

# Chapter 22

## Transfer of Liability to the Trust Fund

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### I. Generally

When Congress enacted the Black Lung Amendments Act of 1981, it determined certain claims (approximately 20,000 in number), originally decided and denied by the Social Security Administration under 20 C.F.R. Part 410, would be reopened for consideration by the Department of Labor under 20 C.F.R. Part 727. Operators were unexpectedly exposed to potential liability in cases they thought were finally denied by the Social Security Administration.

To shield the responsible operator from this unexpected liability, Section 205(a)(1) of the Black Lung Benefits Amendments Act of 1981 provided for the transfer of liability from the identified responsible operator to the Black Lung Disability Trust Fund ("Trust Fund" or "Fund") in cases in which the claim was finally denied within the meaning of Section 205(b) of the 1981 Act (20 C.F.R. Part 410) before March 1, 1978 and had been, or would be, approved in accordance with Section 435 of the Act (20 C.F.R. Part 727).

### II. The regulation

The regulatory provisions at 20 C.F.R. § 725.496 set forth the following criteria for transfer of liability to the Fund:

- (1) the claim must be against a responsible operator;
- (2) the claim must have been originally filed with either the SSA or the DOL before March 1, 1978;
- (3) the claim must fall within the following three classes of denied claims subject to the transfer provision, which are defined in § 402(i) of the Act and § 725.496(b) of the implementing regulations:
  - (a) claims filed with and denied by the SSA prior to March 1, 1978;
  - (b) claims filed with the Department of Labor in which the claimant was notified by the Department of an administrative or informal denial before March 1,

1977, and in which the claimant did not within one year of such notification:

(i) request a hearing; or

(ii) present additional evidence; or

(iii) indicate an intention to present additional evidence; or

(iv) request a modification or reconsideration of the denial on the grounds of a change in condition or mistake in fact.

(c) claims filed with the Department of Labor and denied under the law in effect prior to the enactment of the Black Lung Benefits Reform Act of 1977 (prior to March 1, 1978) following a formal hearing before an Administrative Law Judge, an administrative review before the Benefits Review Board, or before a United States Court of Appeals; and

(4) the claim must have been reconsidered under the Black Lung Benefits Reform Act of 1977 (1977 amendments/Section 435 review).

20 C.F.R. § 725.496.

If a claim satisfies the foregoing requirements, it falls within the 1981 Amendments, and is eligible for transfer. If a claim is not approved under 20 C.F.R. Part 727, but it otherwise meets the requirements at 20 C.F.R. § 725.496 of the regulations, it should be handled as a premature case for the transfer of liability.

### **III. Determination of eligibility for transfer by the District Director**

Twenty C.F.R. § 725.497(b) requires that the District Director review each claim to assess whether it is affected by the transfer provisions. 20 C.F.R. § 725.497(b).

## **A. Burden of persuasion/production**

### **1. District Director has initial burden**

The District Director has a duty to present all relevant facts regarding transfer, and s/he has the initial burden on the issue of transferability. However, once the District Director determines a claim is not subject to transfer, Employer has the burden of presenting clear evidence to the contrary to overcome such a finding. *Vance v. Peter Fork Mining Co.*, 6 B.L.R. 1-1226 (1984).

### **2. Modification, benefits paid by employer**

In *USX Corp. v. Director, OWCP*, 978 F.2d 656 (11<sup>th</sup> Cir. 1992), the Eleventh Circuit held, where the District Director erroneously transferred liability from Employer to the Trust Fund, the Department of Labor's request for modification under 20 C.F.R. § 725.310 to transfer liability back to Employer must be filed within one year of Employer's last payment of benefits, and not within one year of the Trust Fund's last payment.

## **B. Part C claim must be "finally denied"**

To be eligible for transfer provisions, the claim must be "finally denied" prior to March 1, 1978.

### **1. Informal denial insufficient**

The Board holds, for purposes of 20 C.F.R. § 725.496(b)(2), a form letter sent to Claimant (1) informing him or her that the evidence submitted is inadequate to establish entitlement, (2) explaining the standards of proof, and (3) instructing Claimant to submit additional evidence if s/he chooses to pursue the claim, is not a "denial" for the purposes of transfer. 20 C.F.R. § 725.496(b)(2); *Edwards v. Central Coal Co.*, 7 B.L.R. 1-712 (1985). The Board also held the "notice of review" form sent to an operator is not a "denial" for the purposes of transfer. *Krysik v. Harmer Coal Co.*, 6 B.L.R. 1-1167 (1984).

### **2. District Director's failure to act insufficient**

A District Director's failure to take any action in a case for a period of fifteen months does not constitute a *de facto* denial of the claim. *Miller v. Alabama By Products Corp.*, 11 B.L.R. 1-42 (1988).

