

PART IX

REGULATORY PRESUMPTIONS

A. 20 C.F.R. §727.203 INTERIM PRESUMPTION

1. INVOCATION OF THE INTERIM PRESUMPTION GENERALLY

Section 727.203(a) sets forth the medical criteria that qualified miners or survivors may use to invoke the interim presumption of total disability or death due to pneumoconiosis arising out of coal mine employment. Once invoked, the presumption establishes the four elements of eligibility under the Act: 1) the existence of pneumoconiosis; 2) that the pneumoconiosis arose out of coal mine employment 3) the totally disabling nature of the disease; 4) the causal connection between the total disability and pneumoconiosis (or death due to pneumoconiosis). A living miner entitled to invocation of the presumption is *presumed* to be totally disabled due to pneumoconiosis arising out of coal mine employment. In survivors claims, the interim presumption encompasses two sets of presumed facts, each of which must be rebutted: total disability due to pneumoconiosis at the time of the miner's death, and death due to pneumoconiosis. *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Peskie v. United States Steel Corp.*, 8 BLR 1-126, 1-129 n.5 (1985). For further discussion of the interim presumption in survivors' claims see Part X.H. of the Desk Book.

These elements of eligibility are presumed if claimant establishes at least ten years of coal mine employment and if claimant meets one of five medical requirements:

(1) a chest x-ray, biopsy, or autopsy establishes the existence of pneumoconiosis; (2) ventilatory studies establish the presence of a chronic respiratory or pulmonary disease of a specified severity; (3) blood gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lungs to the blood; (4) other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment; or (5) in the case of a deceased miner where no medical evidence is available, the affidavit of a survivor with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

20 C.F.R. §727.203(a)(1)-(a)(5); *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987).

In *Mullins*, the Supreme Court held that all like-kind evidence must be weighed

prior to invocation. While one item of qualifying evidence can establish invocation, it does not compel invocation. Invocation must be established by a preponderance of the evidence. *Mullins*, *supra*. Prior to the holding in *Mullins*, the Third and Fourth Circuits had held that a single qualifying diagnostic test or medical report was sufficient to invoke the interim presumption. *Revak v. National Mines Corp.*, 808 F.2d 996, 9 BLR 2-177 (3d Cir. 1986); *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986).

If the administrative law judge properly invokes the interim presumption pursuant to any subsection of Section 727.203(a), then failure to invoke under any other applicable subsection, or any error in evaluating the evidence pursuant to another method of invocation, is harmless error. See *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Cox v. Director, OWCP*, 5 BLR 1-525 (1982). It is therefore not necessary for the Board to address the administrative law judge's findings under any other subsection. *Cochran*, 12 BLR at 1-137; *Wetzel*, 8 BLR at 1-140. The Board, however, interprets *Mullins* as holding that a finding of subsection (a)(1) invocation precludes subsection (b)(4) rebuttal.

In light of the decision of the Supreme Court in *Pittston Coal Group v. Sebben*, 109 S.Ct. 414, 12 BLR 2-89 (1988), the Board has held that claims involving miners with less than ten years of coal mine employment filed on or before March 31, 1980, are entitled to an interim presumption of total disability due to pneumoconiosis where claimants can establish, pursuant to Section 410.490(b), the existence of pneumoconiosis by x-ray, autopsy or biopsy, and that this pneumoconiosis arose out of coal mine employment. *Phipps v. Director, OWCP*, 17 BLR 1-39 (1992)(en banc)(Smith, J., concurring; McGranery, J., concurring and dissenting).

None of the methods of invocation requires proof that the primary cause of claimant's purported disability was pneumoconiosis and only Section 727.203(a)(4) and (a)(5) requires proof of total disability. *Mullins*, 108 S.Ct. at 431-432, 11 BLR at 2-5.

Once the interim presumption is invoked, the burden shifts to the party opposing entitlement to establish rebuttal by a preponderance of the evidence, pursuant to one of the four methods provided in 20 C.F.R. §727.203(b). See *Lattimer v. Peabody Coal Co.*, 8 BLR 1-509, 1-510 (1986); *Allen v. Union Carbide Corp.*, 8 BLR 1-393, 1-395 (1985); *Canaday v. Westmoreland Coal Co.*, 5 BLR 1-165, 1-168 (1982); see *Peabody Coal Co. v. Hale*, 771 F.2d 246, 8 BLR 2-34 (7th Cir. 1985); *Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1985); *American Coal Co. v. Benefits Review Board*, 738 F.2d 387, 6 BLR 2-81 (10th Cir. 1984); *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984). The underlying facts on which invocation is based remain in the case and must also be considered on rebuttal. *Canaday*, 5 BLR at 1-170.

CASE LISTINGS

[error on invocation harmless where adjudicator indicates he would have found rebuttal] **Bray v. Director, OWCP**, 6 BLR 1-400 (1983).

[no need to show comparability of dust conditions between surface and underground mine work under interim criteria] **Honaker v. Habco Coal Co.**, 6 BLR 1-408 (1983).

[adjudicator erred in considering ventilatory studies and medical reports at subsection (a)(3) to support qualifying blood gas study; only evidence relevant to particular method of invocation can be considered] **Tucker v. Eastern Coal Corp.**, 6 BLR 1-743 (1983).

[non-conforming clinical tests/ x-rays re-read as negative, cannot support invocation at Section 727.203(a)(4)] **Arnoni v. Director, OWCP**, 6 BLR 1-423 (1983), *aff'd mem.* 738 F.2d 420 (3d Cir. 1984); see **Horn v. Jewell Ridge Coal Corp.**, 6 BLR 1-933 (1984).

DIGESTS

The reliability of objective studies is always at issue, and it is the administrative law judge's responsibility to determine the reliability of all evidence submitted. **Robinette v. Director, OWCP**, 9 BLR 1-154 (1986).

Under **Mullins**, the Board granted a motion for reconsideration and modified its earlier decision from a holding based on **Stapleton. Castle v. Eastern Associated Coal Corp.**, 12 BLR 1-105 (1988)(Tait, J., concurring).

In light of the decision of the Supreme Court in **Pittston Coal Group v. Sebben**, 109 S.Ct. 414, 12 BLR 2-89 (1988), the Board held that claims involving miners with less than ten years of coal mine employment filed on or before March 31, 1980, are entitled to an interim presumption of total disability due to pneumoconiosis where claimants can establish, pursuant to Section 410.490(b), the existence of pneumoconiosis by x-ray, autopsy or biopsy, and that this pneumoconiosis arose out of coal mine employment. **Phipps v. Director, OWCP**, 17 BLR 1-39 (1992)(en banc)(Smith, J., concurring; McGranery, J., concurring and dissenting).