

JUDGES' BENCHBOOK OF THE BLACK LUNG BENEFITS ACT



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CHAPTER 8

Living Miners' Claims: Entitlement Under Part 410

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Living Miners' Claims: Entitlement Under Part 410	<u>8.1</u>
I. Applicability of Part 410, generally	<u>8.1</u>
II. Elements of entitlement	<u>8.1</u>
III. The existence of pneumoconiosis	<u>8.2</u>
A. "Pneumoconiosis" defined	<u>8.2</u>
B. Chest roentgenogram evidence	<u>8.2</u>
C. Autopsy or biopsy	<u>8.2</u>
D. Rebuttable presumptions regarding the existence of pneumoconiosis	<u>8.2</u>
1. Fifteen years or more of coal mine employment	<u>8.2</u>
a. "Substantially similar" working conditions	<u>8.3</u>
b. Medical evidence	<u>8.3</u>
c. Rebuttal of the presumption	<u>8.3</u>
2. The "many years" presumption	<u>8.4</u>
a. "Many years" defined	<u>8.4</u>
b. Severe lung impairment required	<u>8.4</u>
E. Other relevant evidence	<u>8.4</u>
1. Elements to be considered	<u>8.4</u>
2. Totally disabling respiratory condition	<u>8.5</u>
IV. Etiology of the pneumoconiosis	<u>8.5</u>
V. Total disability and its etiology	<u>8.5</u>
A. "Total disability" defined	<u>8.5</u>
1. Methods of establishing total disability	<u>8.6</u>

2.	Rebuttal	8.6
B.	Pneumoconiosis is the impairment involved	8.6
1.	Complicated pneumoconiosis	8.7
2.	Multiple disabling conditions	8.7
C.	Establishing total disability; medical evidence listed in the Appendix	8.7
D.	Total disability established; factors not in the Appendix	8.8
E.	Other relevant evidence	8.9
1.	Burden of proof	8.9
2.	Use of lay testimony	8.9
3.	Pulmonary function studies	8.10
4.	Physical performance tests	8.10
F.	Irrebuttable presumption; complicated pneumoconiosis	8.10
1.	Conflicting evidence	8.11
2.	Autopsy evidence	8.11
VI.	Applicability of § 410.490 and Parts 727 and 718	8.11

Chapter 8

Living Miners' Claims: Entitlement Under Part 410

I. Applicability of Part 410, generally [VI(A)]

Under Title IV of the Federal Coal Mine Health and Safety Act of 1969, Congress authorized the Social Security Administration to promulgate permanent regulations regarding entitlement to benefits for miners totally disabled due to coal workers' pneumoconiosis. These regulations are codified at 20 C.F.R. Part 410, subpart D. Part 410 provides that these regulations apply to all claims filed on or before December 31, 1973. 20 C.F.R. § 410.231.

Since the enactment of Part 410, the Board broadened the applicability of this scheme, holding that a claim which is reviewed and subsequently denied under interim regulations at § 410.490 (a § 415 transition claim) must also be analyzed under the permanent regulations at Part 410. *Wells v. Peabody Coal Co.*, 3 B.L.R. 1-85 (1981).

Finally, in *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 B.L.R. 1-627 (1978), the Board set forth the third category of cases to be reviewed under Part 410. Citing to 20 C.F.R. § 727.203(d), the Board held that Part 410 applied to all Part C claims filed prior to the effective date of the permanent Department of Labor regulations at Part 718 (which is March 31, 1980), where the claimant failed to establish entitlement under Part 727. However, five circuit courts of appeal disagreed with the Board's holding in this regard and concluded that Part 718, and not Part 410, applies to claims filed prior to March 31, 1980, but adjudicated and denied under 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 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987).

Some administrative law judges may nevertheless choose to analyze claims under Part 410 in addition to Part 718 on the theory that the Part 410 regulations are less restrictive (and not more restrictive as stated in *Caprini*) than the Part 718 regulations and that Part 718 is written to apply to claims filed after April 1, 1980.

