

## PART IX

### REGULATORY PRESUMPTIONS

#### A. 20 C.F.R. §727.203 INTERIM PRESUMPTION

##### 1. INVOCATION OF THE INTERIM PRESUMPTION GENERALLY

###### e. Section 727.203(a)(5)

In the case of a deceased miner, Section 727.203(a)(5) provides for invocation of the interim presumption by lay testimony that demonstrates the presence of a totally disabling respiratory or pulmonary impairment. The affidavits or hearing testimony of either the surviving spouse or another person with knowledge of the miner's condition may be used. Section 727.203(a)(5) may not be used to invoke the interim presumption if the record contains medical evidence relevant to the existence of, or a disability due to, a respiratory or pulmonary impairment. *Gattuso v. Director, OWCP*, 10 BLR 1-155 (1987); *Adams v. Director, OWCP*, 8 BLR 1-369 (1985); *Burnett v. Director, OWCP*, 7 BLR 1-781 (1985); *Stark v. Director, OWCP*, 6 BLR 1-873 (1984). The provisions of Section 727.203(a)(5) are available to claims of deceased miners as well as to the claims filed by survivor's. *DeForno v. Director, OWCP*, 14 BLR 1-11 (1990).

#### CASE LISTINGS

[where hospital and other medical evidence indicated miner died of cancer of pancreas and suggested he had anthracosilicosis and emphysema, use of lay testimony at subsection (a)(5) inappropriate] *Floharty v. Director, OWCP*, 5 BLR 1-357 (1982); *Serafin v. Director, OWCP*, 3 BLR 1-380 (1981).

[nurse's affidavit concerning miner's breathing difficulties and hospital records exclusively addressing miner's back condition not evidence prohibiting invocation at subsection (a)(5)] *Gonzalez v. Director, OWCP*, 4 BLR 1-571 (1981).

[autopsy report, physician's autopsy review, and physician's deposition, all containing pertinent findings concerning condition of miner's lungs, preclude invocation under subsection (a)(5)] *Coleman v. Eastern Coal Corp.*, 6 BLR 1-757 (1983).

[autopsy report precluded use of subsection (a)(5) because of adjudicator's finding that "if gross lung disease, sufficient to totally disable the miner, had been present. . .such a condition would probably have been noticed in an autopsy"] *Stark v. Director, OWCP*,

6 BLR 1-873 (1984).

[at subsection (a)(5), presence or availability of pertinent medical evidence cannot be assumed; references to evidence submitted earlier to SSA do not demonstrate availability of that evidence now] **Vanover v. Director, OWCP**, 6 BLR 1-920 (1984).

[adjudicator erroneously found subsection (a)(5) inapplicable because of lack of medical evidence and because miner worked until death; adjudicator also improperly discredited survivor's entire testimony under subsection (a)(5) because she could not remember names of deceased miner's medications] **Kosack v. Director, OWCP**, 7 BLR 1-248 (1984).

[adjudicator erred by failing to consider entitlement under subsection (a)(5) where lay evidence could invoke if credited] **Pendleton v. Director, OWCP**, 8 BLR 1-242 (1984).

[death certificate completed by miner's attending physician listing immediate cause of death as pulmonary tuberculosis is medical evidence relevant to miner's respiratory condition] **Adams v. Director, OWCP**, 8 BLR 1-369 (1985).

## **DIGESTS**

Board outlined two step inquiry in the evaluation of lay evidence pursuant to subsection (a)(5) once it determined that there is no medical evidence. First, the administrative law judge must determine whether the lay evidence of record is sufficient, if fully credited, to establish the existence of a totally disabling respiratory or pulmonary impairment. If the evidence is legally insufficient, the inquiry may stop at that point. Second, the administrative law judge must determine the credibility of the evidence, and weigh that evidence which is favorable to claimant against that evidence which is unfavorable. **Gattuso v. Director, OWCP**, 10 BLR 1-155 (1987); **Kosack v. Director, OWCP**, 7 BLR 1-248 (1984).

The Sixth Circuit has held that where medical evidence exists regarding the issue of a miner's pulmonary condition, subsection (a)(5) invocation is not available. **Coleman v. Director, OWCP**, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987).

The Board has limited the Seventh Circuit's interpretation of the application of subsection (a)(5) set out in **Dempsey v. Director, OWCP**, 811 F.2d 1154, 9 BLR 2-226 (7th Cir. 1987), to Part 727 cases arising in the Seventh Circuit. **Gessner v. Director, OWCP**, 11 BLR 1-1 (1987).

Subsection (a)(5) provides invocation of the interim presumption in the case of a deceased miner where there is no medical evidence relevant to the status of the miner's

respiratory or pulmonary disease. ***Gardjulis v. Director, OWCP***, 11 BLR 1-126 (1988).

The administrative law judge may find (a)(5) invocation established even though the lay testimony of record is insufficient to describe the miner's usual coal mine employment. ***Mikels v. Director, OWCP***, 870 F.2d 1407, 12 BLR 2-245 (8th Cir. 1989).

When considering the severity of the deceased miner's respiratory impairment the administrative law judge may consider the miner's work history and the fact that he had continued to work until his death. ***Pendleton v. Director, OWCP***, 822 F.2d 101, 12 BLR 2-411 (4th Cir. 1989).

The Court of Appeals for the Third and Seventh Circuit reject the Board's approach to 20 C.F.R. §727.203(a)(5) and have held that invocation under subsection (a)(5) is available where the available medical evidence is insufficient to establish total disability or lack thereof under subsections (a)(1)-(a)(4). ***Koppenhaver v. Director, OWCP***, 864 F.2d 287, 12 BLR 2-103 (3d Cir. 1988), *vacating* 11 BLR 1-51 (1988)(en banc recon.); ***Hillibush v. U.S. Department of Labor***, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988); ***Collins v. Old Ben Coal Co.***, 861 F.2d 481 (7th Cir. 1988); ***Dempsey v. Director, OWCP***, 811 F.2d 1154, 9 BLR 2-226 (7th Cir. 1987); ***Pekala v. Director, OWCP***, 13 BLR 1-1 (1989).

In a published case, while not specifically accepting the Seventh Circuit's decision in ***Dempsey***, the Fourth Circuit states that the Board's standard contravenes the spirit of the Act and is not required by the literal language of the regulations. ***Cook v. Director, OWCP***, 901 F.2d 33, 13 BLR 2-427 (4th Cir. 1990).

When Section 727.203(a)(5) is available, *see generally* ***Koppenhaver***, 864 F.2d 287, 289, 12 BLR 2-103, 2-107 (3d Cir. 1988); ***Hillibush***, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988), it is applicable to the claims of deceased miners as well as to the claim of survivors. ***DeForno v. Director, OWCP***, 14 BLR 1-11 (1990).