

# Chapter 15

## Survivors' Claims:

### Entitlement Under 20 C.F.R. Part 727

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#### I. Applicability

Twenty C.F.R. Part 727 applies to a survivor's claim filed on or after January 1, 1974, but before April 1, 1980, where the miner had ten or more years of coal mine employment.

A survivor is required by the Act to file his or her claim first "under an approved state workers' compensation law or, if no such law was available in an appropriate State, the claim was to be filed with the Secretary of Labor under Part C of title IV of the Act." 30 U.S.C. § 931; 20 C.F.R. § 727.1.

#### A. Fewer than 10 years of coal mine employment; analyze claim under 20 C.F.R. § 410.490

If a survivor's claim is filed on or after January 1, 1974, but miner has fewer than ten years of employment, then the claim should be analyzed under 20 C.F.R. § 410.490. See *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988); *Whiteman v. Boyle Land Fuel Corp.*, 15 B.L.R. 1-11 (1991)(*en banc*).

#### B. Denial under 20 C.F.R. Part 727; analyze claim under 20 C.F.R. Parts 410 or 718

Twenty C.F.R. § 727.203(d) states, where eligibility is not established under 20 C.F.R. Part 727, such eligibility may be established under 20 C.F.R. Part 718. The Board concluded this provision, as written, was inconsistent with Section 402(f)(2) of the Act. As a result, it held claims denied under 20 C.F.R. Part 727 should be reviewed under 20 C.F.R. Part 410. *Muncy v. Wolfe Creek Collieries Co.*, 3 B.L.R. 1-85 (1981).

The Third, Sixth, Seventh, Eighth, and Eleventh Circuits held, to the contrary. In these circuits, if a claimant cannot establish entitlement under 20 C.F.R. Part 727, and the claim is adjudicated after March 31, 1980, then the regulations at Part 20 C.F.R. 718 (not 20 C.F.R. Part 410) are applicable. *Terry v. Director, OWCP*, 956 F.2d 251 (11th Cir. 1992); *Caprini v. Director, OWCP*, 824 F.2d 283(3<sup>rd</sup> Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395 (7<sup>th</sup> Cir. 1987); *Oliver v. Director, OWCP*, 888 F.2d 1239 (8<sup>th</sup> Cir. 1989);

*Knuckles v. Director, OWCP*, 869 F.2d 996 (6<sup>th</sup> Cir. 1989). Thus, *Muncy* controls only in claims arising outside of the jurisdiction of these circuits.

**C. Rebuttal under subsection (b)(2) precludes entitlement under 20 C.F.R. Parts 410 and 718**

Rebuttal under 20 C.F.R. § 727.203(b)(2) precludes entitlement under 20 C.F.R. Parts 410 and 718. *Wheaton v. North American Coal Corp.*, 8 B.L.R. 1-21 (1985) (consideration under 20 C.F.R. Part 410 precluded); *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989) (consideration under 20 C.F.R. Part 718 precluded).

**D. Rebuttal under subsection (b)(3) or (b)(4) precludes entitlement under 20 C.F.R. Part 410**

Rebuttal under 20 C.F.R. § 727.203(b)(3) or (b)(4) precludes entitlement under 20 C.F.R. Part 410. *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 B.L.R. 1-829 (1985) (rebuttal at (b)(3) addressed); *Lefler v. Freeman United Coal Co.*, 6 B.L.R. 1-579 (1983) (rebuttal at (b)(4) addressed).

## **II. The regulation**

A survivor's claim is analyzed in the same manner as a living miner's claim under 20 C.F.R. Part 727 except, in the case of a survivor, lay evidence may, in certain circumstances, be used to establish total disability due to pneumoconiosis, or death due to pneumoconiosis. 20 C.F.R. § 727.203(a)(5).

Invocation under 20 C.F.R. § 727.203(a) gives rise to the following two interim presumptions in a survivor's claim: (1) the miner was totally disabled due to pneumoconiosis at the time of death; and (2) the miner's death was due to pneumoconiosis. 20 C.F.R. § 727.203(a). See *also Jennings v. Brown Badgett, Inc.*, 9 B.L.R. 1-94 (1986); *Connors v. Director, OWCP*, 7 B.L.R. 1-482 (1984).

