SECTION 411(c)(4)—REBUTTABLE PRESUMPTION OF TOTAL DISABILITY DUE TO PNEUMOCONIOSIS OR DEATH DUE TO PNEUMOCONIOSIS

I. Introduction

As amended in 1972, the Act provided a rebuttable presumption of total disability or death due to pneumoconiosis if a claimant could establish at least fifteen years of underground or substantially similar coal mine employment, and the existence of a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (1976). In 1976, the Supreme Court upheld the constitutionality of the Section 411(c)(4) presumption. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 30-31, 3 BLR 2-36, 2-54 (1976). The Section 411(c)(4) presumption was in effect until the 1981 amendments to the Act eliminated it for claims filed on or after January 1, 1982. Pub. L. No. 97-119, §202(b)(1), 95 Stat. 1643, 1644 (1981).

Effective March 23, 2010, as part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, §1556(a),(c), Congress amended the Act to reinstate the Section 411(c)(4) presumption for claims filed after January 1, 2005, that were pending on or after March 23, 2010. As amended, Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis or that the miner's death was due to pneumoconiosis, if the miner had at least fifteen years of underground coal mine employment, or "employment in a coal mine other than an underground mine" in conditions "substantially similar to conditions in an underground mine," and the evidence establishes the existence of a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4). Section 411(c)(4) further provides that "the Secretary" may rebut the presumption only by establishing 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, employment in a coal mine." 30 U.S.C. §921(c)(4).

Cases that were pending on appeal when Section 411(c)(4) was reinstated, and which were affected by the provision, were remanded with instructions that the record be reopened for the parties to submit evidence in response to the change in law. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 851, 24 BLR 2-385, 2-401 (7th Cir. 2011); *Styka v. Jeddo-Highland Coal Co.*, 25 BLR 1-61, 1-67 (2012).

On September 25, 2013, the Department of Labor revised the regulations to implement the reinstated Section 411(c)(4) presumption. The implementing regulation became effective on October 25, 2013, and is codified at 20 C.F.R. §718.305 (2014).

Section 718.305 sets forth how a claimant may invoke the presumption, 20 C.F.R. §718.305(b), specifies the facts presumed in miners' and survivors' claims, 20 C.F.R.

§718.305(c), and sets forth the standards by which the party opposing entitlement may rebut the presumption in miners' and survivors' claims. 20 C.F.R. §718.305(d).

II. Challenges to Amended Section 411(c)(4)

All challenges to the application of amended Section 411(c)(4) to claims that were filed after January 1, 2005 and were pending on or after March 23, 2010, have been rejected by the Board and the United States Courts of Appeals:

A. Constitutionality of Amended Section 411(c)(4)

Constitutional challenges to the application of amended Section 411(c)(4) have been unsuccessful.

The retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005, and pending on or after March 23, 2010, does not violate an employer's due process rights, nor is it an unconstitutional taking of private property. *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849-51, 24 BLR 2-385, 2-397-401 (7th Cir. 2011); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-85 (2012); *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-5 (2011), *aff'd on other grounds*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013)(Niemeyer, J., concurring).

The Fourth Circuit held that the application of Section 411(c)(4) to award benefits in a miner's subsequent claim did not violate constitutional principles of the separation of powers by reopening the final decision of the Article III court that had affirmed the denial of the miner's prior claim. Specifically, the court held that the administrative law judge did not reopen either the denial of the first claim or the court's affirmance of that decision; he accepted the prior denial as final and correct, and "simply considered [the miner's] second claim based on new evidence under the law in effect at the time of the second claim." *E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 515, BLR (4th Cir. 2015).

B. Absence of Implementing Regulations

The application of Section 411(c)(4) was challenged as premature, because the former implementing regulation, 20 C.F.R. §718.305, did not apply to claims filed on or after January 1, 1982. 20 C.F.R. §718.305(e) (1983). Those challenges were rejected on the basis that the 2010 amendments to the Act were self-executing, and could be applied before the Department of Labor issued implementing regulations. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062-63, 25 BLR 2-453, 2-474-75 (6th Cir. 2013); *see also Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011) and *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010)(rejecting identical challenge to the application of amended Section 932(*l*), 30 U.S.C. §932(*l*)).

The Department promulgated implementing regulations effective October 25, 2013, thereby removing the lack of regulations as an issue. 20 C.F.R. §718.305(a)(2014).

C. Application of Section 411(c)(4) in Subsequent Claims

The application of Section 411(c)(4) has been challenged in miners' subsequent claims, on the basis that the miner must affirmatively establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The Fourth and Seventh Circuits have specifically rejected that argument, holding that the Section 411(c)(4) presumption can be used to establish an element of entitlement for purposes of demonstrating a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *E. Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-14, BLR (4th Cir. 2015); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794-95, 25 BLR 2-285, 2-292-93 (7th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 731, 25 BLR 2-405, 2-420 (7th Cir. 2013).

In a miner's subsequent claim, the Board held that the administrative law judge erred in placing the burden on claimant to affirmatively establish the existence of pneumoconiosis in order to demonstrate a change in an applicable condition of entitlement, before determining whether claimant could invoke the presumption of pneumoconiosis under amended Section 411(c)(4). *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-157 n.11 (2015)(Boggs, J., concurring & dissenting). Specifically, the Board held that invocation of the Section 411(c)(4) presumption, based on a finding that the new evidence established total disability, "would also establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), [and] the burden would shift to employer to disprove the existence of pneumoconiosis on rebuttal at 20 C.F.R. §718.305(d)(1)(i) . . . ." *Id*. at 1-158 n.11.

However, in a survivor's subsequent claim, the amended Section 411(c)(4) presumption of death due to pneumoconiosis is not available if the conditions of entitlement that claimant failed to establish in the initial survivor's claim related solely to the miner's physical condition at the time of death. *See Moser v. Director, OWCP*, 25 BLR 1-97, 1-101 & n.4 (2013); 20 C.F.R. §725.309(c)(4).

D. Challenges to the Application of the Section 411(c)(4) Rebuttal Limitations to Coal Mine Operators

As enacted in 1972, Section 411(c)(4) provided that "the Secretary" may rebut the presumption only by establishing that the miner did not have pneumoconiosis, or that the miner's impairment did not arise out of, or in connection with, coal mine employment. In 1976, in response to a constitutional challenge to those rebuttal limitations brought by coal mine operators, the Supreme Court held that the statutory rebuttal limitations, by

their terms, are inapplicable to coal mine operators. Therefore, the Court declined to address the operators' constitutional challenge to the rebuttal limitations in the originally-enacted Section 411(c)(4). *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 34-37, 3 BLR 2-36, 2-57-58 (1976).

Amended Section 411(c)(4) retains the language specifying only how "the Secretary" may rebut the presumption. Citing *Usery*, coal mine operators argued that the Section 411(c)(4) limitations on the available rebuttal methods could not be applied to them, absent an implementing regulation. The Board rejected that argument. *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011).

Thereafter, the Fourth, Sixth, and Tenth Circuits declined to address the issue, holding that the administrative law judge in each case did not, in fact, restrict the coal mine operator's rebuttal methods. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 555-56, 25 BLR 2-339, 2-347-50 (4th Cir. 2013)(Niemeyer, J., concurring); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1061 n.4, 25 BLR 2-453, 2-472 n.4 (6th Cir. 2013); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1347-48, 25 BLR 2-549, 2-570-72 (10th Cir. 2014).

In a companion case issued on the same day as *Ramage*, the Sixth Circuit held that the administrative law judge did not err in applying the Section 411(c)(4) rebuttal standards to a coal mine operator, because the two rebuttal methods set forth in the statute encompass the disease, disease causation, and disability causation elements that are presumed under Section 411(c)(4). *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069-71, 25 BLR 2-431, 2-443-45 (6th Cir. 2013).

