

PART VII

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

D. TOTAL DISABILITY: SECTION 718.204

1. GENERALLY

Section 718.204(a) provides that miners are entitled to benefits if they are totally disabled due to pneumoconiosis or were totally disabled due to pneumoconiosis at the time of death. Section 718.204(b) defines total disability in a manner similar to the definition at 20 C.F.R. §410.412. Absent the application of the irrebuttable presumption described in Section 718.304 (which implements Section 411(c)(3)), a miner is considered "totally disabled" if pneumoconiosis prevents or prevented the miner from performing his or her usual coal mine work or comparable and gainful employment as defined at Section 718.204(b)(2). **Taylor v. Evans and Gambrel Co., Inc.**, 12 BLR 1-83 (1988). Accordingly, the Board ruled that once claimant has established the miner's inability to perform usual coal mine work, a *prima facie* case for total disability exists and the party opposing entitlement bears the burden of going forth with evidence to prove that the miner is able to perform comparable and gainful work as defined in Section 718.204(b)(2). **Taylor, supra.**

In the absence of contrary, probative evidence, if claimant provides evidence meeting the standards of Section 718.204(c)(1)-(5), the miner's total disability is established. See **Shedlock v. Bethlehem Mines Corp.**, 9 BLR 1-195 (1986); **Gee v. W.G. Moore and Sons**, 9 BLR 1-4 (1986). Pulmonary function studies may establish total disability under Section 718.203(c)(1). Section 718.204(c)(2) provides for a finding of total disability if arterial blood gas levels satisfy the values listed in Appendix C. These blood gas tables establish different qualifying levels for *different altitudes*. See 20 C.F.R. Part 718, Appendix C. Note that there is no authority in 20 C.F.R. §727.203(a) to extrapolate any of the values for determining disability that are listed in its subsections so as to make them applicable to cases arising under Part 718. **Matteo v. Director, OWCP**, 8 BLR 1-200 (1985). Total disability may be established under Section 718.204(c)(3) if a miner has pneumoconiosis and is suffering from cor pulmonale with right sided congestive heart failure. See **Newell v. Freeman United Coal Mining Co.**, 13 BLR 1-37 (1989). Compare 20 C.F.R. Part 718, Appendix C to Subpart D of 20 C.F.R. Part 410.

Where evidence supportive of a finding of total disability is not offered under subsections (c)(1), (c)(2), or (c)(3), Section 718.204(c)(4) provides for a finding of total disability if a physician exercising reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's

respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine work or comparable and gainful work. Compare 20 C.F.R. §727.203(a)(4) and Section 410.414(c). See Part VI.E. and Part IX.A.1.d. of the Desk Book. Finally, Section 718.204(c)(5) provides that lay testimony may establish total disability in a survivor's claim where medical evidence is unavailable. See ***Pekala v. Director, OWCP***, 13 BLR 1-1 (1989); Part X of the Desk Book.

The administrative law judge must discuss all of the evidence of record and determine whether the record contains "contrary probative evidence." "Contrary probative evidence" refers to all evidence, medical and otherwise, that is contrary to and probative of the fact to be established by the method used to establish total disability. The administrative law judge must assign the contrary probative evidence, if any, appropriate weight and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. See ***Clark v. Karst-Robbins Coal Co.***, 12 BLR 1-149 (1989)(en banc); ***Fields v. Island Creek Coal Co.***, 10 BLR 1-19 (1987); ***Rafferty v. Jones & Laughlin Steel Corp.***, 9 BLR 1-231 (1987); ***Shedlock v. Bethlehem Mines Corp.***, 9 BLR 1-195 (1986); ***Gee v. W.G. Moore & Sons***, 9 BLR 1-4 (1986). The mere existence of contrary probative evidence in the record, however, does not preclude evidence supportive of a claim from being sufficient to establish total disability since all relevant evidence must be weighed. See ***Tackett v. Cargo Mining Co.***, 12 BLR 1-11 (1988)(en banc), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); ***Mazgaj v. Valley Camp Coal Co.***, 9 BLR 1-201 (1986).

