

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 June 2011

CASE NO: 2010-BLA-5257

In the Matter of:

PAGE BENDER, JR.,
Claimant

v.

LOGAN COALS, INC.,
Employer

And

WEST VIRGINIA CWP FUND,
Carrier

And

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Respondent.

Appearances

Roger Forman, Esq.
For the Claimant

William Mattingly, Esq.
For the Respondent

Before: MICHAEL LESNIAK
Administrative Law Judge

DECISION AND ORDER—AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (Act). The Act and implementing regulations, 20 C.F.R. Parts 410, 718, and 725 (Regulations),

provide compensation and other benefits to coal miners who are totally disabled by pneumoconiosis and to the surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and Regulations define pneumoconiosis (commonly known as black lung disease, coal workers' pneumoconiosis, or CWP) as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. 20 C.F.R. § 725.101.

On March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010) (PPACA) was signed into law. Section 1556 revives the 15-year presumption at 30 U.S.C. § 921(c)(4), as implemented at 20 C.F.R. § 718.305 for a claim that is (1) filed after January 1, 2005, and (2) pending "on or after the date of enactment," which is March 23, 2010. This subsequent claim was filed after 2005; thus, the presumption will apply if Claimant can establish 15 years of coal mine employment and disability.

I note that Employer challenges the validity of the amended regulations. In *Beulah Ann Mathews v. United Pocahontas Coal Company*, BRB No. 09-0666 BLA (September 22, 2010), the Benefits Review Board concluded that the regulations at issue were valid. Employer's position is noted for appeal purposes only. See e.g., *Kosh v. Director, OWCP*, 8 B.L.R. 1-168, 1-169 (1985).

Procedural History

This is Claimant's second application for benefits. His first claim was filed on March 26, 2003 and was denied by the District Director on July 16, 2003 for failing to show disability. (DX-1).¹ He filed this claim on February 18, 2009. (DX-3). On August 26, 2009, the District Director entered a Proposed Decision and Order-Denying Benefits for failing to establish disability. (DX-32). Claimant requested a hearing on September 17, 2009. (DX-34). At the hearing I admitted Director's Exhibits 1-39, Claimant's Exhibit 1, and Employer's Exhibits 1-13. The parties stipulated that the miner has one dependent for purposes of augmentation and that Employer is the correct responsible operator. I have received and considered Employer's and Claimant's briefs in rendering my decision.

Issues

- 1) Length of coal mine employment;
- 2) Whether Claimant has pneumoconiosis
- 3) Whether Claimant's pneumoconiosis arose out of coal mine employment;
- 4) Whether Claimant is totally disabled;

¹ The following abbreviations are used in this opinion: DX = Director's Exhibit, EX = Employer's/Carrier's Exhibit, CX = Claimant's Exhibit, Tr = Transcript of the June 9, 2010 hearing, BCR = Board-certified radiologist, B = NIOSH-certified B-reader, A= NIOSH-certified.

- 5) Whether Claimant's total disability is due to pneumoconiosis; and
- 6) Whether Claimant has demonstrated a change in an applicable condition of entitlement 20 C.F.R. § 725.309(d).

Findings of Fact and Conclusions of Law

Testimony

Claimant is 60 years old and states that he has worked underground in the coal mines for more than 22 years, but that he has documentation of 22 years. (Tr. at 12-14). His last employer was Logan Coal and his last position was that of a continuous miner. *Id.* at 13. He states that his job was very dusty and that at times he could not see the controls that he was operating. *Id.* at 15. He previously smoked a pack and a half to two packs of cigarettes per day from the age of 16 to approximately 6 months ago and he currently smokes approximately three to four cigarettes per day. *Id.* at 15, 24-25. He has been diagnosed with lung cancer and had a portion of his lung removed. *Id.* He has also undergone 5 bypass surgeries. *Id.* He is on oxygen at night and also uses it after exertion because he gets short winded. *Id.* at 16. He has also had back surgery and has diabetes. *Id.* at 17, 19. Claimant most recently worked for an asphalt paving company and the most difficult part of his job was shoveling asphalt, which he states is heavier than coal. *Id.* at 20.

Subsequent Claim

Pursuant to 20 C.F.R. § 725.309 (d), a subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement previously decided against the miner. In Claimant's previous claim for benefits, the District Director found that Claimant did not establish disability or disability causation. If Claimant establishes disability in this claim, then I must review the record *de novo*.