Effective October 25, 2013, the Department promulgated revised Section 718.305(d), setting forth rebuttal standards derived from Section 411(c)(4) that apply to all parties opposing entitlement. 20 C.F.R. §718.305(d)(2014). The Department explained that applying rebuttal standards to coal mine operators was supported by the 1978 amendment to the Act, which broadened the definition of pneumoconiosis after *Usery* was decided:

> The 1978 amendments to the BLBA expanded the definition of "pneumoconiosis" to include what is now known as "legal pneumoconiosis," *i.e.*, any "chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This amendment rendered proof that a miner's disability resulted from a lung disease caused by coal dust exposure that was not pneumoconiosis no longer a valid method of rebuttal because every disabling lung disease caused by coal dust exposure is legal pneumoconiosis. Thus, the scenario motivating *Usery's* discussion of the rebuttal-limiting sentence [in Section 411(c)(4)] no longer exists: The only ways that any liable party—whether a mine operator or the government—can rebut the 15-year presumption are the two set forth in the presumption,

> which encompass the disease, disease causation, and disability-causation entitlement elements . . . .
>
> [T]here simply are no other facts presumed under the Section 411(c)(4) presumption that a coal mine operator could rebut. Thus, the Department believes that applying the §718.305(d) rebuttal standards to all parties opposing entitlement . . . will prove more helpful to the regulated public by informing it of the ways it can rebut the presumption.

78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013). For more detail on the regulatory rebuttal standards, see Section IV, below, on establishing rebuttal.

Digests

The Sixth circuit, citing *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013), held that the administrative law judge did not err in applying the Section 411(c)(4) limitations on rebuttal to a coal mine operator, because the two rebuttal methods set forth in the statute encompass the disease, disease causation, and disability causation elements of entitlement that are presumed under Section 411(c)(4). *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667, BLR (6th Cir. 2015).

The Fourth Circuit upheld the validity of 20 C.F.R. §718.305(d), holding that the Department of Labor acted within its regulatory authority to promulgate rebuttal standards that apply to coal mine operators as well as the Secretary. *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143, BLR (4th Cir. 2015). In so holding, the court rejected the argument that *Usery's* holding, that the statutory rebuttal standards apply only to the Secretary, barred the agency from applying the same standards to coal mine operators by means of a regulation. *Bender*, 782 F.3d at 138-40. The court distinguished *Usery*, holding that *Usery* did not address whether Congress left a gap in Section 411(c)(4) that the agency was permitted to fill by regulation, or whether application of the rule-out rebuttal standard to coal mine operators in a regulation would be a reasonable exercise of agency authority in filling such a gap in the statute. *Id*.

III. <u>Establishing Invocation of the Section 411(c)(4) Presumption</u>

A claimant may invoke the presumption by establishing that:

> The miner engaged in coal-mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground coal mines in conditions substantially similar to those in underground mines, or in any combination thereof; and

> The miner or survivor cannot establish entitlement under §718.304 by means of chest x-ray evidence; and
>
> The miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to §718.204 . . . .

20 C.F.R. §718.305(b)(1)(i)-(iii).

"The conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). For ease of discussion, this deskbook section will refer to the coal mine employment that must be established to invoke the Section 411(c)(4) presumption as "qualifying coal mine employment."

The second condition listed for invocation, that the claimant is unable to establish entitlement under 20 C.F.R. §718.304, implements the language of Section 411(c)(4) that "there is a chest [x-ray] submitted in connection with such miner's . . . claim . . . and it is interpreted as negative with respect to the requirements of [the Section 411(c)(3) irrebuttable presumption]. . . ." 30 U.S.C. §921(c)(4). This language "simply means that Section 411(c)(4) may be considered as a means of establishing entitlement if a claimant cannot establish the presence of complicated pneumoconiosis through chest x-ray evidence . . . ." 77 Fed. Reg. 19,456, 19,461 (Mar. 30, 2012). Since 20 C.F.R. §718.305(b)(1)(ii) merely "clarifies that the 15-year presumption is an alternate method for establishing entitlement when a claimant is unable to establish entitlement under §718.304," *Id.*, it will not be further analyzed in this deskbook section.

Section 718.305(b)(1)(iii) provides that the existence of a totally disabling respiratory or pulmonary impairment must be established pursuant to the criteria of 20 C.F.R. §718.204, except that the lay evidence rules at 20 C.F.R. §718.204(d) do not apply. 20 C.F.R. §718.305(b)(1)(iii). Instead, the use of lay evidence to establish total disability in Section 411(c)(4) cases is governed by 20 C.F.R. §718.305(b)(3) and (b)(4), which are discussed below.

A. At Least Fifteen Years of Qualifying Coal Mine Employment

1. Length of Qualifying Coal Mine Employment—Generally

To be counted towards the fifteen years of qualifying coal mine employment, the alleged coal mine employment must qualify as the work of a miner. *See* 30 U.S.C. §902(d); 20 C.F.R. §§718.301, 725.101(a)(19), 725.202. Additionally, the general rules for determining the length of coal mine employment under the Act apply. *See, e.g*, 20 C.F.R. §725.101(a)(32)(defining "year"); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 &

n.1 (1988)(en banc)(holding that an administrative law judge may apply any reasonable method of calculation, and discussing the process for determining length of coal mine employment). For more on these topics, consult the "Definition of a Miner" and "Length of Coal Mine Employment" sections of this deskbook.

It is noted that 20 C.F.R. §725.202(b), which sets forth "special provisions" applicable to coal mine construction workers and transportation workers, includes a "rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of . . . [e]stablishing the applicability of *any of the presumptions described in Section 411(c)* of the Act . . . ." 20 C.F.R. §725.202(b)(1)(ii)(emphasis added).

Digests

The Sixth Circuit held that claimant's sixteen years of employment as a federal mine inspector did not meet the "function" test to qualify as the work of a miner, because federal mine inspectors do not work in, or perform duties integral to, the extraction or preparation of coal. Because claimant's work as a federal mine inspector served a purely regulatory function, it did not qualify as the work of a miner under the Act. Since that period of claimant's work history could not be counted as coal mine employment, it had to be excluded from the computation of claimant's years of qualifying coal mine employment for purposes of amended Section 411(c)(4), leaving claimant with only the five years of qualifying coal mine employment he performed before becoming a federal mine inspector. As claimant lacked the fifteen years needed to invoke the amended Section 411(c)(4) presumption, the court vacated the administrative law judge's award of benefits under Section 411(c)(4), and remanded the case for consideration of whether claimant could establish his entitlement to benefits under 20 C.F.R. Part 718, without the benefit of the presumption. *Navistar, Inc. v. Forester*, 767 F.3d 638, 645-46, 25 BLR 2-659, 2-670-73 (6th Cir. 2014).

In an amended Section 411(c)(4) case, the Board reiterated the general rule that "[i]n determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation." *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). Therefore, the Board rejected claimant's argument that the administrative law judge erred in declining to use an optional calculation method set forth in 20 C.F.R. §725.101(a)(32)(iii) which, claimant argued, would have yielded a greater total length of coal mine employment. *Id*.

The Eighth Circuit affirmed the finding that claimant was not entitled to the benefit of the originally-enacted Section 411(c)(4) presumption. Because claimant's job as a blacksmith did not constitute the work of a miner, that time had to be excluded from the computation of claimant's years of qualifying coal mine employment. *Hon v. Director, OWCP*, 699 F.2d 441, 444-45, 5 BLR 2-43, 2-48 (8th Cir. 1983).

