Chapter 8
Living Miners' Claims: Entitlement Under 20 C.F.R. Part 410

I. Applicability of 20 C.F.R. Part 410, generally

Under Title IV of the Federal Coal Mine Health and Safety Act of 1969, Congress authorized the Social Security Administration to promulgate 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. Twenty C.F.R. Part 410 applies to claims filed on or before December 31, 1973. 20 C.F.R. § 410.231.

Since its promulgation, the Board broadened applicability of 20 C.F.R. Part 410 by holding that a claim, which is reviewed and subsequently denied under interim regulations at 20 C.F.R. § 410.490 (a § 415 transition claim), also must be analyzed under the regulations at 20 C.F.R. 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 20 C.F.R. Part 410. Citing to 20 C.F.R. § 727.203(d), the Board held that 20 C.F.R. Part 410 applies to all Part C claims filed prior to the effective date of the permanent Department of Labor regulations at 20 C.F.R. Part 718 (which is March 31, 1980), where Claimant fails to establish entitlement under 20 C.F.R. Part 727. However, five circuit courts of appeal disagreed with the Board's holding in this regard, and these courts concluded 20 C.F.R. Part 718, and not 20 C.F.R. Part 410, applies to claims filed prior to March 31, 1980, but adjudicated and denied under 20 C.F.R. 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 (3rd Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987).

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) the pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled; and (4) the 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

A. "Pneumoconiosis" defined

A finding of pneumoconiosis may be made through any one of the following methods: (1) chest 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 20 C.F.R. § 410.401(b) 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 x-ray evidence

A chest x-ray will indicate the existence of pneumoconiosis if it is classified as Category 1, 2, 3 (for simple pneumoconiosis), and/or A, B, or C (for complicated pneumoconiosis) 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). Twenty C.F.R. § 410.428(3)(b) details the criteria for a valid x-ray study conducted 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). Twenty C.F.R. § 410.428(a)(3) provides a detailed discussion of the specific information that 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 20 C.F.R. § 410.414(a), but "other relevant 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, the 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 an underground mine. It is the mine site, and not the individual miner's work, that must meet the "substantially similar" requirement of 20 C.F.R. § 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 the conditions of a miner's employment at 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); it cannot be established through 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 holds the minimum standard of proof of a totally disabling respiratory impairment comprises consideration of

documentation submitted by an examining physician together along with credible and probative testimony by Claimant and another lay person familiar with 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 the miner does not have pneumoconiosis, or the 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, standing alone, is insufficient to demonstrate the absence of pneumoconiosis, and this evidence will not rebut the presumption under 20 C.F.R. § 410.414. 20 C.F.R. § 410.414(c). However, while negative x-rays alone are insufficient to rebut the presumption, medical opinions based, in part, 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 also may be accomplished by demonstrating the totally disabling chronic respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. The Board interpreted this method of rebuttal as requiring a showing that, "to a reasonable degree of medical certainty," 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 evidence demonstrates 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 defines "many years" as at least 10, but less than 15, years of coal mine employment. *Williamson v. Director, OWCP*, 6 B.L.R. 1-1020 (1984).

b. Severe lung impairment required

In addition to proving "many years" of coal mine employment, Claimant must prove a severe lung impairment pursuant to 20 C.F.R. §§ 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).

A "severe lung impairment" need not be totally disabling. *Martinez v. Director, OWCP*, 2 B.L.R. 1-177 (1979). As a result, Claimant may trigger the presumption on the strength of evidence sufficient to invoke the "other relevant evidence" provisions of 20 C.F.R. §§ 410.414(c) and 410.426(d). *Martinez v. Director, OWCP*, 2 B.L.R. 1-231 (1979).

E. Other relevant evidence

Even though the existence of pneumoconiosis is not established under 20 C.F.R. § 410.414(a) by x-ray, autopsy, or biopsy evidence, or under 20 C.F.R. § 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 (1) the existence of a totally disabling chronic respiratory or pulmonary impairment, and (2) the 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 20 C.F.R. § 410.414(c) where Claimant fails to meet his or her burden by chest x-ray, autopsy, biopsy, or by operation of presumption. *See Green v. Director, OWCP*, 7 B.L.R. 1-276 (1984).

1. Elements to be considered

The Board holds "other relevant evidence" is not limited to the items listed in the regulations. The Administrative Law Judge also may consider the following: positive x-rays not classified according to the requirements of 20 C.F.R. § 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); non-qualifying ventilatory studies under 20 C.F.R. § 410.430, *Gibson v. Ryan's Creek Coal Co.*, 4 B.L.R. 1-591 (1982); and non-qualifying ventilatory studies and blood gas studies that 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 Youghiogheny & Ohio Coal Co.*, 2 B.L.R. 1-746 (1979). Medical reports based on non-qualifying test results also may 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 20 C.F.R. § 410.414(c), Claimant must establish 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 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

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, 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 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), Claimant failed to carry this burden of demonstrating coal workers' pneumoconiosis 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 agreed with the Administrative Law Judge that, where a physician merely noted that Claimant worked in the mines for "some time," the necessary causal relationship is 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, Claimant's testimony alone cannot support a finding that his pneumoconiosis arose out of coal mine employment, particularly where the miner's pneumoconiosis could have arisen from 20 years of employment in a foundry and construction work subsequent to his two years of work in the mines.

