

PART VII

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

D. TOTAL DISABILITY: SECTION 718.204

6. SECTION 718.204(c)(5)

In a survivor's case, the administrative law judge may consider Section 718.204(c)(5) where the evidence is insufficient to establish subsections (c)(1)-(c)(4). *Hillibush v. U. S. Department of Labor*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988); see also *Koppenhaver v. Director, OWCP*, 864 F.2d 287, 12 BLR 2-103 (3d Cir. 1988), *vacating* 11 BLR 1-51 (1988)(en banc recon.); *Coleman v. Director, OWCP*, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987); *Dempsey v. Director, OWCP*, 811 F.2d 1152, 9 BLR 2-226 (7th Cir. 1987). The Board has construed *Hillibush* and the other circuit cases to mean that Section 718.204(c)(5) is not available where medical evidence of record affirmatively establishes "that no lung disease was present." *Pekala v. Director, OWCP*, 13 BLR 1-1 (1989).

CASE LISTINGS

DIGESTS

If claimant establishes access to Section 718.204(c)(5), the administrative law judge must make complete and reviewable findings as to whether the lay evidence in this case is sufficient to establish the presence of total respiratory disability pursuant to *Kosack v. Director, OWCP*, 7 BLR 1-248 (1984), and whether claimant's disability is due to pneumoconiosis. *Gessner v. Director, OWCP*, 11 BLR 1-1 (1987).

In a survivor's claim, the Board held that the administrative law judge did not err in *not* evaluating the lay evidence of record since the medical evidence affirmatively established that no lung disease was present, thereby precluding the use of lay evidence to establish the miner's total disability under Section 718.204(c)(5). *Pekala v. Director, OWCP*, 13 BLR 1-1 (1989).

For purposes of establishing entitlement in a survivor's claim, a death certificate which is silent as to contributing condition(s) to miner's death by a physician who does not indicate that an autopsy or other physical examination of the body has been performed

is inherently unreliable and does not constitute substantial evidence that the miner died of a coronary occlusion. ***Hillibush v. U. S. Department of Labor***, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988)

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