

Chapter 13

Survivors' Claims:

Entitlement Under 20 C.F.R. Part 410

I. Applicability

The time limits for filing a survivor's claim under 20 C.F.R. Part 410 are set forth at 20 C.F.R. § 410.231(b) and (c).

A claim, which is reviewed and denied under the interim regulations at 20 C.F.R. § 410.490 (otherwise known as a "Section 415 transition claim"), must be analyzed under the permanent regulations at 20 C.F.R. Part 410. *Wells v. Peabody Coal Co.*, 3 B.L.R. 1-85 (1981). Additionally, in *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 B.L.R. 1-627 (1978), the Board holds 20 C.F.R. Part 410 applies to all claims filed prior to the effective date of the permanent Department of Labor regulations at 20 C.F.R. Part 718 (which is March 31, 1980), where the claimant failed to establish entitlement under 20 C.F.R. Part 727.

However, five circuit courts of appeals disagreed with the Board's holding in *Muncy*, and concluded 20 C.F.R. Part 718 (not 20 C.F.R. Part 410), applies to Part C claims filed prior to March 31, 1980, but adjudicated and denied under 20 C.F.R. Part 727 after March 31, 1980. *Terry v. Director, OWCP*, 956 F.2d 251 (11th Cir. 1992); *Oliver v. Director, OWCP*, 888 F.2d 1239 (8th Cir. 1989); *Knuckles v. Director, OWCP*, 869 F.2d 996 (6th Cir. 1989); *Caprini v. Director, OWCP*, 824 F.2d 283 (3rd Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987). Thus, *Muncy* controls only in claims arising outside the jurisdiction of these circuits.

II. The regulation

The survivor of a miner is entitled to benefits under 20 C.F.R. Part 410 by either showing (1) the miner was totally disabled due to pneumoconiosis at the time of death, 20 C.F.R. §§ 410.410 - 410.430, or (2) the miner's death was due to pneumoconiosis, 20 C.F.R. §§ 410.454 - 410.462. The existence of pneumoconiosis may be established by chest x-ray, biopsy, or autopsy evidence. 20 C.F.R. §§ 410.414 and 410.454.

III. Presumptions available to certain survivors

Under 20 C.F.R. §§ 410.416 and 410.456, if a miner was employed for ten or more years in the Nation's coal mines and suffered from pneumoconiosis, it is presumed the pneumoconiosis arose out of coal mine employment. Otherwise, a claimant must submit evidence demonstrating disease causation. *Dunlap v. Director, OWCP*, 8 B.L.R. 1-375 (1985).

A. Ten years or more coal mine employment; death from respirable disease

1. General burdens

If a miner was employed for ten years or more in the Nation's coal mines and died from a respiratory disease, death due to pneumoconiosis arising out of coal mine employment is presumed. 20 C.F.R. § 410.462(a). In *Hunter v. Director, OWCP*, 803 F.2d 800, 803 (4th Cir. 1986), the court held Claimant "must come forward with evidence that the disease which caused death was a chronic dust disease or a chronic disease of the lung *and* that the disease reported suggests a reasonable possibility of death due to pneumoconiosis." *Id.* at 804 (emphasis in original). The Sixth Circuit reached a similar result in *Tackett v. BRB*, 806 F.2d 640 (6th Cir. 1986). A couple of examples of cases addressing this issue are as follows:

Bronchopneumonia is not a respiratory disease within the meaning of the presumption. *Martin v. Director, OWCP*, 6 B.L.R. 1-535 (1983).

On the other hand, in *Pyle v. Allegheny River Mining Co.*, 2 B.L.R. 1-1143 (1981), the presumption was invoked where the miner died due to lung cancer, since lung cancer is a chronic condition. However, in *Hunter v. Director, OWCP*, 8 B.L.R. 1-120 (1985), the Board clarified its holding in *Pyle*, and stated the burden is on a claimant to establish the chronic nature of the miner's lung cancer before the presumption is invoked on a case-by-case basis.

2. Invoking the presumption

To invoke the presumption, a claimant must establish the following: (1) the miner suffered from pneumoconiosis or a respiratory disease; (2) the miner's death may have been due to multiple causes; and (3) it is not medically feasible to distinguish which disease caused death, or to specifically determine how much each disease contributed to the death. 20 C.F.R. § 410.462(b); *Bosser v. U.S. Steel Corp.*, 7 B.L.R. 1-478 (1984); *Copley v. Olga Coal Co.*, 6 B.L.R. 1-181 (1983); *Zavora v. U.S. Steel Corp.*, 2 B.L.R. 1-1202 (1980); *McLaughlin v. Jones & Laughlin Steel Corp.*,

2 B.L.R. 1-103 (1979); *Smakula v. Weinberger*, 572 F.2d 127 (3rd Cir. 1978); *Wallace v. Mathews*, 554 F.2d 299 (6th Cir. 1977); *Searchrist v. Weinberger*, 538 F.2d 1054 (4th Cir. 1976).