2. Employment in "one or more underground coal mines"

Section 411(c)(4), as implemented by 20 C.F.R. §718.305, requires at least fifteen years of employment either in "underground coal mines," or in "coal mines other than underground coal mines" in substantially similar conditions. Thus, Section 411(c)(4) distinguishes between *types of coal mines*—underground mines or surface mines—rather than a particular worker's location below ground or above ground. All time spent working as a miner in an underground coal mine counts toward the fifteen-year total of qualifying coal mine employment; no further showing is required.

a. A Miner Who Worked Aboveground at an Underground Mine Need Not Establish Substantial Similarity

As noted above, Section 411(c)(4) focuses on the types of coal mines that miners work in, rather than on whether they actually work underground or on the surface. Further, the regulations define the terms "coal mine" and "underground coal mine" to include all property on or above the mine site. *See* 20 C.F.R. §725.101(a)(12),(30).

Therefore, the Board has held that, "where a miner has worked aboveground at an underground coal mine, he or she need not demonstrate that the work conditions there were substantially similar to conditions in an underground mine to have the benefit of the [amended] Section 411(c)(4) presumption." *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-504 (1979)(interpreting the originally-enacted Section 411(c)(4)).

The Sixth Circuit has agreed, holding that, in view of the regulatory definition of an underground coal mine, "no showing of comparability of conditions is necessary of an aboveground employee at an underground coal mine." *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058-59, 25 BLR 2-453, 2-468 (6th Cir. 2013). The Fourth Circuit reached the same conclusion in an unpublished opinion. *Kanawha Coal Co. v. Director, OWCP* [*Kuhn*], No. 12-2566, 539 F. App'x 215, 218 (4th Cir. 2013)(holding that, because claimant's "above ground work . . . was carried out at an underground mine site," it constituted "qualifying employment for purposes of the fifteen-year presumption").

3. Employment in "coal mines other than underground coal mines in conditions substantially similar to those in underground mines"

Section 411(c)(4) of the Act does not define the term "substantially similar." Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant

demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

In promulgating the above definition of "substantially similar," the Department explained that 20 C.F.R. §718.305(b)(2) was intended to codify the Director's long-standing interpretation of "substantially similar," as reflected in the standard set forth by the Seventh Circuit in *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). 78 Fed. Reg. 59,102, 59,104 (Sept. 25, 2013).

In *Leachman*, interpreting the originally-enacted Section 411(c)(4), the Seventh Circuit rejected the argument that surface miners needed to present evidence addressing the conditions in underground mines in order to prove substantial similarity. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988), *rev'g Leachman v. Midland Coal Co.*, 10 BLR 1-79, 1-81 (1987). Instead, the court held that an aboveground miner "is required only to produce sufficient evidence of the surface mining conditions under which he worked." *Id*. It would then be "the function of the [administrative law judge], based on his expertise and . . . appropriate objective factors . . . to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." 855 F.2d at 512-13.

The Seventh Circuit reiterated the *Leachman* standard in later cases, *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-201-02 (7th Cir. 1995); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80, 22 BLR 2-265, 2-275-76 (7th Cir. 2001); and the Board applied *Leachman* in cases outside the Seventh Circuit. *See Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011).

In promulgating the "regularly exposed" standard in 20 C.F.R. §718.305(b)(2), the Department explained that the legislative fact that underground mines are dusty serves as the benchmark for comparison to determine whether substantial similarity has been established:

> [A] fundamental premise underlying the BLBA, as demonstrated by the legislative history, [is] that "underground mines are dusty." *Midland Coal*, 855 F.2d at 512. Given that legislative fact, it is unnecessary for a claimant to prove anything about dust conditions existing at an underground mine for purposes of invoking the 15-year presumption. Instead, the claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine

78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013).

The Department further explained that, once claimant submits evidence of the dust conditions prevailing at the non-underground mine or mines at which the miner worked, the inquiry for the administrative law judge under 20 C.F.R. §718.305(b)(2) will *not* require the administrative law judge to rely upon his or her own expertise, and will *not* require the administrative law judge to compare the surface mining conditions established to those known to prevail underground:

> The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity . . . . This procedure will . . . alleviate one commenter's concern that some administrative law judges may not be knowledgeable about conditions in underground mines.

78 Fed. Reg. at 59,105. In this respect, 20 C.F.R. §718.305(b)(2) departs from the Seventh Circuit's formulation of the "substantial similarity" inquiry in *Leachman*, to the extent *Leachman* held that the administrative law judge would consult his or her own knowledge and experience regarding underground mining conditions, and would then compare the surface conditions to the underground mining conditions known to exist by the administrative law judge. *See Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343 n.16, 25 BLR 2-549, 2-578 n.16 (10th Cir. 2014)(holding that the administrative law judge "erred in basing his opinion on his own personal experience with the testimony of underground miners," but that the error was harmless, because the evidence credited by the administrative law judge "was sufficient to meet the 'regular exposure' standard under the revised regulation").

The Department has further explained that the term "regularly" was added to 20 C.F.R. §718.305(b)(2) "to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden." 78 Fed. Reg. at 59,105. Finally, rejecting comments that urged the adoption of technical comparability standards, the Department stated that "the standard should be one that may be satisfied by lay evidence addressing the individual miner's experiences," and noted that a coal mine operator may submit evidence that a particular miner was not regularly exposed to coal mine dust. *Id*.

<u>A special provision for coal mine construction workers and transportation workers</u>: It is noted that 20 C.F.R. §725.202(b), which sets forth "special provisions" applicable to coal mine construction workers and transportation workers, includes a "rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of . . . [e]stablishing the applicability of *any of the presumptions described in Section 411(c)* of the Act . . . ." 20 C.F.R. §725.202(b)(1)(ii)(emphasis added). The

presumption may be rebutted by evidence demonstrating that "[t]he individual was not regularly exposed to coal mine dust," 20 C.F.R. §725.202(b)(2)(i), or "did not work regularly in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(b)(2)(ii).

Digests—Cases Decided Under 20 C.F.R. §718.305(b)(2)

The Sixth Circuit held that claimant's testimony that when he worked as a blaster at strip mines, "'all the dust was flying around and you w[ere] breathing it,'" and his "descriptions of 'big clouds of smoke' from coal dust," supported the administrative law judge's finding that claimant "was regularly exposed to coal-mine dust." *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664, BLR (6th Cir. 2015). In so holding, the court rejected the employer's arguments that the administrative law judge erred because he ignored that claimant was primarily exposed to rock dust rather than coal dust, and failed to account for time when claimant was not working as a blaster. *Kennard*, 790 F.3d at 665. Additionally, citing its opinion in *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 25 BLR 2-633 (6th Cir. 2014) (see digest, below), the court reiterated its holding that "the new regulation applies to all cases that were pending when it was promulgated—whether before an [administrative law judge], the Benefits Review Board, or our court." *Kennard*, 762 F.3d at 662.

The Sixth Circuit held that, contrary to the employer's contention, the administrative law judge did not need to discuss conditions in underground mines, because under 20 C.F.R. §718.305(b)(2), claimant need only establish that he was regularly exposed to coal mine dust while working at employer's surface mine. The court determined that the new regulation applied retroactively, because it did not change the law, but merely reflected the Director's long-standing interpretation of Section 411(c)(4). *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014). The court held that the administrative law judge permissibly relied on claimant's testimony that the conditions at the strip mine where he operated a bulldozer were very dusty, which was corroborated by other testimony concerning the heavy truck traffic at the mine and the amount of dust that covered claimant's clothes at the end of his shifts. *Sterling*, 762 F.3d at 490, 25 BLR at 2-643-44.

The Tenth Circuit held that 20 C.F.R. §718.305(b)(2) applied retroactively to the case because it did not change the law, but merely codified the Department's long-standing position. Applying that standard, the court affirmed the administrative law judge's finding of substantial similarity, because claimant's testimony about his working conditions as an equipment operator and equipment oiler at a strip mine "provided substantial evidence of regular exposure to coal dust." *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44, 25 BLR 2-549, 2-564-66 (10th Cir. 2014). Rejecting the employer's argument that air filters on its trucks protected claimant

from dust exposure, the court held that substantial evidence supported the administrative law judge's finding that, even when claimant was working inside the trucks, he was regularly exposed to coal dust. *Goodin*, 743 F.3d at 1344 & n.17, 25 BLR at 2-566 & n.17.

