

## PART V

### STATUTORY PRESUMPTIONS IN MINERS' CLAIMS

#### A. SECTION 411(c)(1)

Section 411(c)(1) of the Act, 30 U.S.C. §921(c)(1), as implemented by 20 C.F.R. §§410.416(a), 718.203 and 718.302, provides that, in the case of a miner who was employed for ten or more years in one or more coal mines and who is suffering from pneumoconiosis, there is a rebuttable presumption that his pneumoconiosis arose out of employment in the nation's coal mines. In any other case, the regulations provide that a miner suffering from pneumoconiosis must submit the evidence necessary to establish that his pneumoconiosis arose out of employment in the nation's coal mines. For additional explanation of this presumption and case law, see Part VI.D. and Part VII.C. of the Black Lung Desk Book.

In light of the definition of legal pneumoconiosis set forth in the revised regulation at 20 C.F.R. §718.201(a)(2), and the historical evolution of the Act, the Tenth Circuit held that the rebuttable presumption at 20 C.F.R. §718.203 is only applicable to claims of clinical pneumoconiosis and does not extend to claims of legal pneumoconiosis. ***Andersen v. Director, OWCP***, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

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#### B. SECTION 411(c)(3)

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulations found at 20 C.F.R. §§410.418 and 718.304, provide that if a miner is suffering or suffered from complicated pneumoconiosis, then there is an *irrebuttable* presumption that s/he is totally disabled due to pneumoconiosis, that death was due to pneumoconiosis, or that, at the time of death, s/he was totally disabled due to pneumoconiosis.

Complicated pneumoconiosis may be proven by x-ray evidence only if the x-ray evidence, which must be weighed, reveals one or more large opacities (greater than one centimeter in diameter), classified as category A, B, or C. 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §§410.418(a), 718.304(a). Complicated pneumoconiosis may be established by autopsy or biopsy evidence, if such evidence establishes massive pulmonary lesions. 30 U.S.C. §921(c)(3)(B); 20 C.F.R. §§410.418(b), 718.304(b). Section 410.418(b) also states that a biopsy or autopsy will be accepted as evidence of complicated pneumoconiosis if the histological findings establish simple pneumoconiosis and progressive massive fibrosis. Section 718.304(b) does not contain this additional provision. Finally, a provision is made for diagnosis of complicated pneumoconiosis by other means, if the condition diagnosed would yield results similar to those described above if diagnosed by x-ray, autopsy or biopsy. 30 U.S.C. §921(c)(3)(C); 20 C.F.R. §§410.418(c), 718.304(c). The Board has construed this standard strictly in several cases. See *Lohr v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984); *Clites v. Jones & Laughlin Steel Corp.*, 2 BLR 1-1019 (1980); *Gaudiano v. United States Steel Corp.*, 1 BLR 1-949 (1978).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify the claimant for the irrebuttable presumption found at Section 411(c)(3). Rather, the administrative law judge must examine all of the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. See *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). 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, must provide a legitimate explanation. *Shultz v. Borgman Coal Co.*, 1 BLR 1-233 (1977). If there is no evidence of complicated pneumoconiosis in the record,

however, no specific finding of fact is required as to the existence or non-existence of complicated pneumoconiosis. **Lewandowski v. Director, OWCP**, 1 BLR 1-840 (1978).

This presumption is not rebutted by the fact that the miner continues or continued to work after being diagnosed as suffering from complicated pneumoconiosis. Moreover, once a claimant is found entitled to the benefit of this presumption, he is entitled to monthly benefits without any offset for earned wages. See **Kelley v. Brookside Pratt Mining Co.**, 1 BLR 1-619 (1978); **Fisher v. Bethlehem Mines Corp.**, 1 BLR 1-591 (1978); see also **Gaul v. Bethlehem Mines Corp.**, 1 BLR 1-911 (1978).

### **DIGESTS**

Before making a determination pursuant to 30 U.S.C. §921(c)(3), [20 C.F.R. §718.304] all relevant evidence must be considered. **Lester v. Director, OWCP**, 993 F.2d 1143, 17 BLR 2-114 (4th Cir.1993).

The Fourth Circuit held that because the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides three different ways of diagnosing complicated pneumoconiosis, it requires that the administrative law judge make an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption, *i.e.*, if a diagnosis is by biopsy, that a miner have “massive lesions” which would, if x-rayed, show as opacities greater than one centimeter in diameter. [Note: The Fourth Circuit declined to impose a rule that complicated pneumoconiosis can only be diagnosed by a biopsy or autopsy if it reveals evidence of a lesion at least two centimeters in diameter in order establish “massive lesions,” which would, if x-rayed, show as opacities greater than one centimeter in diameter. The Fourth Circuit noted that it may be possible for the Department of Labor to engage in a single fact-finding exercise to determine how large a lesion must be in order to appear on an x-ray as a greater than one-centimeter opacity and thereafter to promulgate a rule imposing this finding on all future cases.] **Double B Mining, Inc. v. Blankenship**, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999).