### **3. Date of last denial determines whether subject to transfer**

Where a claim, filed with the Department of Labor prior to March 1, 1977, is subject to repeated administrative or informal denials, the last such denial issued during the pendency of the claim determines whether the claim is subject to transfer. 20 C.F.R. § 725.486(e).

#### **C. Claim must be approved under 20 C.F.R. Part 727**

##### **1. Generally**

In order for claims filed with, and denied by, the Social Security Administration to come within the transfer provisions, the claims must have been (or must be) approved under the provisions of Section 435 of the Act (20 C.F.R. Part 727). 20 C.F.R. § 725.496(d).

In *Harman Mining Co. v. Layne*, 21 B.L.R. 2-507 (4<sup>th</sup> Cir. 1998) (unpub.), the court addressed applicability of the transfer of liability provisions. Under the facts of the claim, the miner filed a Part B claim on June 6, 1973. He then filed a Part C claim on May 12, 1974. In June of 1975, the SSA denied the miner's Part B claim. On July 23, 1976, the DOL approved the Part C claim.

The Department of Labor argued the transfer of liability provision was inapplicable because both claims were filed prior to March 1, 1978. The court agreed, and stated the Part C claim must be filed after March 1, 1978. The court further noted, "[N]either Layne's Part B claim nor his Part C claim satisfies the statutory requirements for transfer" because "[t]he Part C claim was not denied prior to March 1, 1978; the Part B claim was not approved under Section 945."

##### **2. Approval of Part C claim must be "final"**

"Approval" of the claim must be final, and interim approval of a claim, which is ultimately denied, does not qualify for transfer of liability to the Trust Fund. By unpublished decision in *White v. Dana Coal Co.*, BRB No. 97-1294 BLA (July 14, 1999) (unpub.), the Administrative Law Judge properly found an "approved" claim for the purposes of the transfer provisions means a "finally approved claim."

### 3. Director, OWCP has authority to contest claim

The Director, OWCP has discretion to pay benefits, or to defend the Trust Fund against a meritless claim. Subsection 725.497(d) provides:

After it has been determined that an operator or carrier must be dismissed as a party in any claim in accordance with this section, the Director shall take such action as is authorized by the Act to bring about the proper and expeditious resolution of the claim in light of all relevant medical and other evidence. Action to be taken in this regard by the Director may include, but is not limited to, the assignment of the claim to the Black Lung Disability Trust Fund for the payment of benefits, the reimbursement of benefits previously paid by an operator or carrier if appropriate, the defense of the claim on behalf of the Trust Fund, or proceedings authorized by § 725.310.

20 C.F.R. § 725.497(d).

In *Shortt v. Director, OWCP*, 766 F.2d 172, 174 (4<sup>th</sup> Cir. 1985), the Fourth Circuit concluded these provisions empower the Director to "protect the Fund from meritless claims and to bring about the proper resolution of all claims." Consequently, it was proper for the Director to "contest Shortt's claim, despite the initial decision of the deputy commissioner" awarding benefits. The regulatory provisions plainly provide an employer may be reimbursed from the Trust Fund for benefits paid only under "appropriate" circumstances. Considering that one of the Director's fiscal obligations is to protect the Trust Fund from meritless claims, the court concluded it is incongruous to require the Trust Fund to reimburse an employer for the payment of benefits on a claim, which is ultimately denied.

The Seventh Circuit, in *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 325-26 (7<sup>th</sup> Cir. 1983), agreed with the Fourth Circuit, and stated the following:

It would be most unusual for Congress to countenance the establishment of a multi-tiered claim review process if, as petitioner's reading would have it, liability automatically ensued from a positive determination at the first level (of the district director). In short, we think the plain sense of the statute, when viewed against the history of the Amendments, is that the provision creating liability when a claim 'is or has been approved' under Section 945 is simply a grandfather clause which Congress felt necessary to hold the industry Fund liable for claims, unlike the

one presented here, which *had* survived the *entire* gauntlet of appeals and reviews prior to the 1981 enactments but after the 1977 Amendments.

(emphasis in original).

#### **4. Filing the election card**

##### **a. Prerequisite to transfer**

No claim is subject to transfer unless a valid election card, or other equivalent document, is filed by or on behalf of the claimant requesting review under Section 435 (20 C.F.R. Part 727). Thus, for the denied Social Security Administration claim to support transfer, a valid election must have been made. *Chadwick v. Island Creek Coal Co.*, 7 B.L.R. 1-883 (1985), *aff'd on recon*, 8 B.L.R. 1-447 (1986)(en banc). Claimant's assertion of election (or Employer raising the transfer of liability issue) at a formal hearing suffices as a legitimate filing of a Part B claim. *Director, OWCP v. Quarto Mining Co.*, 901 F.2d 532 (6<sup>th</sup> Cir. 1990). There are no provisions for automatic review of denied Social Security Administration claims, which would support transfer. *Chadwick, supra*.