Digests—Cases Decided Under Amended Section 411(c)(4) Before 20 C.F.R. §718.305(b)(2) was Promulgated

The Seventh Circuit held that substantial evidence supported the administrative law judge's finding that claimant worked for at least fifteen years in conditions substantially similar to those in underground mines. Summarizing claimant's credited testimony, the court noted that regardless of his job title at the surface mine, claimant often had to perform repairs at the hopper and the tipple, two particularly dusty areas where, claimant testified, he was exposed to coal dust "practically all the time." *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 732-33, 25 BLR 2-405, 2-421-22 (7th Cir. 2013). Holding that the administrative law judge "appropriately analyzed the miner's testimony" to find substantial similarity, the court rejected employer's arguments as essentially a request to reweigh the evidence. *Id*.

In a case where claimant primarily operated bulldozers at a surface mine, the Seventh Circuit held that substantial evidence supported the administrative law judge's finding of substantial similarity. Citing claimant's credited testimony that coal dust from nearby coal cars blew in his face, and that the mine's dust control efforts were ineffective, the court held that the administrative law judge's finding of substantial similarity was "in line with case law concerning outdoor but excessively dusty coal environments." *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 795, 25 BLR 2-285, 2-294 (7th Cir. 2013).

Where the hearing took place before Congress reinstated Section 411(c)(4), and claimant's testimony provided little detail about his dust exposure in his non-underground coal mine employment, the Board held that substantial evidence did not support the administrative law judge's finding of substantial similarity. *Styka v. Jeddo-Highland Coal Co.*, 25 BLR 1-61, 1-67 (2012). The Board remanded the case, in part, for the administrative law judge to allow the parties to submit additional evidence on claimant's work conditions as an oiler, ramp worker, and preparation plant worker at a strip mine. *Id*.

In remanding the case for the administrative law judge to consider whether claimant was entitled to invocation of the reinstated Section 411(c)(4) presumption, the Board instructed the administrative law judge to determine whether claimant worked for at least fifteen years in an underground coal mine, or in a surface mine in substantially similar conditions. *Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011)(citing *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988)).

The Seventh Circuit held that "a surface or 'strip' miner was not required to directly compare his work environment to conditions underground. Rather, the miner could establish similarity simply by proffering 'sufficient evidence of the surface mining conditions in which he worked.'" *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001)(quoting *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988)). The court held that the administrative law judge's finding of substantial similarity was supported by the miner's "unrefuted testimony about his employment conditions" and the extent of his dust exposure in the repair shops, hoist rooms, and preparation plants where he worked. *Summers*, 272 F.3d at 479-80, 22 BLR at 2-275-76. The court noted that the miner described how the tasks he performed exposed him to dust, and how exhaust fans and the wind aggravated his dust exposure. *Summers*, 272 F.3d at 480, 22 BLR at 2-276. Further, the court noted that the miner "gave additional, convincing, and undisputed testimony that his job conditions above and below ground were 'pretty much the same,'" and held that the administrative law judge "was bound to find similarity after receiving such testimony, for one cannot rationally ignore credible, uncontested evidence." *Id*.

> Note: *Summers* did not involve a miner who was, in fact, employed at a surface mine; he worked at the sites of underground mines for his entire career. *Summers*, 272 F.3d at 480, 22 BLR at 2-285 ("Summers . . . labored underground or in buildings located atop subterranean coal mines."). Because the miner worked exclusively at underground mines, he argued that he was not required to demonstrate substantial similarity. Brief of Respondent at 9, (No. 01-1430), 2001 WL 34133731, at *9. However, the court did not address the argument. When the miner's claim had been before the court for the first time (see digest, below), the court expressly declined to address the same argument, which was then made by both claimant and the Director.

The Seventh Circuit held that the administrative law judge properly found that the miner met the criteria to invoke the Section 411(c)(4) presumption, where the miner testified to "more than 40 years' work at the surface mine, in conditions so dusty that he sometimes could not see what was in front of him . . . ." *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1010, 21 BLR 2-113, 2-130 (7th Cir. 1997)(en banc).

The Seventh Circuit held that the administrative law judge properly applied *Leachman* in finding that the conditions at the surface mine where the miner worked were substantially similar to those underground. The miner worked for twelve years in an underground coal mine, and for nine years at a surface mine. The court held that the administrative law judge permissibly relied on the testimony of two witnesses that the miner was exposed to

coal dust as a surface miner, to determine that during at least three of the nine years he worked at the surface mine, the miner was exposed to dust conditions substantially similar to those underground. *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-201-02 (7th Cir. 1995).

The Board affirmed the administrative law judge's finding that half of the miner's forty years of work in a strip mine took place in dust conditions substantially similar to those in an underground mine. The Board held that the administrative law judge "credited the miner's testimony regarding his exposure to coal dust, and permissibly found that at least fifty percent of the miner's work (*i.e.*, twenty years) was in dust conditions that were substantially similar to those of an underground mine." *Spese v. Peabody Coal Co.*, 19 BLR 1-45, 1-54 (1995).
In affirming an administrative law judge's decision that the employer rebutted the Section 411(c)(4) presumption, the Seventh Circuit declined to address the argument of claimant and the Director that a miner who worked aboveground at the site of an underground mine need not demonstrate substantial similarity. *Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 1225, 18 BLR 2-105, 2-112 (7th Cir. 1994)("Whether [the miner] was entitled to the presumption of §921(c)(4) is not a dispositive issue in this case. The [administrative law judge] assumed for the sake of argument that he was, and so must we.").

Deferring to the Director's position, the Seventh Circuit held that the administrative law judge erred in placing on a surface miner the burden of proving what conditions prevail in an underground mine in order to establish that the conditions of his surface mining employment were substantially similar. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988), *rev'g Leachman v. Midland Coal Co.*, 10 BLR 1-79, 1-81 (1987). The court discerned no plain meaning of the term "substantially similar" in the Act, but agreed with the Director that the Act's legislative history indicated that Congress "was aware that underground mines are dusty and that exposure to coal dust causes pneumoconiosis . . . ." *Leachman*, 855 F.2d at 511-12. The court concluded that the legislative history "supports the conclusion that Congress focused specifically on dust conditions in enacting the 'substantial similarity' provision." *Leachman*, 855 F.2d at 512. Therefore, the court held that "a surface miner must only establish that he was exposed to sufficient coal dust in his surface mine employment." *Id*. The court remanded the case for the administrative law judge to apply that standard to claimant's testimony that, at times, he was exposed to extreme dust conditions during his approximately thirty years as a surface miner. In remanding the case, the court stated that the claimant need only "produce sufficient evidence of the surface mining conditions under which he worked. It is then the function of the [administrative law judge], based on his expertise . . . to compare the surface mining conditions established . . . to the conditions known to prevail in underground mines." *Id*.

Note: The "regularly exposed" standard under revised 20 C.F.R. §718.305(b)(2) now obviates any need for the administrative law judge to rely on his or her own expertise, or to compare the surface mining conditions established to those known to prevail in underground mines. *See* 78 Fed. Reg. 58,102, 59,105 (Sept. 25, 2013).

B. Totally Disabling Respiratory or Pulmonary Impairment

Pursuant to 20 C.F.R. §718.305(b)(1)(iii), to invoke the rebuttable presumption, it must be established that the miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204, except that 20 C.F.R. §718.204(d), governing the use of lay evidence, does not apply. Section 718.305 contains its own provisions governing the use of lay testimony to establish total disability. *See* 20 C.F.R. §718.305(b)(3), (b)(4).