The Sixth Circuit held that the irrebuttable presumption at Section 718.304, see Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), is not automatically triggered by x-ray evidence showing one or more large opacities greater than one centimeter in diameter when conflicting evidence is presented that rebuts the x-ray readings, as an administrative law judge must weigh all the different categories of evidence under Section 718.304 together pursuant to Section 923(b) of the Act, 30 U.S.C. §923(b). **Gray v. SLC Coal Co.**, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

To the extent that there is a divergence between the medical and legal standards for complicated pneumoconiosis, a trier-of-fact must apply the standard enunciated by Congress. The presumption under §921(c)(3) is triggered by a congressionally defined

condition, for which the statute gives no name, but which if found to be present, creates an irrebutable presumption that disability or death was caused by pneumoconiosis. The statute provides three methods for establishing the existence of this condition, but the methods are not necessarily useful as diagnostic, clinical guidelines, and the statute demonstrates no intent to incorporate a purely medical definition of “complicated pneumoconiosis.” ***Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]***, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

The Fourth Circuit held that the presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 does not subsume a 20 C.F.R. §718.203 “arising out of” causation finding. Thus, a miner who is found totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304 is not automatically entitled to benefits. The miner must independently establish, and the administrative law judge must specifically find, that the miner’s pneumoconiosis arose at least in part out of coal mine employment pursuant to 20 C.F.R. §718.203, either through the ten-years presumption, or through medical evidence. ***Daniels Co. v. Mitchell***, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

The United States Court of Appeals for the Eleventh Circuit held, in a survivor’s claim, that it would decline to follow the holding of the United States Court of Appeals for the Fourth Circuit in ***Double B. Mining Inc., v. Blankenship***, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999), that equivalency determinations between the between the x-ray standard and the autopsy standard, see 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, were essential to determine that the existence of complicated pneumoconiosis was established. ***Pittsburg & Midway Coal Co. [Cornelius]***, 508 F.3d 975, 987 n.7, 24 BLR 2-72 n.7 (11th Cir. 2007). The rationale of the court is equally applicable in miner’s claims.

In a case where the United States Court of Appeals for the Fourth Circuit acknowledged that all relevant evidence supported a finding that claimant had radiographic opacities greater than three centimeters, the court rejected employer’s assertion that the administrative law judge improperly shifted the burden of proof, holding that the administrative law judge’s approach in weighing the evidence was consistent with ***Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]***, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), insofar as she “simply stated that the clear evidence of large opacities would support the presumption unless the record contained ‘affirmative evidence’ showing either that the opacities did not exist or that they were due to something else, such as a disease other than pneumoconiosis.” In affirming the award of benefits, the court also held that the administrative law judge permissibly rejected, as speculative and equivocal, the opinions of employer’s experts, who opined that large opacities identified were unrelated to coal dust exposure and likely due to other conditions, such as tuberculosis, histoplasmosis, granulomatous disease, or sarcoidosis, as they failed to point to evidence that claimant was suffering from any of the alternative diseases and explain the bases for their respective diagnoses. ***Westmoreland Coal Co. v. Cox***, 602 F.3d 276, BLR (4th Cir. 2010).

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#### C. SECTION 411(c)(4)

The presumption at Section 718.305 is available in claims filed before January 1, 1982 where the miner worked at least 15 years in underground mining or comparable surface mining, and the evidence establishes the existence of a totally disabling respiratory or pulmonary impairment. At invocation, claimant is not required to establish that the miner's totally disabling respiratory or pulmonary impairment is chronic or that it arose out of coal mine employment. See **Tanner v. Freeman United Coal Co.**, 10 BLR 1-85 (1987). Rather, the inquiry is concerned with the severity of the respiratory impairment irrespective of its cause. The determination of the existence of a totally disabling respiratory or pulmonary impairment, for purpose of applying this presumption, shall be made in accordance with Section 718.204. See 20 C.F.R. §718.305(c); **Tanner, supra**.

At rebuttal, the specific etiology of the totally disabling respiratory impairment need not be established. See **Tanner, supra**. Rather, the party opposing entitlement must establish either that the miner does not or did not have pneumoconiosis or that the miner's impairment did not arise out of or in connection with coal mine employment. See **Alexander v. Island Creek Coal Co.**, 12 BLR 1-44 (1988), *aff'd sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir., Aug. 29, 1989)(unpub.); **Defore v. Alabama By-Products**, 12 BLR 1-27 (1988); **Tanner, supra**.

