PART IX

REGULATORY PRESUMPTIONS

B. 20 C.F.R. §410.490 INTERIM PRESUMPTION

Section 410.490(b) provides a presumption of total disability due to pneumoconiosis, total disability due to pneumoconiosis at the time of death, or death due to pneumoconiosis if x-ray evidence establishes the existence of pneumoconiosis, 20 C.F.R. §410.490(b)(1)(i), or ventilatory studies establish the presence of a chronic respiratory or pulmonary disease. 20 C.F.R. §410.490(b)(1)(ii). Claimant must establish that the impairment arose out of coal mine employment to invoke the presumption. 20 C.F.R. §410.490(b)(2). The presumption may be rebutted if the miner is doing his usual coal mine work or comparable and gainful work or is able to do his usual coal mine work or comparable and gainful work. 20 C.F.R. §410.490(c)(1), (c)(2).

Section 410.490 was promulgated by the Social Security Administration to apply to certain Part B claims when the Department of Health, Education, and Welfare administered the program. In ***Pittston Coal Group v. Sebben***, 109 S.Ct. 414, 12 BLR 2-89 (1988), the Supreme Court held that Section 727.203(a) violates the prohibition in 30 U.S.C. §901(f)(2) against the Secretary of Labor employing "[c]riteria. . .not. . .more restrictive than the criteria applicable to a claim filed on June 30, 1973," since it disqualifies a class of claimants who were eligible for consideration under the Section 410.490 presumption. Thus, the Board held that where entitlement has not been established pursuant to Part 727, entitlement under Section 410.490 must be considered. *See* ***Prater v. Clinchfield Coal Co.***, 12 BLR 1-121, 1-123 (1989).

In cases involving miners with less than ten years of coal mine employment that were filed on or before March 31, 1980, the Board held, in light of the decision of the United States Supreme Court in ***Pittston Coal Group v. Sebben***, 109 S. Ct. 414, 12 BLR 2-89 (1988), that claimants 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. In addition, in light of the Supreme Court decision in ***Pauley v. Bethenergy Mines, Inc.***, 111 S.Ct. 2524, 15 BLR 2-155 (1991), the Board has held that where claimants have so established a presumption of total disability due to pneumoconiosis pursuant to Section 410.490(b), the party opposing entitlement may establish rebuttal of this presumption by any one of the methods contained at Section 727.203(b). ***Phipps v. Director, OWCP***, 17 BLR 1-39 (1992)(en banc)(Smith, J., concurring; McGranery, J., concurring and dissenting).

The Board maintains that a claim which has been *properly adjudicated* under

Part 727 is *not* subject to further adjudication under Section 410.490. ***Pauley v. Bethenergy Mines, Inc.***, 111 S.Ct. 2524, 15 BLR 2-155 (1991); *see also* ***Whiteman v. Boyle Land and Fuel Co.***, 15 BLR 1-11 (1991) (en banc).

CASE LISTINGS

[To retain historical perspective, the following digests are condensed and included here in abbreviated format.]

[adjudicator must weigh conflicting evidence and determine which is more persuasive considering whether claimant has established existence of pneumoconiosis under Section 410.490(b)] ***Sharpless v. Califano***, 585 F.2d 664 (4th Cir. 1978).

[at Section 410.490, rebuttal of total disability not established unless demonstrated that miner not vocationally disabled in the immediate area of home] ***Haywood v. Secretary of Health and Human Services***, 699 F.2d 277, 285, 5 BLR 2-30, 2-40 (6th Cir. 1983).

[adjudicator determined miner's pneumoconiosis did not arise out of coal mine employment; therefore not entitled to presumption of total disability at Section 410.490(b)] ***Foster v. Director, OWCP***, 8 BLR 1-188 (1985).

[Eighth Circuit case, controlled by ***Coughlan v. Director, OWCP***, 757 F.2d 966, 7 BLR 2-177 (8th Cir. 1985), remand required as adjudicator did not apply Section 410.490] ***Marsiglio v. Director, OWCP***, 8 BLR 1-190 (1985).

[Third Circuit case where entitlement under Section 410.490 established through conceded pneumoconiosis and lack of rebuttal evidence] ***Thornton v. Director, OWCP***, 8 BLR 1-277 (1985).

[where all x-ray evidence positive, Section 410.490(b)(1)(i) presumption invoked and Secretary may not have x-rays reread; only where x-ray evidence in conflict will rereadings be allowed to determine if presumption invoked] ***Couch v. Secretary of Health and Human Services***, 774 F.2d 163, 8 BLR 2-57 (6th Cir. 1985).

[adjudicator's failure to evaluate Section 410.490 entitlement harmless error because adjudicator's finding of rebuttal pursuant to Section 727.203(b)(2) precludes entitlement thereunder] ***Minnich v. Pagnotti Enterprises, Inc.***, 9 BLR 1-89 (1986).

[finding of rebuttal at Section 727.203(b)(4) precludes entitlement at Section 410.490] ***Soloe v. Director, OWCP***, 10 BLR 1-125 (1987).
[only way to rebut Section 410.490 is to show that miner is either doing or capable of doing usual coal mine work] ***Sulyma v. Director, OWCP***, 827 F.2d 922, 10 BLR 2-275

(3d Cir. 1987).