1. Establishing Total Disability Using Medical Evidence

Section 718.305(b) cross-references 20 C.F.R. §718.204 as the means for establishing the existence of a totally disabling respiratory or pulmonary impairment. Section 718.204(b)(1) defines "total disability," and 20 C.F.R. §718.204(b)(2) sets forth the medical criteria for establishing total disability using pulmonary function studies, blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, and reasoned medical opinions. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv). For more detail on those topics, consult the "Total Disability" section of this deskbook.

Digests

In affirming an award of benefits under amended Section 411(c)(4), the Sixth Circuit held that, contrary to the employer's argument, the administrative law judge did not base his finding of total disability on a mere count of the qualifying pulmonary function studies. While declining to decide whether to extend its holding in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993) to the analysis of pulmonary function studies, the court held that the administrative law judge conducted a qualitative analysis of the pulmonary function study evidence that was sufficient to satisfy *Woodward*. *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41, 25 BLR 2-675, 2-687-88 (6th Cir. 2014). After summarizing the various factors considered by the administrative law judge when analyzing the pulmonary function studies, the court held that the administrative law judge's finding of total disability was permissible because "he considered more than the mere quantitative differences in the test results" in reaching his conclusion. *Id*. Finally, the court held that, contrary to employer's characterization, the administrative law judge did not predicate his total disability finding on the pulmonary function study evidence, but found that the preponderance of the medical opinion evidence also supported a finding of total disability. *Keathley*, 773 F.3d at 741, 25 BLR at 2-688.

In affirming an award of benefits under amended Section 411(c)(4), the Seventh Circuit held that substantial evidence supported the administrative law judge's finding of total disability under 20 C.F.R. §718.204(b). The court rejected the employer's argument that the administrative law judge committed reversible error in failing to resolve a discrepancy in claimant's reported height when analyzing whether the pulmonary function study evidence was qualifying for total disability. The court noted that the height discrepancy had little impact on the pulmonary function studies, which remained predominantly qualifying for the range of heights listed. Further, the court held that, even if claimant's pulmonary function studies were "muddled," the administrative law judge "could rightly rely on medical opinion [evidence] to establish total disability," since all of the physicians opined that claimant is totally disabled. *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 795, 25 BLR 2-285, 2-294-95 (7th Cir. 2013).

In remanding a case for consideration under amended Section 411(c)(4), the Sixth Circuit vacated the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b), holding that the administrative law judge failed to consider all of the relevant evidence. Specifically, the administrative law judge's total disability finding was based solely on the post-bronchodilator values of a single pulmonary function study. The administrative law judge erred by failing to weigh the non-qualifying, pre-bronchodilator pulmonary function study values, the blood gas study evidence, or the medical opinion evidence. The court instructed the administrative law judge, on remand, to "consider all of the evidence of record on the issue of total disability." *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480-81, 25 BLR 2-1, 2-9-10 (6th Cir. 2011).

In affirming the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption, the Board rejected employer's contention that the administrative law judge failed to weigh all of the contrary probative evidence in finding that claimant established total disability at 20 C.F.R. §718.204(b)(2). The Board noted that the administrative law judge considered the medical evidence under each subsection of 20 C.F.R. §718.204(b)(2)(i)-(iv), and rationally determined that the pulmonary function study evidence and medical opinion evidence established total disability, "by a 'preponderance of the evidence' . . . ." *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-86 (2012). The Board concluded that the administrative law judge's analysis was "consistent with the requirement . . . that the administrative law judge consider all of the contrary probative evidence, prior to finding total disability established." *Id.*

Affirming the administrative law judge's determination that the originally-enacted Section 411(c)(4) presumption was invoked, the Board held that the administrative law judge compared a physician's assessment of the miner's physical limitations with the requirements of the miner's job, and permissibly found that those limitations precluded

the miner from performing his usual coal mine employment. *Spese v. Peabody Coal Co.*, 19 BLR 1-45, 1-53 (1995). Further, the Board held that the administrative law judge properly weighed the contrary probative evidence in finding that claimant established total disability pursuant to 20 C.F.R. §718.204. *Id.*

Where the administrative law judge denied benefits without addressing the applicability of the originally-enacted Section 411(c)(4) presumption, and conflated the issues of total disability, pneumoconiosis, and disability causation, the Tenth Circuit remanded the case for the administrative law judge to apply the proper legal standard. *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81, 13 BLR 2-196, 2-210-12 (10th Cir. 1989). In remanding, the court held that the administrative law judge must consider all evidence relevant to the issue of total disability, including any contrary probative evidence, before finding total disability established under 20 C.F.R. §718.204. *Bosco*, 892 F.2d at 1479, 13 BLR at 2-208. Further, the court emphasized that at the invocation stage of Section 411(c)(4), the proper inquiry is the existence of a totally disabling respiratory or pulmonary impairment, not whether pneumoconiosis is the cause. *Bosco*, 892 F.2d at 1480, 13 BLR at 2-209.

Where the administrative law judge failed to consider all of the relevant evidence in determining whether claimant carried his burden to establish total disability under 20 C.F.R. §718.204, the Board vacated the award of benefits under the originally-enacted Section 411(c)(4), and remanded the case for the administrative law judge to weigh all of the relevant evidence on the issue of total disability, including the contrary probative evidence. *Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85, 1-87 (1987).

The Board rejected the employer's arguments that the originally-enacted Section 411(c)(4) presumption should not have been invoked because claimant did not establish that his totally disabling lung cancer was chronic, or that it arose out of coal mine employment. *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85, 1-86-87 (1987). The Board held that "[u]nder the plain language of Section 411(c)(4) . . . and the implementing regulation . . . claimant is not required to establish that his totally disabling respiratory or pulmonary impairment is chronic." *Tanner*, 10 BLR at 1-86. Further, the Board held, claimant "is not required to establish that the miner's impairment arose out of coal mine employment as a requirement for invocation of the presumption at Section 411(c)(4). The cause of a miner's totally disabling respiratory impairment is not relevant to invocation, but is to be considered on rebuttal." *Tanner*, 10 BLR at 1-86-87 (citation omitted); *see also Snorton v. Zeigler Coal Co.*, 9 BLR 1-106, 1-108 (1986)(holding that claimant need only establish total disability to invoke the Section 411(c)(4) presumption); *but see Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-133-34 (1986)(holding that the administrative law judge erred in failing to consider evidence that claimant's qualifying pulmonary function study results were caused by amyotrophic lateral sclerosis, before

finding the Part 727 interim presumption and the Section 411(c)(4) presumption invoked).

2. Establishing Total Disability Using Lay Evidence

The Act includes lay affidavits and testimony as relevant evidence to be considered on the issue of total disability in living miners' claims and in claims involving a deceased miner, but limits the use of such lay evidence. 30 U.S.C. §923(b). Section 718.305(b)(3) and (b)(4) implement the Act's lay evidence rules in the context of amended Section 411(c)(4).

In a living miner's claim, "a miner's affidavit or testimony, or a spouse's affidavit or testimony, may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(3).

In the case of a deceased miner:

> [A]ffidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

20 C.F.R. §718.305(b)(4).

These lay evidence rules are similar to those contained in 20 C.F.R. §718.204(d). The Department explained that it promulgated separate lay evidence rules for 20 C.F.R. §718.305 because the rules in 20 C.F.R. §718.204(d) "are incomplete for purposes of implementing the Section 411(c)(4) presumption" in survivors' claims. 77 Fed. Reg. 19,456, 19,461-62 (Mar. 30, 2012).

For more detail on this topic, consult the "Total Disability" section of this deskbook.