##### **b. Claimant's election of review, Employer's burden to establish**

Where an election card was mailed to Claimant, but never returned, Employer failed to establish an election that the claim be reviewed under 20 C.F.R. Part 727 and, consequently, the transfer of liability must be denied. *Krecota v. Rochester and Pittsburgh Coal Co.*, 868 F.2d 600 (3<sup>rd</sup> Cir. 1978). However, Employer is entitled to transfer liability to the Trust Fund for a reopened claim, where Claimant did not receive the election card.

In *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163 (6<sup>th</sup> Cir. 1997), Claimant's Part B claim was denied by the Social Security Administration. More than a year later, a second claim was filed with the Department of Labor under Part C. After referral of the claim to the Office of Administrative Law Judges, but prior to a formal hearing, an Administrative Law Judge dismissed Employer as a party to the claim, transferred liability to the Trust Fund, and awarded benefits. On appeal, the Board determined Employer should have remained a party, and it remanded the claim for a new hearing. On remand, a second Administrative Law Judge held a hearing with Employer as a party, and issued a decision denying benefits.

Claimant's appeal of the denial eventually reached the Sixth Circuit, which concluded the claim was not suitable for transfer to the Trust Fund

because Claimant never elected review of his denied Part B claim:

The government points to computer data indicating that it sent an election card to Mr. Crace. (citation omitted). Mrs. Crace does not remember receiving such a card, however, and although she would not have seen all the mail sent to her post office box, she notes that Mr. Crace normally took care of his correspondences. Where letters have been properly sent, we presume that they have reached their destination in the usual time and have been received by the person to whom they were addressed. (citation omitted). The government's computer evidence entitles it to this presumption. Mrs. Crace's testimony that her husband normally took care of his correspondence does not adequately rebut it.

As a result, the court held Employer was a party to the claim and, although the first Administrative Law Judge awarded benefits, Employer was not a party at that time and was not bound by the decision. The court then stated the denial of benefits by a second Administrative Law Judge, where Employer was a party, was supported by substantial evidence in the by record.

In *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568 (6<sup>th</sup> Cir. 1998), liability for the payment of benefits did not transfer from Employer to the Trust Fund because Claimant failed to elect review of his initial claim, which was filed in June of 1973. The court noted computer records at the Social Security Administration indicated an election card was mailed to the miner at his correct address, which raised a rebuttable presumption that the election card was received. By law, the miner had six months in which to submit the election card, or an "equivalent document." Testimony by the miner's wife that she did not recall receiving the election card was, according to the court, insufficient to rebut the presumption. Moreover, the court held the miner's filing of a Part C claim two months after the election card was mailed to him did not serve to support a transfer of liability. The court noted the Department of Labor specifically rejected such an argument in the promulgation of its regulations.

#### **IV. Separate consideration of survivors' claims**

A party responsible for the payment of survivor's benefits is not relieved of this responsibility merely because the miner's claim is subject to transfer of liability provisions; rather, a survivor's claim is considered independently of the miner's claim. *Patton v. Earl Patton Coal Co.*, 848 F.2d 668 (6<sup>th</sup> Cir. 1988), *aff'g*, 9 B.L.R. 1-164 (1987).

## **V. Merger of claims to support transfer**

In general, if a claimant files more than one claim for benefits, and the earlier claim is still pending, the claims merge and must be considered as one claim. Merger is necessary for effective administration of cases since claims can be filed with the Social Security Administration, or with the Department of Labor pursuant to Section 415 of the Act, and under 20 C.F.R. Parts 727 and 718. 20 C.F.R. § 725.310.

### **A. Merger of multiple claims under 20 C.F.R. § 725.309**

The procedural histories of multiple claims are considered separately to determine whether the transfer provisions apply, unless the claims were required to be merged pursuant to the implementing regulations. 20 C.F.R. § 725.496(c). The circumstances under which merged claims will support transfer are limited.

The regulations at 20 C.F.R. § 725.309 provide for merger of multiple claims. 20 C.F.R. § 725.309(b) states, in the case of a claimant who files more than one claim for benefits, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. A later claim cannot be merged with an earlier claim, which was denied and appeal rights have been waived or exhausted. The earlier claim must still be pending. *Hagerman v. Island Creek Coal Co.*, 11 B.L.R. 1-116 (1988).