There is one other presumption found at 20 C.F.R. Part 727, which is applicable to survivors' claims. The provisions at 20 C.F.R. § 727.204(a) set forth a rebuttable presumption of entitlement to survivor's benefits and provide, "In the case of a miner who died on or before March 1, 1978, who was employed for 25 years or more in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner shall be entitled to the

payment of benefits, unless it is established at the time of death such miner was not partially or totally disabled due to pneumoconiosis." 20 C.F.R. § 727.204(a).

### **III. The interim presumptions**

#### **A. Methods of invocation**

Under 20 C.F.R. § 727.203(a), a miner who engaged in coal mine employment for at least ten years is presumed totally disabled due to coal workers' pneumoconiosis at the time of death, or is presumed due to coal workers' pneumoconiosis, if any one of the following medical criteria is met:

- (1) an x-ray, autopsy, or biopsy establish the existence of pneumoconiosis;
- (2) ventilatory studies establish the presence of a chronic respiratory or pulmonary disease;
- (3) blood gas studies demonstrate the presence of an impairment in the transfer of oxygen; or
- (4) other medical evidence establish the presence of a totally disabling respiratory or pulmonary impairment.

20 C.F.R. § 727.203(a).

Satisfying the requirements of any one of the separate medical criteria is sufficient to invoke the interim presumption. As a result, the Fourth Circuit, in *Lagamba v. Consolidation Coal Co.*, 787 F.2d 172 (4<sup>th</sup> Cir. 1986), held it was error to not invoke the presumption based on positive x-ray evidence and qualifying blood gas studies, even though the autopsy report confirmed the cause of death as hepatitis and reported no evidence of pneumoconiosis. For a discussion regarding invocation under 20 C.F.R. § 727.203(a)(1)-(4), see Chapter 10.

#### **B. Lay evidence**

The provisions at 20 C.F.R. § 727.203(a)(5) permit invocation of the interim presumption in a survivor's claim where an affidavit of the survivor, or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment. However, there is conflict among the Board and circuit courts

of appeals regarding availability of 20 C.F.R. § 727.203(a)(5) as a means of invocation.

In *Pekala v. Director, OWCP*, 13 B.L.R. 1-1 (1989), the Board concluded 20 C.F.R. § 718.204(c)(5) is available in cases where the medical evidence of record does not *affirmatively establish* the absence of a lung disease. The Board declined, however, to rule on applicability of 20 C.F.R. § 718.204(c)(5), where the evidence is *insufficient to invoke* under subsections (a)(1)-(4). Although the decision in *Pekala* involved the lay evidence provisions at 20 C.F.R. § 718.204(c)(5), the Board held the same rule applies in cases adjudicated under 20 C.F.R. § 727.203(a)(5).

Some circuit courts of appeal hold, however, 20 C.F.R. § 727.203(a)(5) is available where the miner is deceased, and the medical evidence of record is *insufficient to invoke* the presumptions under 20 C.F.R. § 727.203(a)(1)-(4). *Hillibush v. Dept. of Labor*, 853 F.2d 197 (3<sup>rd</sup> Cir. 1988); *Cook v. Director, OWCP*, 901 F.2d 33 (4<sup>th</sup> Cir. 1990); *Collins v. Old Ben Coal Co.*, 861 F.2d 481 (7<sup>th</sup> Cir. 1988). And, the Sixth Circuit Court of Appeals holds 20 C.F.R. § 727.203(a)(5) is not available where there is medical evidence regarding the miner's pulmonary condition, even if such evidence is insufficient to invoke the presumptions through 20 C.F.R. § 727.203(a)(1)-(4). *Coleman v. Director, OWCP*, 829 F.2d 3 (6<sup>th</sup> Cir. 1987).

### **C. Rebuttal of the interim presumptions**

As with invocation of the interim presumptions, analysis under the rebuttal provisions in the survivor's claim is the same as for a living miner's claim recalling, however, that two presumptions must be rebutted when a survivor's claim is involved (total disability due to pneumoconiosis at the time of death, and death due to pneumoconiosis).