Digests

In a survivor's claim governed by the law of the Sixth Circuit, the Board applied *Coleman v. Director, OWCP*, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987), and reversed the award of benefits where the finding of total disability under amended Section 411(c)(4) was based on lay testimony, because the record contained medical evidence addressing the issue of total disability. *Sword v. G&E Coal Co.*, 25 BLR 1-127 (2014)(Hall, J., dissenting). The Board noted that *Coleman* held, in a Part 727 survivor's claim under an

analogous lay testimony rule, that a claimant could not rely on lay testimony where the record contained medical evidence on the issue of disability due to a respiratory or pulmonary impairment. *Sword*, 25 BLR at 1-131-32. Because the record in *Sword* contained pulmonary function studies, blood gas studies, and medical opinions addressing respiratory disability, albeit evidence that was discredited by the administrative law judge, the Board held that claimant was precluded from relying on lay testimony to invoke the amended Section 411(c)(4) presumption of death due to pneumoconiosis. *Sword*, 25 BLR at 1-132 (Hall, J. dissenting).

In a survivor's claim under the originally-enacted Section 411(c)(4), involving the lay testimony rule in the former 20 C.F.R. §718.305(b)(1983), the Third Circuit held that claimant "may rely on lay affidavits alone" if the medical evidence is insufficient to establish total disability. *Hillibush v. U.S. Dep't of Labor*, 853 F.2d 197, 205-06, 11 BLR 2-223, 2-232 (3d Cir. 1988).

IV. Establishing Rebuttal of the Section 411(c)(4) Presumption

In a miner's claim, the party opposing entitlement may rebut the presumption by:

> (i) Establishing both that the miner does not, or did not, have:
> (A) Legal pneumoconiosis as defined in §718.201(a)(2); and
> (B) Clinical pneumoconiosis as defined in §718.201(a)(1), arising out of coal mine employment (*see* §718.203); or
> (ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201.

20 C.F.R. §718.305(d)(1)(i),(ii). The rebuttal standard allows the party opposing entitlement to rebut the elements that are presumed in the miner's claim, namely, disease (legal and clinical pneumoconiosis), disease causation (clinical pneumoconiosis arising out of coal mine employment), and disability causation (total disability due to pneumoconiosis).

In a survivor's claim, the party opposing entitlement may rebut the presumption by:

> (i) Establishing both that the miner did not have:
> (A) Legal pneumoconiosis as defined in §718.201(a)(2); and
> (B) Clinical pneumoconiosis as defined in §718.201(a)(1), arising out of coal mine employment (*see* §718.203); or
> (ii) Establishing that no part of the miner's death was caused by pneumoconiosis as defined in §718.201.

20 C.F.R. §718.305(d)(2)(i),(ii). This standard allows the party opposing entitlement to rebut the elements presumed in the survivor's claim, namely, disease (legal and clinical

pneumoconiosis), disease causation (clinical pneumoconiosis arising out of coal mine employment), and death causation (the miner's death was due to pneumoconiosis).

The presumption cannot be rebutted by establishing "the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3). In proposing 20 C.F.R. §718.305(d)(3), the Department explained that, if the presumption is invoked, any obstructive disease from which the miner suffers or suffered is presumed to be due to coal mine dust exposure. Therefore, "[a] medical opinion stating only that the etiology of the miner's lung disease is unknown" would be "insufficient to disprove either the existence of pneumoconiosis or a causal connection between the miner's death or disability and his coal-mine-dust exposure." 77 Fed. Reg. 19,456, 19,463-64 (Mar. 30, 2012). However, the party seeking to rebut the presumption need not establish "the specific cause of a miner's lung disease in order to establish rebuttal; it is sufficient if the party proves, based on credible medical evidence, that the miner's totally disabling respiratory or pulmonary disease is not related to his coal mine employment." 77 Fed. Reg. at 19,464 (citing *Tanner v. Freeman United Coal Co.*, 10 BLR 1–85, 1–87 (1987)).

Digests—Rebuttal of Pneumoconiosis

The Sixth Circuit held that a medical opinion that smoking was the primary cause of claimant's chronic obstructive pulmonary disease (COPD) but that coal dust "likely" contributed, was too equivocal to rebut the presumption of legal pneumoconiosis. The court held that to rebut the presumption, a medical opinion must affirmatively prove the absence of pneumoconiosis. *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, BLR (6th Cir. 2015). Further, the court held that the administrative law judge permissibly discredited another physician's opinion because the physician did not explain why coal dust did not also contribute to claimant's COPD, along with smoking, and relied on his belief that claimant's COPD was responsive to bronchodilators, when evidence in the record indicated that the COPD did not respond to bronchodilators. *Id*. Finally, the administrative law judge permissibly discounted the opinion of another physician who gave no explanation for why coal mine dust exposure was not a factor in claimant's COPD. *Id*.

Where the administrative law judge found that claimant affirmatively established clinical pneumoconiosis, and then determined that claimant invoked the Section 411(c)(4) presumption, the Board held that the administrative law judge erred. The threshold issue was not whether claimant could affirmatively establish pneumoconiosis and a change in an applicable condition under 20 C.F.R. §725.309, but whether he could invoke the Section 411(c)(4) presumption, thereby shifting the burden to employer to establish that claimant does *not* have pneumoconiosis. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-157 n.11 (2015)(Boggs, J., concurring & dissenting). Moreover, the Board held that the administrative law judge erred in basing the pneumoconiosis finding solely on

the analog x-ray evidence, without also considering the digital x-rays and medical opinions of record. *Id*.

The Sixth Circuit held that an administrative law judge permissibly discounted a doctor's opinion that the miner's chronic bronchitis was not legal pneumoconiosis because coal dust-related chronic bronchitis "should dissipate" or "usually ceases" with cessation of dust exposure. The court held that the physician's premise conflicted with 20 C.F.R. §718.201(c), which states that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. *Sunny Ridge Mining Co., Inc. v. Keathley*, 773 F.3d 734, 738, 25 BLR 2-675, 2-685 (6th Cir. 2014). The court rejected the employer's argument that the physician's opinion was consistent with the regulations, since the regulations nowhere state that "chronic bronchitis" is latent and progressive. The court held that the physician was addressing "'chronic bronchitis caused by coal dust exposure,' which fits neatly within the definition of legal pneumoconiosis . . . ." *Keathley*, 773 F.3d at 739, 25 BLR at 2-686.

The Sixth Circuit affirmed the administrative law judge's decision to discredit a physician's opinion, that the miner's reduced FEV1 and FEV1/FVC ratio indicated that his chronic obstructive pulmonary disease (COPD) was not due to coal dust exposure, because the opinion was inconsistent with the position of the Department of Labor, set forth in the preamble to the 2001 regulatory revisions, that coal mine dust exposure may cause COPD, with associated decrements in FEV1/FVC. *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92, 25 BLR 2-633, 645 (6th Cir. 2014). The court further held that the administrative law judge appropriately discredited another physician's opinion that the miner's COPD was not legal pneumoconiosis because he did not have clinical pneumoconiosis. The physician's opinion "conflict[ed] with the statute, which differentiates between legal and clinical pneumoconiosis . . . ." *Sterling*, 762 F.3d at 492, 25 BLR at 2-646. The court declined to address employer's arguments regarding rebuttal of the presumed fact of clinical pneumoconiosis, because substantial evidence supported the administrative law judge's finding that employer did not disprove legal pneumoconiosis. *Sterling*, 762 F.3d at 492, 25 BLR at 2-647.

The Tenth Circuit affirmed the administrative law judge's finding that employer's experts' reliance on statistical probabilities undermined their conclusion that the miner did not have legal pneumoconiosis. Thus, their opinions that "to an overwhelming probability" the miner's chronic obstructive pulmonary disease (COPD) would be due to smoking, not coal dust, and that, because the miner worked at a surface mine he had "statistically less risk" of coal dust contribution to his COPD, were insufficient to establish rebuttal. *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1345-46, 25 BLR 2-549, 2-568 (10th Cir. 2014).

The Sixth Circuit held that the administrative law judge permissibly discounted the rebuttal opinions of employer's experts even though their opinions relied only in part on

premises inconsistent with the preamble, i.e., the physicians relied, in part, on the negative x-ray evidence to conclude that the miner did not have legal pneumoconiosis. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013).

