PART VII

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

B. EXISTENCE OF PNEUMOCONIOSIS

4. SECTION 718.202(a)(3): PRESUMPTIONS

c. Section 718.306: "25 year" presumption.

Section 718.202(a)(3) contains the "25 year" presumption found in Section 718.306, implementing Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), which was added to the Act by the Black Lung Benefits Reform Act of 1977, but was deleted by the Black Lung Benefits Amendments of 1981. Its provisions do not apply to claims filed on or after 180 days after January 1, 1982, or claims filed prior to June 30, 1982. 30 U.S.C. §921(c)(5). Section 411(c)(5) provides a rebuttable presumption of entitlement to benefits to eligible survivors of miners who were employed for twenty-five years or more in coal mines before June 30, 1971, and who died on or before March 1, 1978. It was designed to ease the burden of establishing entitlement caused by the unavailability of medical evidence to certain survivors. *See* S. Rep. No. 95-209, 95th Congress, 1st Sess. 18, *reprinted in* ***The Legislative History of the] Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977***, at 621 (Comm. Print 1979).

Under Section 411(c)(5), the eligible survivors of a miner are entitled to a rebuttable presumption of entitlement if two conditions are met. First, the miner must have completed a period of at least twenty-five years of qualifying[1] coal mine employment ending on or before June 30, 1971, *see* ***Fugate v. Falcon Coal Co.***, 12 BLR 1-59 (1988)(en banc recon.), the date on which federal dust standards went into effect. Second, the miner must have died on or before March 1, 1978, the effective date of the Reform Act.

The presumption may be established by a showing that the miner was partially or totally disabled due to pneumoconiosis prior to death. Rebuttal can be established by a showing that: 1) the miner did not suffer from pneumoconiosis, 2) the miner was not

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[1] No distinction is made between underground and surface mining for determining the length of the miner's employment. *See* ***Battaglia v. Peabody Coal Co.***, 3 BLR 1-729 (1981), *vacated and remanded on other gr'ds*, 690 F.2d 106, 5 BLR 2-1 (7th Cir. 1982).

partially or totally disabled, *or* 3) if the miner was partially or totally disabled, the disability was not due to pneumoconiosis. ***Amax Coal Co. v. Burns***, 855 F.2d 499 (7th Cir. 1988); ***Begley v. Consolidation Coal Co.***, 826 F.2d 1512, 10 BLR 2-265 (6th Cir. 1986); ***Gober v. Reading Anthracite Co.***, 12 BLR 1-67 (1988); ***Dipyatic v. Bethlehem Mines Corp.***, 7 BLR 1-758 (1985); ***Trujillo v. Kaiser Steel Corp.***, 3 BLR 1-497 (1981).

Section 718.306 implements Section 411(c)(5) of the Act. 20 C.F.R. §718.306. Section 718.306 is applied to claims filed on or after March 31, 1980. Section 718.306(b) defines "partial disability" as a *reduced ability* to engage in the miner's "usual coal mine work" or "comparable and gainful work." *See* Part II.G., I. of the Desk Book for definitions of these terms.

Section 718.306(c) provides only two express methods of rebuttal, *i.e*., that the miner did not experience a reduced ability to work at the time of death, or that the miner did not suffer from pneumoconiosis. In ***Trujillo v. Kaiser Steel Corp.***, 3 BLR 1-497 (1981), and ***Freeman v. Old Ben Coal Co.***, 3 BLR 1-599 (1981), *aff'd sub nom.* ***Freeman v. Director, OWCP***, 687 F.2d 214, 4 BLR 2-137 (7th Cir. 1982), the Board held that Section 411(c)(5) also provides for a third method of rebuttal, *i.e.*, that any disability that existed at the time of death was due to a cause other than pneumoconiosis.

Section 718.306(d) provides limits on the type of evidence that can be used to establish rebuttal. None of the following items, *by itself*, is sufficient to establish rebuttal.

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

20 C.F.R. §718.306(d). Although any one of these types of evidence is not sufficient to establish rebuttal, they do have "some probative value" and may be considered by the administrative law judge. ***Freeman***, 687 F.2d at 217. In addition, the administrative law judge must consider all relevant evidence in determining rebuttal and is in no way limited to these types of evidence. *See* ***Duda v. North American Coal Co.***, 6 BLR 1-1203 (1984).

The Board has held that retroactive application of the Reform Act, which added the new Section 411(c)(5) presumption, to claims filed and heard before March 1, 1978, is not a violation of due process as long as the parties are given notice that the Reform Act is being considered, and are given an opportunity to comment on its effects and to submit new evidence. ***Trujillo v. Kaiser Steel Corp.***, 3 BLR 1-497 (1981). Further, the Board rejected the argument that Section 411(c)(5) liability applies only to the Secretary of Labor and is inapplicable to operators, noting that Section 422, 30 U.S.C. §932, appears to mandate specifically operator liability under Section 411(c)(5) by making various provisions of the Longshore Act applicable to operators "with respect to death or total disability due to pneumoconiosis arising out of coal mine employment in such mine, or with respect to entitlements established in paragraph (5) of Section 411(c)." ***Marinelli v. North American Coal Corp.***, 3 BLR 1-658 (1981); ***Trujillo****, supra*.

Employers have attempted to escape liability for Section 411(c)(5) benefits in cases where the deceased miner completed twenty-five years of coal mine employment prior to 1969. Citing ***Truitt v. North American Coal Co.***, 2 BLR 1-199 (1979), *appeal dismissed sub nom.* ***Director v. North American Coal Corp.***, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980), employers argued that these miners should be presumed disabled at the completion of twenty-five years and, therefore, those claims should be treated as one involving no post-1969 coal mine employment. Such treatment would absolve the employer from liability under Section 422(c) of the Act, 30 U.S.C. §932(c). The Board rejected the applicability of ***Truitt*** to the Section 411(c)(5) presumption, noting the distinction between the *rebuttable* nature of the 411(c)(5) presumption and the *irrebuttable* nature of the 411(c)(3) presumption, relied upon in ***Truitt***. ***Marinelli****, supra;* ***Trujillo****, supra*.

Thus, the fact that the twenty-five year requirement is satisfied prior to 1969 will not relieve an operator of liability unless the miner's last coal mine employment was prior to January 1, 1970. If there is at least one day of coal mine employment after December 31, 1969, it is employer's burden to establish that the miner's presumed partial or total disability did not arise at least in part out of that exposure.

The Board has also held that the June 30, 1971, cutoff date provided by Section 411(c)(5) has no relationship to determining the responsible operator. The purpose of that cutoff date is merely to limit those who qualify for the presumption to the survivors of miners who were exposed for at least twenty-five years to the severe dust conditions that existed prior to the imposition of dust standards on June 30, 1971. Thus, while Section 725.493, 20 C.F.R. §725.493, (*see* Part II.L. of the Desk Book) provides that the operator with whom the miner had the most recent periods of cumulative employment of not less than one year shall be the responsible operator, it is not necessary that the miner complete at least one year of employment with the employer as of June 30, 1971, in order for the employer to be the responsible operator. ***Trujillo****, supra*.

For a more complete discussion of Section 411(c)(5) and related cases, see Part

X.G. of the Desk Book.

CASE LISTINGS

DIGESTS

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