V. Total disability and its etiology

A. "Total disability" defined

Twenty C.F.R. § 410.412(a) defines "total disability" due to pneumoconiosis 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
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> (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 establishing 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 at 20 C.F.R. Part 410 provide four means of establishing total disability: (1) through medical factors listed in the Appendix at 20 C.F.R. § 410.424(a), or their medical equivalent, where the impairment meets the duration requirement of 12 months at 20 C.F.R. § 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 20 C.F.R. § 410.426(a); (3) through "other relevant evidence" as described at 20 C.F.R. § 410.426(d); or (4) by operation of presumption at 20 C.F.R. § 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, 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).

A finding of total disability may be overcome if the party opposing entitlement establishes 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 Claimant was not disabled was affirmed by the Board, since the evidence demonstrated 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

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

1. Complicated pneumoconiosis

Upon finding complicated pneumoconiosis, the regulations at 20 C.F.R. § 410.418 provide an *irrebuttable* presumption of total disability due to pneumoconiosis. If, however, the presumption at 20 C.F.R. § 410.418 does not apply, then it is Claimant's burden to establish the 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 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 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 Claimant's total disability may be due to other conditions, *i.e.* heart disease or cancer, will not negate entitlement so long as the record shows the miner's pneumoconiosis is also totally disabling. *Hughes v. Heyl & Patterson Inc.*, 1 B.L.R. 1-604 (1978). If, however, the miner 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 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

The regulations provide that medical considerations alone shall justify a finding a miner is totally disabled where (1) the impairment is listed in the Appendix to 20 C.F.R. Part 410, or its medical equivalent, and (2) 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 to 20 C.F.R. Part 410 lists the following medical criteria:

> (1) arterial oxygen tension at rest or during exercise and simultaneously determined arterial PCO_2 equal to or less than the values specified in the table; or
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> (2) cor pulmonale with right-sided congestive failure, with:
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> > (A) right ventricular enlargement or outflow prominence on x-ray or fluoroscopy; or
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> > (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 of V1; or
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> (3) congestive heart failure with signs of vascular congestion such as hepatomegaly or peripheral pulmonary edema with:
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> > (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 establishing 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, congestion, and congestive hepatomegaly, with no associated finding of congestive heart failure, is insufficient to establish congestive heart failure. *McGhee v. Westmoreland Coal Co.*, 2 B.L.R. 1-607 (1979).

D. Total disability established; factors not in the Appendix

The regulations at 20 C.F.R. § 410.426 provide an alternative means of establishing total disability and read, 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 the miner 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

Under 20 C.F.R. § 410.414(c), the miner may establish total disability due to pneumoconiosis using "other relevant evidence." 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 20 C.F.R. §§ 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 the study and/or test does not establish that the miner is totally disabled. Under the regulations, pneumoconiosis may be totally disabling if other relevant evidence establishes the miner has a chronic respiratory impairment, the severity of which prevents the miner not only from doing his or her previous coal mine work, but also comparable and gainful work considering his or her age, his education, and work experience. 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 held Claimant's burden of proof under this section was similar to the burden required under 20 C.F.R. § 410.412. In particular, the Board concluded a *prima facie* case of total disability is demonstrated if evidence establishes the existence of a chronic respiratory or pulmonary disability, which prevents the miner from engaging in his or her usual coal mine employment. The burden then shifts to the party opposing entitlement to show the miner can perform comparable and gainful work in the immediate area of his or her residence.

The Board noted this section is designed to permit the use of discretion by the Administrative Law Judge, who must rely on 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 Administrative Law 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; rather, there must be some medical evidence showing 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 is disabling if the miner's ventilatory study results produce MVV and FEV_1 values 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 qualifying ventilatory study, this does not mandate a finding that the miner's pneumoconiosis is totally disabling. Rather, as noted above, it creates a presumption. The presumption may be rebutted where, based on the impairment, age, education and work experience, the miner can do his or her 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, even where total disability was presumed by the results of qualifying ventilatory studies, the presumption was rebutted by evidence that 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

For non-qualifying ventilatory studies, pneumoconiosis nevertheless may be 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 s/he suffers from complicated pneumoconiosis as described in 20 C.F.R. § 410.418. Although x-rays may serve as evidence of complicated pneumoconiosis, the quality standards at 20 C.F.R. § 410.428(b) 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, "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 an explanation must be provided if the evidence is rejected. *Shultz v. Borgman Coal Co.*, 1 B.L.R. 1-233 (1977).

If the record supports a finding of complicated pneumoconiosis, a claimant is entitled to an irrebuttable presumption of total disability due to pneumoconiosis. And, as a result, this presumption is not rebutted by demonstrating that the miner continued to work after being diagnosed with complicated pneumoconiosis. *Truitt*, *supra*; *Namec v. Lehigh Valley Anthracite, Inc.,* 1 B.L.R. 1-514 (1978). However, a claimant must prove that the miner's 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 (3rd Cir. 1980). For example, where a single x-ray reading indicated complicated pneumoconiosis, and more numerous x-rays indicated the presence of 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 holds 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 on 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 (3rd 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 the evidence did not support a finding of complicated pneumoconiosis, 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, an 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).

See Chapter 11 for further discussion of "equivalency" determinations as related to finding complicated pneumoconiosis under 20 C.F.R. Part 718.

VI. Applicability of 20 C.F.R. § 410.490 and 20 C.F.R. Parts 727 and 718

Because, in most cases, claims adjudicated under 20 C.F.R. Part 410 have been reviewed and denied under the interim regulations at 20 C.F.R. § 410.490 or 20 C.F.R. Part 727, it would seem that a claim denied under 20 C.F.R. Part 410 need not be considered under 20 C.F.R. Part 718. *See e.g. Ezell v. Illinois Central Gulf Railroad*, BRB No. 88-0760 BLA (Mar. 30, 1993) (unpub.).