II. Elements of entitlement

Benefits are provided under the Act “to coal miners who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines.” 20 C.F.R. § 410.410(a). To establish entitlement to benefits, a claimant must establish, by a preponderance of the evidence, that the miner: (1) suffers from pneumoconiosis; (2) that such pneumoconiosis arose out of coal mine employment; (3) that the miner is totally disabled; and (4) that such total disability is due to pneumoconiosis. 20 C.F.R. § 410.410(b). Failure to establish any one of these elements will result in a denial of benefits. *Hall v. Director, OWCP*, 2 B.L.R. 1-998 (1980).

III. The existence of pneumoconiosis [VI(B)]

A. “Pneumoconiosis” defined

A finding of pneumoconiosis may be made through any one of the following methods: (1) chest roentgenogram (x-ray) evidence; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by “other relevant evidence.” 20 C.F.R. §§ 410.414(a)-(c). The regulations at Part 410 define “pneumoconiosis” as follows:

(1) a chronic dust disease of the lung arising out of coal mine employment in the Nation's coal mines, and includes coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis, arising out of such employment; or (2) any other chronic respiratory or pulmonary impairment when the conditions are met for the application of the presumption described in § 410.414(b).

20 C.F.R. §§ 410.401(b)(1) and (b)(2).

B. Chest roentgenogram evidence

A chest x-ray will indicate the existence of pneumoconiosis if it is classified as Category 1, 2, 3, A, B, or C in accordance with 20 C.F.R. § 410.428(a)(1)(i-iii). An x-ray which is classified as Category 0 (0/-, 0/0, or 0/1) does not constitute evidence of pneumoconiosis. 20 C.F.R. § 410.428(1). Section 410.428(3)(b) details the criteria for a valid x-ray study in conformance with accepted medical standards.

C. Autopsy or biopsy

An autopsy or biopsy constitutes highly probative evidence regarding the existence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985). Section 410.428(a)(3) provides a detailed discussion of the specific information which must be included in the autopsy or biopsy report such as a macroscopic and microscopic description of the lungs. 20 C.F.R. § 410.428(c).

D. Rebuttable presumptions regarding the existence of pneumoconiosis

1. Fifteen years or more of coal mine employment

Where the existence of pneumoconiosis is not established through a chest x-ray, biopsy, or autopsy under § 410.414(a), but other evidence demonstrates the existence of a totally disabling chronic respiratory or pulmonary impairment, it may be presumed, in the absence of evidence to the contrary, that a miner is totally disabled due to pneumoconiosis. 20 C.F.R. § 410.414(b)(1). This presumption applies where a miner was employed for 15 or more years in one or more of the Nation's underground coal mines, or in one or more of the Nation's other coal mines where the environmental conditions were “substantially similar” to those in an underground coal mine. 20 C.F.R. § 410.414(b)(3).

a. “Substantially similar” working conditions

The question of whether working conditions are “substantially similar” to the condition of an underground mine only arises when the situs of a miner's employment is a *surface mine* rather than an underground mine. It is the mine site and not the individual miner's work which must meet the “substantially similar” requirement of § 410.414(b)(3). Thus, an above-ground worker at an underground mine site is not required to show comparability of environmental conditions to take advantage of the presumption. *Alexander v. Freeman United Coal Mining Co.*, 2 B.L.R. 1-497 (1979). However, to find that the conditions of a miner's employment in a surface mine are substantially similar to those of an underground mine, the administrative law judge must render a specific opinion regarding the issue of “substantially similar” with supporting rationale. *Luker v. Old Ben Coal Co.*, 2 B.L.R. 1-304 (1979).