Length of Coal Mine Employment

Claimant was found to have 21 years of coal mine employment in a Proposed Decision and Order issued on July 16, 2003. (DX-1). I also have reviewed the miner's social security earnings. I find that Claimant worked as an underground coal miner for 21 years based on Claimant's testimony, taken together with the history of coal mine employment form and the Social Security earnings records.

Medical Evidence

Chest x-rays

Exhibit No.	X-ray Date	Date Read	Physician/Qualifications	Interpretation
DX-31	7/1/09	7/6/09	Dr. Zaldivar B	Quality: 1 2/1
EE-6	7/1/09	8/17/09	Dr. Wiot B/BCR	Quality: 1 0/1
EX-5	3/24/09	6/15/09	Dr. Wiot B/BCR	Quality: 1 2/1

Pulmonary Function Studies

Exhibit/Physician	Date	Age / Height ²	FEV1	FVC	MVV	FEV1/FVC	Qualifying
DX-31 Dr. Zaldivar	7/1/09	59/67"	1.75	3.76		46%	Y
			1.84*	4.03*		46%*	N
DX-12 Dr. Rasmussen	3/24/09	59/67"	2.11	4.32		49%	N
			2.17*	4.34*		50%*	N

*post-bronchodilator

Arterial Blood Gas Studies

Exhibit/Physician	Date	PCO2	PO2	Notes	Qualifying
DX-31 Dr. Zaldivar	7/1/09	44	60		Y
DX-12 Dr. Rasmussen	3/24/09	41	58		Y
		40*	56*		Y

*after exercise

² The fact-finder must resolve conflicting heights of Claimant recorded on the ventilator study reports in the claim. *Toler v. Easter Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Claimant's height, as recorded on pulmonary function tests, ranges from 69" to 71." I find that the best estimate of Claimant's height is 69.7", as it is the average of all of the recorded heights.

Treatment Records

Pulmonary Services

The miner was treated for pulmonary disease and pulmonary cancer by Dr. Al-Asadi from 1/14/08 to 3/12/09. (EX-1). The miner's PFT showed moderate obstructive lung disease and his CT scan showed a lesion with some interstitial fibrosis and multiple lung nodules. *Id.* He was diagnosed with lung cancer, received chemotherapy, and underwent a left upper lobectomy. *Id.* He was continuously advised to quit smoking, but failed to do so. *Id.*

The miner was also treated by Dr. Al-Asadi from 10/5/09 to 12/14/09. (EX-12). He was diagnosed with a chronic obstructive defect according to a pulmonary function test. *Id.*

Finally, the miner again saw Dr. Al-Asadi on 1/28/10 (EX-14). Dr. Al-Asadi noted that Claimant "...seems to be doing fairly well subjectively and objectively except for continuation to smoke." *Id.*

Charleston Heart Clinic

The miner was treated by Dr. Sakkal at Charleston Heart Clinic from 2/19/08 to 3/12/09 for coronary artery disease. (EX-2). He underwent an EKG and a Stress Test and was followed for coronary artery disease. *Id.*

Charleston Area Medical Center

The miner had several biopsies taken of his lymph nodes on 2/12/08, all of which were negative for cancer. (EX-9). He was also treated for pulmonary and coronary artery disease at the Charleston Area Medical Center from 12/12/09 to 1/13/10. (EX-13). Several CT scans were taken and showed mild pulmonary fibrosis, interstitial edema that improved over time, and a stable right middle lobe nodule. *Id.* The miner underwent a left cardiac catheterization and a coronary artery bypass grafting. *Id.*

Biopsy³

Dr. Caffrey reviewed the miner's lymph node and upper left lung biopsy on 11/4/09. (EX-3). Dr. Caffrey is board certified in anatomical and clinical pathology. (EX-4). The biopsy showed evidence of coal workers' pneumoconiosis; however, Dr. Caffrey notes, "It is pertinent to note the surgical pathologist from CAMC in the gross description of the left upper lobe of the lung did not describe findings consistent with CWP, and in the final diagnosis from the left upper lung did not diagnose CWP." (EX-3). He states that based on the biopsy findings he does not believe that the CWP identified in the left upper lobe of the lung is such that it would have caused Claimant to have retired from the mines at age 45. *Id.* He explains that the lesions of

³ While generally a biopsy report cannot offer an opinion as to disability causation, I will consider Dr. Caffrey's opinion as to disability causation because Employer has only designated one medical report under § 725.414(a)(1).