[remand for application of ***Halon v. Director, OWCP***, 713 F.2d 21, 5 BLR 2-115 (3d Cir. 1983) where claimant established over ten years coal mine employment subsequent to holding in ***Mullins Coal Co., Inc. of Va. v. Director, OWCP***, 484 U.S. 135, 11 BLR 2-1 (1988)] ***Cornelius v. D.W.Biller, Inc.***, 11 BLR 1-29 (1988)(en banc recon.)(Ramsey, CJ., dissenting).

[under ***Caprini v. Director, OWCP***, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987), adjudicator erred by evaluating evidence under Part 410 rather than Part 718 because claim *adjudicated* after March 31, 1980; harmless error, however, as finding of rebuttal pursuant to Section 410.490(c)(2) precludes entitlement under Part 718] ***Kiewlak v. Director, OWCP***, 11 BLR 1-34 (1988).

[Sixth Circuit held adjudicator must weigh evidence at Section 410.490 prior to invocation] ***Riley v. National Mines Corp.***, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988).

[Sixth Circuit affirmed adjudicator's finding of no entitlement at Section 410.490 where no evidence establishing causal relationship between miner's coal mine employment and pneumoconiosis] ***Grant v. Director, OWCP***, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988).

[Section 410.490 not applicable to claims with ten or more years of coal mine employment; here remand for consideration of Section 727.203(b)(3) in this Third Circuit case] ***Britten v. Florence Mining Co.***, 14 BLR 1-16 (1990), *vacating* 13 BLR 1-31 (1989).

DIGESTS

The Board modified its original decision in ***Hall v. Director, OWCP***, 12 BLR 1-133 (1989), and held under the standard enunciated in ***Youghiogheny and Ohio Coal Co. v. Milliken***, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1988), that the miner is not entitled to the benefits of Section 410.490 inasmuch as he has established in excess of ten years of coal mine employment. ***Hall v. Director, OWCP***, 14 BLR 1-1 (1989), *modifying on recon.*, 12 BLR 1-133 (1989); *see* ***Pauley v. Bethenergy Mines, Inc.***, 111 S.Ct. 2524, 15 BLR 2-155 (1991); *see also* ***Whiteman v. Boyle Land and Fuel Co.***, 15 BLR 1-11 (1991)(en banc); ***Lynn v. Island Creek Coal Co.***, 12 BLR 1-146 and 13 BLR 1-57 (1989)(en banc)(McGranery, J., concurring).

In all circuits, the Board applies Section 410.490 to all claims where the miner has established less than ten years of coal mine employment and filed a claim prior to March 31, 1980. *See* ***Bean v. Director, OWCP***, 14 BLR 1-7 (1989)[note however, in several unpublished cases in the Sixth Circuit (*see e.g.*, ***Castle v. Director, OWCP***, No. 90-3041 (6th Cir., Nov. 7, 1990)), the Court held that Section 410.490 provides another means to establish Part 727 invocation and that, once invoked, the four rebuttal methods of Section 727.203(b) apply].

In this case in which the miner filed for benefits in 1974 and was credited with at least ten years of coal mine employment, the Board reversed the administrative law judge's award of benefits under 20 C.F.R. §410.490 pursuant to the United States Supreme Court's holding that a claim which is properly adjudicated under 20 C.F.R. Part 727 is not subject to adjudication under 20 C.F.R. Section 410.490. ***Pauley v. Bethenergy Mines, Inc.***, 111 S.Ct. 2524, 15 BLR 2-155 (1991). The Board remanded the case to the administrative law judge to consider entitlement under 20 C.F.R. Part 727. The Board also instructed the administrative law judge that should he find the evidence insufficient to establish entitlement under Part 727, he must consider whether the evidence is sufficient to establish entitlement under 20 C.F.R. Part 410, Subpart D. ***Lusk v. Consolidation Coal Co.***, 16 BLR 1-82 (1991).

In cases involving miners with less than ten years of coal mine employment which were filed on or before March 31, 1980, the Board held, in light of the decision of the United States Supreme Court in ***Pittston Coal Group v. Sebben***, 109 S. Ct. 414, 12 BLR 2-89 (1988), that claimants 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).

In cases involving miners with less than ten years of coal mine employment which were

filed on or before March 31, 1980, the Board held that, in light of the Supreme Court decision in ***Pauley v. Bethenergy Mines, Inc.***, 111 S.Ct. 2524, 15 BLR 2-155 (1991), where claimants have established a presumption of total disability due to pneumoconiosis pursuant to Section 410.490(b) by establishing the existence of pneumoconiosis by x-ray, autopsy or biopsy, and that pneumoconiosis arose out of coal mine employment, the party opposing entitlement may establish rebuttal of this presumption by any one of the methods contained at Section 727.203(b). ***Phipps v. Director, OWCP***, 17 BLR 1-39 (1992)(en banc)(Smith, J., concurring; McGranery, J., concurring and dissenting).

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