b. Medical evidence

The existence of a totally disabling respiratory or pulmonary impairment must be established through medical evidence, *Mendis v. Director, OWCP*, 7 B.L.R. 1-855 (1985), and not by lay testimony alone. *Peabody Coal Co. v. Director, OWCP*, 581 F.2d 121 (7th Cir. 1978); *Centak v. Director, OWCP*, 6 B.L.R. 1-1072 (1984); *Wozny v. Director, OWCP*, 2 B.L.R. 1-141 (1979); *Casias v. Director, OWCP*, 2 B.L.R. 1-259 (1979). The Board has held that the minimum standard of proof of a totally disabling respiratory impairment comprises documentation submitted by an examining physician together with credible and probative testimony by the claimant and another lay person familiar with the claimant's condition. *Skursha v. U.S. Steel Corp.*, 2 B.L.R. 1-518 (1979); *Sparkman v. Director, OWCP*, 2 B.L.R. 1-488 (1979).

c. Rebuttal of the presumption

The presumption may be rebutted only if it is established that the miner does not have pneumoconiosis or that his respiratory impairment did not arise out of, or in connection with, employment in a coal mine. 20 C.F.R. § 410.414(b)(2). Negative x-ray evidence alone is insufficient to demonstrate the absence of pneumoconiosis and will not rebut the presumption under § 410.414. 20 C.F.R. § 410.414(c). However, while negative x-rays alone are insufficient to rebut, medical opinions based on negative x-rays may support a finding of rebuttal. *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985); *Maynard v. Central Coal Co.*, 2 B.L.R. 1-985 (1980). Rebuttal may also be accomplished by demonstrating that the totally disabling chronic respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. The Board has interpreted this method of rebuttal as requiring a showing that “to a reasonable degree of medical certainty” the claimant's totally disabling impairment was caused by something other than coal mine employment. *Martinez v. Director, OWCP*, 2 B.L.R. 1-231 (1979); *Legate v. Island Creek Coal Co.*, 1 B.L.R. 1-902 (1978); *Rogers v. Ziegler Coal Co.*, 1 B.L.R. 1-897 (1978).

2. The “many years” presumption

The provisions of the 15 year presumption also apply where the evidence shows a work history reflecting “many years” of coal mine employment (although less than 15), as well as a *severe lung impairment*. 20 C.F.R. § 410.414(b)(4). See *Clegg v. Director, OWCP*, 1 B.L.R. 1-433 (1978).

a. “Many years” defined

The Board has defined “many years” to mean at least 10, but less than 15, years of coal mine employment. *Williamson v. Director, OWCP*, 6 B.L.R. 1-1020 (1984). In addition to proving “many years” of coal mine employment, the claimant must prove a severe lung impairment pursuant to §§ 410.412, 410.422, or 410.424, which is beyond a mere showing of a respiratory or pulmonary impairment. 20 C.F.R. § 410.414(b). See also *Parsons v. Director, OWCP*, 6 B.L.R. 1-272 (1983). Lay testimony alone is insufficient to invoke this presumption. *Romero v. Director, OWCP*, 2 B.L.R. 1-531 (1979); *Miller v. Director, OWCP*, 2 B.L.R. 1-447 (1979).

b. Severe lung impairment required

The Board has held that a “severe lung impairment” need not be a totally disabling lung impairment. *Martinez v. Director, OWCP*, 2 B.L.R. 1-177 (1979). As a result, the claimant may trigger the presumption on the strength of evidence sufficient to invoke the “other relevant evidence” provisions of §§ 410.414(c) and 410.426(d). *Martinez v. Director, OWCP*, 2 B.L.R. 1-231 (1979).

E. Other relevant evidence

[VI(E)]

Even though the existence of pneumoconiosis is not established under § 410.414(a) by x-ray, autopsy, or biopsy evidence or under § 410.414(b) by evidence demonstrating a totally disabling chronic respiratory impairment, a finding of total disability due to pneumoconiosis may be made if “other relevant evidence” establishes the existence of a totally disabling chronic respiratory or pulmonary impairment and that such impairment arose out of employment in a coal mine. 20 C.F.R. § 410.414(c). Indeed, the administrative law judge is required to consider the provisions at § 410.414(c) where the claimant has failed to meet his or her burden by chest x-ray, autopsy, biopsy, or by operation of presumption. See, e.g., *Green v. Director, OWCP*, 7 B.L.R. 1-276 (1984).