CWP occupy less than 5% of the lung tissue on the slides. *Id.* He further states that Claimant's employment as a miner did not cause or contribute to his development of lung cancer. *Id.* He states that the miner is disabled from coal mining due to the removal of his upper left lung that contained a tumor. *Id.*

Medical Opinions⁴

Dr. Zaldivar

Dr. Zaldivar examined the miner on July 1, 2009. (DX-31). In addition, he was deposed on July 27, 2010. (EX-15). He is board certified in pulmonary, internal, and sleep disorder medicine and is a B reader. (DX-31). He notes that the miner worked in the coal mines from 1980 to 1984 as a mining operator, roof bolt operator, and shuttle car operator. *Id.* He also notes that the miner worked on a paving crew from 1995 to 2000. *Id.* Further, he notes that the miner began smoking in 1968, quit in 2007, and smoked approximately one package of cigarettes per day. *Id.*

He states that the miner has coal workers' pneumoconiosis as a result of his coal dust exposure; however, he does not indicate whether he is diagnosing clinical or legal pneumoconiosis. *Id.* He notes that the miner's smoking played a "major role" in his COPD, but that coal workers' pneumoconiosis caused "zero percent of the abnormalities we now see." *Id.*; EX-15 at 41. He diagnosed the miner with simple pneumoconiosis, possible bronchiectasis in the left lung, moderate irreversible airway obstruction, air trapping by lung volumes with hyperinflation, moderate diffusion impairment, and resting hypoxemia. *Id.* He finds that the miner is severely impaired, and in his medical report notes that the impairment is only partly related to his occupation, but during his deposition states that none of the miner's impairment is due to coal dust exposure. *Id.*; EX-15 at 41. He states, "A large part of his ventilatory abnormality and blood gas abnormality is due to the lobectomy and the chemotherapy treatments." *Id.* He explains that chemotherapy causes inflammation and fibrosis of the lungs and can cause both a restrictive and obstructive impairment. EX-15 at 21. Further, he explains that had the miner not smoked or had lung cancer, he would expect the miner's spirometry to remain within normal limits. *Id.* at 28. He also notes that the miner had a carboxyhemoglobin level indicative of a smoker and the miner admitted that he was still smoking at the time of his exam. (DX-31).

Dr. Tuteur

Dr. Tuteur reviewed the miner's medical records and submitted a report dated April 12, 2010. (EX-10). He is board certified in internal and pulmonary medicine. (EX-11). He is aware that the miner worked in underground coal mining for approximately 20 years as a roof

⁴ When medical reports and/or physicians' testimonies refer to documents that are not in evidence, I deem the objectionable portion of the testimony redacted. Unless I make a specific finding herein that the redacted data is critical to a physician's ultimate opinion, the redaction of objectionable information will not materially affect the weight I accord such opinion. See *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, BRB No. 04-0812 BLA (Jan. 27, 2006); see also, *Webber v. Peabody Coal Co.*, 23 BLR 1-123, BRB No. 05-0335 BLA (Jan. 27, 2006)(en banc).

bolter, shuttle car operator, and continuous miner. *Id.* In addition, he is aware that the miner smoked cigarettes and based on “the most detailed cigarette use history... in the Charleston Heart Clinic records of February 19, 2008,” the miner has approximately a 120 pack year smoking history. *Id.* He also notes that the miner has diabetes, heart disease, and lung cancer, which was treated with chemotherapy and a lobectomy. *Id.*

He diagnosed the miner with clinical, but not legal, coal workers’ pneumoconiosis based on the miner’s chest x-rays and work history. *Id.* He finds that the miner is not disabled as a result of coal workers’ pneumoconiosis based on the pulmonary function tests, and the physical examination, which failed to show decreased lung expansion or late inspiratory crackling sounds. *Id.* He states that the miner does have a totally disabling respiratory impairment, but that it is not due to coal workers’ pneumoconiosis. *Id.* He notes that the miner’s spirometry results have worsened, but that it is a result of having developed and treated lung cancer. *Id.* He also states that the miner has COPD in the form of chronic bronchitis and emphysema, but states that it is caused by smoking cigarettes. *Id.* He notes that 20% of smokers develop COPD whereas 1% of never smoking miner’s develop COPD. *Id.*

