

JUDGES' BENCHBOOK OF THE BLACK LUNG BENEFITS ACT



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CHAPTER 14 Survivors' Claims: Entitlement Under § 410.490

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Survivors' Claims: Entitlement Under § 410.490

I. Applicability [X(H)]

The regulations provide that § 410.490 applies to survivors' claims where the miner dies before January 1, 1974 and the survivor files a claim for benefits within six months of the miner's death. 20 C.F.R. § 410.490(b). Section 410.490 is also applicable to claims filed under Part 727 where the record shows that miner has less than ten years of coal mine employment. *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*).

Moreover, a claim which is reviewed and denied under the interim regulations under § 410.490 must also be analyzed under Part 410. *Wells v. Peabody Coal Co.*, 3 B.L.R. 1-85 (1981).

II. Invocation of the interim presumptions

Similar to Part 727, § 410.490 provides two presumptions applicable to survivors' claims. A miner will be presumed to have been totally disabled at the time of death, and his death will be presumed to be due to pneumoconiosis if a chest x-ray, autopsy, or biopsy establishes the existence of pneumoconiosis, or in the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the duration requirements of § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the table, and the impairment arose out of coal mine employment. 20 C.F.R. § 410.490(b)(1) and (2). "Lay testimony about the miner's physical condition will not suffice to invoke the presumption." *Lloyd v. Mathews*, 413 F. Supp. 1161, 1163 (E.D. Pa. 1976).

Where it is not established on the basis of the presumption that a miner was totally disabled due to pneumoconiosis at the time of death or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set forth at §§ 410.412 to 410.462. 20 C.F.R. § 410.490(e).

III. Rebuttal of the interim presumptions

The interim presumptions shall be rebutted if the evidence establishes that the individual was in fact doing his usual coal mine work or comparable and gainful work, or the evidence establishes that the individual was able to do his usual coal mine work or comparable and gainful work. 20 C.F.R. §§ 410.490(c)(1) and (2). Evidence that the miner was in fact doing his usual coal mine work at the time of death is relevant to rebuttal of the interim presumption. *Farmer v. Weinberger*, 519 F.2d 627, 630 (6th Cir. 1975).

A comparison of the rebuttal provisions at § 410.490(c) with those at § 727.203(b), reveals

that § 727.203(b) provides two additional means of rebuttal: (1) the miner's total disability did not arise out of coal mine employment and, (2) the miner does not have pneumoconiosis. 20 C.F.R. § 727.203(b)(3) and (b)(4). The provisions at Part 727 require ten years of coal mine employment to be applicable and provide four means of rebuttal whereas the more liberal § 410.490 regulations require no minimum period of coal mine employment, and provide only two means of rebuttal.

In *Phipps v. Director, OWCP*, 17 B.L.R. 1-39 (1992)(en banc), the Board concluded that this disparity needed to be remedied and, in accordance with the United States Supreme Court's decision in *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991), the Board held that the four methods of rebuttal set forth at § 727.203(b) are applicable to claims adjudicated under § 410.490 of the regulations.

The Supreme Court's decision in *Pauley* resolves the conflict which developed among the Board and circuit courts in an attempt to render just and equitable solutions to the apparent discrepancy between the terms of Part 727 and § 410.490. It was determined in *Pauley* that the rebuttal provisions at § 727.203(b)(3) and (b)(4) are implicitly included at § 410.490. This conclusion was supported through the language at § 410.490 which references § 410.416 involving the ten year coal mine employment causation presumption, as well as § 410.401(b)(1) which defines "pneumoconiosis" as compensable under the Act. Therefore, the Court reasoned that the Part 410 regulations act in concert to infer the inclusion of the rebuttal provisions at §§ 727.203(b)(3) and (b)(4).

In assessing total disability, the Board holds that it will apply the same standard for total disability as under Part 727; namely, only physical capacity is considered. *Shaw v. Cementation Co. of America*, 10 B.L.R. 1-114 (1987). However, for Part B claims, the Sixth Circuit applies the vocational disability standard (*i.e.* the ability of the miner to find comparable employment in his or her immediate area of work). *Neace v. Director, OWCP*, 867 F.2d 264 (6th Cir. 1989). For Part C claims, the Sixth Circuit applies a medical test of physical capabilities, not a vocational analysis. *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985). For further discussion of the factors to consider in determining whether the miner is able to perform "comparable and gainful" employment, *see* Chapter 10.