1. Elements to be considered

The Board holds that “other relevant evidence” is not limited to the items listed in the regulations. The administrative law judge may also consider the following: positive x-rays not classified according to the requirements of § 410.428, *Watson v. Director, OWCP*, 4 B.L.R. 1-186 (1981); lay testimony, *Yendall v. Director, OWCP*, 4 B.L.R. 1-467 (1981); ventilatory studies which fail to meet the quality standards of § 410.430, *Gibson v. Ryan's Creek Coal Co.*, 4 B.L.R. 1-591 (1982); and nonqualifying ventilatory studies and blood gas studies which nonetheless reveal some degree of impairment. *Bain v. Old Ben Coal Co.*, 2 B.L.R. 1-1219 (1981); *Honaker v. Jewell Ridge Coal Co.*, 2 B.L.R. 1-947 (1980); *Marshall v. The Youghioghny & Ohio Coal Co.*, 2 B.L.R. 1-746 (1979). Medical reports based on nonqualifying test results may also be considered “other relevant

evidence.” *Ovies v. Director, OWCP*, 3 B.L.R. 1-610 (1981); *Brown v. U.S. Steel Corp.*, 2 B.L.R. 1-97 (1979).

2. Totally disabling respiratory condition

Under the second prong of § 410.414(c), the claimant must establish that the miner's totally disabling respiratory condition arose out of coal mine employment. *Spisok v. Director, OWCP*, 4 B.L.R. 1-225 (1981). In establishing a causal relationship between the miner's condition and his coal mine employment, “where a significant discrepancy exists between the administrative law judge's finding as to the claimant's length of coal mine employment and the assumption by the physicians regarding the claimant's length of coal mine employment, the administrative law judge must note this discrepancy and explain how the discrepancy affects the credibility of the physicians' opinions.” *Fitch v. Director, OWCP*, 9 B.L.R. 1-45, 1-46 (1986).

IV. Etiology of the pneumoconiosis

[VI(D)]

Where a miner is credited with ten or more years of coal mine employment and is suffering from pneumoconiosis, it will be presumed, in the absence of persuasive evidence to the contrary, that the pneumoconiosis arose out of such employment. 20 C.F.R. § 414.416(a).

A miner with less than ten years of coal mine employment bears the burden of proving the causal relationship between pneumoconiosis and the coal mine employment. 20 C.F.R. § 410.416(b); *Fly v. Peabody Coal Co.*, 1 B.L.R. 1-713 (1978).

In *Lewandowski v. Director, OWCP*, 1 B.L.R. 1-180 (1978), the claimant failed to carry this burden where he had an employment history of two years of coal mine work, 17 years in foundries and steel works, and an 18 to 20 year smoking history. The Board concluded that substantial evidence supported the administrative law judge's finding that the pneumoconiosis did not arise out of the claimant's coal mining. The Board agreed that, where a physician merely noted that the claimant worked in the mines for “some time,” the necessary causal relationship was not established because the opinion was too equivocal and vague. *Windom v. Director, OWCP*, 7 B.L.R. 1-52 (1984). Moreover, without benefit of competent medical proof, the claimant's testimony alone could not support a finding that his pneumoconiosis arose out of his coal mine employment where the miner's pneumoconiosis could have arisen from his 20 years of employment in a foundry and construction work subsequent to his four years of work in the mines. *Id.*

V. Total disability and its etiology

[VI(C)]

A. “Total disability” defined

The regulations at 20 C.F.R. § 410.412(a) provide the definition for “total disability” and reads, in part, as follows:

(1) A miner shall be considered to be totally disabled due to pneumoconiosis if his

pneumoconiosis prevents (or, in the case of a deceased miner, prevented) him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time . . . ; and

(2) His impairment can be (or was) expected to result in death, or (did last), has lasted, or can be expected to last for a continuous period of not less than 12 months.