#### **1. Benefits Review Board**

In *Chadwick v. Island Creek Coal Co.*, 7 B.L.R. 1-883 (1985)(en banc), the Board set forth its analysis of the use of merger to support transfer in a case involving multiple claims. In *Chadwick*, Claimant filed a Part B claim, which was denied in June of 1975. He then filed a Part C claim in December of 1974, which was denied in July of 1977. But, on review, the Part C claim was approved in March of 1980.

The Board noted the Part C claim by itself could not support transfer, since the claim was not finally denied prior to March 1, 1977, pursuant to 20 C.F.R. § 725.496. In addition, although Claimant must make a valid election for review of a denied Part B claim, the Board noted, assuming a valid election had been made, the procedural histories of the claims also must be merged. Therefore, had Claimant made a valid election sometime in 1978, the elected Part B claim would merge with the earlier Part C claim. Since the Part C claim was pending at the time of approval, the merger of the duplicate claims would not support transfer.

## 2. Seventh Circuit

In *Old Ben Coal Co. v. Luker*, 826 F.2d 688 (7<sup>th</sup> Cir. 1987), the Seventh Circuit rejected the Board's holding in *Chadwick*, but remanded the case for reconsideration of whether Claimant made a valid election of a Part B claim.

In *Robertson v. Peabody Coal Co.*, 11 B.L.R. 1-120 (1988), the Board addressed the issue of transfer in a case arising in the Seventh Circuit. The Administrative Law Judge found "good cause" for Claimant's failure to timely elect review of the denied Part B claim. After merging the subsequent claim under the Board's holding in *Chadwick*, the Administrative Law Judge concluded liability had transferred. The Board noted its merger theory, as set forth in *Chadwick*, had been rejected by the Seventh Circuit in *Luker*. However, since "good cause" excused election of the Part B claim, the Part B claim was sufficient, by itself, to support transfer. As a result, the Board construed the subsequent approval of the claim as an approval of the Part B claim.

Notwithstanding the Seventh Circuit Court's opinion in *Luker*, the Board's analysis in *Chadwick* continues to govern cases involving transfer issues in the other circuits.

### **B. Merger of 20 C.F.R. § 410.490 and Part 727 claims and transfer**

The regulations at 20 C.F.R. § 727.103 clarify procedures for multiple claims under 20 C.F.R. § 725.309 where the interim presumptions at 20 C.F.R. § 727.203(a) apply. A claimant who originally filed a claim before the Social Security Administration may elect to have the claim reviewed by either the Social Security Administration, or by the Department of Labor. If a claimant requests review by the Department of Labor, or if more than one claim has been filed with the Department of Labor, such claims shall be merged and processed with the first claim filed with the Department of Labor. 20 C.F.R. § 727.103(c).

In *Bates v. Director, OWCP*, 7 BLR 1-113 (1984), the Board held, where Claimant elected review of a Part B claim, the claim merged with a Section 415 transition claim (20 C.F.R. § 410.490) also filed by Claimant. Likewise, the later Part C claim filed by Claimant merged with the pending Section 415 claim.

A claimant (1) who files a claim for benefits under Part B or Part C prior to March 1, 1978, (2) whose previous claims are pending or have been finally denied, and (3) who files an additional claim, the later claim shall merged with any earlier claim, which is subject to review under 20 C.F.R. Part 727. 20 C.F.R. § 725.309(b). If the earlier claim (subject to review under 20 C.F.R.

Part 727) is denied, then the new claim shall also be denied.

In *Tackett v. Howell and Bailey Coal Co.*, 9 B.L.R. 1-181 (1986), the Board held an initial claim was not finally denied since Claimant timely requested modification under 20 C.F.R. § 725.310. Therefore, the later claim merged with the earlier claim pursuant to 20 C.F.R. § 725.309(b).

In *Lawley v. U.S. Steel Corp.*, 11 B.L.R. 1-14 (1985), Claimant filed two Part C claims. The October 1974 claim was informally denied in June of 1975. The March 1976 claim was informally denied in May of 1976 and, upon review, was later approved in August of 1977. The Board held, although the two claims merge, liability does not transfer since the later claim was approved in August of 1977, prior to the effective date of the Reform Act.

**C. No merger of survivor's and miner's claims to support transfer**

Occasionally, a deceased miner's claim will be adjudicated with the survivor's claim. If a miner dies while his or her claim is pending, the estate may continue to pursue the claim, and any dependent spouse or children may be entitled to benefits. A survivor of the miner may also file for benefits separately, and the claims are often heard together for administrative efficiency. However, the claims must be adjudicated separately. As held in *Johnson v. Eastern Associated Coal Corp.*, 8 B.L.R. 1-248 (1985), a deceased miner's previously denied claim cannot be combined with the subsequent approval of a widow's survivor's claim to support the transfer of liability. See also *The Earl Patton Coal Co. v. Patton*, 848 F.2d 668 (6<sup>th</sup> Cir. 1988).