The Seventh Circuit rejected employer's argument that the administrative law judge failed to make adequate findings under the Administrative Procedure Act, when he found that the x-ray evidence and the CT scan evidence was in equipoise as to the existence of pneumoconiosis. After noting that the administrative law judge properly considered the qualifications of the physicians interpreting the x-rays and CT scans, the court observed that there was "nothing inherently wrong" with the administrative law judge's finding that the evidence was equally balanced, such that employer did not carry its rebuttal burden. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 734-35, 25 BLR 2-405, 2-424-25 (7th Cir. 2013). Further, the court rejected employer's arguments that the administrative law judge merely "counted heads" when weighing the medical opinions on the issue of pneumoconiosis, and automatically credited the opinion of the miner's treating physician, without analyzing the factors set forth at 20 C.F.R. §718.104(d). *Id*.

The Fourth Circuit held that, having found clinical pneumoconiosis established by the x-ray evidence, the administrative law judge permissibly discredited the rebuttal opinions of employer's experts who relied on negative x-rays and CT scans. Further, the court affirmed the administrative law judge's finding that employer's experts did not adequately and convincingly explain why the miner's interstitial fibrosis did not constitute legal pneumoconiosis. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554-56, 25 BLR 2-339, 2-350-54 (4th Cir. 2013).

The Seventh Circuit held that a physician's opinion that the miner's chronic obstructive pulmonary disease (COPD) was of "uncertain origin" was insufficient to rebut the amended Section 411(c)(4) presumption, noting that the former version of 20 C.F.R. §718.305(d) specifically provides that the presumption may not be rebutted based on evidence of a "totally disabling obstructive respiratory or pulmonary disease of unknown origin." *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 795-96, 25 BLR 2-285, 2-295 (7th Cir. 2013)(quoting 20 C.F.R. §718.305(d)(1983)). Additionally, the court held, the administrative law judge reasonably discounted another physician's opinion that the miner's COPD was due solely to smoking, because that physician relied on a smoking history that was longer than the history found established by the administrative law judge. *Id*.

In a miner's subsequent claim, the Board vacated the administrative law judge's finding that employer was bound by a stipulation of the existence of pneumoconiosis in claimant's previous claim and was, therefore, precluded from rebutting the amended Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis.

The Board determined that it was not clear from the facts of the case whether employer fairly entered into the stipulation. Additionally, the Board held that "fundamental fairness and due process would require relief from even a formal stipulation made prior to the change in law . . . and the reallocation of the burden of proof to employer on rebuttal under amended Section 411(c)(4), if applicable." *Styka v. Jeddo-Highland Coal Co*., 25 BLR 1-61, 1-64-65 (2012).

The Board held that the administrative law judge permissibly weighed the x-ray and medical opinion evidence in finding that employer failed to establish that claimant does not have pneumoconiosis. *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-5-6 (2011). Specifically, the Board held that the administrative law judge properly analyzed the radiological credentials of the physicians who interpreted claimant's x-rays, and permissibly found that the positive readings for clinical pneumoconiosis outweighed the negative readings. *Id*. Additionally, the Board held that the administrative law judge permissibly found that the medical opinion of a physician diagnosing claimant with both clinical and legal pneumoconiosis was better documented and reasoned than were the contrary opinions submitted by employer. *Owens*, 25 BLR at 1-7-9. Further, the Board held, the administrative law judge permissibly discounted the opinions of two of employer's physicians because she found that they did not adequately explain why claimant's twenty-nine years of coal mine dust exposure did not contribute to his idiopathic pulmonary fibrosis. *Owens*, 25 BLR at 1-9.

The Sixth Circuit held that negative x-ray evidence alone does not rebut the amended Section 411(c)(4) presumption, nor does a finding that the record does not contain a well-reasoned medical opinion diagnosing pneumoconiosis. Rather, to rebut the presumption, employer must make "an affirmative showing that [claimant] does not suffer from pneumoconiosis, or that the disease is not related to coal mine work . . . ." *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80 & n.5, 25 BLR 2-1, 2-8-9 & n.5 (6th Cir. 2011).

Applying the former version of 20 C.F.R. §718.305, the Fourth Circuit held that, as a matter of law, rebuttal of the presumption could not be established by the evidence of record, in a case where the miner was diagnosed with "multiple pulmonary afflictions," including emphysema and bronchitis, for which "no origin . . . [was] established or even suggested. . . ." *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). The court held that legal pneumoconiosis could not be disproved, because the record lacked evidence that the miner's "manifest pulmonary impairments" were not related to or aggravated by coal dust exposure. *Barber*, 43 F.3d at 901, 19 BLR at 2-66-67.

Digests—Rebuttal of Disability Causation

The Sixth Circuit held that the administrative law judge properly required employer to prove that legal pneumoconiosis played no part in causing claimant's disabling respiratory impairment. The court rejected the employer's argument that it should only have to show that pneumoconiosis was not a "substantially contributing cause" of claimant's total disability. *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667, BLR (6th Cir. 2015). Further, the court rejected the employer's argument that the administrative law judge failed to separately consider disability causation, and instead treated that issue as automatically resolved by employer's failure to rebut the presumption of legal pneumoconiosis. The court noted that, in considering the medical opinion evidence relevant to the existence of legal pneumoconiosis, the administrative law judge considered the cause of claimant's impairment. Because the question of what caused claimant's impairment was resolved by the administrative law judge's earlier, careful review of the medical evidence relevant to the existence of legal pneumoconiosis, there was "no need for the [administrative law judge] to analyze the opinions a second time." *Kennard*, 790 F.3d at 668.

The Fourth Circuit held that the administrative law judge permissibly discounted a physician's disability causation rebuttal opinion because the doctor did not diagnose the miner with pneumoconiosis, contrary to the administrative law judge's finding that pneumoconiosis was affirmatively established. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, BLR (4th Cir. 2015). The court emphasized that opinions that erroneously fail to diagnose pneumoconiosis may not be credited on the question of disability causation, unless an administrative law judge identifies specific and persuasive reasons for concluding that a doctor's judgment does not stem from his misdiagnosis. *Id*. Further, even if there are specific, persuasive reasons for crediting a disability causation opinion from a physician who fails to diagnose pneumoconiosis, that opinion may carry only "little weight." *Id*. Moreover, the court held that it is not enough for a doctor to simply state that his disability causation opinion would not change if he assumed that the miner had pneumoconiosis. Rather, the doctor must give a reasoned explanation as to why he would continue to believe that pneumoconiosis was not the cause of a miner's disability, even if pneumoconiosis was present. *Id*.

The Fourth Circuit upheld the validity of 20 C.F.R. §718.305(d)(1)(ii), which provides that, to rebut the presumed fact that the miner is totally disabled due to pneumoconiosis, the party opposing entitlement must affirmatively establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(ii). *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137-43, BLR (4th Cir. 2015). Applying the analysis set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court determined that deference to the Department of Labor's judgment was appropriate, as 20 C.F.R. §718.305(d)(1)(ii) represented a reasonable exercise of agency authority. *Bender*,

782 F.3d 129, 137-43. The court held that the "no part" standard requires "any party, including a coal mine operator, who seeks to rebut the presumption by disproving disability causation, [to] 'rule out' any connection between a miner's pneumoconiosis and his disability." *Bender*, 782 F.3d at 135. The court rejected the employer's argument that it should only have to show that pneumoconiosis was not a "substantially contributing cause" of claimant's total disability, holding that such a standard would effectively "nullify" the presumption, by forcing a claimant to prove the substantial impact of pneumoconiosis on his disability to counter the employer's evidence. *Bender*, 782 F.3d at 141-42. The court then explained "the type of proof that the rule-out standard requires" from the party opposing entitlement:

> To rebut the presumption of disability due to pneumoconiosis, an operator must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. § 718.305(d). Therefore, the rule-out standard is not satisfied by showing that pneumoconiosis was one of several causes of a miner's disability, or that pneumoconiosis was a minor *or even an incidental cause* of the miner's respiratory or pulmonary impairment . . . . Instead, an operator opposing an award of black lung benefits affirmatively must establish that the miner's disability is attributable exclusively to a cause or causes other than pneumoconiosis . . . . Thus, to make the required showing . . . a medical expert testifying in opposition to an award of benefits must consider pneumoconiosis together with all other possible causes, and adequately explain why pneumoconiosis was not at least a partial cause of the miner's respiratory or pulmonary disability.