It should be noted that the Section 411(c)(4) presumption was deleted by the Black Lung Benefits Amendments of 1981, and the presumption is, therefore, inapplicable to claims filed on or after January 1, 1982. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(e).

Section 718.305 contains provisions that clarify the use of lay testimony to establish the Section 411(c)(4) presumption. Section 718.305(a) states that, in the case of a *living* miner, a spouse's affidavit or testimony may not be used *by itself* to establish the applicability of the presumption. Section 718.305(b) provides that, in the case of a *deceased* miner where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment.

Section 718.305(c) provides that the determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made in accordance with Section

718.204.

### DIGESTS

The Seventh Circuit declined to hold that as a matter of law an individual who has worked for a coal mine company above ground for 15 years or more need not demonstrate that his working conditions on the surface were "substantially similar" to those underground to proceed under 30 U.S.C. §921(c)(4). **Summers v. Freeman United Coal Mining Co.**, 14 F.3d 1220, 18 BLR 2-105 (7th Cir. 1994).

Disagreeing with the Board, the Seventh Circuit reversed the Board and concluded that the evidence established invocation of the Section 718.305 presumption and that rebuttal was not established. The Court held that the ALJ's preoccupation with the existence of pneumoconiosis, prior to addressing the existence of a totally disabling respiratory impairment was error. The Court further noted that to qualify for the Section 718.305 presumption, claimant only has the burden to establish at least 15 years of coal mine employment and a totally disabling respiratory impairment (and have filed before January 1, 1982). The Court held that claimant did not have to establish pneumoconiosis or a cause of disability to invoke the presumption. **Mitchell v. Director, OWCP**, 25 F.3d 500, 18 BLR 2-257 (7th Cir. 1994).

The Fourth Circuit held that the application of Section 718.305 supported an award of benefits as the evidence, even though containing two autopsy-based diagnoses of no clinical pneumoconiosis, did not support a finding of rebuttal, *i.e.*, proof that the miner's pulmonary impairment was not related to or aggravated by dust exposure in the mines. [Note: in this case, while both physicians ruled out clinical pneumoconiosis based on a review of the autopsy evidence, the Court was concerned that there was no evidence indicating that the miner's "manifest pulmonary impariments" were not related to or aggravated by coal dust exposure.] **Barber v. Director, OWCP**, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995).

The Seventh Circuit affirmed the ALJ's findings that employer established rebuttal pursuant to 20 C.F.R. §718.305 holding that the ALJ properly weighed the conflicting testimony and determined that the medical evidence did not establish the existence of pneumoconiosis or that the miner's pneumoconiosis arose in whole or in part out of coal dust exposure. The Court indicated that the standard for determining whether the miner's pneumoconiosis arose in whole or in part out of coal dust exposure was whether coal dust exposure was a contributing cause of the miner's disabling pulmonary impairment or whether mining was a necessary but not a sufficient condition of the miner's disability. **Blakley v. Amax Coal Co.**, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995).

For purposes of invoking the rebuttable presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented at 20 C.F.R. §718.305(a), a miner who works in a

coal mine other than an underground mine bears the additional burden of producing evidence that the conditions of his employment in a coal mine were substantially similar to conditions in an underground mine. The Seventh Circuit held that, while a miner cannot prove similarity simply by showing that he was in and around a coal mine without any further discussion of his employment conditions, a miner is not required to directly compare his work environment to conditions underground. Rather, the miner can establish similarity simply by proffering sufficient evidence of the surface mining conditions in which he worked and it is then up to the ALJ, based on his expertise, knowledge of the industry and appropriate objective factors, to compare the miner's working conditions as established by the evidence to those conditions prevalent in underground mines. The court held that in this case, the ALJ's finding of similarity was supported by the miner's unrefuted testimony about his employment conditions which clearly described, in objective terms, the extent of dust exposure caused by the job her performed, as well as the fact that his job conditions above and below ground were the same. ***Freeman United Coal Mining Co. v. Summers***, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001)(quoting ***Director, OWCP v. Midland Coal Co. [Leachman]***, 855 F.2d 509 (7th Cir. 1988)).

The Seventh Circuit recognized that, where blindness was the sole cause of a miner's disability, and pneumoconiosis played no role in his inability to work, the evidence is sufficient to establish rebuttal of the Section 718.305 presumption. ***Gulley v. Director, OWCP***, 397 F.3d 535 (7th Cir. 2005).

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