20 C.F.R. § 410.412(a).

There are similar provisions for the establishment of total disability due to pneumoconiosis at the time of death or death due to pneumoconiosis in survivors' claims. 20 C.F.R. § 410.412(b).

1. Methods of establishing total disability

The regulations provide four means of establishing total disability under Part 410: (1) through medical factors listed in the Appendix at § 410.424(a), or their medical equivalent, where the impairment meets the duration requirement of 12 months at § 410.412(a); (2) by demonstrating that the severity of the impairment not only prevents the miner from performing his usual coal mine employment, but also renders him unable to engage in comparable or gainful work in light of his age, education, and work experience pursuant to § 410.426(a); (3) through “other relevant evidence” as described at § 410.426(d); or (4) by operation of presumption at § 410.418.

2. Rebuttal

Once it is determined that a miner is totally disabled due to pneumoconiosis, then the party opposing entitlement bears the burden of establishing by affirmative evidence that conditions other than pneumoconiosis are the cause of the miner's disability. *Smith v. Director, OWCP*, 7 B.L.R. 1-370 (1984); *Sauders v. Director, OWCP*, 7 B.L.R. 1-186 (1984).

Moreover, a finding of total disability may be overcome if the party opposing entitlement establishes that the miner continued to perform his usual coal mine work. In *Williamson v. U.S. Steel Corp.*, 2 B.L.R. 1-470 (1979), although the record contained a qualifying blood gas study, a finding that the claimant was not disabled was affirmed by the Board since the evidence demonstrated that the claimant continued to work effectively in his usual coal mine job for almost three years following the qualifying blood gas test. *See also Kimick v. National Mines Corp.*, 2 B.L.R. 1-221 (1979).

B. Pneumoconiosis is the impairment involved

[VI(C)(2)]

The regulations provide that total disability cannot be established under Part 410 unless pneumoconiosis is the impairment involved. 20 C.F.R. § 410.422(b).

1. Complicated pneumoconiosis

Upon a finding of complicated pneumoconiosis, the regulations at § 410.418 provide an *irrebuttable* presumption of total disability due to pneumoconiosis. If, however, the presumption at § 410.418 does not apply, then it is the claimant's burden to establish that the miner's pneumoconiosis is, in and of itself, totally disabling. *Castle v. Director, OWCP*, 4 B.L.R. 1-237 (1981); *Burks v. Hawley Coal Mining Corp.*, 2 B.L.R. 1-223 (1979); *Rogers v. Ziegler Coal Co.*, 1 B.L.R. 1-847 (1978). If the record shows that the claimant is totally disabled, and there is no evidence attributing this impairment to any cause other than pneumoconiosis, it may be presumed that pneumoconiosis is the primary cause of the claimant's disability. *Kurimak v. U.S. Steel Corp.*, 2 B.L.R. 1-75 (1979); *Stiltner v. Island Creek Coal Co.*, 2 B.L.R. 1-120 (1979); *Collins v. U.S. Steel Corp.*, 1 B.L.R. 1-654 (1978).

2. Multiple disabling conditions

The fact that a claimant's total disability may be due to other conditions, *i.e.* heart disease or cancer, such a determination will not negate entitlement so long as the record shows that the claimant's pneumoconiosis is also totally disabling. *Hughes v. Heyl & Patterson Inc.*, 1 B.L.R. 1-604 (1978). If, however, the claimant is totally disabled due to a breathing impairment, and the evidence is in conflict as to whether the cause of that impairment is pneumoconiosis, the administrative law judge must weigh the evidence, resolve the conflicts, and make a finding supported by adequate rationale. *Kurimak, supra*; *Rasel v. Bethlehem Mines Corp.*, 1 B.L.R. 1-918 (1978).