Dr. Rasmussen

Dr. Rasmussen examined the miner on March 24, 2009. (DX-12). In addition, he was deposed on March 24, 2010 and wrote a supplemental report dated June 1, 2010. (EX-8; CX-1). He is board certified in internal and forensic medicine and is a disability analyst and a forensic examiner; he is also a B reader. (DX-12). He is aware that the miner worked in the coal mines for approximately 22 years and that his last job was that of a continuous miner operator, which required heavy manual labor. *Id.* Additionally, he notes that the miner has a 39 pack year smoking history. *Id.*

He diagnosed the miner with clinical and legal pneumoconiosis based on the miner’s work history, x-ray, airflow obstruction, and reduced single breathe diffusing capacity for carbon monoxide. (SBDLCO). *Id.* He finds that the miner is disabled from a pulmonary standpoint due to coal dust exposure, smoking, and left lower lobectomy with post operative chemotherapy, but concludes that coal dust exposure represents a material co-contributor. *Id.* He states that chemotherapy and radiation therapy can both cause interstitial fibrosis, which could result in a restrictive defect and gas exchange impairment. *Id.*

In his supplemental report, Dr. Rasmussen reviewed Dr. Caffrey’s biopsy report and conclusions, stating that he “...find[s] it hard to believe that Mr. Bender’s left upper lobectomy could have resulted in the type of impairment of severe degree in which we encountered, which would seldom be found in individuals who had had a total pneumonectomy.” (CX-1). Further, he states that the miner could have minimal pneumoconiosis that causes a significant pulmonary function impairment caused by coal mine dust exposure. *Id.* He further reviewed Dr. Tuteur’s report and called into question Dr. Tuteur’s noted smoking history. *Id.* He explained that Dr. Tuteur’s opinion that the miner does not have a “permanent gas exchange impairment” is incorrect. *Id.* Dr. Tuteur explained that the miner’s recovery gas values after exercise were much improved from the values taken during exercise as the basis for his statement, but Dr. Rasmussen explains that this phenomenon has been documented in individuals with normal lung

function for many years. *Id.* He concludes that his opinion remains unchanged and that the miner has both clinical and legal pneumoconiosis and is totally disabled from a pulmonary standpoint as a result of his coal dust exposure. *Id.*

During deposition, Dr. Rasmussen explained that only a minority of patients develop any lung impairment from chemotherapy and radiation therapy. (EX-8 at 9, 17). He finds the miner disabled based on his gas exchange impairment, which was not caused by his cardiac condition as evidenced by his normal anaerobic threshold. *Id.* at 22. He stated that he knows that coal dust exposure caused, at least in significant part, the miner's disability because, "... gas exchange impairment out of proportion to ventilatory impairment is probably as common among coal miner's as is COPD, itself." *Id.* at 25. He also explained that it is impossible to determine whether coal dust exposure or cigarette smoking caused the miner's obstruction as they result in identical disease processes. *Id.*

Standard of Review

The administrative law judge (ALJ) need not accept the opinion of any particular medical witness or expert, but must weigh all the evidence and draw his/her own conclusions and inferences. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The adjudicator's function is to resolve the conflicts in the medical evidence; those findings will not be disturbed on appeal if supported by substantial evidence. *Id.* In considering the medical evidence of record, an ALJ must not selectively analyze the evidence. *See Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 9 BLR 1067 (1986).

Entitlement to Benefits

This claim was filed after March 31, 1980 and is therefore adjudicated under the regulations at 20 C.F.R. § 718. Under this Section, a claimant must establish, by a preponderance of the evidence, that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, and that he is totally disabled due to pneumoconiosis. Because this is a subsequent claim, Claimant must also demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. § 725.309(d). Failure to establish one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-205; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). This claim was filed after January 19, 2001 and is governed by the amended regulations. As this is a subsequent claim, pursuant to 20 C.F.R. § 725.309 (d), the claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement previously decided against the miner. If the miner is able to establish disability, then I must review the claim *de novo*.

Total Disability

A miner shall be considered totally disabled if either the irrebuttable presumption in § 718.304 applies, or if the miner's pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. § 718.204(b)(1). In this case Claimant is ineligible for the irrebuttable presumption in § 718.304 because he has not been diagnosed with complicated pneumoconiosis. The regulations further provide that in the absence

of contrary probative evidence, a miner's total disability shall be established by qualifying pulmonary function studies, qualifying blood gas studies, the existence of cor pulmonale with right-sided congestive heart failure, or the reasoned and documented opinion of a physician finding that Claimant's pulmonary or respiratory impairment prevents him from engaging in his usual coal mine work. 20 C.F.R. § 718.204(b)(2).