#### **1. Methods of rebuttal**

The regulations at 20 C.F.R. § 727.203(b) provide the following four means of rebuttal: (1) the miner was in fact doing his or her usual coal mine work or comparable and gainful work at the time of death; (2) the miner was able to do his or her usual coal mine work, or comparable and gainful work at the time of death; (3) total disability or death did not arise in whole or in part out of coal mine employment; or (4) the miner did not suffer from pneumoconiosis. 20 C.F.R. § 727.203(b).

## **2. Party opposing entitlement carries burden**

The party opposing entitlement carries the burden of establishing rebuttal of both presumptions by a preponderance of the evidence. *Connors v. Director, OWCP*, 7 B.L.R. 1-482 (1985). For a discussion of the proper standard to apply for each method of rebuttal, see Chapter 10.

## **3. Employment in mines at time of death**

Under 20 C.F.R. § 727.205, a deceased miner's employment in a mine at the time of death *shall not* be used as conclusive evidence that the miner was not totally disabled. In the case of a deceased miner who was employed in a coal mine at the time of death, all relevant evidence, including the circumstances of such employment and statements of the miner's spouse, shall be considered in determining whether the miner was totally disabled due to pneumoconiosis at the time of death. See *Connors v. Director, OWCP*, 7 B.L.R. 1-482 (1985).

However, in *Spadafore v. Director, OWCP*, 8 B.L.R. 1-82 (1985), since the miner was employed at the time of death and was performing his job adequately, working overtime, and rarely missing work on account of illness, the interim presumption totally disability due to pneumoconiosis at the time of death was rebutted under 20 C.F.R. § 727.203(b)(1). For further discussion of rebuttal under 20 C.F.R. Part 727, see Chapter 10.

## **IV. Presumption of survivor's entitlement to benefits – 25 years or more of coal mine employment**

### **A. Requirements for invocation**

Under 20 C.F.R. § 727.204, in a case where the miner (1) died on or before March 1, 1978, and (2) was employed for 25 years in one or more coal mines prior to June 30, 1971, an eligible survivor of the miner shall be entitled to the payment of benefits unless, at the time of death, the miner was not partially or totally disabled due to pneumoconiosis. A miner is partially disabled if s/he had reduced ability to engage in his or her usual coal mine work, or comparable and gainful work as defined by 20 C.F.R. Part 718. *Prater v. Hite Preparation Co.*, 829 F.2d 1363 (6<sup>th</sup> Cir. 1987).

## B. Rebuttal of

To rebut the presumption at 20 C.F.R. § 727.204, evidence must demonstrate the following: (1) the miner's ability to perform his or her usual and customary work, or comparable and gainful work was not reduced at the time of death, or (2) the miner did not have pneumoconiosis. 20 C.F.R. § 727.204(c). *Short v. Westmoreland Coal Co.*, 10 B.L.R. 1-127 (1987). Thus, in *Feathers v. Consolidation Coal Co.*, 8 B.L.R. 1-26 (1985), the presumption was rebutted where evidence established the miner was working full time, in a satisfactory manner, and at the same job he held for the previous 20 years. Thus, the miner was not partially, or totally, disabled at the time of death.

Under the regulations, admission of any one of the following categories of evidence, standing alone, is insufficient to rebut the presumption:

- (1) evidence that a deceased miner was employed in a coal mine at the time of death;
- (2) evidence pertaining to a deceased miner's level of earnings prior to death;
- (3) a chest x-ray interpreted as negative for the existence of pneumoconiosis;
- (4) a death certificate that makes no mention of pneumoconiosis.

20 C.F.R. § 727.204(d).

Consequently, although any one of the above-listed categories of evidence, by itself, cannot establish rebuttal, admission of more than one of the listed types of evidence (within the discretion of the fact-finder) may constitute sufficient rebuttal evidence. *Short v. Westmoreland Coal Co.*, 10 B.L.R. 1-127, 1-129 (1987). See e.g. *Freeman v. Director, OWCP*, 687 F.2d 214 (7<sup>th</sup> Cir. 1982); *U.S. Steel Corp. v. Oravetz*, 686 F.2d 197 (3<sup>rd</sup> Cir. 1982); *Duda v. North American Coal Co.*, 6 B.L.R. 1-1203 (1984).