Where it is established that a condition other than pneumoconiosis is the primary cause of the miner's total disability, then the presumption of total disability due to pneumoconiosis is rebutted. *Maurizio v. Director, OWCP*, 2 B.L.R. 1-16 (1979). In *Casuas v. Director, OWCP*, 1 B.L.R. 1-518 (1978), the Board affirmed the administrative law judge's finding that a qualifying blood gas study was rebutted by evidence that the claimant's breathing impairment was primarily related to a cardiac problem, and was not related to coal mine employment. *See also Maurizio, supra*; *Stevens v. Director, OWCP*, 1 B.L.R. 1-386 (1978).

C. Establishing total disability; medical evidence listed in the Appendix

[VI(C)(3)]

The regulations provide that medical considerations alone shall justify a finding that a miner is totally disabled where his impairment is one that is listed in the Appendix to this subpart, or its medical equivalent, and there is no evidence to establish that the miner is engaged in comparable or gainful work. 20 C.F.R. § 410.424(a). *See Dunlap v. Director, OWCP*, 8 B.L.R. 1-375 (1985). The Appendix lists the following medical criteria:

(1) arterial oxygen tension at rest or during exercise and simultaneously determined arterial PCO₂ equal to or less than the values specified in the table; or

(2) cor pulmonale with right-sided congestive failure, with:

(A) right ventricular enlargement or outflow prominence on x-ray or

fluoroscopy; or

(B) ECG showing QRS duration less than 0.12 second and R of 5 mm. or more in V1 and R/S of 1.0 or more in V1 and transition zone (decreasing R/S left on V1; or

(3) congestive heart failure with signs of vascular congestion such as hepatomegaly or peripheral pulmonary edema with:

(A) cardiac-thoracic ratio of 55 percent or greater; or

(B) extension of the cardiac shadow.

20 C.F.R. § 410.424(a).

With respect to the establishment of congestive heart failure, an abnormal EKG alone is insufficient to establish either cor pulmonale with right-sided congestive heart failure or congestive heart failure with signs of vascular congestion. The EKG must meet the specifications listed after each criterion before it will be deemed sufficient to establish the existence of cor pulmonale. *Childress v. Harmon Mining Corp.*, 2 B.L.R. 1-644 (1979). Similarly, an autopsy listing pulmonary edema and congestions and congestive hepatomegaly with no associated finding of congestive heart failure is insufficient to establish such congestive heart failure. *McGhee v. Westmoreland Coal Co.*, 2 B.L.R. 1-607 (1979).

D. Total disability established; factors not in the Appendix
[VI(C)(4)]

Section 410.426 provides an alternative means of establishing total disability and reads, in part, as follows:

(a) Pneumoconiosis which constitutes neither an impairment listed in the appendix . . . nor the medical equivalent thereof, shall nevertheless be found totally disabling if because of the severity of such impairment, the miner is (or was) not only unable to do his previous coal mine work, but also cannot (or could not), considering his age, his education, and work experience, engage in any other kind of comparable and gainful work . . . available to him in the immediate area of his residence.

20 C.F.R. § 410.426(a).

Total disability is defined in terms of work capacity and, therefore, evidence of the miner's continued employment may be used to prove that he is not totally disabled. However, in rare instances where a miner continues to work but there is evidence of a reduced ability to perform as a result of the miner's pneumoconiosis, the miner may be considered totally disabled. *Kinnick v. National Mines Corp.*, 2 B.L.R. 1-221 (1979); *Kurimcak v. U.S. Steel Corp.*, 2 B.L.R. 1-75 (1979); *Mondragon v. C.F. & I. Steel Corp.*, 1 B.L.R. 1-323 (1977). For a discussion of factors to be considered in determining whether miner is able to perform "comparable and gainful work," see

Chapter 9.

E. Other relevant evidence [VI(E)]

Under § 410.414(c), the miner may employ “other relevant evidence” to establish total disability due to pneumoconiosis. The regulation specifies that “other relevant evidence” includes the following:

[M]edical tests such as blood gas studies, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the miner's physician, his spouse's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the individual's physical condition and other supportive materials.