One of Claimant's pulmonary function tests is qualifying and all of his ABG studies are qualifying under the disability standards set forth in the regulations. See 20 C.F.R. § 718. Appendix B & C. The evidence does not establish that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Claimant has a gas exchange impairment based on his arterial blood gas tests.

Total disability may nevertheless be found 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 the miner from engaging in his usual or comparable coal mine employment. 20 C.F.R. § 718.204(b)(2) (2000); 20 C.F.R. § 718.204(b)(1)(ii) (2008).

The record contains four doctors' opinions as to disability and all four doctors found that the miner is disabled from a respiratory condition. I find that the miner is disabled from a respiratory condition based on the arterial blood gas tests and the opinions of all four doctors. This subsequent claim was filed after 2005, Claimant established more than 15 years of coal mine employment and disability; thus, the presumption at 20 C.F.R. § 718.305 applies.

As a result the burden shifts to Employer to prove that (1) the miner's disability does not, or did not, arise out of coal mine employment; or (2) the miner does not, or did not, suffer from pneumoconiosis. In a similar regulatory presumption context, the Fourth Circuit stated that the rebuttal standard "requires the employer to rule out any causal relationship between the miner's disability and his coal mine employment by a preponderance of the evidence." *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 339 20 BLR2-246, 2-250 (4th Cir. 1996).

Employer's medical doctors all state that the miner's disability is a result of his history of tobacco abuse, his lung cancer, and subsequent cancer treatment. The miner's lung cancer treatment consisted of a lobectomy and several rounds of chemotherapy. Dr. Caffrey, who reviewed a biopsy of the miner's lung, stated that the lesions of coal workers' pneumoconiosis occupy less than 5% of the miner's lung tissue. As Dr. Rasmussen explains, "A finding of limited pneumoconiosis certainly does not exclude Mr. Bender's coal mine dust exposure as a contributing cause of his disabling lung disease." He finds that the miner's coal workers' pneumoconiosis is too minimal to cause or contribute to the miner's disability. Dr. Tuteur believes that the miner's disability is a result of his cigarette smoking and lung cancer treatment, explaining that chemotherapy causes both a restrictive and obstructive defect. However, he does not explain how he can determine that none of the miner's impairment is due to coal dust exposure. Dr. Zaldivar states that the miner's spirometry results have worsened, but that it is a result of lung cancer treatment. He does not adequately explain why the worsened results could not also be due to coal workers' pneumoconiosis, which is a progressive disease. Thus, I find that Employer has failed to prove that the miner's disability does not or did not arise out of coal mine employment.

Employer may also rebut the presumption by proving that the miner does not have pneumoconiosis. However, all of Employer's doctors acknowledge that the miner has pneumoconiosis. Thus, Employer has failed to rebut the presumption and I find that Claimant has established that he has a disability caused by coal workers' pneumoconiosis. As the Claimant has now established a condition of entitlement previously adjudicated against him, I must review the record *de novo*.

The previous claim contains an x-ray read as 1/0 by a B reader, two non-qualifying pulmonary function tests, one non-qualifying arterial blood gas test, and one medical report from Dr. Ranavaya who found that the miner had pneumoconiosis but no impairment. Seven years have passed since this previous medical evidence. I give more weight to the most current evidence as pneumoconiosis is a latent and progressive disease.

Conclusion

After reviewing the record *de novo* I find that the miner has established every element of entitlement. He is entitled to benefits under the Act.

Attorney's Fees

No award of attorney's fees for services to the Claimant is made herein because no application has been received. Thirty days are hereby allowed to Claimant's counsel for the submission of such application. Counsel's attention is directed to 20 C.F.R. §§ 725.365 and 725.366 of the regulations. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. Parties have ten days following the receipt of such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim of Page Bender Jr. for benefits under the Act is hereby **AWARDED**. As the evidence does not clearly establish an onset date of total disability due to pneumoconiosis, benefits will be awarded as of February 1, 2009, the first day of the month in which this subsequent claim was filed. § 725.503(b). Logan Coal, Inc. is **ORDERED** to pay Claimant, Page Bender Jr., all benefits entitled to him under the Act, as augmented by his dependent wife, Diana Bender.

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MICHAEL P. LESNIAK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your

appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.78 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed. At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).