Bender, 782 F.3d at 143-44 (citations omitted, emphasis added). Applying those principles, the court affirmed the administrative law judge's finding that the opinions submitted by employer were insufficient to establish rebuttal at 20 C.F.R. §718.305(d)(1)(ii), because they identified smoking and lung cancer treatment as the causes of the miner's total respiratory disability, but did not adequately explain why pneumoconiosis was not at least a partial cause. *Bender*, 782 F.3d at 144. Finally, the court declined to disturb the administrative law judge's decision to discount a physician's opinion that the miner's pneumoconiosis was not severe enough to be disabling, holding that the administrative law judge permissibly credited claimant's physician's opinion that "the extent of pneumoconiosis as reflected on an x-ray has no bearing on whether the disease was a cause of a miner's disability." *Bender*, 782 F.3d at 144-45.

The Board upheld the validity of 20 C.F.R. §718.305(d)(1)(ii), holding that, because amended Section 411(c)(4) is silent as to the rebuttal methods available to an employer, it was appropriate for the Department of Labor to promulgate regulations to fill the statutory gap. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 (2015)(Boggs, J., concurring & dissenting). The Board held that, because the Act

requires miners to prove that their disability is caused by pneumoconiosis, 20 C.F.R. §718.305(d)(1)(ii) appropriately provides that a party opposing entitlement may rebut the element of disability causation by proving that the miner's respiratory disability is not due to pneumoconiosis. *Id.* Further, the Board noted that, under 20 C.F.R. §718.305(d)(1)(ii), the party opposing entitlement must establish that "no part" of the miner's respiratory or pulmonary disability is due to pneumoconiosis, a more rigorous standard than the "substantially contributing cause" standard for a miner to establish disability causation under 20 C.F.R. §718.204(c). *Id*. at 1-156. The Board held that "[t]his difference is warranted, because Congress determined that miners with fifteen or more years of qualifying coal mine employment should bear a lesser burden to obtain benefits." *Id*. Agreeing with the Director, the Board held that the administrative law judge applied an incorrect rebuttal standard, as he required employer to rule out *coal dust exposure*, rather than *pneumoconiosis*, as a contributing cause of claimant's disabling respiratory impairment at Section 718.305(d)(1)(ii). *Id.* at 1-158. The Board instructed the administrative law judge that if, on remand, employer could not disprove the existence of clinical and legal pneumoconiosis, it would need to rebut the presumed fact of disability causation by establishing that "no part, not even an insignificant part, of claimant's respiratory or pulmonary disability was caused by either clinical or legal pneumoconiosis." *Id.* at 1-159.

The Tenth Circuit held that the employer was required to "rule out" any connection between the miner's disability and his pneumoconiosis. *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1336-37, 1346, 25 BLR 2-549, 2-555-56, 2-568-70 (10th Cir. 2014). The court held that, having found employer's experts' opinions insufficient to rebut legal pneumoconiosis, the administrative law judge permissibly found the same opinions to be insufficient to rebut the presumed fact of disability causation; a separate analysis was not required. *Goodin*, 743 F.3d at 1346 n.20, 25 BLR at 2-579 n.20. Further the court upheld the administrative law judge's finding that, even if smoking was the cause of the miner's disabling impairment, employer failed to show that coal mine dust exposure did not aggravate or materially worsen the miner's condition. *Goodin*, 743 F.3d at 1346, 25 BLR at 2-569-70.

The Sixth Circuit rejected employer's argument that the administrative law judge applied an improper rebuttal standard in requiring employer to "rule out" coal mine employment as a cause of the miner's disabling impairment. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069-71, 25 BLR 2-431, 2-443-45 (6th Cir. 2013). Further, the court held that the administrative law judge permissibly discounted a doctor's disability causation opinion because the doctor did not diagnose the miner with legal pneumoconiosis, where the presumed fact of legal pneumoconiosis was not rebutted. *Ogle*, 737 F.3d at 1074, 25 BLR at 2-452.

The Sixth Circuit held that the administrative law judge permissibly discounted the disability causation rebuttal opinions of the physicians who did not diagnose legal

pneumoconiosis, contrary to the administrative law judge's finding that legal pneumoconiosis was affirmatively established. The court reasoned that the issues of legal pneumoconiosis and disability causation are closely related, such that the answer to the question of whether a miner had legal pneumoconiosis, also answered the question of whether his disabling impairment was caused by his coal mine employment. Thus, the same reasons for which the administrative law judge discounted employer's experts' opinions that claimant did not suffer from legal pneumoconiosis, also undercut their opinions that claimant's impairment was unrelated to his coal mine employment. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1061-62, 25 BLR 2-453, 473-74 (6th Cir. 2013).

The Seventh Circuit held that the administrative law judge permissibly rejected employer's experts' rebuttal opinions where one physician based his opinion on statistical generalities, and the other physician did not diagnose pneumoconiosis, contrary to the administrative law judge's findings. *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425-26 (7th Cir. 2013)("Having denied that [the miner] suffered from pneumoconiosis, the doctor was, of course, unable to opine on the cause of a disease that he denied the claimant had.").

The Fourth Circuit affirmed the administrative law judge's finding that employer's experts did not adequately and convincingly explain why the miner's interstitial fibrosis, which they identified as the cause of the miner's total disability, did not constitute legal pneumoconiosis. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353-54 (4th Cir. 2013).

Addressing the administrative law judge's findings that employer failed to rebut the presumed fact of disability causation, the Board noted that employer merely repeated its arguments regarding the existence of pneumoconiosis, which the Board had already rejected. As employer made no other challenge, the Board affirmed the finding that employer did not establish that claimant's impairment did not arise out of, or in connection with, coal mine employment. *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-11 (2011).

Applying the former version of 20 C.F.R. §718.305, the Fourth Circuit held that, as a matter of law, rebuttal of the presumption could not be established by the evidence of record, in a case where the miner was diagnosed with "multiple pulmonary afflictions," including emphysema and bronchitis, for which "no origin . . . [was] established or even suggested. . . ." *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). The court held that disability causation could not be rebutted, because the evidentiary record did not address whether any of the conditions that contributed to the miner's total disability was related to, or aggravated by, coal mine dust exposure. *Barber*, 43 F.3d at 901, 19 BLR at 2-66-67.

In remanding the case for the administrative law judge to explain his finding that employer failed to rebut the originally-enacted Section 411(c)(4) presumption, the Board agreed with the Director that "the specific etiology of claimant's totally disabling respiratory impairment need not be established by the party opposing entitlement." *Tanner v. Freeman United Coal Co.,* 10 BLR 1–85, 1–87 (1987). The Board held that the party opposing entitlement need only establish that the totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. *Tanner*, 10 BLR at 1-87-88.

The Fourth Circuit held that the employer was required to rule out a causal connection between the miner's lung cancer and his pneumoconiosis or coal mine employment in order to rebut the originally-enacted Section 411(c)(4) presumption. *Rose v. Clinchfield Coal Co*., 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (1980).

Digests—Rebuttal of Death Causation

In a survivor's claim, the Board held that to rebut the amended Section 411(c)(4) presumption, "the party opposing entitlement must establish either that the miner did not have pneumoconiosis or that his death did not arise from his coal mine employment." *Copley v. Buffalo Mining Co*., 25 BLR 1-81, 1-89 (2012).