20 C.F.R. §§ 410.414(c) and 410.426(d).

The provisions at §§ 410.414 and 410.426 apply where a ventilatory study and/or a physical performance test is medically contraindicated, or cannot be obtained, or where evidence obtained as a result of such does not establish that the miner is totally disabled. Under the regulations, pneumoconiosis may nevertheless be found totally disabling if other relevant evidence establishes that the miner has a chronic respiratory impairment, the severity of which prevents him not only from doing his previous coal mine work, but also, considering his age, his education, and work experience, prevents him from engaging in comparable and gainful work. 20 C.F.R. § 410.426(d).

1. Burden of proof

In *Fletcher v. Central Appalachian Coal Co.*, 1 B.L.R. 1-980 (1978), *aff'd sub. nom.*, *Central Appalachian Coal Co. v. BRB*, 679 F.2d 1086 (4th Cir. 1982), the Board discussed the claimant's burden of proof under this section, and by analogizing it to that under § 410.412, the Board held that the claimant establishes a *prima facie* case of total disability if s/he establishes the existence of a chronic respiratory or pulmonary disability which prevents him from engaging in his usual coal mine employment. The burden then shifts to the party opposing entitlement to show that the claimant can nonetheless perform comparable and gainful work in the immediate area of his residence.

The Board noted that this section is designed to permit the use of discretion by a administrative law judge who is called upon to use his or her experience and judgment in weighing all the evidence pertaining to the issue total disability. *Roetter v. Peabody Coal Co.*, 1 B.L.R. 1-957 (1978). However, the Board may set aside the judge's inferences if they are not supported by substantial evidence. *Hall v. Director, OWCP*, 8 B.L.R. 1-193 (1985).

2. Use of lay testimony

Lay testimony alone is insufficient to establish total disability; there must be some medical evidence showing that the lung impairment in question is of such severity that it is totally disabling. *Lynn v. Director, OWCP*, 3 B.L.R. 1-125 (1981); *Wozny v. Director, OWCP*, 2 B.L.R. 1-141 (1979);

Casias v. Director, OWCP, 2 B.L.R. 1-259 (1979).

3. Pulmonary function studies

Pneumoconiosis shall be found disabling if it is established that the miner has a respiratory impairment, because of pneumoconiosis, demonstrated on the basis of a ventilatory study in which the MVV and the FEV₁ are equal to or less than the values specified in the table. 20 C.F.R. § 410.426(b). The quality standards for ventilatory studies are found at 20 C.F.R. § 410.430.

Even though the administrative law judge credits a ventilatory study which qualifies under the table, that does not mandate a finding that the miner's pneumoconiosis is totally disabling. Rather, as noted above, it creates a presumption which may be rebutted by evidence that, based on the impairment, age, education and work experience of the claimant, he can do his usual coal mine work or comparable gainful work. Thus, in *Vance v. Buffalo Mining Co.*, 1 B.L.R. 1-555 (1978), the Board held that even though presumptive total disability was established by the results of qualifying ventilatory studies, the presumption was rebutted by evidence that, despite the established impairment, the miner continued to perform his usual coal mine work. See also *Caudill v. Director, OWCP*, 9 B.L.R. 1-174 (1986); *Fletcher v. Central Appalachian Coal Co.*, 1 B.L.R. 1-980 (1978), *aff'd sub nom, Central Appalachian Coal Co. v. BRB*, 679 F.2d 1986 (4th Cir. 1982).

4. Physical performance tests

Where the values are not met for ventilatory studies, pneumoconiosis may nevertheless be found disabling if a physical performance test establishes a chronic respiratory or pulmonary impairment which is medically the equivalent of the values specified in the table for ventilatory studies. 20 C.F.R. § 410.426(c).

