CLAIMS UNDER 20 C.F.R. §§727.203 AND 410.490

The interim presumption provided for in 20 C.F.R. §727.203(a) is available to survivors of miners who engaged in coal mine employment for at least ten years where one of the medical criteria of Section 727.203(a)(1)-(4) is met. See Part IX.A.1. of the Desk Book. In addition, subsection (a)(5) provides for invocation of the presumption in the case of a deceased miner based on lay evidence demonstrating the presence of a totally disabling respiratory or pulmonary impairment where no medical evidence is available. See Part IX.A.1.e. of the Desk Book.

Invocation of the interim presumption in a survivor's claim gives rise to two presumptions, *i.e.*, that the miner was totally disabled due to pneumoconiosis at the time of death and that the miner's death was due to pneumoconiosis. 20 C.F.R. §727.203(a); **Jennings v. Brown Badgett, Inc.**, 9 BLR 1-94 (1986); **Connors v. Director, OWCP**, 7 BLR 1-482 (1984); **Husk v. Sewell Coal Co.**, 4 BLR 1-7 (1981). Once the presumption is invoked, the party opposing entitlement must rebut both of these presumptions to defeat entitlement. See **Jennings, supra**. Section 727.205(a), 20 C.F.R. §727.205(a), precludes reliance on coal mine employment at the time of death as conclusive evidence that the miner was not totally disabled. The administrative law judge must also determine that there were no changed circumstances of employment indicative of reduced ability to perform coal mine work. 20 C.F.R. §727.205(b). Additional digests concerning invocation and rebuttal of the interim presumption are found at Part IX.A. of the Desk Book.

A claim properly adjudicated under Part 727 is not subject to further adjudication under Section 410.490. **Pauley v. Bethenergy Mines, Inc.**, 111 S.Ct. 2524, 15 BLR 2-155 (1991); see also **Whiteman v. Boyle Land and Fuel Co.**, 15 BLR 1-11 (1991)(en banc); **Phipps v. Director, OWCP**, 17 BLR 1-39 (1992)(en banc)(Smith, J., concurring; McGranery, J., concurring and dissenting). For additional information regarding Section 410.490, refer to Part IX.B. of the Desk Book.

CASE LISTINGS

[subsection (b)(3) established by showing neither miner's death nor disability arose out of coal mine employment] **Husk v. Sewell Coal Co.**, 4 BLR 1-7 (1981)(Kalaris, J.,

concurring; Miller, J., concurring and dissenting).

[interrelationship of rebuttal subsections in survivors' claims discussed] **Napier v. Bethlehem Steel Corp.**, 5 BLR 1-1 (1982).

[subsection (b)(1) rebuttal based on miner's continued employment, affidavits of coworkers of miner's undiminished work capacity] **Mills v. Itmann Coal Co.**, 5 BLR 1-96 (1982).

[adjudicator's finding miner not totally disabled at time of death under subsection (b)(1) based on evidence he worked regularly until death and performed usual tasks at mines] **Bozek v. United States Steel Corp.**, 6 BLR 1-73 (1983).

[rebuttal affirmed where claimant did not contest finding death was not due to pneumoconiosis; uncontradicted medical evidence established that, assuming miner had pneumoconiosis, no disability resulted] **Bostic v. South Hollow Coal Co.**, 6 BLR 1-487 (1983).

[rebuttal affirmed in survivor's claim where finding that miner not totally disabled prior to death not contested; finding that miner's death due to carbon monoxide poisoning supported by substantial evidence] **Bucklen v. Florence Mining Co.**, 6 BLR 1-1185 (1984).

[adjudicator cannot find rebuttal established solely because miner worked at time of death, see 20 C.F.R. §727.205; must proffer evidence relevant to miner's ability to perform work at time of death] **Martin v. Regina Fuel Corp.**, 6 BLR 1-1206 (1984).

[adjudicator rationally concluded medical opinion regarding etiology of respiratory impairment inadequate to establish rebuttal at Section 727.203(b)(3); Board did not reach issue of cause of miner's death] **Vivian v. Director, OWCP**, 7 BLR 1-360 (1984).

[adjudicator properly considered other evidence, including medical reports of four non-examining physicians finding pneumoconiosis played no role in miner's death, over autopsy prosector who found emphysema and pneumoconiosis placed burden on miner's cardio-pulmonary system at Section 727.203(a), to find miner not totally disabled prior to death; reliance on intention to return to work not "conclusive"] **Connors v. Director, OWCP**, 7 BLR 1-482 (1984).

[adjudicator properly found presumption rebutted; miner killed by gunshot wound; medical and lay evidence establish no disability prior to death in addition to miner's continued employment prior to death] **Smith v. Island Creek Coal Co.**, 7 BLR 1-734 (1985).

[adjudicator's rebuttal finding affirmed where death certificate, autopsy, and pathologist's testimony establishes miner's sole cause of death as bronchopneumonia, condition unrelated to coal mine employment] **Ham v. Bethlehem Mines Corp.**, 8 BLR 1-3 (1985).

[subsection (b)(1) rebuttal based on miner's employment at time of death, adequate work performance, voluntary overtime, rarely missed work due to illness, despite autopsy evidence of pneumoconiosis (not relevant to subsection (b)(1)) and existence of many dependents; mere presence of dependents does not establish miner able to work through sheer determination, see 20 C.F.R. §727.205] **Spadafore v. Director, OWCP**, 8 BLR 1-82 (1985).

[miner's continued coal mine employment until two days prior to death may not be considered conclusive evidence miner not totally disabled if credible evidence of changed circumstances of miner's employment indicates reduced ability to perform job] **George v. Williamson Shaft Contracting Co.**, 8 BLR 1-91 (1985).

[adjudicator properly found no rebuttal by showing miner not totally disabled based on lay testimony miner had taken easier job, unable to work much longer, and detailing employment circumstances; finding rebuttal not established by showing miner not totally disabled due to pneumoconiosis at time of death harmless error] **Peskie v. United States Steel Corp.**, 8 BLR 1-126 (1985).

DIGESTS

The Sixth Circuit held that a deceased miner's employment in a mine at the time of death shall not be conclusive evidence that the miner was not totally disabled. See 20 C.F.R. §727.205. There is no statutory authority for imposing upon the widow of a deceased miner the burden of proving changed circumstances of employment. **Farmer v. Rogers**, 839 F.2d 269, 11 BLR 2-53 (6th Cir. 1988).

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