3. Death due to multiple causes

Where the miner's death is due to multiple causes, pneumoconiosis need not be the "primary cause" of death. *Zavora v. U.S. Steel Corp.*, 2 B.L.R. 1-1202 (1980). Reliable death certificates and autopsy reports may constitute substantial evidence upon which to find death due to multiple causes (including pneumoconiosis). *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 B.L.R. 1-103 (1979); *Kinnick v. National Mines Corp.*, 2 B.L.R. 1-221 (1979). However, a physician's lack of personal knowledge of the deceased miner, and failure to perform an autopsy, are factors to be considered in determining the reliability of a death certificate. *Copley v. Olga Coal Co*, 6 B.L.R. 1-181 (1983).

4. Medically infeasible to distinguish cause of death

Claimant also must establish it is medically infeasible to distinguish which disease caused death, "[P]neumoconiosis need not be found to be a 'significant contributing factor to death.' Rather, the claimant must establish that it is not medically feasible to ascribe death to one specific cause or to ascertain the specific contribution of each of the several conditions which combined to cause death." *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 B.L.R. 1-103, 1-108 (1979).

5. Total disability due to pneumoconiosis at the time of death

Under 20 C.F.R. § 410.412(b)(1), a miner is totally disabled due to pneumoconiosis at the time of death if, at the time of death, the miner's pneumoconiosis prevented him or her from engaging in usual or comparable and gainful coal mine work. See 20 C.F.R. §§ 410.424 through 410.426.

Under 20 C.F.R. § 410.424(a), medical considerations alone shall justify a finding of total disability where the miner's impairment meets the duration requirement at 20 C.F.R. § 410.412(a)(2) or 20 C.F.R. § 410.412(b)(2), and is listed in the Appendix (*i.e.*, blood gas studies, cor pulmonale, or congestive heart failure). However, an individual shall not be found totally disabled if other evidence rebuts disability, *e.g.*, the individual was engaged in comparable and gainful work. Under 20 C.F.R. § 410.424, the claimant need not show pneumoconiosis was the primary cause of the decedent's total disability. Rather, the party opposing

entitlement bears the burden of establishing the decedent was not totally disabled due to pneumoconiosis. *Dunlap v. Director, OWCP*, 8 B.L.R. 1-375 (1985).

B. The 15-year presumption and "many years" presumption

1. The 15-year presumption

Under 20 C.F.R. §§ 410.414(b) and 410.454(b), if evidence (other than that listed above) demonstrates the existence of a totally disabling chronic respiratory or pulmonary impairment, a miner is presumed to be totally disabled due to pneumoconiosis at the time of death or a miner's death is presumed to be due to pneumoconiosis, if the miner was employed for 15 or more years in one or more of the Nation's underground mines, or engaged in "substantially similar" employment.

2. The "many years" presumption

This presumption is invoked where the evidence shows a work history reflecting "many years" of coal mine employment (meaning less than 15 years, but greater than 10 years), *Williamson v. Director, OWCP*, 6 B.L.R. 1-1020 (1984)), and the miner suffers from a "severe lung impairment." 20 C.F.R. §§ 410.414(b)(4) and 410.454(b)(4). The presumption may be rebutted only if the miner does not, or did not, have pneumoconiosis, or the respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 20 C.F.R. §§ 410.414(b)(2) and 410.454(b)(2).

C. Complicated pneumoconiosis

Under 20 C.F.R. §§ 410.418 and 410.458, there is an irrebuttable presumption of total disability due to pneumoconiosis, or death due to pneumoconiosis, if the miner suffers from complicated pneumoconiosis. The determination of whether complicated pneumoconiosis exists is a finding of fact within the purview of the Administrative Law Judge. *Maypray v. Island Creek Coal Co.*, 7 B.L.R. 1-683 (1985).

For a discussion of adjudicating a miner's lifetime claim under 20 C.F.R. Part 410, see Chapter 8. For a discussion of analyzing evidence of complicated pneumoconiosis, see Chapter 11.