F. Irrebuttable presumption; complicated pneumoconiosis

The regulations create an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he or she suffers from complicated pneumoconiosis as described in 20 C.F.R. § 410.418. Although x-rays can serve as evidence of complicated pneumoconiosis, the quality standards of § 410.428(b) for x-ray evidence do not apply to x-rays diagnosing complicated pneumoconiosis. *Swartz v. U.S. Steel Corp.*, 8 B.L.R. 1-481 (1986). The Board in *Swartz* stated that "Section 410.428(a), the section governing proof of complicated pneumoconiosis, does not require that x-rays introduced to prove complicated pneumoconiosis meet any quality standards other than they be classified as showing pneumoconiosis of Category A, B, or C under the specified classification systems." If the record contains any evidence indicating the existence of complicated pneumoconiosis, the administrative law judge must specifically address it and, if it is rejected, provide a legitimate explanation. *Shultz v. Borgman Coal Co.*, 1 B.L.R. 1-233 (1977).

If it is determined that the record supports a finding of complicated pneumoconiosis, the miner is entitled to an irrebuttable presumption of total disability due to pneumoconiosis. Consequently, this presumption is not rebutted by the fact that the miner continued to work after being diagnosed as suffering from complicated pneumoconiosis. *Truitt, supra; Namec v. Lehigh Valley Anthracite, Inc.*, 1 B.L.R. 1-514 (1978). However, the claimant must still prove that his

pneumoconiosis arose out of coal mine employment.

1. Conflicting evidence

Where the record contains evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, the administrative law judge must resolve the conflicts and make a finding. *Truitt v. North American Coal Corp.*, 2 B.L.R. 1-199 (1979), *aff'd sub nom, Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980). For example, where the record contains only a single x-ray reading indicating complicated pneumoconiosis, while more numerous x-rays indicate only simple pneumoconiosis or lung cancer, the Board affirmed the administrative law judge's finding of simple pneumoconiosis. *Rose v. Clinchfield Coal Co.*, 2 B.L.R. 1-13 (1979); *Spangler v. Director, OWCP*, 1 B.L.R. 1-698 (1978); *Travis v. Peabody Coal Co.*, 1 B.L.R. 1-314 (1977).

2. Autopsy evidence

Concerning autopsy evidence of complicated pneumoconiosis, the Third Circuit has held that an administrative law judge is permitted to make an equivalency determination, if the record contains a proper evidentiary basis. An equivalency determination is necessary when there is a question about whether nodules found in the lung upon medical examination (autopsy or biopsy) would correspond to opacities viewed on an x-ray indicating complicated pneumoconiosis. *Clites v. Jones & Loughlin Steel Corp.*, 663 F.2d 14 (3d Cir. 1981). In *Clites*, a physician testified that nodules found on autopsy, if viewed radiographically, would amount to opacities over one centimeter. Thus, the court upheld the administrative law judge's finding of the existence of complicated pneumoconiosis.

In subsequent cases, the Board has not defined what evidence forms a proper evidentiary basis for complicated pneumoconiosis. In *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 B.L.R. 1-1264 (1984), the Board concluded that the evidence lacked such a basis even though a doctor indicated that “the lung parenchyma also has underspread black modules which vary up to 0.9 to 1.2 centimeters.” Similarly, the evidentiary basis was found lacking in *Smith v. Island Creek Coal Co.*, 7 B.L.R. 1-734 (1985), where the doctor who performed the autopsy indicated that the lungs revealed two nodular areas measuring 1.2 to 1.3 centimeters, but no attempt was made to equate the nodules found with the size of x-ray opacities. *See also Reilly v. Director, OWCP*, 7 B.L.R. 1-139 (1984).

VI. Applicability of § 410.490 and Parts 727 and 718

Because claims adjudicated under Part 410 will have been reviewed and denied under the interim regulations at § 410.490 and Part 727, it would seem that a claim denied under Part 410 need not be considered under Part 718. *See e.g. Ezell v. Illinois Central Gulf Railroad*, BRB No. 88-0760 BLA (Mar. 30, 1993)(unpublished). However, some administrative law judges may choose to analyze the claim under Part 718 out of caution.