In summary, in order to establish total disability pursuant to Section 718.204(c), "a claimant must establish that the miner's respiratory or pulmonary impairment is totally disabling and that non-respiratory and non-pulmonary impairments have no bearing on establishing total disability under this provision." ***Carson v. Westmoreland Coal Co.***, 19 BLR 1-16, 1-21 (1994); see ***Beatty v. Danri Corp.***, 16 BLR 1-11, 1-15 (1991); see also ***Jewell Smokeless Coal Corp. v. Street***, 42 F.3d 241 (4th Cir. 1994); see also ***Tussey v. Island Creek Coal Co.***, 982 F.2d 1036, 1040, 17 BLR 2-16, 2-21 (6th Cir. 1993); ***Lollar v. Alabama By-Products Corp.***, 893 F.2d 1258, 1262-63, 13 BLR 2-277, 2-280 (11th Cir. 1990). The disabling loss of lung function due to extrinsic factors, e.g., loss of muscle function due to a stroke, does not constitute respiratory or pulmonary disability pursuant to Section 718.204(c). ***Carson v. Westmoreland Coal Co.***, 19 BLR 1-16 (1994).

CASE LISTINGS

DIGESTS

While an administrative law judge is not *required* by 20 C.F.R. §718.204(e)(3)(iii) to use a claimant's changed circumstances of employment to affirmatively support a finding of total disability, the administrative law judge may not consider claimant's lighter, less strenuous job to be his usual coal mine work when it was received as a result of his inability to perform his prior, more demanding job. ***Mazgaj v. Valley Camp Coal Co.***, 9 BLR 1-201 (1986).

The Board will interpret Section 718.204(c) as requiring a claimant to establish the existence of a totally disabling respiratory or pulmonary impairment and that non-respiratory and non-pulmonary impairments are irrelevant to establishing total disability under Section 718.204(c). ***Beatty v. Danri Corp.***, 16 BLR 1-11 (1991).

The administrative law judge must weigh like and unlike evidence together, and determine whether claimant has established total disability by a totality of the evidence, in his consideration of the evidence pursuant to Section 718.204(c). ***Budash v. Bethlehem Mines Corp.***, 16 BLR 1-27 (1991).

In order to establish total disability pursuant to Section 718.204(c), "a claimant must establish that the miner's respiratory or pulmonary impairment is totally disabling and that non-respiratory and non-pulmonary impairments have no bearing on establishing total disability under this provision." ***Carson v. Westmoreland Coal Co.***, 19 BLR 1-16, 1-21 (1994); see ***Beatty v. Danri Corp.***, 16 BLR 1-11, 1-15 (1991); see also ***Jewell Smokeless Coal Corp. v. Street***, 42 F.3d 241 (4th Cir. 1994); see also ***Tussey v. Island Creek Coal Co.***, 982 F.2d 1036, 1040, 17 BLR 2-16, 2-21 (6th Cir. 1993); ***Lollar v. Alabama By-Products Corp.***, 893 F.2d 1258, 1262-63, 13 BLR 2-277, 2-280 (11th Cir. 1990). The disabling loss of lung function due to extrinsic factors, e.g., loss of muscle function due to a stroke, does not constitute respiratory or pulmonary disability pursuant to Section 718.204(c). ***Carson v. Westmoreland Coal Co.***, 19 BLR 1-16 (1994), *modified on recon.*, 20 BLR 1-64 (1996).

The Board agreed to grant the Director's Motion for Reconsideration and the relief requested, and strike the sentence "The disabling loss of lung function due to extrinsic factors, e.g., loss of muscle function due to a stroke, does not constitute respiratory or pulmonary disability pursuant to Section 718.204(c)," ***Carson***, 19 BLR at 1-21 (footnote omitted), from its decision. ***Carson v. Westmoreland Coal Co.***, 20 BLR 1-64 (1996), *modifying on recon.*, 19 BLR 1-16 (1994).

The D.C. Circuit held that the Black Lung Act, 30 U.S.C. §902(f)(1)(D), grants the Secretary of Labor the authority to establish the medical criteria for adequate proof of total disability. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 873, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160

F.Supp.2d 47 (D.D.C. 2001).

a. Revised Section 718.204(a)

DIGESTS

The D.C. Circuit held that the second sentence of the revised regulation at 20 C.F.R. §718.204(a), providing that “any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner’s pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis,” while rational and consistent with the Administrative Procedure Act, is impermissibly retroactive as applied to pending claims. Therefore, the revised regulation at Section 718.204(a) may only be applied to new claims filed after January 19, 2001, the regulations’ effective date. ***Nat’l Mining Ass’n v. Department of Labor***, 292 F.3d 849, 864-865, 873, BLR (D.C. Cir. 2002), *aff’g in part and rev’g in part Nat’l Mining Ass’n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). [Note: The Department of Labor subsequently incorporated the D.C. Circuit’s holding at Section 718.2, which states that the second sentence of Section 718.204(a) may not be applied to claims pending on January 19, 2001, but may be applied to claims filed after that date.]

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